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# Presidential Documents

**Title 3—**

## The President

**Executive Order 13278 of December 11, 2002**

## President's Commission on the United States Postal Service

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure the efficient operation of the United States Postal Service while minimizing the financial exposure of the American taxpayers, it is hereby ordered as follows:

**Section 1.** *Establishment.* There is established the President's Commission on the United States Postal Service (Commission).

**Sec. 2.** *Membership.* Commission shall be composed of nine members appointed by the President. The President shall designate two members of the Commission to serve as Co-Chairs.

**Sec. 3.** *Mission.* (a) The mission of the Commission shall be to examine the state of the United States Postal Service, and to prepare and submit to the President a report articulating a proposed vision for the future of the United States Postal Service and recommending the legislative and administrative reforms needed to ensure the viability of postal services.

(b) In fulfilling its mission, the Commission shall consider the following issues and such other issues relating to the Postal Service as the Commission determines appropriate:

(i) the role of the Postal Service in the 21st century and beyond;

(ii) the flexibility that the Postal Service should have to change prices, control costs, and adjust service in response to financial, competitive, or market pressures;

(iii) the rigidities in cost or service that limit the efficiency of the postal system;

(iv) the ability of the Postal Service, over the long term, to maintain universal mail delivery at affordable rates and cover its unfunded liabilities with minimum exposure to the American taxpayers;

(v) the extent to which postal monopoly restrictions continue to advance the public interest under evolving market conditions, and the extent to which the Postal Service competes with private sector services; and

(vi) the most appropriate governance and oversight structure for the Postal Service.

**Sec. 4.** *Administration.* (a) The Department of the Treasury or any organizational entity subject to the direction of the Secretary of the Treasury shall, to the extent permitted by law, provide administrative support and funding for the Commission. The Commission is established within the Department of the Treasury for administrative purposes only.

(b) Members of the Commission shall serve without any compensation for their work on the Commission. Members appointed from among private citizens of the United States, however, while engaged in the work of the Commission, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in Government service (5 U.S.C. 5701–5707), to the extent funds are available.

(c) The Commission shall have a staff headed by an Executive Director.

(d) The Commission, with the concurrence of the Secretary of the Treasury, may establish subcommittees, consisting of Commission members, as appropriate, to aid in its work.

(e) Consistent with such guidance as the President or, on the President's behalf, the Secretary of the Treasury, may provide, the Commission shall exchange information with and obtain advice from Members of Congress; Federal, State, local, and tribal officials; commercial, nonprofit, and residential users of the United States Postal Service; and others, as appropriate, including through public hearings.

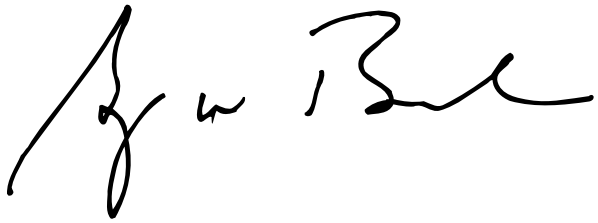
(f) Insofar as the Federal Advisory Committee Act, as amended, may apply to the Commission, any functions of the President under that Act, except for those in section 6 of that Act, shall be performed by the Secretary of the Treasury, in accordance with the guidelines that have been issued by the Administrator of General Services.

(g) Nothing in this order shall be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

**Sec. 5.** *Report.* The Commission shall submit its report, consistent with its mission set forth in section 3 of this order, to the President, through the Secretary of the Treasury, not later than July 31, 2003.

**Sec. 6.** *General Provisions.* (a) This order is intended only to improve the internal management of the Federal Government and it is not intended to, and does not create, any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.

(b) The Commission shall terminate 30 days after submitting its report and in no event later than August 30, 2003.



THE WHITE HOUSE,
*December 11, 2002.*

[FR Doc. 02–31624
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# Rules and Regulations

Federal Register

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. 2002–NE–16–AD; Amendment 39–12952; AD 2002–23–08]**

**RIN 2120–AA64**

### Airworthiness Directives; Rolls-Royce plc. RB211–535 Turbofan Engines; Correction

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

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

**SUMMARY:** This document makes a correction to Airworthiness Directive (AD) 2002–23–08, applicable to Rolls-Royce plc. (RR) models RB211–535E4–37, RB211–535E4–B–37, and RB211–535E4–B–75 turbofan engines. AD 2002–23–08 was published in the **Federal Register** on November 29, 2002 (67 FR 71094). In the **DATES** section of the preamble, two dates are incorrect. This document corrects those dates. In all other respects, the original document remains the same.

**EFFECTIVE DATE:** December 16, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ian Dargin, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7178; fax (781) 238–7199.

**SUPPLEMENTARY INFORMATION:** A final rule; request for comments airworthiness directive FR Doc. 02–29001, applicable to models RB211–535E4–37, RB211–535E4–B–37, and RB211–535E4–B–75 turbofan engines, was published in the **Federal Register** on November 29, 2002 (67 FR 71094). The following correction is needed:

On page 71094, in the second column, second paragraph, in the **DATES** section, first line, remove the phrase ''Effective December 30, 2002.'' and add in its place ''Effective December 16, 2002.'' Also, in the fifth line, remove the phrase ''as of December 30, 2002.'' and add in its place ''as of December 16, 2002.''

Issued in Burlington, MA, on December 5, 2002.

**Francis A. Favara,**

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

[FR Doc. 02–31395 Filed 12–12–02; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. 99–NM–287–AD; Amendment 39–12979; AD 2002–25–04]**

**RIN 2120–AA64**

### Airworthiness Directives; McDonnell Douglas Model DC–9–10, –20, –30, –40, and –50 Series Airplanes; and C–9 (Military) Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–9–10, –20, –30, –40, and –50 series airplanes, and C–9 (military) airplanes, that requires a one-time visual inspection of circuit breakers to determine the manufacturer of the circuit breakers, and corrective action, if necessary. The actions specified by this AD are intended to prevent internal overheating and arcing of circuit breakers and airplane wiring due to long-term use and breakdown of internal components of the circuit breakers, which could result in smoke and fire in the flight compartment and main cabin. This action is intended to address the identified unsafe condition.

**DATES:** Effective January 17, 2003.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 17, 2003.

**ADDRESSES:** The service information referenced in this AD may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Elvin Wheeler, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5344; fax (562) 627–5210.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model DC–9–10, –20, –30, –40, and –50 series airplanes; and C–9 (military) airplanes was published in the **Federal Register** on June 5, 2001 (66 FR 30101). That action proposed to require a one-time visual inspection of circuit breakers to determine the manufacturer of the circuit breakers, and corrective action, if necessary.

#### Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the single comment received.

The commenter expresses concern that, although the applicability in the proposed AD only specifies Model DC–9 and MD–80 series airplanes, the referenced circuit breakers (manufactured by Wood Electric Corporation or Wood Electric Division of Potter Brumfield Corporation), may be fitted to other FAA type-certificated products or aircraft. The commenter asks for confirmation that this is or is not the case.

We agree that the subject circuit breakers can be installed on other FAA type-certificated products. We previously issued other rulemaking actions that address the commenter's concern. AD 2001–08–16, amendment 39–12193, was issued on April 17, 2001

(66 FR 20914, April 26, 2001). That AD is applicable to certain McDonnell Douglas Model DC–8 series airplanes and requires a one-time inspection to determine the manufacturer of the circuit breakers, and corrective action, if necessary. AD 2000–09–07, amendment 39–11716, was issued on May 3, 2000 (65 FR 30534, May 12, 2000). That AD is applicable to certain McDonnell Douglas Model DC–10–10, –15, –30, –30F, and –40 series airplanes, and KC–10A (military) airplanes. That AD requires a one-time general visual inspection of circuit breakers to determine the manufacturer of the circuit breakers, and corrective action, if necessary. Therefore, no change to the final rule is necessary.

### Explanation of Editorial Change

We have changed the service bulletin citation throughout this final rule to exclude the Evaluation Form. (The form is intended to be completed by operators and submitted to the manufacturer to provide input on the quality of the service bulletin; however, this AD does not include such a requirement.)

### Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the change previously described. The FAA has determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

### Cost Impact

There are approximately 830 Model DC–9 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 540 airplanes of U.S. registry will be affected by this AD, that it will take approximately 80 work hours per airplane to accomplish the inspection of the circuit breakers (over 700 installed on each airplane), and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $2,592,000, or $4,800 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

### Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

### § 39.13 [Amended]

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

**2002–25–04 McDonnell Douglas: Amendment 39–12979. Docket 99–NM–287–AD.**

*Applicability:* Model DC–9–11, DC–9–12, DC–9–13, DC–9–14, DC–9–15, and DC–9–15F airplanes; DC–9–21 airplanes; DC–9–31, DC–9–32, DC–9–32 (VC–9C), DC–9–32F, DC–9–33F, DC–9–34, DC–9–34F, and DC–9–32F (C–9A, C–9B) airplanes; DC–9–41 airplanes; and DC–9–51 airplanes; as listed in McDonnell Douglas Alert Service Bulletin DC9–24A171, Revision 01, dated September 21, 1999; certificated in any category.

**Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

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

To prevent internal overheating and arcing of circuit breakers and airplane wiring due to long-term use and breakdown of internal components of the circuit breakers, which could result in smoke and fire in the flight compartment and main cabin, accomplish the following:

**Inspection and Replacement, if Necessary**

(a) Within 18 months after the effective date of this AD: Perform a one-time general visual inspection of circuit breakers to determine the manufacturer of the circuit breaker, in accordance with McDonnell Douglas Alert Service Bulletin DC9–24A171, Revision 01, dated September 21, 1999, excluding Evaluation Form.

**Note 2:** For the purposes of this AD, a general visual inspection is defined as ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or drop-light, and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

(1) If no Wood Electric Corporation or Wood Electric Division of Potter Brumfield Corporation circuit breaker is found, no further action is required by this AD.

(2) If any Wood Electric Corporation or Wood Electric Division of Potter Brumfield Corporation circuit breaker is found, prior to further flight, replace the circuit breaker with a new circuit breaker in accordance with the service bulletin.

**Spares**

(b) As of the effective date of this AD, no person shall install, on any airplane,

a circuit breaker having a part number listed in paragraph 1.A.2., ''Spares Affected,'' of McDonnell Douglas Alert Service Bulletin DC9–24A171, Revision 01, dated September 21, 1999, excluding Evaluation Form.

**Alternative Methods of Compliance**

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

**Note 3:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

**Special Flight Permits**

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

**Incorporation by Reference**

(e) The actions shall be done in accordance with McDonnell Douglas Alert Service Bulletin DC9–24A171, Revision 01, dated September 21, 1999, excluding Evaluation Form. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**Effective Date**

(f) This amendment becomes effective on January 17, 2003.

Issued in Renton, Washington, on December 5, 2002.

**Vi L. Lipski,**

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

[FR Doc. 02–31178 Filed 12–12–02; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 97

**[Docket No. 30344; Amdt. No. 3036]**

## Standard Instrument Approach Procedures; Miscellaneous Amendments

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

**ACTION:** Final rule.

**SUMMARY:** This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective December 13, 2002. The compliance date for each SIAP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 13, 2002.

**ADDRESSES:** Availability of matter incorporated by reference in the amendment is as follows:

*For Examination*—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which affected airport is located; or

3. The Flight Inspection Area Office which originated the SIAP.

4. The Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

*For Purchase*—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

*By Subscription*—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

**FOR FURTHER INFORMATION CONTACT:** Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

**SUPPLEMENTARY INFORMATION:** This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description on each SIAP is contained in the appropriate FAA Form 8260 and the National Flight Data Center (FDC)/Permanent (P) Notices to Airmen (NOTAM) which are incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation's Regulations (FAR). Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction of charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

### The Rule

This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes SIAPs. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained in the content of the following FDC/P NOTAMs for each SIAP. The SIAP information in some previously designated FDC/Temporary (FDC/T) NOTAMs is of such duration as to be permanent. With conversion to FDC/P NOTAMs, the respective FDC/T NOTAMs have been canceled.

The FDC/P NOTAMs for the SIAPs contained in this amendment are based on the criteria contained in the U.S.

Standard for Terminal Instrument Procedures (TERPS). In developing these chart changes to SIAPs by FDC/P NOTAMs, the TERPS criteria were applied to only these specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Further, the SIAPs contained in this amendment are based on the criteria contained in the TERPS. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

## Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

## List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on December 6, 2002.

**James J. Ballough,**

*Director, Flight Standards Service.*

## Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

## PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 is revised to read as follows:

**Authority:** 49 U.S.C. 40103, 40113, 40120, 44701; 49 U.S.C. 106(g); and 14 CFR 11.49(b)(2).

2. Part 97 is amended to read as follows:

### §§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS/DEM, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows: (Effective upon publication)

| FDC date | State | City | Airport | FDC No. | Subject |
|---|---|---|---|---|---|
| 11/14/02 | NY | Albany | Albany Intl | 2/1944 | ILS RWY 1, AMDT 9B. |
| 11/14/02 | NY | Albany | Albany Intl | 2/1946 | GPS RWY 19, ORIG–A. |
| 11/14/02 | NY | Albany | Albany Intl | 2/1947 | GPS RWY 1, ORIG–A. |
| 11/14/02 | NY | Albany | Albany Intl | 2/1948 | ILS RWY 19, AMDT 21A. |
| 11/14/02 | NY | Albany | Albany Intl | 2/1949 | VOR RWY 28, ORIG–A. |
| 11/14/02 | NY | Albany | Albany Intl | 2/1950 | GPS RWY 28, ORIG–A. |
| 11/15/02 | CA | Oakland | Metropolitan Oakland Intl | 2/1990 | NBD RWY 27R, AMDT 5A. |
| 11/15/02 | TX | Laredo | Laredo Intl | 2/1996 | LOC BC RWY 35L, AMDT 1A. |
| 11/18/02 | MN | St. Cloud | St. Cloud Regional | 2/2033 | VOR/DME RWY 13, AMDT 8B. |
| 11/20/02 | TX | Houston | George Bush Intercontinental | 2/2066 | RNAV (GPS) RWY 27, ORIG–B. |
| 11/20/02 | TX | Houston | George Bush Intercontinental | 2/2067 | RNAV (GPS) RWY 33R, ORIG–B. |
| 11/21/02 | IL | Belleville | Scott AFB/Midamerica | 2/2098 | NDB RWY 32R, ORIG–B. |
| 11/21/02 | FL | Panama City | Panama City-Bay County Intl | 2/2111 | RNAV (GPS) RWY 5, ORIG. |
| 11/21/02 | FL | Panama City | Panama City-Bay County Intl | 2/2112 | RNAV (GPS) RWY 32, ORIG. |
| 11/22/02 | OH | Jackson | James A. Rhodes | 2/2146 | VOR/DME–A, AMDT 1. |
| 11/22/02 | OH | Jackson | James A. Rhodes | 2/2147 | RNAV (GPS) RWY 1, ORIG. |
| 11/22/02 | OH | Jackson | James A. Rhodes | 2/2148 | RNAV (GPS) RWY 19, ORIG. |
| 11/25/02 | NJ | Teterboro | Teterboro | 2/2203 | ILS RWY 6, AMDT 29A. |
| 11/25/02 | NJ | Teterboro | Teterboro | 2/2204 | VOR/DME RWY 6, ORIG–B. |
| 11/25/02 | NJ | Teterboro | Teterboro | 2/2205 | COPTER ILS RWY 6, AMDT 1B. |
| 11/25/02 | | | | | |
| 11/25/02 | OR | Corvallis | Corvallis Muni | 2/2212 | NDB RWY 17, AMDT 1. |
| 11/26/02 | TX | Dallas | Dallas-Love Field | 2/2225 | ILS RWY 13R, AMDT 4B. |
| 11/26/02 | TX | Houston | George Bush Intercontinental | 2/2244 | RNAV (GPS) RWY 8, ORIG–B. |
| 11/28/02 | VA | Emporia | Emporia-Greensville Regional | 2/2246 | RNAV (GPS) RWY 33, ORIG. |
| 11/28/02 | VA | Emporia | Emporia-Greensville Regional | 2/2247 | NDB RWY 33, ORIG. |
| 11/28/02 | VA | Emporia | Emporia-Greensville Regional | 2/2278 | LOC RWY 33, ORIG. |
| 11/28/02 | TX | Waco | TSTC Waco | 2/2258 | NDB RWY 17L, AMDT 9A. |
| 11/28/02 | TX | Waco | TSTC Waco | 2/2259 | ILS RWY 17L, AMDT 11B. |
| 11/28/02 | TX | Waco | TSTC Waco | 2/2267 | GPS RWY 17L, ORIG–A. |
| 11/28/02 | TX | Dallas-Fort Worth | Dallas-Fort Worth Intl | 2/2269 | CONVERGING ILS RWY 13R, AMDT 5. |
| 11/28/02 | TX | Dallas-Fort Worth | Dallas-Fort Worth Intl | 2/2270 | CONVERGING ILS RWY 17C, AMDT 4D. |
| 11/28/02 | TX | Dallas-Fort Worth | Dallas-Fort Worth Intl | 2/2271 | CONVERGING ILS Y RWY 36L, ORIG. |
| 11/28/02 | TX | Dallas-Fort Worth | Dallas-Fort Worth Intl | 2/2272 | ILS RWY 35L, AMDT 3. |
| 11/28/02 | TX | Dallas-Fort Worth | Dallas-Fort Worth Intl | 2/2273 | ILS RWY 17C, AMDT 7C. |
| 11/28/02 | TX | Dallas-Fort Worth | Dallas-Fort Worth Intl | 2/2274 | ILS RWY 13R, AMDT 6A. |
| 11/28/02 | TX | Dallas-Fort Worth | Dallas-Fort Worth Intl | 2/2275 | ILS RWY 17L, AMDT 2. |
| 11/28/02 | TX | Dallas-Fort Worth | Dallas-Fort Worth Intl | 2/2276 | ILS RWY 35R, AMDT 2. |

| FDC date | State | City | Airport | FDC No. | Subject |
|---|---|---|---|---|---|
| 11/28/02 | TX | Dallas-Fort Worth | Dallas-Fort Worth Intl | 2/2277 | ILS Y RWY 36L, ORIG. |
| 11/28/02 | TX | Dallas-Fort Worth | Dallas-Fort Worth Intl | 2/2281 | CONVERGING ILS RWY 35L, AMDT2. |
| 11/28/02 | NJ | Teterboro | Teterboro | 2/2313 | RNAV (GPS) RWY 6, ORIG. |
| 11/28/02 | NJ | Teterboro | Teterboro | 2/2314 | VOR/DME–A, AMDT 2A. |
| 11/28/02 | NJ | Teterboro | Teterboro | 2/2315 | VOR/DME–B, AMDT 2B. |
| 11/28/02 | PA | Philadelphia | Wings Field | 2/2328 | RNAV (GPS) RWY 6, ORIG. |
| 11/28/02 | PA | Philadelphia | Wings Field | 2/2329 | RNAV (GPS) RWY 24, ORIG. |
| 11/28/02 | WA | Bellingham | Bellingham Intl | 2/2344 | MLS RWY 34, ORIG–A. |
| 11/28/02 | CO | Denver | Denver Intl | 2/2340 | ILS RWY 34, AMDT 1 (CAT I, II, III). |
| 11/28/02 | CO | Denver | Denver Intl | 2/2339 | ILS RWY 16, AMDT 2. |
| 11/28/02 | CO | Denver | Denver Intl | 2/2338 | RNAV (GPS) RWY 34, ORIG. |
| 11/28/02 | CO | Denver | Denver Intl | 2/2336 | RNAV (GPS) RWY 16, ORIG. |
| 11/28/02 | CO | Denver | Denver Intl | 2/2309 | ILS RWY 35R, AMDT 1 (CAT I, II, III). |
| 11/28/02 | CO | Denver | Denver Intl | 2/2308 | ILS RWY 35L, AMDT 3 (CAT I, II, III). |
| 11/28/02 | CO | Denver | Denver Intl | 2/2307 | ILS RWY 17R, AMDT 2. |
| 11/28/02 | CO | Denver | Denver Intl | 2/2306 | ILS RWY 17L, AMDT 2. |

[FR Doc. 02–31351 Filed 12–12–02; 8:45 am]
BILLING CODE 4910–13–M

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 97

**[Docket No. 30343; Amdt. No. 3035]**

## Standard Instrument Approach Procedures; Miscellaneous Amendments

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

**ACTION:** Final rule.

**SUMMARY:** This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

**DATES:** This rule is effective December 13, 2002. The compliance date for each SIAP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 13, 2002.

**ADDRESSES:** Availability of matters incorporated by reference in the amendment is as follows:

*For Examination*—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;
2. The FAA Regional Office of the region in which the affected airport is located;
3. The Flight Inspection Area Office which originated the SIAP; or,
4. The Office of Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

*For Purchase*—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or
2. The FAA Regional Office of the region in which the affected airport is located.

*By Subscription*—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

**FOR FURTHER INFORMATION CONTACT:** Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

**SUPPLEMENTARY INFORMATION:** This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation Regulations (FAR). The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, and 8260–5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

### The Rule

This amendment to part 97 is effective upon publication of each separate SIAP as contained in the transmittal. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (NFDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures

(TERPS). In developing these SIAPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedures before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

**Conclusion**

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR part 97**

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC on December 6, 2002.

**James J. Ballough,**

*Director, Flight Standards Service.*

**Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

## PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 is revised to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120, 44701; and 14 CFR 11.49(b)(2).

2. Part 97 is amended to read as follows:

**§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, and 97.35 [Amended]**

By amending: §97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; §97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; §97.27 NDB, NDB/DME; §97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; §97.31 RADAR SIAPs; §97.33 RNAV SIAPs; and §97.35 COPTER SIAPs, identified as follows:

** * *Effective January 23, 2003*

Kodiak, AK, Kodiak, VOR OR TACAN Y RWY 25, Orig
Kodiak, AK, Kodiak, NDB RWY 25, Orig
Kodiak, AK, Kodiak, ILS Y RWY 25, Orig
Kodiak, AK, Kodiak, RNAV (GPS) RWY 25, Orig
Kodiak, AK, Kodiak, VOR OR TACAN–1 RWY 25, Amdt 5, CANCELLED
Kodiak, AK, Kodiak, NDB–1 RWY 25, Amdt 3, CANCELLED
Kodiak, AK, Kodiak, ILS/DME–1 RWY 25, Amdt 3. CANCELLED
Kodiak, AK, Kodiak, GPS RWY 25, Orig–A, CANCELLED
Calipatria, CA Cliff Hatfield Memorial, RNAV (GPS) RWY 8, Orig
Daggett, CA, Barstow-Daggett, VOR OR TACAN RWY 22, Amdt 8A
Daggett, CA, Barstow-Daggett, RNAV (GPS) RWY 22, Orig
Daggett, CA, Barstow-Daggett, RMAV (GPS) RWY 26, Orig
Palm Springs, CA Desert Resorts Regional, VOR/DME RWY 30, Amdt 1
Palm Springs, CA Desert Resorts Regional, RNAV (GPS) RWY 30, Orig
Palm Springs, CA Desert Resorts Regional, RNAV (GPS) RWY 35 Orig
La Junta, CO, La Junta Muni, NDB OR GPS RWY 8, Amdt 5A, CANCELLED
Orlando, FL, Orlando Intl, VOR/DME RWY 36R, Amdt 10
St. Augustine, FL, St. Augustine, ILS RWY 31, Orig
Ankeny, IA, Ankeny Regional, RNAV (GPS) RWY 18, Orig
Ankeny, IA, Ankeny Regional, RNAV (GPS) RWY 22, Orig
Sioux City, IA, Sioux Gateway/Col Bud Day Field, NDB RWY 17, Amdt 1
Crisfield, MD, Crisfield Muni, VOR–A, Orig
Crisfield, MD, Crisfield Muni, RNAV (GPS) RWY 32, Orig
Provincetown, MA, Provincetown Muni, NDB RWY 7, Amdt 1
Provincetown, MA, Provincetown Muni, NDB RWY 25, Amdt 2
Provincetown, MA, Provincetown Muni, ILS RWY 7, Amdt 8
Provincetown, MA, Provincetown Muni, RNAV (GPS) RWY 7, Orig
Provincetown, MA, Provincetown Muni, RNAV (GPS) RWY 25, Orig
Pottstown, PA, Pottstown-Limerick, NDB RWY 28, Amdt 1A, CANCELLED
Richfield, UT, Richfield Muni, RNAV (GPS) RWY 19, Orig
Martinsville, VA, Blue Ridge, RNAV (GPS) RWY 12, Orig
Martinsville, VA, Blue Ridge, RNAV (GPS) RWY 30, Orig
Martinsville, VA, Blue Ridge, GPS RWY 12, Orig-A, CANCELLED
Martinsville, VA, Blue Ridge, GPS RWY 30, Orig-A, CANCELLED

The FAA published the following procedures in Docket No. 30332; Amdt No. 30332; Amdt No. 3025 to Part 97 of the Federal Aviation Regulations (Vol. 67, FR No. 195, Page 62639; dated Tuesday, October 08, 2002) under section 97.29 effective November 28, 2002 which are hereby rescinded:

Chicago, IL, Chicago Midway, ILS RWY 13C, Amdt 41
Chicago, IL, Chicago Midway, ILS RWY 31C, Amdt 6

Refer to FDC NOTAM 2/2295 and (General Notice) GENOT 2/59 for further information.

The FAA published the following procedures in Doctket No. 30341; Amdt No. 3033 to Part 97 of the Federal Aviation Regulations (Vol. 67, FR No. 232, Page 71818; dated Tuesday, December 3, 2002) under section 97.29 effective January 23, 2003 which are hereby rescinded:

Farmington, NW, Four Corners Regional, VOR RWY 23, Orig
Farmington, NW, Four Corners Regional, VOR RWY 25, Amdt 10
Farmington, NW, Four Corners Regional, VOR/DME RWY 5, Orig
Farmington, NW, Four Corners Regional, RNAV (GPS) RWY 5, Orig
Farmington, NW, Four Corners Regional, RNAV (GPS) RWY 7, Amdt 1
Farmington, NW, Four Corners Regional, RNAV (GPS) RWY 23, Orig

[FR Doc. 02–31350 Filed 12–12–02; 8:45 am]

BILLING CODE 4910–13–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 868

**[Docket No. 01N–0576]**

### Medical Devices; Reclassification of the Cutaneous Carbon Dioxide and the Cutaneous Oxygen Monitor

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

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is reclassifying the cutaneous carbon dioxide ($PcCO_2$) monitor from class II (performance standards) into class II (special controls). FDA is also reclassifying the cutaneous oxygen ($PcO_2$) monitor for an infant patient who is not under gas anesthesia from class II (performance standards) into class II (special controls) and is reclassifying the cutaneous oxygen ($PcO_2$) monitor for all other uses from class III (premarket approval) into class II (special controls). Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the guidance document entitled ''Class II

Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCO_2$) and Oxygen ($PcO_2$) Monitors; Guidance for Industry and FDA'' that will serve as the special control for the devices. These reclassifications are taken on the agency's own initiative based on new information. These actions are being taken under the Federal Food, Drug, and Cosmetic Act (the act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments), the Safe Medical Devices Act of 1990 (the SMDA), the Food and Drug Administration Modernization Act of 1997 (FDAMA), and the Medical Device User Fee and Modernization Act.

**DATES:** This rule is effective January 13, 2003.

**FOR FURTHER INFORMATION CONTACT:** William A. Noe, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8609, ext. 174.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The act (21 U.S.C. 301 *et. seq.*), as amended by the 1976 amendments (Public Law 94–295), the SMDA (Public Law 101–629), and FDAMA (Public Law 105–115), established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under the 1976 amendments, class II devices were defined as those devices for which there is insufficient information to show that general controls themselves will assure safety and effectiveness, but for which there is sufficient information to establish performance standards to provide such assurance. The SMDA broadened the definition of class II devices to mean those devices for which there is insufficient information to show that general controls themselves will assure safety and effectiveness, but for which there is sufficient information to establish special controls to provide such assurance, including performance standards, postmarket surveillance, patient registries, development and dissemination of guidelines, recommendations, and any other appropriate actions the agency deems necessary (section 513(a)(1)(B) of the act).

It is the agency's position that it is not necessary to obtain a new classification recommendation from a panel that had recommended classification into class II prior to the SMDA. If a panel recommended that a device be classified into class II under the 1976 definition of class II, which included only performance standards as a class II control, clearly the Panel's recommendation for class II status would not change if controls, in addition to performance standards, could be added.

Under section 513 of the act, devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), generally referred to as preamendments devices, are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976, generally referred to as postamendments devices, are classified automatically by statute (section 513(f) of the act) into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval, unless and until: (1) The device is reclassified into class I or II; (2) FDA issues an order classifying the device into class I or II in accordance with section 513(f)(2) of the act, as amended by FDAMA; or (3) FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to previously offered devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and part 807 of the regulations (21 CFR part 807).

A preamendments device that has been classified into class III may be marketed, by means of premarket notification procedures, without submission of a premarket approval application (PMA) until FDA issues a final regulation under section 515(b) of the act (21 U.S.C. 360e(b)) requiring premarket approval.

Reclassification of classified preamendments devices is governed by section 513(e) of the act. This section provides that FDA may, by rulemaking, reclassify a device (in a proceeding that parallels the initial classification proceeding) based upon ''new information.'' The reclassification can be initiated by FDA or by the petition of an interested person. The term ''new information,'' as used in section 513(e) of the act, includes information developed as a result of a reevaluation of the data before the agency when the device was originally classified, as well as information not presented, not available, or not developed at that time. (See, e.g., *Holland Rantos* v. *United States Department of Health, Education, and Welfare*, 587 F.2d 1173, 1174 n.1 (D.C. Cir. 1978); *Upjohn* v. *Finch*, 422 F.2d 944 (6th Cir. 1970); *Bell* v. *Goddard*, 366 F.2d 177 (7th Cir. 1966).)

Reevaluation of the data previously before the agency is an appropriate basis for subsequent regulatory action where the reevaluation is made in light of newly available regulatory authority (see *Bell* v. *Goddard*, supra, 366 F.2d at 181; *Ethicon, Inc.* v. *FDA*, 762 F. Supp. 382, 389–91 (D.D.C. 1991)), or in light of changes in ''medical science.'' (See *Upjohn* v. *Finch*, supra, 422 F.2d at 951.) Regardless of whether data before the agency are past or new data, the ''new information'' on which any reclassification is based is required to consist of ''valid scientific evidence,'' as defined in section 513(a)(3) of the act and 21 CFR 860.7(c)(2). (See, e.g., *General Medical Co.* v. *FDA*, 770 F.2d 214 (D.C. Cir. 1985); *Contact Lens Assoc.* v. *FDA*, 766 F.2d 592 (D.C. Cir.), cert. denied, 474 U.S. 1062 (1985). FDA relies upon ''valid scientific evidence'' in the classification process to determine the level of regulation for devices. For the purpose of reclassification, the valid scientific evidence upon which the agency relies must be publicly available. Publicly available information excludes trade secret and/or confidential commercial information, e.g., the contents of a pending premarket approval application (PMA). (See section 520(c) of the act (21 U.S.C. 360j(c).)

In accordance with section 513(e) of the act and 21 CFR 860.130(b)(1), based on new information with respect to the device, FDA, on its own initiative, is reclassifying the $PcCO_2$ monitor from class II (performance standards) into class II (special controls). FDA is also reclassifying the $PcO_2$ monitor for an infant patient who is not under gas anesthesia from class II (performance standards) into class II (special controls) and the $PcO_2$ monitor for all other uses from class III (premarket approval) into class II (special controls).

FDAMA added a new section 510(m) to the act. Section 510(m) of the act provides that a class II device may be

exempted from the premarket notification requirements under section 510(k), if the agency determines that premarket notification is not necessary to assure the safety and effectiveness of the device. FDA has determined that premarket notification is necessary to assure the safety and effectiveness of the $PcCO_2$ monitor and the $PcO_2$ monitor.

## II. Regulatory History of the Device

In the **Federal Register** of February 12, 2002 (67 FR 6444), FDA published a proposed rule reclassifying the $PcCO_2$ monitor from class II (performance standards) into class II (special controls), the $PcO_2$ monitor for an infant patient who is not under gas anesthesia from class II (performance standards) into class II (special controls), and the $PcO_2$ monitor for all other uses from class III (premarket approval) into class II (special controls), on the agency's own initiative based on new information.

FDA also identified the document ''Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCO_2$) and Oxygen ($PcO_2$) Monitors; Guidance for Industry and FDA'' as the special control applicable to these devices.

Interested persons were invited to comment on the proposed rule by April 15, 2002, and on the draft special control guidance document by May 13, 2002. FDA received no comments on the proposed rule. FDA received two comments on the draft guidance document and they are discussed in the notice of availability for the guidance published elsewhere in this issue of the **Federal Register**.

Based on a review of the available information, FDA concludes that the guidance document ''Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCO_2$) and Oxygen ($PcO_2$) Monitors; Guidance for Industry and FDA,'' in conjunction with general controls, provides reasonable assurance of the safety and effectiveness of these devices. Following the effective date of this final rule, any firm submitting a 510(k) premarket notification for the $PcCO_2$ monitor or the $PcO_2$ monitor will need to address the issues covered in the special control guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurances of safety and effectiveness. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the guidance document.

## III. Summary of Final Rule

FDA is adopting the assessment of the risks to public health stated in the proposed rule published on February 12, 2002. Furthermore, FDA is issuing a final rule that revises §§ 868.2480 and 868.2500, thereby reclassifying the generic type of device, $PcCO_2$ monitor, from class II (performance standards) into class II (special controls) and the generic type of device, $PcO_2$ monitor, for an infant patient who is not under gas anesthesia from class II (performance standards) into class II (special controls), and for all other uses, from class III (premarket approval) into class II (special controls). The special control capable of providing reasonable assurance of safety and effectiveness for these devices is a guidance document entitled ''Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCO_2$) and Oxygen ($PcO_2$) Monitors; Guidance for Industry and FDA.'' This guidance document describes a means by which $PcCO_2$ and $PcO_2$ monitor devices may comply with the requirement of special controls for class II devices. Following the effective date of this final rule, any firm submitting a premarket notification (510(k)) for a $PcCO_2$ monitor or $PcO_2$ monitor will need to address the issues covered in the special control guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurances of safety and effectiveness.

For the convenience of the reader, FDA is adding new § 868.1(e) to inform the reader where to find guidance documents referenced in 21 CFR part 868.

## IV. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that these classification actions are of a type that do not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## V. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C 601–612), and the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et. seq.*). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is consistent with the regulatory philosophy and principles identified in the Executive order. In addition, the final rule is not a significant regulatory action as defined by the Executive order and so is not subject to review under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Reclassification of the cutaneous oxygen monitor from class III will relieve all manufacturers of these devices of the cost of complying with the premarket approval requirements in section 515 of the act. Furthermore, this rule may permit small potential competitors to enter the marketplace by lowering their costs.

Compliance with special controls for the cutaneous oxygen monitor and the cutaneous carbon dioxide monitor will not impose significant new costs on affected manufacturers because most of these devices already comply with the special controls. Based upon its review of the information submitted in premarket notifications for these devices, FDA believes that manufacturers presently marketing these devices are in conformance with the guidance document. The guidance document assures that, in the future, these generic types of devices will be at least as safe and effective as the presently marketed devices. These devices are already subject to premarket notification and labeling requirements. The guidance document advises manufacturers on appropriate means of complying with these requirements.

The agency, therefore, certifies that this final rule will not have a significant economic impact on a substantial number of small entities. In addition, this rule will not impose costs of $100 million or more on either the private sector or State, local, and tribal governments in the aggregate, and therefore a summary statement of analysis under section 202(a) of the Unfunded Mandates Reform Act of 1995 is not required.

## VI. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and

responsibilities among the various levels of government. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

**VII. Paperwork Reduction Act of 1995**

The final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (the PRA) is not required.

The information collections addressed in the special control guidance document identified by this rule have been approved by OMB in accordance with the PRA under the regulations governing premarket notification submissions (part 807, subpart E, OMB control number 0910–0120). The labeling provisions addressed in the guidance have been approved by OMB in accordance with the PRA under OMB control number 0910–0485.

**List of Subjects in 21 CFR Part 868**

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 868 is amended as follows:

## PART 868—ANESTHESIOLOGY DEVICES

1. The authority citation for 21 CFR part 868 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

2. Section 868.1 is amended by adding paragraph (e) to read as follows:

**§ 868.1 Scope.**

* * * * *

(e) Guidance documents referenced in this part are available on the Internet at http://www.fda.gov/cdrh/guidance.html.

3. Section 868.2480 is amended by revising paragraph (b) to read as follows:

**§ 868.2480 Cutaneous carbon dioxide ($PcCO_2$) monitor.**

* * * * *

(b) *Classification*. Class II (special controls). The special control for this device is FDA's ''Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCO_2$) and Oxygen ($PcO_2$) Monitors; Guidance for Industry and FDA.'' See § 868.1(e) for the availability of this guidance document.

4. Section 868.2500 and the section heading is revised to read as follows:

**§ 868.2500 Cutaneous oxygen ($PcO_2$) monitor.**

(a) *Identification*. A cutaneous oxygen ($PcO_2$) monitor is a noninvasive, heated sensor (e.g., a Clark-type polargraphic electrode) placed on the patient's skin that is intended to monitor relative changes in the cutaneous oxygen tension.

(b) *Classification*. Class II (special controls). The special control for this device is FDA's ''Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCO_2$) and Oxygen ($PcO_2$) Monitors; Guidance for Industry and FDA.'' See § 868.1(e) for the availability of this guidance document.

Dated: December 2, 2002.

**Linda S. Kahan,**

*Deputy Director, Center for Devices and Radiological Health.*

[FR Doc. 02–31442 Filed 12–12–02; 8:45 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF STATE

## 22 CFR Part 45

**[Public Notice 4216]**

## Visas: Documentation of Immigrants Under Section 124 of Public Law 101–649

**AGENCY:** Department of State.

**ACTION:** Final rule.

**SUMMARY:** This rule removes the Department's regulations concerning the documentation of immigrants under section 124 of Immigration Act of 1990 (IMMACT 90). This section provided immigrant status for certain aliens who were resident and employed in Hong Kong. Qualifying aliens could be granted immigrant status during fiscal years 1991 and 1993 and could be granted extended immigrant visa validity up to January 1, 2002. Since this category of visas no longer exists, the Department is removing the regulations.

**EFFECTIVE DATE:** December 13, 2002.

**FOR FURTHER INFORMATION CONTACT:** Pam Chavez, Legislation and Regulations Division, Visa Services, Department of State, Washington, DC 20522–0113.

**SUPPLEMENTARY INFORMATION:**

Section 124 of the Immigration Act of 1990 (IMMACT 90) created a special immigrant visa classification for residents of Hong Kong employed by either U.S. owned or operated businesses or by the American Consulate General in Hong Kong. Visas for business employees were to have been issued during fiscal years 1991 and 1993. Section 154 of IMMACT 90 also provided for an extension of validity of these visas through January 1, 2002. Visas for Consulate General employees were to have been issued by January 1, 2001. Since these visas are no longer being issued and since the extended validity period has now expired, the Department is removing the regulations pertaining to this class of immigrants.

**Regulatory Findings**

*Administrative Procedure Act*

The Department is publishing this rule as a final rule, since it is merely removing regulations that governed a class of immigrants which no longer exists.

*Regulatory Flexibility Act*

The Department of State, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities.

*Unfunded Mandates Act of 1995*

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign based companies in domestic and import markets.

*Executive Order 12866*

The Department of State does not consider this rule to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. In addition, the Department is exempt from Executive Order 12866 except to the extent that it is promulgating regulations in conjunction with a domestic agency that are significant regulatory actions. The

Department has nevertheless reviewed the regulation to ensure its consistency with the regulatory philosophy and principles set forth in that Executive Order.

*Executive Order 13132*

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

*Paperwork Reduction Act*

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

**List of Subjects in 22 CFR Part 45**

Aliens, Immigrants, Passports and Visas.

Accordingly, under the authority 8 U.S.C. 1153, the Department is removing part 45.

Dated: November 22, 2002.

**Maura Harty,**

*Assistant Secretary for Consular Affairs, Department of State.*

[FR Doc. 02–31483 Filed 12–12–02; 8:45 am]

BILLING CODE 4710–06–P

## PENSION BENEFIT GUARANTY CORPORATION

## 29 CFR Parts 4022 and 4044

## Benefits Payable in Terminated Single-Employer Plans; Allocation of Assets in Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** The Pension Benefit Guaranty Corporation's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans prescribe interest assumptions for valuing and paying benefits under terminating single-employer plans. This final rule amends the regulations to adopt interest assumptions for plans with valuation dates in January 2003. Interest assumptions are also published on the PBGC's Web site (*http://www.pbgc.gov*).

**EFFECTIVE DATE:** January 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

**SUPPLEMENTARY INFORMATION:** The PBGC's regulations prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

Three sets of interest assumptions are prescribed: (1) A set for the valuation of benefits for allocation purposes under section 4044 (found in Appendix B to part 4044), (2) a set for the PBGC to use to determine whether a benefit is payable as a lump sum and to determine lump-sum amounts to be paid by the PBGC (found in Appendix B to part 4022), and (3) a set for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology (found in Appendix C to part 4022).

Accordingly, this amendment (1) adds to Appendix B to part 4044 the interest assumptions for valuing benefits for allocation purposes in plans with valuation dates during January 2003, (2) adds to Appendix B to part 4022 the interest assumptions for the PBGC to use for its own lump-sum payments in plans with valuation dates during January 2003, and (3) adds to Appendix C to part 4022 the interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology for valuation dates during January 2003.

For valuation of benefits for allocation purposes, the interest assumptions that the PBGC will use (set forth in Appendix B to part 4044) will be 5.30 percent for the first 20 years following the valuation date and 5.25 percent thereafter. These interest assumptions (in comparison with those in effect for December 2002) reflect a 5-year decrease in the period during which the initial rate applies (from a period of 25 years following the valuation date to a period of 20 years following the valuation date). The initial rate, in effect during the 20-year period, is unchanged from the initial rate in effect for December 2002. The ultimate rate, in effect thereafter, represents an increase (from the ultimate rate in effect for December 2002) of 1.00 percent.

The interest assumptions that the PBGC will use for its own lump-sum payments (set forth in Appendix B to part 4022) will be 4.00 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. These interest assumptions are unchanged from those in effect for December 2002.

For private-sector payments, the interest assumptions (set forth in Appendix C to part 4022) will be the same as those used by the PBGC for determining and paying lump sums (set forth in Appendix B to part 4022).

The PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect, as accurately as possible, current market conditions.

Because of the need to provide immediate guidance for the valuation and payment of benefits in plans with valuation dates during January 2003, the PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

The PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. *See* 5 U.S.C. 601(2).

**List of Subjects**

*29 CFR Part 4022*

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

*29 CFR Part 4044*

Employee benefit plans, Pension insurance, Pensions.

In consideration of the foregoing, 29 CFR parts 4022 and 4044 are amended as follows:

## PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

1. The authority citation for part 4022 continues to read as follows:

**Authority:** 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

2. In appendix B to part 4022, Rate Set 111, as set forth below, is added to the table. (The introductory text of the table is omitted.)

**Appendix B to Part 4022—Lump Sum Interest Rates For PBGC Payments**

* * * * *

| Rate set | For plans with a valuation date | | Immediate annuity rate (percent) | Deferred annuities (percent) | | | | |
|---|---|---|---|---|---|---|---|---|
| | On or after | Before | | $i_1$ | $i_2$ | $i_3$ | $n_1$ | $n_2$ |
| * * * | * | | * | | * | | * | |
| 111 | 1–1–03 | 2–1–03 | 4.00 | 4.00 | 4.00 | 4.00 | 7 | 8 |

3. In appendix C to part 4022, Rate Set 111, as set forth below, is added to the table. (The introductory text of the table is omitted.)

**Appendix C to Part 4022—Lump Sum Interest Rates For Private-Sector Payments**

* * * * *

| Rate set | For plans with a valuation date | | Immediate annuity rate (percent) | Deferred annuities (percent) | | | | |
|---|---|---|---|---|---|---|---|---|
| | On or after | Before | | $i_1$ | $i_2$ | $i_3$ | $n_1$ | $n_2$ |
| * * * | * | | * | | * | | * | |
| 111 | 1–1–03 | 2–1–03 | 4.00 | 4.00 | 4.00 | 4.00 | 7 | 8 |

## PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

4. The authority citation for part 4044 continues to read as follows:

**Authority:** 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

5. In appendix B to part 4044, a new entry, as set forth below, is added to the table. (The introductory text of the table is omitted.)

**Appendix B to Part 4044—Interest Rates Used to Value Benefits**

* * * * *

| For valuation dates occurring in the month— | The values of $i_t$ are: | | | | | |
|---|---|---|---|---|---|---|
| | $i_t$ | for t = | $i_t$ | for t = | $i_t$ | for t = |
| * * * * | | * | | * | | * |
| January 2003 | .0530 | 1–20 | .0525 | >20 | N/A | N/A |

Issued in Washington, DC, on this 6th day of December 2002.

**Joseph H. Grant,**

*Deputy Executive Director and Chief Operating Officer, Pension Benefit Guaranty Corporation.*

[FR Doc. 02–31434 Filed 12–12–02; 8:45 am]

BILLING CODE 7708–01–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 300

**[FRL–7420–3]**

## National Oil and Hazardous Substances Contingency Plan; National Priorities List Update

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of partial deletion of the West Virginia Ordnance Works Site from the National Priorities List.

**SUMMARY:** The Environmental Protection Agency (EPA) Region III announces the partial deletion of portions of the West Virginia Ordnance Works (WVOW) site from the National Priorities List (NPL). The NPL constitutes appendix B of 40 CFR part 300, which is the National Oil and Hazardous Substances Contingency Plan (NCP), which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended. EPA and the State of West Virginia have determined that all appropriate responses under CERCLA have been implemented at the portions of the site being deleted from the NPL and that no further cleanup by responsible parties is appropriate. Moreover, EPA and the State of West Virginia have determined that response actions conducted at the site to date remain protective of public health, welfare, and the environment.

**EFFECTIVE DATE:** December 13, 2002.

**ADDRESSES:** Comprehensive information on this release is available for viewing at the site information repositories at the following locations:

Mason County Public Library, 508 Viand Street, Point Pleasant, WV 25550, (304) 675–0894; *Hours of Operation:* Monday through Saturday, 10 a.m.–5 p.m.

U.S. EPA Region III Library, 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–5254; *Hours of Operation:* Monday through Friday, 8 a.m.–5p.m.

U.S. Army Corps of Engineers, Huntington District, 502 8th Street, Huntington, WV 25701, (800) 822–8413 or (304) 529–5388; *Hours of Operation:* Monday through Friday, 8 a.m.–4:30 p.m.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jack Potosnak, PE, Remedial Project Manager, U.S. EPA Region III (3HS13), 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–3362.

**SUPPLEMENTARY INFORMATION:** The portions of the site to be deleted from the NPL are the OU–11 Sellite Plant, the OU–12 North and South Powerhouses and Vicinity, the ENV–6 Wetlands Mitigation area, ESI–3 Tract 21, the ESI–5 Refueling Depot, and the ESI–9 Main and Outgoing Classification Yards.

A Notice of Intent to Delete for this site was published October 22, 2002 (67 FR 64846). The closing date for comments on the Notice of Intent to Delete was November 21, 2002. EPA received no comments.

EPA identifies releases which appear to present a significant risk to public health, welfare, or the environment, and it maintains the NPL as the list of those releases. Releases on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund. Any release deleted from the NPL remains eligible for Fund-financed remedial actions in the unlikely event that conditions at the site warrant such action. Section 300.425(e)(3) of the NCP states that Fund-financed actions may be taken at sites deleted from the NPL. Deletion of a site from the NPL does not affect responsible party liability or impede agency efforts to recover costs associated with response efforts.

**List of Subjects in 40 CFR Part 300**

Environmental protection, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Reporting and recordkeeping requirements, Superfund.

Dated: December 2, 2002.

**Donald S. Welsh,**

*Regional Administrator, U.S. Environmental Protection Agency, Region III.*

40 CFR part 300 is amended as follows:

## PART 300—[AMENDED]

1. The authority citation for part 300 continues to read as follows:

**Authority:** 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

2. Table 2 of appendix B to part 300 is amended by revising the entry for WV, Ordnance Works (USARMY), Point Pleasant to read as follows:

**Appendix B to Part 300—National Priorities List**

| St | Site name | City/County | Notes [a] |
|---|---|---|---|
| * | * | * | * |
| WV | West Virginia Ordnance (USARMY) | Point Pleasant | P |

[a] P=Sites with partial deletion(s).

[FR Doc. 02–31240 Filed 12–12–02; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Center for Medicare & Medicaid Services

### 42 CFR Part 405

**[CMS–1908–IFC]**

**RIN 0938–AJ97**

## Medicare Program; Application of Inherent Reasonableness to All Medicare Part B Services (Other Than Physician Services)

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Interim final rule.

**SUMMARY:** This interim final rule sets forth the process for establishing a realistic and equitable payment amount for all Medicare Part B services (other than physician services) when the existing payment amounts are inherently unreasonable because they are either grossly excessive or deficient. We also do not intend to apply this rule to services paid under a prospective payment system, such as outpatient hospital or home health. This rule describes the factors we (or our carrier) will consider and the procedures we will follow in establishing realistic and equitable payment amounts. This rule also responds to the public comments we received on the interim final rule with comment period that described the factors we will follow in establishing realistic and equitable payment amounts. In addition, the rule responds to a General Accounting Office report (as required by section 223 of the Balanced Budget Refinement Act of 1999), and it implements sections 1842(b)(8) and (b)(9) of the Social Security Act as revised by section 4316 of the Balanced Budget Act of 1997.

**DATES:** *Effective date:* These regulations are effective on February 11, 2003.

*Comment date:* Comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on February 11, 2003.

**ADDRESSES:** In commenting, please refer to file code CMS–1908–IFC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission or e-mail. Mail written comments (one original and three copies) to the following address only:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1908–IFC, P.O. Box 8017, Baltimore, MD 21244–8017.

Please allow sufficient time for mailed comments to be timely received in the event of delivery delays.

If you prefer, you may deliver (by hand or courier) your written comments (one original and three copies) to one of the following addresses:

Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–1850.

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for commenters wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and could be considered late.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** William Long, (410) 786–5655.

**SUPPLEMENTARY INFORMATION:** *Inspection of Public Comments:* Comments received timely will be available for public inspection as they are received,

generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, call telephone number: (410) 786–7195.

## I. Background

Title XVIII of the Social Security Act (the Act) contains various methodologies for making payment under Part B of the Medicare program. These payment methodologies vary among the different categories of items and services covered under Part B.

Section 4316 of the Balanced Budget Act of 1997 (BBA), Pub. L. 105–33, enacted on August 5, 1997, however, permits the Secretary to deviate from the payment methodologies prescribed in title XVIII of the Act if their application results in a payment amount that, because it is determined to be grossly excessive or deficient, is not inherently reasonable. Section 4316 of the BBA also requires the Secretary to describe the factors to be considered in determining an amount that is realistic and equitable.

The inherent reasonableness concept is not new to the statute. The Secretary has always taken the position that the authority to regulate unreasonable payment amounts is inherent in his authority to determine reasonable charges according to section 1842 of the Act. Moreover, effective September 10, 1986, section 9304(a) of the Consolidated Omnibus Budget Reconciliation Act (COBRA) (Pub. L. 99–272) of 1985 added section 1842(b)(8) and (b)(9) of the Act. These provisions expressly authorize the Secretary to deviate from the payment methodologies prescribed in the Act if their application results in a payment amount for a particular service or group of services, that is determined to be grossly excessive or deficient and is therefore, not inherently reasonable. The statute requires the Secretary to describe in regulations the factors to be considered in determining an amount that is realistic and equitable.

Regulations implementing this provision are contained in 42 CFR 405.502(g) and (h) and were published on August 11, 1986 in the **Federal Register** (51 FR 28710). These regulations describe the factors to be used in determining if the application of the reasonable charge methodology results in a charge that is grossly excessive or grossly deficient. The regulations also describe the factors to be considered in establishing a reasonable charge that is realistic and equitable.

As implemented by the current regulations, section 1842(b)(8) of the Act applies not only to our authority to establish national reasonable charge limits, but also to our carriers' authority to establish carrier-level reasonable charge limits on grossly excessive or deficient charges.

Section 4316 of the BBA amends section 1842(b)(8) of the Act and includes the following key differences:

- It excludes physician services from application of inherent reasonableness.
- It extends the authority to establish special payment limits to Medicare carriers regardless of the methodology used for determining payment and simplifies the inherent reasonableness process for adjustments to payment amounts that are 15 percent or less.

On January 7, 1998 we published in the **Federal Register** (63 FR 687) an interim final rule implementing section 4316 of the BBA.

## II. Provisions of the 1998 Interim Final Rule

In the January 7, 1998 interim final rule, we revised § 405.502(g) and (h) by excluding references to physician services. We also deleted specific references to the reasonable charge payment methodology. We deleted these references because the inherent reasonableness provisions apply to all Part B services, except physician services, irrespective of the payment methodology. However, we do not intend to apply this rule to services paid under a prospective payment system, such as outpatient hospital or home health services. We also reflected the change in the statute that permitted us to simplify the process for making adjustments to payment amounts for a category of items or services when the increase or decrease in the payment amount is no more than 15 percent per year. (For purposes of § 405.502(g) and (h), a ''category of items or services'' may consist of a single item or service or any number of items or services.)

Although the BBA gives the Secretary discretion to reduce the number of factors that are used to make inherent reasonableness determinations, we retained all but one of the factors that appear in § 405.502(g)(1), because they remain as appropriate examples of factors that may result in deficient or excessive payment amounts. We removed the factor related to the use of new technology for which an extensive charge history does not exist because there was already in place an alternative process for establishing payment amounts for new items or services for which an extensive charge history does not exist. (We reinserted this example in the final regulation; however, due to comments we received requesting that this example not be deleted.)

When we implemented section 9304(a) of COBRA of 1985, we interpreted the statute as codifying both our authority and a carrier's authority to establish realistic and equitable payment amounts. We interpreted the provisions of section 4316 of the BBA in the same way. Thus, the final regulations describe the circumstances and factors our carriers and we would use in setting realistic and equitable payment amounts if the existing payment amounts are grossly excessive or deficient.

Section 4316 of the BBA amends section 1842(b)(8), adding provisions that apply if a reduction or increase would vary the payment amount by 15 percent or less ''during any year.'' (Other provisions apply to larger increases and decreases.) Under this authority, we (or a carrier) may determine that more than a 15-percent adjustment is warranted, but we may choose to apply only a 15-percent adjustment in any given year and use the ''15 percent'' methodology. For example, we (or a carrier) may determine that a 25-percent reduction is warranted. However, the adjustment could be accomplished over 2 years—15 percent applied the first year, and 10 percent applied the following year.

Other than these BBA changes and some minor modifications, the revised 1998 interim final regulations were the same as the final regulations that were published in the **Federal Register** (53 FR 26067) on July 11, 1988.

While amended section 1842(b)(8)(C) of the Act does not specifically require that we include all the factors for making inherent reasonableness determinations for a category of items or services currently contained in § 405.502(g), it permits the Secretary to consider any additional factors determined to be appropriate. The additional pre-BBA factors we may consider, in accordance with current § 405.502(g)(1), include the following:

- The market place is not competitive.
- The payment amounts in a particular locality grossly exceed amounts paid in other localities for the category of items or services.
- The payment amounts grossly exceed acquisition or production costs for the category of items or services.
- There have been increases in payment amounts that cannot be explained by inflation or technology.

**III. Balanced Budget Refinement Act of 1999**

Section 223 of the Balanced Budget Refinement Act (BBRA) of 1999, Pub. L. 106–113, enacted on November 29, 1999, prohibits the use of the inherent reasonableness authority until the following events have occurred:

*Step 1:* The Comptroller General releases a report regarding the impact of the Secretary's fiscal intermediaries' and carriers' use of the authority.

This report entitled ''Medicare Payments-Use of Revised 'Inherent Reasonableness' Generally Appropriate (GAO/HEHS-OO–79)'' was released by the General Accounting Office (GAO) in July 2000. A discussion of this report and our response to its recommendations is contained in section IV of this regulation.

*Step 2:* The Secretary has published a notice of final rulemaking in the **Federal Register** that relates to the authority and that responds to the report and to comments received in response to the Secretary's interim final regulation relating to the authority that was published on January 7, 1998.

This regulation constitutes a notice of final rulemaking relating to inherent reasonableness authority. In addition to responding to the GAO Report, this regulation also responds to the comments received regarding the interim final regulation that was published January 7, 1998. Section V of this regulation includes our responses to these comments. However, we are issuing this regulation as an interim final rule so that the public will have an additional opportunity to comment. We are particularly interested in receiving comments on two provisions that contain further specificity than found in the 1998 interim final rule. These two provisions are the definitions of ''grossly excessive'' and ''grossly deficient'' in § 405.502(g)(1)(ii) and the criteria for using valid and reliable data in § 405.502(g)(4). Comments on the 1998 interim final rule are addressed in section V of this interim final rule.

*Step 3:* In publishing the final regulation, the Secretary will reevaluate the appropriateness of the criteria included in the interim final regulation for identifying payments that are excessive or deficient.

The criteria set forth in the interim final rule were never intended to include every set of circumstances where inherent reasonableness would be considered appropriate. We have reviewed the criteria that were included in the interim final rule. These same criteria were also included in the 1986 final regulation and are, therefore, not new but have been in effect for over 10 years. These criteria were originally established by the Congress. We believe the criteria remain as appropriate today as they were when the Congress established them, and we would need compelling reasons for determining that any of the criteria are inappropriate. A more detailed discussion of the criteria is contained in section V of this preamble. Once again, we would point out that these criteria are furnished as examples of situations of possible grossly excessive or deficient payment amounts and we believe they are realistic and continue to be relevant. In addition, the criteria were never intended to include every set of circumstances for which inherent reasonableness would be considered appropriate.

*Step 4:* Take appropriate steps to ensure the use of valid and reliable data when exercising the authority.

The regulation has been revised to include a new section that provides a methodology taken from the GAO report to ensure the use of valid and reliable data (§ 405.502(g)(4)). The criteria include doing the following:

- Develop written guidelines for data collection and analysis;
- Ensure consistency in any survey to collect and analyze pricing data.
- Develop a consistent set of survey questions to use when requesting retail prices.
- Ensure that sampled prices fully represent the range of prices nationally.
- Consider the geographic distribution of Medicare beneficiaries.
- Consider relative prices in the various localities to ensure that an appropriate mix of areas with high, medium, and low consumer prices was included.
- Consider criteria to define populous State, less populous State, urban area, and rural area.
- Consider a consistent approach in selecting retail outlets within selected cities.
- Consider whether the distribution of sampled prices from localities surveyed is fully representative of the distribution of the U.S. population.
- Consider the products generally used by beneficiaries and collect prices of these products.
- When using wholesale costs, consider the cost of the services necessary to furnish a product to beneficiaries.

**IV. Response to GAO Report**

In July 2000, the GAO released a report entitled ''Medicare Payments—Use of Revised 'Inherent Reasonableness' Generally Appropriate (GAO/HEHS–00–79).'' This interim final regulation responds to the GAO report and, in section V, responds to the comments received regarding the January 7, 1998 interim final regulation. In its report, the GAO found that CMS's use of the revised inherent reasonableness process was generally appropriate. Also, the GAO made four specific recommendations that are discussed below.

*Recommendation:* In publishing the final rule on the inherent reasonableness process, CMS should define with sufficient clarity the terms ''grossly excessive'' and ''grossly deficient.''

*Response:* We concur with this recommendation. The GAO indicated that the definition of these terms is needed so that it is clear to the medical equipment industry precisely what constitutes grossly excessive or grossly deficient. In its report, the GAO states that ''clearly an adjustment of under 15 percent could qualify [as grossly excessive or grossly deficient], because the inherent reasonableness authority extends to situations in which the difference between a current and proposed payment amount is under 15 percent.''

In addition, the statute provides two different processes once a determination is made that a payment amount is grossly excessive or deficient. That is, the statute specifies a process for adjustments of 15 percent or more in a given year and a simplified process for adjustments of less than 15 percent in a given year. However, the statute does not define what constitutes a grossly excessive or deficient payment amount. Nevertheless, the statute places significant importance on a 15 percent criterion. For this reason, we believe that differences between current and proposed payment amounts of less than 15 percent should not be considered grossly excessive or grossly deficient and therefore do not provide a sufficient basis for using Inherent Reasonableness authority. This definition does not preclude adjustments of less than 15 percent in a given year once it is determined that an overall adjustment of 15 percent or more is justified.

*Recommendation:* For future inherent reasonableness reviews based on survey data, CMS or the carriers should develop and implement a more structured survey design, including sample selection, survey instrumentation, and data collection methods, and ensure that the design is consistently used by all entities conducting the survey.

*Response:* In September of 1998, the carriers proposed reducing payment

amounts for blood glucose test strips, lancets, intermittent urinary catheters, basic enteral formula, albuterol sulfate (an inhalation solution), and eyeglass frames. The basis for these payment reductions was their determination that the current fees were grossly excessive. The carriers based this determination on a comparison of the current fees with the retail prices charged by suppliers. The retail data were gathered from telephone inquiries and on-site visits to retailers. Each DMERC obtained retail prices from four States in their region (three populous States and one less populous State). Thus, the carriers obtained prices from a total of 16 States across the country (12 populous States and 4 less populous States). Within each State, the carriers obtained prices from three urban areas and two rural areas. Within each urban area, the carriers obtained prices from four large stores and one small store. Within each rural area, the carriers selected one store. At least 200 observations were made for each of the six items with over 1,000 observations being made for blood glucose test strips.

The following are the GAO's main criticisms of this retail price survey as stated in the report and our responses:

• The carriers' sampling plan was developed without fully considering the geographic distribution of Medicare beneficiaries.

Based on this criticism from the GAO, in the future we will ensure that greater consideration is given to survey design including the geographic distribution of Medicare beneficiaries for the purpose of conducting retail price surveys.

• The carriers did not consider relative prices in the localities from which they sampled, which would have helped ensure that an appropriate mix of areas with high, medium, and low consumer prices was included.

The carriers surveyed both large and small States, urban and rural areas, and independent and chain stores for this purpose. In the future, we will take steps to ensure that consideration is given to including areas with high, medium, and low consumer prices.

• The carriers did not establish criteria to define populous State, less populous State, urban area, rural area, and, consequently, each carrier used different criteria in selecting locations.

• We will adopt more standard definitions of what constitutes populous States, less populous States, urban areas, and rural areas and will ensure that the carriers use these definitions.

• The carriers were not consistent in how they chose retail outlets within selected cities.

While the carriers surveyed both independent and chain stores, we will instruct the carriers to be more consistent in the methodology they use to make these selections.

• The carriers did not use consistent methods to collect and analyze the pricing data and did not develop written guidelines for data collection and analysis.

The carriers did use written spreadsheets to contain the basic information that they were looking for when they contacted each retail store. The method that was used was a simple example of price shopping, namely, pricing data were collected by contacting retail stores to find out how much they charge for a certain list of items. The carriers followed general guidelines that were provided by CMS. We will issue more detailed guidelines to the carriers to ensure that a more standardized method is used when obtaining pricing information in the future.

Also, based on these GAO criticisms of the carriers price survey, the carriers will not finalize their September 1998 proposed adjustments since the methodology used by the carriers' for making the proposed adjustments does not reflect the revised regulatory criteria recommended by GAO for making inherent reasonableness determinations. Likewise, the CMS inherent reasonableness proposals that were published in August 1999 will not be finalized since the methodology used for making the proposed adjustments also do not reflect the revised criteria recommended by GAO and adapted in this final regulation.

*Recommendation:* CMS and the carriers should collect and analyze additional information to more precisely estimate any payment reductions for glucose test strips, albuterol sulfate, and enteral formulas, as well as for additional payment reductions in subsequent years for lancets, eyeglass frames, latex Foley catheters, and catheter insertion trays without drainage bags.

*Response:* See response to previous recommendation.

*Recommendation:* CMS should monitor indicators that could signal potential problems with patient access to the product groups for which it is reducing maximum payments and act quickly to rectify any problems that arise.

*Response:* As stated in our comments on the draft report, we will monitor patient access to items for which payment amounts are adjusted using the inherent reasonableness process by periodically checking the rate at which suppliers are accepting assignment for these items and by monitoring any beneficiary complaints regarding access.

## V. Comments and Responses

### *A. General*

The January 7, 1998 interim final rule invited comments. The specific comments and our responses to these comments follow:

*Comment:* Only the Congress should be permitted to revise payment rates.

*Response:* The inherent reasonableness authority was first expressly granted to the Secretary by the Congress in section 9304 of COBRA of 1985. The inherent reasonableness process was specifically established by the Congress for the Secretary to use in adjusting unreasonable payment amounts. In section 4316 of the BBA, the Congress further modified the inherent reasonableness authority which allows the Secretary to revise payment rates. Therefore, the Congress clearly granted the Secretary the authority to revise payment rates using the inherent reasonableness process.

*Comment:* The statute limits inherent reasonableness adjustments to particular items, not categories of items.

*Response:* The regulations have always referred to inherent reasonableness as applying to categories of services. While the statute makes reference to particular items or services, we do not believe that this precludes our applying inherent reasonableness to categories of particular items or services that are similar in function and technology, for example, durable medical equipment grouped together under the same code in the Health Care Common Procedure Coding System (HCPCS). It would be impractical to make separate inherent reasonableness adjustments for each unique item or service. For example, it would not be practical to make inherent reasonableness determinations for every different manufacturer, brand name, or model of a specific type of wheelchair described by a particular HCPCS code. Moreover, if a category of items is so similar that payment is made based on the same code and same payment determination, it seems to us completely logical to apply the same limitation to the whole category.

*Comment:* The inherent reasonableness provision should not be applied to hospital outpatient services.

*Response:* The statute applies inherent reasonableness to all Part B items and services other than physicians' services as defined and paid for under section 1848 of the Act. By statute, hospital outpatient services,

therefore, are not excluded from the inherent reasonableness process. However, we do not intend to apply this rule to services paid under a prospective payment system, such as outpatient hospital or home health services.

*Comment:* The inherent reasonableness provision should not be applied to drugs administered in physicians' offices.

*Response:* The statute applies inherent reasonableness to all Part B items and services other than physicians' services as defined and paid for under section 1848 of the Act. Drugs are paid under section 1842(o) of the Act and not section 1848 of the Act. The inherent reasonableness authority can and should be used in cases for which the standard rules for determining payment amounts for drugs result in grossly deficient or excessive payment amounts. However, we do not intend to apply this rule to services paid under a prospective payment system, such as outpatient hospital or home health services. Further, no item or service will be subjected to a change in payment under the inherent reasonable authority until it is published by either CMS in the **Federal Register** or its carriers in their own publication and consideration of comments received in response to the proposed notice. (CMS notices are published in the **Federal Register**.)

*Comment:* It would be inappropriate for CMS to change laboratory payments while the Institute of Medicine is conducting a study on Part B payments.

*Response:* Before applying inherent reasonableness to laboratory services, we will consider the results of the study conducted by the Institute of Medicine. As we noted above, the inherent reasonableness authority can and should be used in cases where the standard rules for determining payment amounts for laboratory services result in grossly deficient or excessive payment amounts. Moreover, no item or service will be subjected to a change in payment under the inherent reasonableness authority until it is published by either CMS in the **Federal Register** or its carriers in their own publication and consideration of comments received in response to the proposed notice.

*Comment:* CMS should not ignore grossly deficient situations. CMS should include the mechanisms for increasing deficient payments.

*Response:* We will monitor all complaints from beneficiaries, suppliers, providers, and others regarding patient access to items and services for which payment amounts may be adjusted using the inherent reasonableness process. If we determine that a payment amount is grossly deficient, then we will propose that the payment amount be adjusted using the inherent reasonableness process.

*Comment:* CMS should increase payment allowances for items used by ostomy patients.

*Response:* The inherent reasonableness authority was suspended by the BBRA (see section III of this final rule for a discussion of the BBRA). Before that statute, we were reviewing the payment amounts for several ostomy items to determine if inherent reasonableness adjustments were necessary. We intend to continue reviewing payment for these items once the inherent reasonableness authority is restored.

*Comment:* If CMS or a carrier decides to reduce excessive payment allowances by more than 15 percent spread out over 2 or more years, it should repeat the review process each year; otherwise, this provision contravenes congressional intent.

*Response:* As recommended in the GAO report, when adjustments of more than 15 percent are spread out over multiple years, we will review market prices in the years subsequent to the year that the initial 15 percent reduction is effective. The purpose of this review is to ensure that further reductions continue to be appropriate. However, the GAO does not recommend that a new proposed notice be published for each year in which reductions are implemented in addition to the initial 15 percent reduction, and we agree that it is not necessary to publish another notice.

*Comment:* Arbitrary adjustments to payment rates will affect patient access, assignment rates, beneficiary liability, and quality of care.

*Response:* The purpose of the inherent reasonableness process is to establish realistic and equitable payment amounts when it is determined that the current payment methods result in amounts that are grossly excessive or grossly deficient. If payment amounts are proposed using the inherent reasonableness process that are not realistic and equitable, then the public has an opportunity to address this during the comment period. Information we or our carriers receive during the comment period or at any other time that demonstrates that inherent reasonableness adjustments will affect patient access, assignment rates, beneficiary liability, or quality of care would result in our appropriately adjusting the payment amount.

Whether attempting to adjust payments centrally through a **Federal Register** notice or through the Medicare carriers, we believe that payment adjustments can only be effective if they follow a defensible process for doing so and are based on accurate information. As described in § 405.502(g)(1) through (g)(4) of this regulation, a carrier proposing to establish a special payment limit for a category of items or services must inform the affected suppliers and Medicaid agencies of the proposed payment amounts and the factors considered in proposing the particular limit. As part of its analysis, all carriers must also consider the following elements:

- The effects on the Medicare program, including costs, savings, assignment rates, beneficiary liability, and quality of care.
- What entities would be affected such as classes of providers or suppliers and beneficiaries.
- How significantly would these entities be affected.
- How would the adjustment affect beneficiary access to items or services.

The intent of these requirements is to assure that carriers collect sufficient information on market prices and potential effects on suppliers and beneficiaries before taking action.

*Comment:* Inherent reasonableness adjustments could cause other payers to subsidize the Medicare program.

*Response:* The goal of the inherent reasonableness process is to establish payment amounts that are realistic and equitable. When Medicare has realistic and equitable payment amounts, this should not result in other payers subsidizing the Medicare program, or conversely, Medicare subsidizing other payers.

*Comment:* CMS needs to establish an inherent reasonableness appeals procedure.

*Response:* The statute does not provide for an appeals process in the case of inherent reasonableness adjustments to payment amounts. Thus, the Congress obviously did not intend for a special appeal process to be available. However, issues or concerns identified during the public comment period on proposed inherent reasonableness adjustments are given full consideration and a final determination is published before the actual adjustments in payment are made. The comment period, therefore, provides a mechanism for commenters to raise issues and concerns regarding inherent reasonableness adjustments before they are put in place. In addition, after an adjustment is made, we will continue to monitor issues relating to patient access and take corrective action if necessary.

*B. Factors Used in Making an Inherent Reasonableness Determination*

*Comment:* CMS should consider all the factors that may result in grossly deficient or excessive payment and not limit consideration to just one or two of the factors.

*Response:* The examples listed in § 405.502(g)(1)(vii) are just examples, and the regulation explicitly states that the list of examples is not all-inclusive. When making an inherent reasonableness determination, we can use one or more of the examples listed in the regulation or an example that is not listed in the regulation. This approach allows us to adapt the methodology we use to address the various specific issues that may pertain to any particular case regarding the use and availability of data as well as other factors relevant to making an inherent reasonableness determination in that case.

*Comment:* The regulation should include greater specificity and guidance on the criteria and data that will be used to make payment adjustments. It should define grossly deficient or excessive. It should also define ''windfall profit.''

*Response:* Both § 405.502(g)(1)(vii) and section 1842(b)(8)(C) of the statute give examples of factors that can result in payment amounts that are grossly excessive or grossly deficient. The Act and regulation also give examples of methods that can be used in order to establish reasonable payment amounts. It is not necessary or practical to make these lists of examples all-inclusive. Moreover, having general criteria allows us flexibility in adapting inherent reasonableness applications to the wide array of items and services encompassed within Medicare Part B, different marketing conditions, and the availability of data. We define the terms ''grossly excessive'' and ''grossly deficient'' in this rule in section IV dealing with the GAO report and its recommendations. In this rule, we removed the term ''windfall'' and we replaced it with the term ''excessive'' because for purposes of this regulation they both have the same meaning. We define the term excessive in § 405.502(g)(1)(ii).

*Comment:* The factors to be considered should be rephrased to ensure that they apply to deficient payment allowances as well as excessive payment allowances.

*Response:* The factors in § 405.502(g)(1)(vii) apply to both excessive and deficient payment amounts.

*Comment:* CMS should specify that national inherent reasonableness determinations are made by CMS, and carrier determinations are made by carriers/intermediaries or groups of carriers/intermediaries without regard to whether the determination applies in every carrier area or to a particular geographic area.

*Response:* We agree with this comment, and we are revising § 405.502(g)(3) of the regulation to provide further clarification on the terms we use to distinguish between inherent reasonableness conducted by CMS and inherent reasonableness conducted by the carriers.

*Comment:* CMS should use caution when comparing Medicare payment amounts to other purchasers' payment amounts. Some suppliers may take a loss on a small portion of business.

*Response:* We recognize that some suppliers' charges may reflect marketing strategies and business practices independent of Medicare. For example, some businesses may sell an item for less than cost in order to increase customer traffic. Also, some suppliers may charge excessive amounts for products in order to subsidize other products. However, the purpose of inherent reasonableness is not to accommodate marketing strategies, but to ensure that the Medicare payment amounts for items or categories of items are realistic and equitable. In addition, in identifying prices, we check a variety of suppliers and types of suppliers. This levels out the effect of these marketing strategies.

*Comment:* In comparing Medicare's allowances with other purchasers' allowances, CMS should take into account volume commitments to suppliers by other purchasers. It would be inappropriate to compare laboratory prices charged to physicians and other large purchasers to prices charged to Medicare because physicians and other purchasers can guarantee the laboratory a certain volume of patients and need only bill once per month. Billing Medicare for each patient is more expensive.

*Response:* While the statute generally does not give CMS the authority to negotiate volume discounts with suppliers, it also does not permit CMS to subsidize the discounts that suppliers grant to other purchasers. CMS's charge is to calculate a fair and equitable payment amount, not to underwrite suppliers' profitability. Medicare is the largest volume purchaser for many items and services. As a payer, Medicare expenditures represent 17.6 percent of total national health expenditures by all payers. Expenditures for Part B, excluding physician services, are approximately $60 billion per year. Although Medicare does not give specific volume guarantees to suppliers and does not ask for volume discounts, there is a predictable volume of Medicare business, and suppliers have the opportunity to profit from this. To suggest that Medicare's payments be higher than other purchasers' payments in light of the large Medicare volume is unwarranted. Logically, it does not follow that a large purchaser such as Medicare should be expected to pay more than other smaller purchasers.

*Comment:* CMS should not use the Veterans Administration's (VA) prices for comparison as the VA program is vastly different than Medicare.

*Response:* Section 1842(b)(8) of the Act provides that comparing Medicare payments with payments made by other purchasers is an appropriate way to determine whether or not Medicare payment amounts are reasonable. The VA is a major purchaser of medical supplies and devices. The VA payment amounts in some cases, such as for oxygen equipment, are retail prices and can be compared with Medicare's payment amount without adding a mark-up factor. In other cases, the VA purchases items directly from manufacturers and supplies them to the VA patients. In addition, the VA may directly provide certain services that would otherwise be provided by suppliers under the Medicare program. Therefore, in many cases, the VA payments represent wholesale prices, and, thus, we have imputed a markup before comparing these amounts to Medicare payment amounts. Using wholesale prices with a markup has long been recognized in regulations at § 405.502(g)(2) as an appropriate method for determining reasonable payment amounts under the inherent reasonableness authority. When we publish a proposed inherent reasonableness notice, we will explain the criteria we used to establish an appropriate markup.

*Comment:* In determining if the marketplace is not competitive, CMS should consider if the lack of competition is a result of Medicare's deficient payment allowances.

*Response:* The examples in § 405.502(g)(1)(vii) are situations for which adjustments in payment may be required, such as the one referred to in this comment, may or may not result in excessive or deficient payment amounts. That is, the number of suppliers for a particular item does not in itself indicate whether or not our payment amount is excessive or deficient. While the number of suppliers may in certain cases be relevant and be considered, it would have to be considered along with

other factors to determine if an inherent reasonableness adjustment is warranted. We believe the language used in the regulation is consistent with this interpretation.

*Comment:* In determining if the payment allowance in a locality is different than the amount paid in other localities, CMS should consider differences in costs in the other localities.

*Response:* For purposes of inherent reasonableness, it is not always necessary to consider local variations in payment amounts which is consistent with the Congress limiting the degree of local variation by eliminating the reasonable charge payment methodology for most items and services. In the past, the reasonable charge methodology in some instances resulted in variations among areas as high as 300 percent. In place of the reasonable charge payment methodology, the Congress has established fee schedule payment methodologies with national payment limits or caps for most items and services previously paid on a reasonable charge basis. In the case of durable medical equipment (DME) and prosthetics and orthotics, the Congress established a fee schedule methodology with national floors and ceilings that allow maximum variations only up to 15 percent for DME and 30 percent for prosthetics and orthotics. (According to regulations at §§ 442.220 and 442.228, for DME, the ceiling is equal to the weighted average of local payment amounts; the floor is equal to 85 percent of the weighted average. For prosthetics and orthotics, the ceiling is equal to 120 percent of the national average purchase price; the floor is equal to 90 percent of the national average.) Also, we note that for some items covered by Medicare, items are available for an established price on a national basis through catalogues or the internet. For this reason, the regulatory provision pertaining to local variations in costs will probably have limited applicability. However, when it is used, we will take into account the relative costs of furnishing a category of items or services in different locations as described in the regulation.

*Comment:* In determining whether the payment allowances are grossly in excess of acquisition or production costs, CMS should consider other types of relevant costs, for example, rent. CMS should consider all direct and indirect costs, including any service component, in making an inherent reasonableness determination.

*Response:* In some instances, it may be appropriate to use cost rather than retail or wholesale prices in determining whether a payment amount is grossly excessive or deficient. In those instances in which we use cost data, we will consider both direct and indirect costs of the supplier as well as any service component.

*Comment:* In determining if increases in payment amounts cannot be explained by inflation or technology, CMS should also examine other factors such as malpractice or product liability risks.

*Response:* If we determine that increases in payment amounts cannot be explained by inflation or technology but can be explained by other factors, we will consider these other factors when making an inherent reasonableness determination.

*Comment:* By removing the example relating to increases in payment amounts that cannot be explained by inflation or technology, in the interim final rule with comment, CMS would never again consider making an inherent reasonableness adjustment based on new technology.

*Response:* As indicated previously, the factors listed in § 405.502(g)(1)(vii) are merely examples. There is no requirement that any specific example must be used or that only the specific examples listed in the regulation can be used. However, because this is a good example, we are putting it back into the regulation.

*Comment:* CMS should consider improvements in technology in making an inherent reasonableness determination.

*Response:* As indicated in § 405.502(g)(1)(vii)(C) of this final rule, improvements in technology are listed as a factor that we may consider when making inherent reasonableness determinations.

*Comment:* CMS's gap-filling methodology does not result in adequate payment levels for medical equipment and supplies, especially for new technology.

*Response:* Section 1834 of the Act stipulates that the fee schedule payment amounts for DME and prosthetics and orthotics be calculated based on the average reasonable charge for the item from a base period, for example, 1986 and 1987. These base fee schedule amounts are updated on an annual basis by a factor legislated by the Congress. When the reasonable charge data from the base period do not exist, for example, when an item was not on the market at that time, the Medicare carriers establish the base fee schedule amounts using a ''gap-filling'' methodology. This methodology is used to approximate historic reasonable charges, from the base period. For example, Medicare carriers may use fee schedule amounts for comparable items or supplier price lists with prices for comparable items.

When base year data are not available and more current prices are used, the carriers decrease the more current prices by a ''deflation'' factor in order to approximate the base year price for gap-filling purposes. The deflation factors are based on the percentage change in the consumer price index for all urban consumers (CPI–U) from the mid-point of the fee schedule base period to the mid-point of the year that the price is in effect. The gap-filling process is only used when the base year data required by the statute for use in calculating the fee schedules do not exist. We believe that this methodology does result in adequate payment amounts by taking into account comparable prices, retail prices, and inflationary factors. However, we can adjust gap-filled fee schedule amounts that we determine are grossly excessive or grossly deficient using the inherent reasonableness process.

*Comment:* For laboratory services, competitive pricing or changing technology are not relevant to pricing under inherent reasonableness since laboratory services are paid on a fee schedule basis.

*Response:* Fee schedules as payment methodologies do not preclude the use of inherent reasonableness. The inherent reasonableness process is the process that the Congress has established to address fee schedule amounts or other payment amounts that are not reasonable for various reasons. As indicated by previous GAO and the Office of Inspector General (OIG) reports, fee schedule payment amounts may not always be realistic and equitable. Inherent reasonableness, as authorized by the statute, allows us to look at other factors such as competitive pricing and changes in technology in order to determine whether the fee schedule amounts are excessive or deficient.

*Comment:* The methodology for making inherent reasonableness determinations should include valid statistical techniques.

*Response:* As mentioned previously, section 223(b) of the BBRA requires that, in publishing this regulation, the Secretary will take appropriate steps to ensure the use of valid and reliable data when exercising inherent reasonableness authority. We have added a provision in § 405.502(g)(4) of the final regulation that defines the steps we will take to ensure the use of valid and reliable data. See our response

regarding this topic in section III of this regulation.

*Comment:* CMS does not have the authority under inherent reasonableness to require that it receive the ''best price.''

*Response:* The commenter is referring to a methodology that we may use in determining whether payment amounts are grossly excessive or grossly deficient. As described in § 405.502(g)(1)(vii)(D), one methodology that may be used to make an inherent reasonableness determination is whether the payment amount for an item or service is substantially higher or lower than the payments made for the item or service by other purchasers in the same locality. If we identify a price and there are indications that the item or service is readily available at that price, then, we believe, this price would be a realistic and equitable payment amount. As the GAO observed in its report on inherent reasonableness, ''retail prices represent the prices generally available to individual beneficiaries, include a share of the costs of maintaining retail space as well as other services, and are generally higher than what a prudent large-volume purchaser would pay.'' Therefore, using the best retail price available on the open market for an item or service would be appropriate as long as beneficiary access to the item or service is not significantly affected.

*Comment:* CMS needs to find a ''pattern'' of excessive charges before it can use its inherent reasonableness authority.

*Response:* We disagree with this comment. We do not believe that identifying patterns of excessive charges is necessary to determine that Medicare is paying a grossly excessive or deficient payment amount. For example, even though multiple payers may be paying an excessive amount for an item or service, a single payer may be paying significantly less than the other payers. This may be the result of the single payer using a more innovative payment methodology, such as competitive bidding or negotiated rate setting. We do not believe we should be precluded from comparing, in this case, Medicare's excessive payment amount with another entity's significantly lower amount that was a result of a more innovative payment methodology.

*C. Factors Used in Establishing a Special Payment Amount*

*Comment:* A payment amount should not be established based on bulk purchasing.

*Response:* In an open market system, bulk purchasing ordinarily results in a discounted price. Medicare pays for items on an individual claim-by-claim basis and does not enter into contracts to purchase a predetermined number of items. Nevertheless, a large volume of claims is paid by Medicare and the total Medicare dollars that are paid out for Part B items and services (other than physician services) (approximately $60 billion dollars in fiscal year 2001) are significant. Because Medicare may account for a significant part of the market, we believe that Medicare should not be precluded from taking into consideration discounts available to other payers when determining what constitutes a reasonable payment amount for an item or service.

*Comment:* A payment amount should permit the small supplier to continue to have reasonable revenues and profit margins. For example, mail order catalogs should not be used for establishing a payment amount because small dealers are unable to take advantage of discounted pricing.

*Response:* The purpose of inherent reasonableness is to replace grossly excessive and grossly deficient payment amounts with realistic and equitable payment amounts. We recognize that small suppliers may be necessary to provide service to beneficiaries and to ensure appropriate access to items and services. However, there are instances in which catalog prices are useful in determining whether adjustments in payments are warranted. For example, in 1995, catalog prices were used to reduce the Medicare payment amounts for home blood glucose monitors and, since then, we have not received any complaints that beneficiaries are having trouble obtaining home blood glucose monitors. Other items, such as blood glucose test strips, are ordinarily purchased by Medicare beneficiaries through catalogs.

*Comment:* A payment amount should reflect the ''added'' costs of doing business with Medicare.

*Response:* In considering retail prices, we recognize that businesses, in setting these prices, take into account the costs of providing their customers with appropriate services. For example, retail stores take into account the costs of processing VISA and MasterCard claims, including the user fees that suppliers must pay to accept credit cards and the costs of submitting bills to credit card companies. Businesses generally do not charge VISA and MasterCard customers more than other customers. Also, it should be noted that there are distinct costs to service cash customers, such as necessary security systems and the deposit of funds in banks. Ordinarily, purchasers, whether they use coupons, obtain an American Association of Retired Persons (AARP) discount, use a credit card, write a check, or use private or public insurance, do not expect to pay more than the retail price; nor does a customer needing help in selecting a particular item expect to pay more than the retail price. Thus, retail prices take into account these costs of doing business. However, if we do not consider retail prices, but instead use wholesale prices as a basis for calculating inherent reasonableness, we will include a markup to make these prices comparable to retail prices.

*Comment:* CMS should establish single national payment amounts and should not recognize any geographic variation.

*Response:* There are instances in which it is appropriate to establish a single national payment amount (for example, home blood glucose monitors). There may be other items that are available at the same price on a national basis. However, in other instances, when there is a significant labor or service component, it may not be appropriate to establish a single national payment amount for an item or service. The Congress seemed to recognize, to a limited extent, the need for variation in payment amounts for some items and services. For example, the Congress mandated both upper and lower limits for the fee schedule amounts for DME, with a range in payment of 15 percent.

*Comment:* Reductions should not exceed 7 percent in 1 year and should be limited to a total of 20 percent over 3 years.

*Response:* The statute provides us the authority to adjust payments by as much as necessary in order to correct a grossly excessive or grossly deficient payment amount. It would be inappropriate for Medicare to spend excessive amounts for items and services, once it had determined that the payment amount was grossly excessive or deficient.

*D. Carrier Procedures*

*Comment:* Inherent reasonableness decisions should not be made by carriers but should be made through the formal rulemaking process or at least published in the **Federal Register**. Carriers should not be permitted to reprice items without national policy or greater CMS scrutiny. The carriers are making de facto national policy under this rule.

*Response:* Before the BBA, CMS requested an amendment to the inherent reasonableness statutory requirements to allow carriers to make inherent reasonableness adjustments so that we could respond timely to frequent price

changes in the marketplace. We had specifically asked the Congress to drop the requirement that all inherent reasonableness determinations had to be made through publishing in the **Federal Register** so that carriers could make their own inherent reasonableness determinations without pursuing the cumbersome and lengthy **Federal Register** process. The BBA gives us that latitude.

As authorized by section 1842(a) of the Act, carriers, under our direction, have historically been used to make determinations regarding payment amounts, coverage determinations, in the absence of a national coverage determination, and utilization safeguards. Also, section 1842(b) of the Act specifies that inherent reasonableness adjustments of more than 15 percent a year must be published in the **Federal Register**. This clearly demonstrates that it was the intent of the Congress that adjustments of 15 percent or less in a given year can be made without publishing in the **Federal Register**. The regulations specifically provide for inherent reasonableness adjustments to be made by the Secretary or our carriers and includes specific instructions for carrier use of inherent reasonableness. Specifically, carriers are able to make inherent reasonableness determinations efficiently and respond quickly to price changes in the market place. Before the BBA, we completed only one inherent reasonableness adjustment because of the cumbersome statutory requirements. Because of the cumbersome inherent reasonableness process, we were not able to use inherent reasonableness to address the numerous OIG, GAO, and newspaper reports that Medicare's payments were excessive. The effect of the BBA was to facilitate the implementation of inherent reasonableness determinations by allowing carriers to make payment adjustments. The GAO concurs that the use of carriers to make inherent reasonableness adjustments is appropriate. The GAO states in its report on inherent reasonableness that:

> CMS acted within its authority in delegating the revised inherent reasonableness process to the carriers. The BBA was important in removing the barriers that prevented the carriers from conducting inherent reasonableness reviews. * * * Moreover, delegation is proper because pricing Medicare goods and services is already a responsibility of the carriers and the statute does not specifically preclude delegation of this authority to the carriers.

*Comment:* CMS needs to ensure against arbitrary and capricious decisions and carrier abuse of inherent reasonableness authority. Carriers should seek CMS's review and approval of all inherent reasonableness adjustments.

*Response:* The regulation requires that no payment adjustments may take place without informing suppliers of the proposed payment amounts, the factors considered in proposing the limit, and soliciting comments from suppliers. After considering the comments received, the regulation also requires the carriers to inform CMS of any inherent reasonableness limitations it plans to establish. No limitations can take affect until we have informed the carriers that we have received the carrier's notification. This allows us the opportunity to review the carrier's determination and ensure that arbitrary and capricious limitations are not implemented. In cases where one or more of our carriers undertake an adjustment using this inherent reasonableness authority that either has an impact of $100 million or more in any one year, or has a significant effect on a substantial number of small entities, the carrier or carriers will notify providers of the planned adjustment and the analysis on which it is based. In this way, affected parties would be able to comment on the planned adjustment.

*Comment:* Carriers may abuse their inherent reasonableness authority by reducing payment allowances by more than 15 percent over more than a 1-year period without the procedural protection of rulemaking, that is, compliance with the Administrative Procedure Act (APA).

*Response:* The statute allows the carriers to make inherent reasonableness adjustments of more than 15 percent over 2 or more years as long as the adjustments do not exceed 15 percent in a single year. This was confirmed in the GAO report on inherent reasonableness. In addition, before implementing inherent reasonableness limits, the carriers are required by the regulation to inform affected suppliers of the factors it used in establishing the limit and to provide the opportunity for suppliers to comment.

*Comment:* Allowing carriers to make independent payment decisions will result in payment disparities between carriers.

*Response:* Inherent reasonableness is the authority for establishing realistic and equitable payment amounts. In some cases, applying inherent reasonableness may result in payment amounts that vary by geographic area. In other cases, it may be justifiable to eliminate payment disparities by establishing a single national payment amount. In certain situations, the Congress has recognized the need for variation in payment amounts.

*Comment:* Carriers should only be permitted to make inherent reasonableness adjustments once every 5 years or be limited in the number of items subject to inherent reasonableness.

*Response:* The statute does not limit the number of times that this authority may be used, nor does it limit the number of items that can be reviewed using this authority. In some cases, it may be necessary to make more frequent adjustments than every 5 years to take into account changes in technology or economics.

*Comment:* Section 4554 of the BBA requires that any advisory committee established by a carrier for coverage and administrative policies under Part B will include an individual to represent the independent clinical laboratories.

*Response:* Section 4554 of the BBA, by its own terms, provides only for laboratory representatives to be on carrier advisory committees for coverage and administrative policies. This section does not implicate Medicare payment policies, nor is there any implication that an advisory committee would be part of an inherent reasonableness review of payment levels by the carrier.

*Comment:* This rule should apply to intermediaries as well as carriers.

*Response:* The inherent reasonableness authority applies to all Part B items and services except physician services. Therefore, this rule applies to both carriers and intermediaries who process Medicare Part B claims. However, we do not intend to apply this rule to services paid under a prospective payment system, such as outpatient hospital or home health services.

*Comment:* A process should be put into place to allow suppliers to formally petition carriers for inherent reasonableness reviews. The petitions would be required to meet specific standards to be considered for inherent reasonableness.

*Response:* Anyone has the opportunity to submit a request to CMS or a Medicare carrier for an inherent reasonableness adjustment. The regulations provide guidance on the criteria that will be used in determining whether an adjustment in the Medicare payment amount(s) is warranted. We do not believe that there would be an added benefit to creating a formal process; we believe that it is best to keep the process flexible so that we and the carriers can respond to the various situations that could arise. For example,

the type and quantity of data needed in order to conduct an inherent reasonableness review cannot be determined ahead of time and may vary significantly depending on the item or service at issue.

*Comment:* Will carriers take into account suppliers' administrative and service costs in making inherent reasonableness determinations?

*Response:* In those cases for which actual cost data are used as a basis for an inherent reasonableness determination, administrative and service costs would be taken into account. Conversely, when we or a carrier use retail prices or data on payments made by other payers as a basis for an inherent reasonableness determination, administrative and service costs are typically included as part of the retail prices or third party payer amounts.

*Comment:* Who at the DMERC has inherent reasonableness authority?

*Response:* Each carrier determines which of its staff or components are best qualified to conduct inherent reasonableness reviews, as they do in the case of other pricing issues.

*Comment:* Carriers should be required to provide affected parties with the data and all relevant information they use to make inherent reasonableness determinations.

*Response:* The carriers will publish the data and all relevant information they use to make inherent reasonableness determinations in the proposed notice to suppliers. Any additional background data used by the carriers in making inherent reasonableness determinations that are not published in the proposed notice will be made available.

*Comment:* Carriers need more guidance to ensure that they contact all relevant parties when publishing an inherent reasonableness adjustment.

*Response:* Carriers will be required to notify all suppliers and/or organizations representing suppliers of any proposed inherent reasonableness adjustments. Therefore, those parties that are directly affected by the changes in payment will be notified of the proposed adjustments and may respond to these proposed changes before they take effect (*see* § 405.502(g)(3)(ii)).

*Comment:* Carriers should provide a written response to comments on inherent reasonableness adjustments.

*Response:* In the final notice of inherent reasonableness that is sent to suppliers and/or organizations representing suppliers, the carriers will be required to provide written responses to the comments they received on the proposed notice of inherent reasonableness.

*Comment:* The sequence of steps a carrier will follow in making an inherent reasonableness determination should be made clearer.

*Response:* We concur with this comment. We have revised § 405.502(g)(3)(ii) to clarify the procedures a carrier must follow.

*Comment:* Interested parties should have the ability to comment on decisions when the adjustment is less than 15 percent.

*Response:* All proposed inherent reasonableness adjustments will be published and a comment period will be provided for all adjustments regardless of the percentage change in payment; some will be published on a carrier-wide basis, while those made by CMS will be published in the **Federal Register**.

*E. Impact*

*Comment:* In compliance with the APA, the inherent reasonableness rule should be withdrawn and published as a notice of proposed rulemaking with a public comment period. This would give the industry the opportunity to comment before implementation. Suppliers no longer have the procedural safeguards that have been in place since 1986. ''Good cause'' does not exist to waive the proposed rulemaking process.

*Response:* Section 223 of the BBRA prohibits us from using the inherent reasonableness authority until we respond to the GAO report and publish a notice of final rulemaking that responds to comments received on the January 7, 1998, interim final regulation on inherent reasonableness. We are meeting the mandate of section 223 of the BBRA by publishing this interim final rule and are therefore in compliance with the statute. Moreover, consistent with both section 223 of the BBRA and the APA, the 1998 interim final rule served the same purpose as a notice of proposed rulemaking since this regulation invited public comment. This interim final rule responds to the comments we received on the 1998 interim final regulation.

Also, we note that the GAO report addressed this issue and concluded that a notice of proposed rulemaking was not necessary. Specifically, the GAO report states that ''going through the notice of proposed rulemaking to issue inherent reasonableness regulations would have serious financial implications for Medicare and its beneficiaries.'' In addition, the GAO states that ''CMS's reliance on the good cause exception to bypass formal notice and comment rulemaking procedures seems reasonable.''

*Comment:* The rule does not comply with the Regulatory Flexibility Act and will have a significant economic impact on a substantial number of small entities. In addition, CMS indicates in the regulatory impact statement that it has insufficient data to predict exactly the nature of the impact of this rule; yet CMS certifies that the rule will not have a significant impact on a substantial number of small entities.

*Response:* Because this rule does not include any actual proposed or final inherent reasonableness determinations, it will have no impact on Medicare's payment amounts. However, we believe that the rule, by allowing us to conduct inherent reasonableness in the future, has the potential to significantly impact small businesses. This belief is based on a June 2002 OIG report indicating that Medicare may be overpaying between $130 million and $958 million per year for 16 items of medical equipment. In addition, in 2002, the GAO indicated that Medicare may be overpaying for medical equipment by more than 20 percent. However, we are unable to predict the specific dollar impact based on the future application of inherent reasonableness. Since we recognize the potential for future payment adjustments, either upward or downward, we will publish in the **Federal Register** impact statements that will comply with Executive Order 12866 whenever CMS proposed national limits and the dollar impact of inherent reasonableness determinations exceeds $100 million in any one year, and will address impact on small entities in accordance with the Regulatory Flexibility Act. However, we believe that, if inherent reasonableness adjustments are applied, then they will eliminate grossly excessive or deficient payment amounts. If a payment amount is adjusted upward because it is deficient, it will benefit suppliers and beneficiaries. A more generous payment amount may result in greater availability of items and services to Medicare beneficiaries. The converse may not be true if the payment amount is adjusted downward. A lower payment amount should not necessarily result in a lack of availability of items and services since the revised payment amount would be realistic and equitable. We believe that a realistic and equitable payment amount would ensure continued availability of items and services. Thus, we believe that the application of an adjustment will merely serve as a vehicle for eliminating excessive profits. This adjustment will benefit the Medicare program by

reducing costs and benefit beneficiaries by reducing coinsurance payments.

*Comment:* The rule does not comply with the Contract With America Advancement Act of 1996, which requires that a major rule must be submitted to the Congress before that rule can become effective.

*Response:* Since this rule has been determined to be a major rule, it is being submitted to the Congress consistent with the Contract With American Advancement Act.

*Comment:* In making inherent reasonableness determinations, CMS should have to consider the impact on quality of care, access issues, and the financial viability of suppliers in the marketplace.

*Response:* We will consider the impact of future inherent reasonableness adjustments, and as stated above, whenever CMS proposed national limits and the dollar impact of inherent reasonableness determinations exceed $100 million in any one year, we will analyze the impact on quality of care, access issues, and the financial viability of suppliers in the marketplace. However, we do not believe that using the inherent reasonableness authority will have a negative impact because the purpose of the authority is to ensure that Medicare makes payments that are realistic and equitable, and better reflect market prices.

*F. Effective Date*

*Comment:* The effective date should be 6 months following publication of payment reductions.

*Response:* The effective date for payment adjustments will be determined on a case-by-case basis, but in no case will the effective date be sooner than 60 days after publication of the final notice of inherent reasonableness. We believe that in most cases it would not be in the best interest of the Medicare program to delay implementation of inherent reasonableness adjustments more than 60 days as this would result in the continuation of payment amounts that are either grossly excessive or deficient.

*Comment:* All inherent reasonableness decisions should be made at the same time so that suppliers can offset payment reductions with payment increases.

*Response:* The purpose of inherent reasonableness is not to be budget neutral or to make an equal number of increases and decreases in payment. The purpose is to address situations in which the standard payment rules result in grossly excessive or deficient amounts. It would be unreasonable for us to delay making an increase in payment because we have not yet identified an item or service that warranted a decrease in payment. The converse is also true. We note that historically the GAO and OIG have conducted studies that indicate that Medicare's payment amounts are generally excessive.

*Comment:* Carriers should have to provide for a 60-day comment period and a 60-day notification period before the effective date of an inherent reasonableness determination.

*Response:* We concur with the commenter. We will inform carriers to provide for a 60-day comment period and that any final carrier inherent reasonableness determination may not be effective until 60 days following public notice.

## VI. Provisions of This Interim Final Regulation

In response to comments on the January 7, 1998 interim final rule, we made the following changes in this interim final rule:

- Clarified § 405.502(g)(1)(ii) by stating that a payment amount will not be considered grossly excessive or grossly deficient if the overall payment adjustment is less than 15 percent.
- Amended § 405.502(g)(1)(iii) by clarifying the difference between a national determination and a carrier determination.
- Added § 405.502(g)(2)(vii)(H) to include an example of new technology that exists and is not reflected in the existing payment allowance.
- Amended § 405.502(g)(3)(ii) by adding ''proposed payment amounts and the'' to the first sentence to provide suppliers the opportunity to comment on the carrier's proposed payment allowances as well as the factors the carrier considered; and adding a requirement that a carrier notify us in writing of any final limits it plans to establish.
- Added § 405.502(g)(4) to include the criteria for using valid and reliable data.
- Added § 405.502(g)(5) to provide that when payment adjustments of more than 15 percent are spread out over multiple years, subsequent adjustments will be reviewed for their appropriateness.

However, because we are interested in receiving comments on this rule, particularly the two provisions that contain further specificity than found in the 1998 interim final rule, we are publishing this rule as an interim final rule and are soliciting comments. These two provisions are the definitions of ''grossly excessive'' and ''grossly deficient'' in § 405.502(g)(1)(ii) and the criteria for using valid and reliable data in § 405.502(g)(4). We already received comments on the other provisions when we published the interim final rule in January 1998. These comments are addressed in section V of this interim final rule.

## VII. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it does not need to be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

## VIII. Regulatory Impact Statement

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and the Regulatory Flexibility Act (RFA) (September 16, 1980 Public Law 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more annually). This regulation has no immediate economic effect on current Medicare payments. However, it establishes a process that could be used in the future to establish reasonable and equitable payment amounts. Because this rule does not include any actual inherent reasonableness determinations, it has no immediate impact on Medicare's payment amounts. However, we do believe that the future use of inherent reasonableness has the potential to have significant impact; therefore it is a major rule. This belief is based on a June 2002 OIG report indicating that Medicare may be overpaying between $130 million and $958 million per year for 16 items of medical equipment. In addition, the GAO recently indicated that Medicare may be overpaying for medical equipment by more than 20 percent. However, these reports were not done to the specifications we are establishing in this rule and, therefore, they may not be an accurate estimate of the specific dollar impact that could result from the future application of inherent reasonableness under these requirements. Since we recognize the potential for future payment adjustments, either upward or

downward, when CMS makes adjustments we will publish in the **Federal Register** regulatory impact statements that will comply with Executive Order 12866 and the Regulatory Flexibility Act whenever the dollar impact of inherent reasonableness determinations exceed $100 million in any one year. At this time, we lack sufficient data to conduct a quantitative analysis of the impact of this rule.

We lack such data because until we publish this rule, and we are able to conduct an inherent reasonableness study using the criteria described in this rule, we are unable to determine whether Medicare is overpaying or underpaying for items or services and to what degree. We do not know if, or when, or for which services, we would make payment adjustments, or the percentage adjustment we would make, or even the particular industry that would be affected. Also, we do not know if these adjustments would increase or decrease Medicare payment amounts. As a result, we cannot anticipate the specific dollar effect or impact on suppliers and beneficiaries.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $26 million or less in any 1 year (see 65 FR 69432 for details). For purposes of the RFA, all suppliers of Medicare Part B services are considered to be small entities. Individuals and States are not included in the definition of a small entity. Since this rule does not include any actual inherent reasonableness determinations, it will not have an impact on small businesses. However, it establishes a process that could be used in the future to establish reasonable and equitable payment amounts.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This regulation does not mandate expenditures by State, local, or tribal governments, or by the private sector. Therefore, the requirements of section 202 do not apply.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this regulation does not impose any costs on State or local governments, the requirements of E.O. 13132 are not applicable.

We do not expect suppliers of Part B services to be immediately affected by this rule since the rule will have no immediate impact on Medicare's payment amounts. However, we do believe that use of inherent reasonableness has the potential to significantly impact small businesses in the future. This belief is based on a June 2002 OIG report indicating that Medicare may be overpaying between $130 million and $958 million per year for 16 items of medical equipment. In addition, the GAO recently indicated that Medicare may be overpaying for medical equipment by more than 20 percent. However, we are still unable to predict the specific dollar impact on the future application of inherent reasonableness. Since we recognize the potential for future payment adjustments, either upward or downward, when CMS makes adjustments we will publish in the **Federal Register** impact statements that will comply with Executive Order 12866 and the Regulatory Flexibility Act whenever the dollar impact of inherent reasonableness determinations exceed $100 million in any one year, or when the adjustments will have a significant impact on a substantial number of small entities. We do not have sufficient data to predict exactly the nature of the future impact of this rule or the magnitude of the impact. Below, we discuss likely outcomes. Should the provisions of these regulations be applied, the resultant payment amounts will no longer be grossly excessive or deficient. If a payment amount is adjusted upward because it is deficient, it will benefit suppliers and beneficiaries. A more generous payment amount may result in greater availability of items and services to Medicare beneficiaries. The converse may not be true if the payment amount is adjusted downward. A lower payment amount should not necessarily result in a lack of availability of items and services since the revised payment amount would be realistic and equitable, and would better reflect market prices for the given item or service. We believe that a realistic and equitable payment amount would ensure continued availability of items and services. This adjustment will benefit the Medicare program by reducing costs, thereby protecting the Medicare trust fund, and benefit beneficiaries by reducing coinsurance payments. In addition, this regulation only specifies the criteria and methodology for determining when a service or item is inherently unreasonable and does not result in any adjustments.

After publication of this regulation, if CMS initiates an inherent reasonableness determination that results in payment adjustments in excess of $100 million in any one year, CMS will publish in the **Federal Register** an analysis in compliance with Executive Order 12866. If the CMS adjustment will have a significant impact on a substantial number of small entities, we will also conduct an analysis in accordance with the Regulatory Flexibility Act. In cases where one or more of our carriers undertake an adjustment using this inherent reasonableness authority that either has an impact of $100 million or more in any one year, or has a significant effect on a substantial number of small entities, the carrier or carriers will notify providers of the planned adjustment and the analysis on which it is based. In this way, affected parties would be able to comment on the planned adjustment.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

**List of Subjects in Part 405**

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

For the reasons set forth in the preamble, 42 CFR chapter IV, part 405 is amended as set forth below:

## PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

### Subpart E—Criteria for Determining Reasonable Charges

1. The authority citation for part 405, subpart E, continues to read as follows:

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

2. In § 405.502, paragraphs (g) and (h) are revised to read as follows:

**§ 405.502 Criteria for determining reasonable charges.**

* * * * *

(g) *Determination of payment amounts in special circumstances*—(1) *General.* (i) For purposes of this paragraph, a ''category of items or services'' may consist of a single item or service or any number of items or services.

(ii) CMS or a carrier may determine that the standard rules for calculating payment amounts set forth in this subpart for a category of items or services identified in section 1861(s) of the Act (other than physician services paid under section 1848 of the Act and those items and services for which payment is made under a prospective payment system, such as outpatient hospital or home health) will result in grossly deficient or excessive amounts. A payment amount will not be considered grossly excessive or deficient if it is determined that an overall payment adjustment of less than 15 percent is necessary to produce a realistic and equitable payment amount. For CMS initiated adjustments, CMS will publish in the **Federal Register** an analysis of payment adjustments that exceed $100 million per year in compliance with Executive Order 12866. If CMS makes adjustments that have a significant effect on a substantial number of small entities, it will publish an analysis in compliance with the Regulatory Flexibility Act.

(iii) If CMS or the carrier determines that the standard rules for calculating payment amounts for a category of items or services will result in grossly deficient or excessive amounts, CMS, or the carrier, may establish special payment limits that are realistic and equitable for a category of items or services. If CMS makes a determination, it is considered a national determination. A carrier determination is one made by a carrier/intermediary or groups of carriers/intermediaries even if the determination applies to all State fees.

(iv) The limit on the payment amount is either an upper limit to correct a grossly excessive payment amount or a lower limit to correct a grossly deficient payment amount.

(v) The limit is either a specific dollar amount or is based on a special method to be used in determining the payment amount.

(vi) Except as provided in paragraph (h) of this section, a payment limit for a given year may not vary by more than 15 percent from the payment amount established for the preceding year.

(vii) *Examples of excessive or deficient payment amounts.* Examples of the factors that may result in grossly deficient or excessive payment amounts include, but are not limited to, the following:

(A) The marketplace is not competitive. This includes circumstances in which the marketplace for a category of items or services is not truly competitive because a limited number of suppliers furnish the item or service.

(B) Medicare and Medicaid are the sole or primary sources of payment for a category of items or services.

(C) The payment amounts for a category of items or services do not reflect changing technology, increased facility with that technology, or changes in acquisition, production, or supplier costs.

(D) The payment amounts for a category of items or services in a particular locality are grossly higher or lower than payment amounts in other comparable localities for the category of items or services, taking into account the relative costs of furnishing the category of items or services in the different localities.

(E) Payment amounts for a category of items or services are grossly higher or lower than acquisition or production costs for the category of items or services.

(F) There have been increases in payment amounts for a category of items or services that cannot be explained by inflation or technology.

(G) The payment amounts for a category of items or services are grossly higher or lower than the payments made for the same category of items or services by other purchasers in the same locality.

(H) A new technology exists which is not reflected in the existing payment allowances.

(2) *Establishing a limit.* In establishing a payment limit for a category of items or services, CMS or a carrier considers the available information that is relevant to the category of items or services and establishes a payment amount that is realistic and equitable. The factors CMS or a carrier consider in establishing a specific dollar amount or special payment method for a category of items or services may include, but are not limited to, the following:

(i) *Price markup.* This is the relationship between the retail and wholesale prices or manufacturer's costs of a category of items or services. If information on a particular category of items or services is not available, CMS or a carrier may consider the markup on a similar category of items or services and information on general industry pricing trends.

(ii) *Differences in charges.* CMS or a carrier may consider the differences in charges for a category of items or services made to non-Medicare and Medicare patients or to institutions and other large volume purchasers.

(iii) *Costs.* CMS or a carrier may consider resources (for example, overhead, time, acquisition costs, production costs, and complexity) required to produce a category of items or services.

(iv) *Use.* CMS or a carrier may impute a reasonable rate of use for a category of items or services and consider unit costs based on efficient use.

(v) *Payment amounts in other localities.* CMS or a carrier may consider payment amounts for a category of items or services furnished in another locality.

(3) *Notification of limits*—(i) *National limits.* CMS publishes in the **Federal Register** proposed and final notices announcing a special payment limit described in paragraph (g) of this section before it adopts the limit. The notices set forth the criteria and circumstances, if any, under which a carrier may grant an exception to a payment limit for a category of items or services.

(ii)(A) *Carrier-level limits.* A carrier proposing to establish a special payment limit for a category of items or services must inform the affected suppliers and Medicaid agencies of the proposed payment amounts, the factors it considered in proposing the particular limit, as described in paragraphs (g)(1) through (g)(4) of this section, and solicit comments. The notice must also consider the following:

(*1*) The effects on the Medicare program, including costs, savings, assignment rates, beneficiary liability, and quality of care.

(*2*) What entities would be affected such as classes of providers or suppliers and beneficiaries.

(*3*) How significantly would these entities be affected.

(*4*) How would the adjustment affect beneficiary access to items or services.

(B) The carrier must evaluate the comments it receives. The carrier must notify CMS in writing of any final limits it plans to establish. CMS will acknowledge in writing to the carrier that it received the carrier's notification. After the carrier has received CMS's acknowledgement, the carrier must inform the affected suppliers and State Medicaid agencies of any final limits it

establishes. The effective date for a final payment limit may apply to services furnished at least 60 days after the date that the carrier notifies affected suppliers and State Medicaid agencies of the final limit.

(4) *Use of valid and reliable data.* In determining whether a payment amount is excessive or deficient and in establishing an appropriate payment amount, valid and reliable data will be used. To ensure the use of valid and reliable data, CMS or the carrier must meet the following criteria to the extent applicable:

(i) Develop written guidelines for data collection and analysis;

(ii) Ensure consistency in any survey to collect and analyze pricing data.

(iii) Develop a consistent set of survey questions to use when requesting retail prices.

(iv) Ensure that sampled prices fully represent the range of prices nationally.

(v) Consider the geographic distribution of Medicare beneficiaries.

(vi) Consider relative prices in the various localities to ensure that an appropriate mix of areas with high, medium, and low consumer prices was included.

(vii) Consider criteria to define populous State, less populous State, urban area, and rural area.

(viii) Consider a consistent approach in selecting retail outlets within selected cities.

(ix) Consider whether the distribution of sampled prices from localities surveyed is fully representative of the distribution of the U.S. population.

(x) Consider the products generally used by beneficiaries and collect prices of these products.

(xi) When using wholesale costs, consider the cost of the services necessary to furnish a product to beneficiaries.

(5) If CMS or a carrier makes a payment adjustment of more than 15 percent spread over multiple years, CMS or the carrier will review market prices in the years subsequent to the year that the initial reduction is effective in order to ensure that further reductions continue to be appropriate.

(h) *Special payment limit adjustments greater than 15 percent of the payment amount.* In addition to applying the general rules under paragraphs (g)(1) through (g)(4) of this section, CMS applies the following rules in establishing a payment adjustment greater than 15 percent of the payment amount for a category of items or services within a year:

(1) *Potential impact of special limit.* CMS considers the potential impact on quality, access, beneficiary liability, assignment rates, and participation of suppliers.

(2) *Supplier consultation.* Before making a determination that a payment amount for a category of items or services is not inherently reasonable by reason of its grossly excessive or deficient amount, CMS consults with representatives of the supplier industry likely to be affected by the change in the payment amount.

(3) *Publication of national limits.* If CMS determines under paragraph (h) of this section to establish a special payment limit for a category of items or services, it publishes in the **Federal Register** the proposed and final notices of a special payment limit before it adopts the limit. The notices set forth the criteria and circumstances, if any, under which a carrier may grant an exception to the limit for the category of items or services.

(i) *Proposed notice.* The proposed notice—

(A) Explains the factors and data that CMS considered in determining that the payment amount for a category of items or services is grossly excessive or deficient;

(B) Specifies the proposed payment amount or methodology to be established for a category of items or services;

(C) Explains the factors and data that CMS considered in determining the payment amount or methodology, including the economic justification for a uniform fee or payment limit if it is proposed;

(D) Explains the potential impacts of a limit on a category of items or services as described in paragraph (h)(1) of this section; and

(E) Allows no less than 60 days for public comment on the proposed payment limit for the category of items or services.

(ii) *Final notice.* The final notice—

(A) Explains the factors and data that CMS considered, including the economic justification for any uniform fee or payment limit established; and

(B) Responds to the public comments.

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

Dated: February 2, 2002.

**Thomas A. Scully,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: July 22, 2002.

**Tommy G. Thompson,**

*Secretary.*

[FR Doc. 02–31126 Filed 12–12–02; 8:45 am]

BILLING CODE 4120–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 90

**[WT Docket No. 96–86; FCC 02–216]**

## The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In view of the Federal Communications Commission's commitment to ultimately require equipment operating in the 764–776 MHz and 794–806 MHz band (''700 MHz public safety band'') General Use and State License channels to meet a spectrum efficiency requirement of one voice channel per 6.25 kHz, the Commission in this item adopted a phased-in implementation of (*i.e.*, a ''single migration path'' to) this spectrum efficiency requirement. The rules adopted are based on the record developed in response to the *Fifth Notice of Proposed Rule Making* in the above-captioned proceeding. These rules are intended to promote the efficient, effective, and maximum use of 700 MHz public safety band General Use and State License channels without hindering development and deployment of public safety equipment. In addition, in order to comport with current international agreements, a Commission rule was revised, which had incorrectly implied that Canadian television signals are entitled to interference protection within the United States.

**DATES:** Effective January 13, 2003.

**FOR FURTHER INFORMATION CONTACT:** Roberto Mussenden, Esq., 202/418–0680, *rmussend@fcc.gov,* Wireless Telecommunications Bureau.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Federal Communications Commission's Report and Order, FCC 02–216, adopted on July 16, 2002, and released on August 2, 2002. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting

Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *bmillin@fcc.gov.*

1. In this *Fifth Report and Order,* we adopt a migration path to a 6.25 kHz voice efficiency requirement for the 764–776 MHz and 794–806 MHz band General Use and State License channels. The actions we take today are based on the record developed in response to the *Fifth Notice of Proposed Rule Making* in the above-captioned proceeding. In addition to the adoption of a specific migration path for the General Use and State License channels, we clarify the rule relating to cross-border interference with Canada to comport with current international agreements.

2. In keeping with the Commission's safe harbor guidelines to facilitate use of the 764–776 MHz and 794–806 MHz band, we are mindful that the migration path we adopt today must not hinder the development and deployment of public safety equipment nor delay the planning and construction of pubic safety systems in this band. Specifically, we adopt the following measures to ensure efficient, effective and maximized use of the narrowband General Use and State License channels of the 700 MHz public safety band:

- Allow the marketing, manufacture and importation of 12.5 kHz equipment until December 31, 2006.
- Accept applications for filing to use 12.5 kHz equipment that are filed on or before December 31, 2006.
- Accept applications for filing for new systems to use 6.25 kHz equipment that are filed after December 31, 2006.
- Permit legacy licensees to continue using 12.5 kHz based systems until December 31, 2016.
- Permit legacy licensees to purchase dual mode equipment (operates in 12.5 or 6.25 kHz mode) for system expansion or maintenance and operate it in the 12.5 kHz mode until December 31, 2016.
- Ban the marketing, manufacture and importation of equipment that is exclusively 12.5 kHz effective after December 31, 2006.
- Cease type certifying equipment that is exclusively 12.5 kHz after December 31, 2006.
- Require use of 6.25 kHz equipment exclusively effective after December 31, 2016.

## I. Procedural Matters

### *A. Regulatory Flexibility Act*

3. Appendix B contains a Final Regulatory Flexibility Analysis (FRFA) with respect to the *Fifth Report and Order.* As required by the Regulatory Flexibility Act, the Commission has prepared the analysis of the possible impact on small entities of the rules and proposed rules set forth in this document. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this *Fifth Report and Order,* including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act.

## II. Final Regulatory Flexibility Analysis

4. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), An Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Fourth Report and Order and Fifth Notice of Proposed Rule Making (Fifth NPRM),* 66 FR 10,632, February 16, 2001, of this proceeding. The Commission sought written public comment on the proposals in the *Fifth NPRM,* including comment on the IRFA. The present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

### *A. Need for, and Objectives of, the Fifth Report and Order*

5. The need is to resolve outstanding migration issues regarding a migration path for the General Use and State License channels located within the 700 MHz public safety band. Resolution entails requiring a 6.25 kHz requirement for the General Use and State License channels. Our objective is to promote the efficient, effective, and maximum use of 700 MHz public safety band and not hinder development and deployment of public safety equipment. Specifically, the rules adopted herein will: Require licensees in the narrowband General Use and State License channels, whose applications are filed after December 31, 2006, to operate only in voice mode using a voice efficiency standard of at least one voice path per 6.25 kHz of spectrum bandwidth; allow licensees in the narrowband General Use and State License channels, whose applications are filed on or before December 31, 2006 (''legacy licensees''), to operate in voice mode using a voice efficiency standard of at least one voice path per 12.5 kHz of spectrum bandwidth until December 31, 2016; allow legacy licensees to buy dual mode equipment (*i.e.*, equipment that operates in 12.5 kHz or 6.25 kHz mode) for system expansion or maintenance; ban the manufacture, importation, and marketing of equipment that only operates on a voice efficiency standard of at least one voice channel per 12.5 kHz of spectrum bandwidth after December 31, 2006; and prevent acceptance of applications for certification of equipment that operates exclusively on a voice efficiency standard of at least one voice channel per 12.5 kHz of spectrum bandwidth or that lacks the ability to operate on a voice efficiency standard of one voice channel per 6.25 kHz of spectrum bandwidth after December 31, 2006.

### *B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA*

6. No comments were submitted in response to the IRFA. Comments were submitted in response to the *Fifth NPRM* regarding whether different migration paths would be appropriate for public safety entities in rural urban areas based on their different needs.

### *C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply*

7. The RFA directs agencies to provide a description of and, where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operations; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

8. A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 1992, there were approximately 275,801 small organizations. ''Small governmental jurisdiction'' generally means ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.'' As of 1992, there were approximately 85,006 such jurisdictions in the United States. This number includes 38,978 counties, cities, and towns; of these, 37,566, or ninety-six percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (ninety-one percent) are small entities.

9. *Public Safety Radio Pool Licensees.* As a general matter, Public Safety Radio Pool licensees include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services that draw from a

common pool of spectrum. Spectrum in the 700 MHz public safety band is governed by 47 U.S.C. 337. Non-Federal governmental entities as well as private businesses are licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.

10. *Radio and Television Equipment Manufacturers.* We anticipate that at least six radio equipment manufacturers will be affected by our decisions in this proceeding. According to the SBA's regulations, a radio and television broadcasting and communications equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicate that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would therefore be classified as small entities. We do not have information that indicates how many of the six radio equipment manufacturers associated with this proceeding are among these 778 firms. However, Motorola and Ericsson, two of the six manufacturers, are major, nationwide radio equipment manufacturers, and, thus, we conclude that these manufacturers would not qualify as small businesses because, in all likelihood, they have more than 750 employees.

11. *Television Stations.* This proceeding will affect full service TV station licensees (Channels 60–69), TV translator facilities, and low power TV (LPTV) stations. The SBA defines a TV broadcasting station that has no more than $12 million in annual receipts as a small business. TV broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by TV to the public, except cable and other pay TV services. Included in this industry are commercial, religious, educational, and other TV stations. Establishments primarily engaged in TV broadcasting and which produce taped TV program materials are also included in this industry. Separate establishments primarily engaged in producing taped TV program materials are classified under another NAICS Code, and are defined as small if annual receipts do not exceed $6 million.

12. There were 1,509 TV stations operating in the nation in 1992. That number has remained fairly constant as indicated by the approximately 1,551 operating TV broadcasting stations in the nation as of February 28, 1997. For 1992 the number of TV stations that produced less than $10.0 million in revenue was 1,155 establishments, or approximately 77 percent of the 1,509 establishments. There are currently 95 full service analog TV stations, either operating or with approved construction permits on channels 60–69. In the DTV Proceeding, we adopted a DTV Table that provides only 15 allotments for DTV stations on channels 60–69 in the continental United States. There are seven DTV allotments in channels 60–69 outside the continental United States. Thus, the rules will affect approximately 117 TV stations; approximately 90 of those stations may be considered small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-TV affiliated companies. We recognize that the rules may also impact minority-owned and women-owned stations, some of which may be small entities. In 2000, minorities owned and controlled 23 (1.9 percent) of 1,288 full power commercial TV stations in the United States. According to the U.S. Bureau of the Census, in 1987 women owned and controlled 27 (1.9 percent) of 1,342 commercial and non-commercial TV stations in the United States.

13. There are currently 4,977 TV translator stations and 1,952 LPTV stations. Approximately 1,309 low power TV and TV translator stations are on channels 60–69 which could be affected by policies in this proceeding. The Commission does not collect financial information of any broadcast facility and the Department of Commerce does not collect financial information on these broadcast facilities. We will assume for present purposes, however, that most of these broadcast facilities, including LPTV stations, could be classified as small businesses. As indicated earlier, approximately 77 percent of TV stations are designated under this analysis as potentially small businesses. Given this, LPTV and TV translator stations would not likely have revenues that exceed the SBA maximum to be designated as small businesses.

*D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

14. The *Fifth Report and Order* does not adopt rules that entail recordkeeping, and/or third-party consultation. However, it does adopt rules that entail certain reporting and compliance requirements. The rules allow legacy licensees (as described in the *Fifth Report and Order*) to operate their systems at a 12.5 kHz voice efficiency standard until December 31, 2016, when these systems must convert to a 6.25 kHz voice efficiency standard on the General Use and State License channels. These legacy licensees must file, through ULS, no later than January 31, 2017, a declaration that they have completed the requisite conversion.

*E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

15. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

16. The rules adopted in the *Fifth Report and Order* are essentially designed to achieve standardization of technology at points in time in the distant future. Therefore, we do not believe that the impact of these rules will be different for smaller entities in the long run. In formulating the rules in the *Fifth Report and Order,* we reduced economic burdens wherever possible for all entities, large and small. The regulatory burdens that we have adopted are necessary to ensure that the public receives the public safety benefits of innovative new services in a prompt and efficient manner. For example, we have adopted technical and operational rules that will promote competition in the equipment market. We believe that the rules must be as competitively and technologically neutral as possible, in order to allow for competing equipment designs and to avoid hindering future innovative technological developments.

17. We note that tighter technical specifications generally allow more intense spectrum use, but may result in higher equipment costs. Conversely, although wider tolerances may allow manufacturers to use less costly component parts in transmitting equipment, they also may result in less efficient spectrum use. Because the Commission is statutorily required to consider the safety of life and property in its consideration of spectrum management issues, we believe that the technical regulations we adopt herein provide a reasonably balanced approach in meeting the Commission's mandate.

18. As for radio equipment for use on the 700 MHz public safety band, we believe that the rules we adopt today will foster competition in the market for radio equipment for use in the 700 MHz public safety band, and thereby increase the opportunity for small entities to enter this market. As for smaller public safety entities, the rules we adopt today are designed to allow them (and all public safety entities) a full 10-year life cycle for equipment they may purchase between now and December 31, 2006. We do not believe there are feasible alternatives to these rules, in that they are the narrowly tailored to allow both early access to the 700 MHz public safety band, and give early entrants into that spectrum a full life span for the equipment they use. Although we considered whether to permit smaller entities, specifically those operating in rural areas, to operate indefinitely using a 12.5 kHz voice efficiency standard, we rejected this approach because we wanted to ensure certainty and consistency of operations by all licensees as described in the *Fifth Report and Order* and to avoid sustaining a viable market for spectrally inefficient equipment.

19. *Report to Congress:* The Commission will send a copy of the *Fifth Report and Order,* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A). Also, the Commission will send a copy of the *Fifth Report and Order* to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the *Fifth Report and Order* and FRFA (or summaries thereof) will be published in the **Federal Register**. *See* 5 U.S.C. 604(b).

## III. Ordering Clauses

20. Authority for the issuance of this Fifth Report and Order is contained in Sections 4(i), 4(j), 7(a), 302, 303(b), 303(f), 303(g), 303(r), 307(e), 332(a), and 332(c) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 157(a), 302, 303(b), 303(f), 303(g), 303(r), 307(e), 332(a), 332(c).

21. Part 90 of the Commission's Rules, 47 CFR Part 90 is amended as specified in rule changes.

22. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Fifth Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

## List of Subjects in 47 CFR Part 90

Communications equipment, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

## Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 90 as follows:

## PART 90—PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for part 90 continues to read as follows:

**Authority:** Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

2. Section 90.201 is revised to read as follows.

### § 90.201 Scope.

This subpart sets forth the general technical requirements for use of frequencies and equipment in the radio services governed by this part. Such requirements include standards for acceptability of equipment, frequency tolerance, modulation, emissions, power, and bandwidths. Special additional technical standards applicable to certain frequency bands and certain specialized uses are set forth in subparts J, K, N, and R.

3. Section 90.203 is amended by adding paragraphs (m) and (n) to read as follows.

### § 90.203 Certification required.

* * * * *

(m) Applications for part 90 certification received after December 31, 2006 will not be granted to transmitters designed to operate in the voice mode on channels designated in §§ 90.531(b)(5) or 90.531(b)(6) that do not provide at least one voice path per 6.25 kHz of spectrum bandwidth.

(n) Transmitters designed to operate in the voice mode on channels designated in §§ 90.531(b)(5) or 90.531(b)(6) that do not provide at least one voice path per 6.25 kHz of spectrum bandwidth shall not be manufactured in, or imported into the United States after December 31, 2006. Marketing of these transmitters shall not be permitted after December 31, 2006.

4. Section 90.531 is amended by revising paragraphs (b)(5) and (6) and paragraph (d)(1) to read as follows.

### § 90.531 Band Plan.

* * * * *

(b) * * *

(5) *Narrowband state channels.* The following narrowband channels are designated for direct licensing to each state (including U.S. territories, districts, and possessions): 25–36, 65–76, 105–116, 145–156, 185–196, 225–236, 265–276, 305–316, 645–656, 685–696, 725–736, 765–776, 805–816, 845–856, 885–896, 925–936, 985–996, 1025–1036, 1065–1076, 1105–1116, 1145–1156, 1185–1196, 1225–1236, 1265–1276, 1605–1616, 1645–1656, 1685–1696, 1725–1736, 1765–1776, 1805–1816, 1845–1856, 1885–1896. Voice operations on these channels are subject to compliance with the spectrum usage efficiency requirements set forth in § 90.535(d).

(6) *Narrowband general use channels.* All narrowband channels established in paragraph (b) of this section, other than those listed in paragraphs (b)(1), (b)(2), (b)(4) and (b)(5) of this section are designated to public safety eligibles subject to Commission approved regional planning committee regional plans. Voice operations on these channels are subject to compliance with the spectrum usage efficiency requirements set forth in § 90.535(d).

* * * * *

(d) * * *

(1) *Narrowband.* Subject to compliance with the spectrum usage efficiency requirements set forth in § 90.535, two or four contiguous narrowband (6.25 kHz) channels may be used in combination as 12.5 kHz or 25 kHz channels, respectively. The lower (in frequency) channel for two channel combinations must be an odd (*i.e.*, 1, 3, 5 * * *) numbered channel. The lowest (in frequency) channel for four channel combinations must be a channel whose number is equal to 1+(4xn), where n = any integer between 0 and 479, inclusive (*e.g.*, channel number 1, 5, * * * 1917). Channel combinations are designated by the lowest and highest channel numbers separated by a hyphen, *e.g.*, ''1–2'' for a two channel combination and ''1–4'' for a four channel combination.

* * * * *

5. Section 90.533 is amended by revising paragraph (a) to read as follows:

### § 90.533 Transmitting sites near the U.S./Canada or U.S./Mexico border.

* * * * *

(a) Public safety transmitters operating in the 764–776 MHz and 794–806 MHz bands must conform to the limitations on interference to Canadian television stations contained in

agreement(s) between the United States and Canada for use of television channels in the border area.

* * * * *

6. Section 90.535 is amended by revising paragraphs (b) and (c) and by adding paragraph (d) to read as follows.

**§ 90.535 Modulation and spectrum usage efficiency requirements.**

* * * * *

(b) Transmitters designed to operate in the narrowband segment using digital modulation must be capable of maintaining a minimum data (non-voice) rate of 4.8 kbps per 6.25 kHz of bandwidth.

(c) Transmitters designed to operate in the wideband segment using digital modulation must be capable of maintaining a minimum data (non-voice) rate of 384 kbps per 150 kHz of bandwidth.

(d) The following provisions apply to licensees operating in the channels designated in §§ 90.531(b)(5) or 90.531(b)(6).

(1) With the exception of licensees designated in paragraph (d) (2) of this section, after December 31, 2006, licensees may only operate in voice mode in these channels at a voice efficiency of at least one voice path per 6.25 kHz of spectrum bandwidth.

(2) Licensees authorized to operate systems in the voice mode on these channels from applications filed on or before December 31, 2006, may continue operating in the voice mode on these channels (including modification applications of such licensees granted after December 31, 2006, for expansion or maintenance of such systems) at a voice efficiency of at least one voice path per 12.5 kHz of spectrum bandwidth until December 31, 2016.

(3) The licensees designated in paragraph (d)(2) of this section must, no later than January 31, 2017, file a declaration through the Universal Licensing System that they are operating these channels at a voice efficiency of at least one voice path per 6.25 kHz of spectrum bandwidth.

[FR Doc. 02–31383 Filed 12–12–02; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 011005244–2011–02; I.D. 120902F]**

## Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Reopening of Directed Fishery for Loligo Squid

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

**ACTION:** Directed fishery reopening.

**SUMMARY:** NMFS announces that commercial quota is available to allow the directed fishery for Loligo squid to remain open. Vessels issued a Federal moratorium permit to harvest Loligo squid in excess of the incidental catch allowance may continue landing Loligo squid after 0001 hours, December 12, 2002. The intent of this action is to allow for the full utilization of the commercial quota allocated to the Loligo squid directed fishery.

**DATES:** Effective 0001 hours, December 12, 2002, through December 31, 2002.

**FOR FURTHER INFORMATION CONTACT:** Paul H. Jones, Fishery Policy Analyst, 978–281–9273, fax 978–281–9135, e-mail paul.h.jones@noaa.gov.

**SUPPLEMENTARY INFORMATION:** Section 648.22 of part 50 CFR requires NMFS to close the directed *Loligo* squid fishery in the EEZ for the remainder of the year when 95 percent of the total annual domestic annual harvest (DAH) has been harvested. The Administrator, Northeast Region, NMFS, based on dealer reports and other available information, determined that 95 percent of the total DAH for Loligo squid would be harvested by November 2, 2002 (67 FR 66072, October 30, 2002). Therefore, effective 0001 hours, November 2, 2002, the directed fishery for *Loligo* squid was closed. However, the closure threshold level of *Loligo* harvest was not attained, and NMFS reopened the directed *Loligo* squid fishery from 0001 hours, December 2, 2002, through 0001 hours, December 12, 2002 (67 FR 70556, November 25, 2002). Due to recent bad weather, new projections indicate the closure threshold level of *Loligo* harvest may not be attained. Therefore, NMFS announces that the directed *Loligo* squid fishery will remain open. Vessels issued a Federal moratorium permit to harvest *Loligo* squid in excess of the incidental catch allowance may continue fishing for, retaining and landing *Loligo* squid in excess of the incidental catch allowance after 0001 hours, December 12, 2002, through December 31, 2002.

### Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: December 10, 2002.

**John H. Dunnigan,**

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

[FR Doc. 02–31444 Filed 12–10–02; 2:41 pm]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 67, No. 240
Friday, December 13, 2002

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 TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. 97–ANE–50–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Textron Lycoming Fuel Injected Reciprocating Engines

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The Federal Aviation Administration (FAA) proposes to supersede an existing airworthiness directive (AD), 98–18–12, applicable to certain Textron Lycoming reciprocating engines with certain Crane/Lear Romec ''AN'' rotary fuel pumps installed. That AD currently requires initial and follow-up torque check inspections of pump relief valve attaching screws. This proposal would require the same initial and follow-up torque check inspections of relief valve attaching screws, and add as a terminating action, replacement of the affected fuel pump at or before the overhaul interval, with a fuel pump having a new design valve housing. This proposal is prompted by the introduction of a new design pump relief valve housing and associated parts that provide enhanced resistance to fuel leakage, and the need for clarification of the requirements of the current AD. The actions specified by the proposed AD are intended to prevent rotary fuel pump leaks, which could result in an engine failure, engine fire, and damage to or loss of aircraft.

**DATES:** Comments must be received by February 11, 2003.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–ANE–50–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location, by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. Comments may also be sent via the Internet using the following address: *9-ane-adcomment@faa.gov.* Comments sent via the Internet must contain the docket number in the subject line.

The service information referenced in the proposed rule may be obtained from Lycoming, 652 Oliver St., Williamsport, PA 17701; telephone; (717) 327–7080, fax; (717) 327–7100. This information may be examined, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

**FOR FURTHER INFORMATION CONTACT:** Norm Perenson, Aerospace Engineer, New York Aircraft Certification Office, FAA, Engine and Propeller Directorate, 10 Fifth Street, 3rd floor, Valley Stream, NY 11581–1200; telephone (516) 256–7537; fax (516) 568–2716.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 97–ANE–50–AD.'' The postcard will be date stamped and returned to the commenter.

### Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–ANE–50–AD, 12 New England Executive Park, Burlington, MA 01803–5299.

### Discussion

On September 1, 1998, the FAA issued AD 98–18–12, Amendment 39–10728 (63 FR 48571, September 11, 1998), applicable to certain Textron Lycoming reciprocating engines with Crane/Lear Romec ''AN'' rotary fuel pump series RG9080, RG9570, and RG17980 installed. That AD requires initial and follow-up torque check inspections of pump relief valve attaching hardware screws, to prevent fuel leakage. That condition, if not corrected, could result in an engine failure, engine fire, and damage to or loss of aircraft.

Since AD 98–18–12 was issued, the manufacturer of the fuel pump has introduced a new design pump relief valve housing and associated parts, that provides enhanced resistance to fuel leakage on Crane/Lear Romec ''AN'' rotary fuel pumps, series RG9080, RG9570, and RG17980. The proposed AD would also address two concerns with the current AD:

- Initial and follow-up torque checks of affected pumps used as replacement pumps; and
- Compliance time for follow-up torque checks.

The current AD does not address installing affected pumps as replacement pumps. The proposed AD would allow installation of replacement pumps not modified with a newly designed valve, and require the same initial and follow-up torque checks to be performed to all replacement pumps until a pump with a ''/M'' after the part number is installed.

Additionally, the current AD does not specify an exact time by when follow-up torque checks must be performed. The current AD requires, and the proposal would require, that operators perform those follow-up torque checks after waiting a minimum time, either 50 hours TIS or 6 months, in order to allow the gasket to seat. Follow-up torque checks performed too soon after the

initial torque is set, would not reveal potential loosening that could lead to the fuel leaks. The FAA expected that operators would perform follow-up checks at the next opportunity after that minimum period had elapsed to ensure that the gasket had fully seated and that fuel leaks were no longer likely to develop. Therefore, this proposal would require follow-up torque checks at periodic intervals, and when no retorquing is required, visual inspections at periodic intervals.

**Manufacturer's Service Information**

The FAA has reviewed and approved the technical contents of Lycoming Service Bulletin (SB) No. 529B, dated June 10, 2002, that describes procedures for initial and follow-up torque check inspections of affected pump relief valve attaching screws.

**FAA's Determination of an Unsafe Condition and Proposed Actions**

Since an unsafe condition has been identified that is likely to exist or develop on other Textron Lycoming reciprocating engines with Crane/Lear Romec ''AN'' rotary fuel pump series RG9080, RG9570, and RG17980 installed, the proposed AD would supersede AD 98–18–12, maintaining the same requirement for initial and follow-up torque check inspections of relief valve attaching screws, and add as a terminating action, replacement of the fuel pump with one having a newly designed valve housing. The actions must be done in accordance with the service bulletin described previously.

**Economic Analysis**

There are about 16,000 engines with Crane/Lear Romec ''AN'' rotary fuel pumps of the affected design in the worldwide fleet. The FAA estimates that 9,600 pumps installed on aircraft of U.S. registry would be affected by this proposed AD. The FAA also estimates that it would take approximately 3 work hours per pump to perform the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $300 per pump. Based on these figures, the total cost of the proposed AD on U.S. operators is estimated to be $4,608,000.

**Regulatory Analysis**

This proposed rule does not have federalism implications, as defined in Executive Order 13132, because it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the FAA has not consulted with state authorities prior to publication of this proposed rule.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

2. Section 39.13 is amended by removing Amendment 39–10728 (63 FR 48571, September 11, 1998), and by adding a new airworthiness directive, to read as follows:

**Textron Lycoming:** Docket No. 97–ANE–50. Supersedes AD 98–18–12, Amendment 39–10728.

**Applicability**

This airworthiness directive (AD) is applicable to Textron Lycoming IO–320, LIO–320, IO–360, HIO–360, TIO–360, LTIO–360, GO–435, GO–480, IGO–480–A1B6, IO–540, IGO–540, AEIO–540, HIO–540, TIO–540, LTIO–540, TIGO–541, IO–720, and TIO–720 reciprocating engines, with Crane/Lear Romec RG9080, RG9570, and RG17980 series ''AN'' rotary fuel pumps listed in Table 1 installed. Table 1 follows:

TABLE 1.—APPLICABLE PUMP CROSS REFERENCE LIST

| Lear/Romec series | Textron Lycoming part number (P/N) |
|---|---|
| RG9080F2 | 68262, 68262–85 |
| RG9080J4A | LW–13909, LW–13909–85 |
| RG9080J6A | LW–14444, LW–14444–85 |
| RG9080J7A | LW–13920, LW–13920–85 |
| RG9080J8A | LW–15740, LW–15740–85 |
| RG9570K1 | 62E22288 |
| RG9570P/P1 | LW–19012 |
| RG17980 | 74547, 74547–85 |
| RG17980A | 76188, 76188–85 |
| RG17980D | 76486, 76486–85 |
| RG17980E | 77443, 77443–85 |
| RG17980J | 78993, 78993–85 |
| RG17980K | LW–11166, LW–11166–85 |
| RG17980P | LW–12534, LW–12534–85 |
| RG17980U | 62D21153, 62D21 |

These engines are installed on, but not limited to fuel injected, reciprocating engine-powered aircraft manufactured by Cessna, The New Piper, Inc., Mooney, Raytheon (Beech), Bellanca, Champion, Partenavia, Rockwell, Schweizer, Enstrom, Aerospatiale (SOCATA), Maule, Aero Commander, Helio, Hiller, and Pacific Aerospace Corp.

**Note 1:** This AD applies to each engine identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area

subject to the requirements of this AD. For engines that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (e) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

**Compliance**

Required as indicated, unless already done.

To prevent rotary fuel pump leaks, which could result in an engine failure, engine fire, and damage to or loss of the aircraft, accomplish the following:

(a) If the Lear/Romec part number (P/N) on rotary fuel pumps, series RG9080, RG9570, or RG17980 has an ''/M'' suffix, the pump has been modified, and no further action is required.

(b) If the P/N does not have an ''/M'' suffix, perform initial and follow-up torque check inspections of pump relief valve attaching screws in accordance with the Accomplishment Instructions of Lycoming Service Bulletin (SB) No. 529B, dated June 10, 2002, as follows:

(1) Within 10 hours time-in-service (TIS), or 30 days after the effective date of this AD, whichever occurs first, perform the initial torque check inspection. If the torque does not meet the specifications in Lycoming SB No. 529B, dated June 10, 2002, tighten screws to the required torque in accordance with that SB.

(2) Perform follow-up torque check inspections at 50 hour intervals TIS, or 6 months since the previous torque check inspection, whichever occurs first. If the torque does not meet the specification in Lycoming SB No. 529B, dated June 10, 2002, during this follow-up inspection, tighten screws to the required torque in accordance with that SB.

(3) Continue the follow-up torque check inspections required by paragraph (a)(2) of this AD until:

(i) The accumulation of 100 hours TIS since the inspection with the torque remaining within the SB specification; or

(ii) The torque meets the SB specification during the initial inspection and a subsequent inspection taking place after accumulating an additional 50 hours TIS also meets the SB specification.

(4) After the accumulation of 100 hours TIS since the inspection with the torque remaining within the SB specification; visually inspect the pump at 50-hour intervals until the pump is replaced with a modified pump (with the ''/M'' after the part number).

(c) Replacement of a rotary fuel pump series RG9080, RG9570, or RG17980, with an unmodified pump (without the ''/M'' after the part number) requires repeating the initial and follow-up inspections in accordance with paragraph (b) of this AD.

**Optional Terminating Action**

(d) Replacement of a rotary fuel pump series RG9080, RG9570, or RG17980, with a modified pump (with the ''/M'' after the part number) constitutes terminating action for the inspection requirements specified in paragraphs (b)(1) through (b)(4) of this AD.

**Alternative Methods of Compliance**

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

**Note 2:** Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the New York ACO.

**Special Flight Permits**

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

Issued in Burlington, Massachusetts, on December 5, 2002.

**Francis A. Favara,**

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

[FR Doc. 02–31396 Filed 12–12–02; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. 2002–NM–73–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Aerospatiale Model ATR42–500 Series Airplanes, and Model ATR72–102, –202, –212, and –212A Series Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Aerospatiale Model ATR42–500 series airplanes, and Model ATR72–102, –202, –212, and –212A series airplanes. This proposal would require replacement of insulation blankets constructed of metallized polyethyleneteraphthalate (MPET) located from sections 11 through 16 of the fuselage with new insulation blankets constructed of Terul 18™. This proposal is prompted by reports of in-flight and ground fires on certain airplanes manufactured with insulation blankets constructed of MPET, which may contribute to the spread of a fire when ignition occurs from small ignition sources such as electrical arcing or sparking. The action specified by the proposed AD is intended to ensure that insulation blankets constructed of MPET are removed from the fuselage. Such insulation blankets could propagate a small fire that is the result of an otherwise harmless electrical arc and could lead to a much larger fire. This action is intended to address the identified unsafe condition.

**DATES:** Comments must be received by January 13, 2003.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–73–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2002–NM–73–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from Aerospatiale, 316 Route de Bayonne, 31060 Toulouse, Cedex 03, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

**FOR FURTHER INFORMATION CONTACT:** Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained

in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2002–NM–73–AD.'' The postcard will be date stamped and returned to the commenter.

**Availability of NPRMs**

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–73–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

**Discussion**

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified the FAA that an unsafe condition may exist on certain Aerospatiale Model ATR42–500 series airplanes, and Model ATR72–102, –202, –212, and –212A series airplanes. The DGAC advises that it has received reports of fires initiated by an electrical short circuit behind a sidewall, in which the flammability characteristics of thermal/acoustical insulation material constructed of metallized polyethyleneteraphthalate (MPET) may have been a contributing factor. Although reported incidents have not occured on ATR airplane models, the DGAC has issued French airworthiness directives 2001–635–061(B) and 2001–636–088(B), both dated December 26, 2001, in order to assure the continued airworthiness of Aerospatiale Model ATR42–500 series airplanes, and Model ATR72–102, –202, –212, and –212A series airplanes in France.

Insulation blankets constructed of MPET that are installed in the fuselage, if not removed, could propagate a small fire that is the result of an otherwise harmless electrical arc and could lead to a much larger fire.

**Explanation of Relevant Service Information**

The manufacturer has issued Avions de Transport Regional Service Bulletin ATR42–25–0134 (for Model ATR42–500 series airplanes); and ATR72–25–1074 (for Model ATR72–102, –202, –212, –212A series airplanes); both dated January 24, 2002. These service bulletins describe procedures for replacing the existing insulation blankets constructed of MPET located from sections 11 through 16 of the fuselage with new, improved insulation blankets constructed of Terul 18™. Accomplishment of the actions specified in the service bulletins is intended to adequately address the identified unsafe condition. The DGAC classified these service bulletins as mandatory.

**FAA's Conclusions**

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

**Explanation of Requirements of Proposed Rule**

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the applicable service bulletin described previously.

**Differences Between Proposed Rule and Foreign Airworthiness Directives**

The proposed AD would differ from the parallel French airworthiness directives in that it would require accomplishment of the replacement within 5 years after the effective date of this AD. The parallel French airworthiness directives require accomplishment of the replacement during the next ''eight-year calendar check and before May 31, 2009.'' In developing an appropriate compliance time for this proposed AD, the FAA considered not only the DGAC's recommendation, but the degree of urgency associated with addressing the subject unsafe condition, the compliance time mandated in previously issued ADs concerning insulation blankets constructed of MPET installed on other transport category airplanes, and the average utilization of the affected fleet.

The FAA's intent is that the replacement be conducted during a regularly scheduled maintenance visit for the majority of the affected fleet, when the airplanes would be located at a base where special equipment and trained personnel would be readily available, if necessary. In order to meet the deadline, the FAA expects early planning and anticipates that operators will have to take advantage of every heavy maintenance opportunity. In light of these factors, the FAA finds a 5-year compliance time for completing the required actions to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety. The difference in compliance time has been coordinated with and acknowledged by the DGAC.

**Cost Impact**

The FAA estimates that 2 Aerospatiale Model ATR42–500 series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 500 work hours per airplane to accomplish the proposed replacement, and that the average labor rate is $60 per work hour. Required parts would cost approximately $50,000 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators of Model ATR42–500 series airplanes is estimated to be $160,000 or $80,000 per airplane.

The FAA estimates that 19 Aerospatiale Model ATR72–102, –202, –212, and –212A series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 500 work hours per airplane to accomplish the proposed replacement, and that the average labor rate is $60 per work hour. Required parts would cost approximately $60,000 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators of Model ATR72–102, –202, –212, and –212A series airplanes is

estimated to be $1,710,000 or $90,000 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this proposed AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

**Regulatory Impact**

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

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

**Aerospatiale:** Docket 2002–NM–73–AD.

*Applicability:* Model ATR42–500 series airplanes, and Model ATR72–102, –202, –212, and –212A series airplanes, certificated in any category; except those airplanes on which ATR Modification 5117 or 5322 (reference Avions de Transport Regional Service Bulletin ATR 42–25–0134, dated January 24, 2002, or Avions de Transport Regional Service Bulletin ATR 72–25–1074, dated January 24, 2002; as applicable) has been installed.

**Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

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

To ensure that insulation blankets constructed of metallized polyethyleneteraphthalate (MPET) are removed from the fuselage, to prevent propagation of a fire that is the result of an otherwise harmless electrical arc and could lead to a much larger fire, accomplish the following:

**Insulation Blanket Replacement**

(a) Within 5 years after the effective date of this AD, replace insulation blankets located from sections 11 through 16 inclusive of the fuselage with new, improved insulation blankets constructed of Terul 18™, in accordance with the Accomplishment Instructions of Avions de Transport Regional Service Bulletin ATR42–25–0134 (for Model ATR42–500 series airplanes); or ATR72–25–1074 (for Model ATR72–102, –202, –212, –212A series airplanes); both dated January 24, 2002; as applicable.

**Note 2:** Although paragraph (a) of this AD allows up to 5 years for the required replacement, the FAA encourages operators to review their airplanes to assess their individual needs for materials and plan accordingly. The FAA anticipates that operators will accomplish the requirements of this AD at the earliest practicable maintenance opportunity to lessen the burden toward the end of the compliance time.

**Part Installation**

(b) As of the effective date of this AD, no person shall install an insulation blanket constructed of MPET on any airplane.

**Alternative Methods of Compliance**

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

**Note 3:** Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

**Special Flight Permits**

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

**Note 4:** The subject of this AD is addressed in French airworthiness directives 2001–635–061(B) and 2001–636–088(B), both dated December 26, 2001.

Issued in Renton, Washington, on December 6, 2002.

**Vi L. Lipski,**

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

[FR Doc. 02–31471 Filed 12–12–02; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Food and Drug Administration

## 21 CFR Part 870

**[Docket No. 94N–0418 and 96P–0276]**

## Medical Devices: Cardiovascular Devices: Reclassification of the Arrhythmia Detector and Alarm

**ACTION:** Proposed rule.

**SUMMARY:** The Food and Drug Administration (FDA) is proposing to reclassify the arrhythmia detector and alarm from class III (premarket approval) to class II (special controls) based on new information regarding the device. FDA is also proposing to revise the identification of the arrhythmia detector and alarm to separate the automated external defibrillator (AED) from the identification of the arrhythmia detector and alarm. FDA intends to propose the reclassification of the AED at a later time. FDA is taking this action in response to petitions submitted under the Federal Food, Drug, and Cosmetic Act (the act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) and the Safe

Medical Devices Act of 1990 (the SMDA), and the Food and Drug Administration Modernization Act of 1997 (FDAMA).

**DATES:** Submit written or electronic comments by March 13, 2003.

**ADDRESSES:** Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to: http://www.fda.gov/dockets/ecomments.

**FOR FURTHER INFORMATION CONTACT:** Carole C. Carey, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8609.

**SUPPLEMENTARY INFORMATION:**

## I. Regulatory Authorities

The act, as amended by the 1976 amendments (Public Law 94–295), the SMDA (Public Law 101–629), and FDAMA (Public Law 105–115), establishes a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the act, devices that were in commercial distribution before May 28, 1976 (the date of enactment of the amendments), generally referred to as preamendments devices, are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976, generally referred to as postamendment devices, are classified automatically by statute (section 513(f) of the act) into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval, unless and until the device is reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to previously offered devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and 21 CFR part 807 of the regulations.

A preamendments device that has been classified into class III may be marketed, by means of premarket notification (510(k)) procedures, without submission of a premarket approval application until FDA issues a final regulation under section 515(b) of the act (21 U.S.C. 360e(b)) requiring premarket approval.

The SMDA added section 515(i) to the act. This section requires FDA to issue an order to manufacturers of preamendment class III devices and substantially equivalent postamendments devices for which no final regulation requiring the submission of premarket approval applications (PMAs) has been issued. This order requires such manufacturers to submit to the agency a summary of, and a citation to, any information known or otherwise available to them respecting such devices, including adverse safety and effectiveness information that has not been submitted under section 519 of the act (21 U.S.C. 360i). Section 519 of the act requires manufacturers, importers, distributors, and device user facilities to submit adverse event reports of certain device-related events and reports of certain corrective actions taken. Section 515(i) of the act also directs FDA to either revise the classification of the device into class I or class II or require the device to remain in class III and establish a schedule for the promulgation of a rule requiring the submission of PMAs for those devices remaining in class III.

In the **Federal Register** of May 6, 1994 (59 FR 23731), FDA announced the availability of a document setting forth its strategy for implementing the provisions of the SMDA that require FDA to review the classification of preamendments class III devices. Under this plan, the agency divided preamendment class III devices into the following three groups: (1) Group 1 devices are devices that FDA believes raise significant questions of safety and/or effectiveness, but are no longer used or are in very limited use; (2) group 2 devices are devices that FDA believes have a high potential for being reclassified into class II; and group 3 devices are devices that FDA believes are currently in commercial distribution and are not likely candidates for reclassification. FDA also announced its intention to call for submission of PMAs for the 15 highest priority devices in group 3, and for all group 1 devices. The agency also announced its intention to issue an order under section 515(i) of the act for the remaining group 3 devices and for all of the group 2 devices.

In the **Federal Register** of August 14, 1995 (60 FR 41984 and 60 FR 41986), FDA published two orders for certain class III devices requiring the submission of safety and effectiveness information in accordance with the preamendments class III strategy for implementing section 515(i) of the act. FDA published two updated orders in the **Federal Register** of June 13, 1997 (62 FR 32352 and 32355). The orders describe in detail the format for submitting the type of information required by section 515(i) of the act so that the information submitted would clearly support either reclassification or indicate that a device should be retained in class III. The orders also scheduled the required submissions in groups, at 6-month intervals, beginning with August 14, 1996. The device proposed in this regulation for reclassification was included in group 3.

Reclassification of classified preamendments devices is governed by section 513(e) of the act. This section provides that FDA may, by rulemaking, reclassify a device based upon ''new information.'' The reclassification can be initiated by FDA or by the petition of an interested person.

The term ''new information,'' as used in section 513(e) of the act, includes information developed as a result of a reevaluation of the data before the agency when the device was originally classified, as well as information not presented, not available, or not developed at that time. (See, e.g., *Holland Rantos* v. *United States Department of Health, Education, and Welfare,* 587 F.2d 1173, 1174 n.1 (D.C. Cir. 1978); *Upjohn* v. *Finch*, 422 F.2d 944 (6th Cir. 1970); and *Bell* v. *Goddard*, 366 F.2d 177 (7th Cir. 1966).)

Reevaluation of the data previously before the agency is an appropriate basis for subsequent regulatory action where the reevaluation is made in light of changes in ''medical science.''

(See *Upjohn* v. *Finch*, supra, 422 F.2d at 951), or in light of newly available regulatory controls (cf. *Ethicon, Inc.*, v. *FDA*, 762 F. Supp. 382, 388–389 (D.D.C. 1991)), such as special controls or design controls. However, regardless of whether data before the agency are past or new data, the ''new information'' on which any reclassification is based is required to consist of ''valid scientific evidence'' as defined in section 513(a)(3) of the act and 21 CFR

860.7(c)(2). FDA relies upon ''valid scientific evidence'' in the classification process to determine the level of regulation for devices.

## II. Regulatory History of the Device

The arrhythmia detector and alarm subject to this proposal was classified in part 870 (21 CFR part 870) by a final rule published in the **Federal Register** of February 5, 1980 (45 FR 7907) at § 870.1025. In the proposed rule upon which the final rule was based (March 9, 1979 (44 FR 13284)), FDA considered the recommendations of the Cardiovascular Device Classification Panel. Subsequently, FDA classified the arrhythmia detector and alarm into class III, because there was insufficient information to determine that class I or class II controls could provide reasonable assurance of the safety and effectiveness of the device.

FDA is addressing three petitions to reclassify arrhythmia detectors and alarms from the Health Industry Manufacturers Association (HIMA) (now known as Advamed); Quinton Instrument Co.; and Zymed Medical Instrumentation (Refs. 1 through 3) and safety and effectiveness information (''515(i) submissions'') submitted by Datascope Corp.; Hogan and Harton L.L.P.; Life Sensing Instrument Co.; Inc.; Medical Data Electronics; Mennen Medical Ltd.; Mortara Instrument; and, Olsson, Frank and Weeda, P.C. (Refs. 4 through 10).

FDA is not addressing at this time the petitions submitted by HIMA (Advamed) to reclassify automated external defibrillators (AEDs) from class III to class II. This device is primarily designed for a different intended use than the arrhythmia detector and alarm. An AED has a shock advisory algorithm, automatically detects a shockable cardiac rhythm, and automatically delivers an electric shock (fully automated device) or delivers a shock when activated by the operator (semi-automated device). Defibrillators are preamendment class II devices under § 870.5300. Arrhythmia detectors and alarms are preamendment class III devices under § 870.1025. AEDs are devices found substantially equivalent to the class III arrhythmia detector and alarm (§ 870.1025) in response to a 510(k) because they are a combination of the class II defibrillator and the class III arrhythmia detector and alarm. FDA, therefore, found them equivalent to the higher class of the combined devices. In a future issue of the **Federal Register**, FDA will publish a notice of a panel meeting that will discuss the possible reclassification of AEDs.

## III. Proposed Addition of Identification for AEDs

FDA is proposing to add a new identification of the AEDs to read as follows:

An automated external defibrillator is a low-energy device with a rhythm recognition detection system that delivers into a 50 ohm test load an electrical shock of a maximum of 360 joules of energy used for defibrillating (restoring normal heart rhythm) the atria or ventricles of the heart. The device analyzes the patient's electrocardiogram, interprets the cardiac rhythm and automatically delivers an electrical shock (fully automated AED), or advises the user to deliver the shock (semi-automated or shock advisory AED) to treat ventricular fibrillation or pulseless ventricular tachycardia.

The name of the classification regulation, arrhythmia detector and alarm and the identification of these devices will remain unchanged.

## IV. Proposed Reclassification

FDA is proposing that the arrhythmia detector and alarm be reclassified from class III to class II. FDA believes that the guidance document identified in section VIII of this document as the special control would provide reasonable assurance of the safety and effectiveness of the device. Therefore, in accordance with sections 513(e) and 515(i) of the act and 21 CFR 860.130, based on new information with respect to the device, FDA is proposing to reclassify the arrhythmia detector and alarm preamendment class III device into class II.

The agency does not intend to exempt this proposed class II device from premarket notification (510(k)) submissions as permitted by section 510(m) of the act.

FDA believes that it needs to review the information to address the risks identified in the guidance document in order to assure that a new device is at least as safe and effective as legally marketed devices.

## V. Risks to Health

After considering the information discussed by the panel during the original classification proceedings, as well as published literature, medical device reports (MDR), and section 515(i) of the act submissions of safety and effectiveness information, FDA has evaluated the risks associated with the arrhythmia detector and alarm. FDA now believes that the following are the risks to health associated with the use of the arrhythmia detector and alarm:

### *A. Misdiagnosis*

Inaccurate electrocardiogram (ECG) waveform measurement and analysis can lead to misdiagnosis and could result in failure-to-alarm in the case of life threatening arrhythmias or cause false alarms to be activated. Conditions exist under which an algorithm may misclassify portions of the ECG waveform. Inadequate design and poor signal processing techniques in the presence of artifact or noise can also result in miscounting of heart rate and misclassification of arrhythmias. Noise degrades signal quality and is affected by patient motion, electromagnetic interference, and improper electrode placement. It may distort the signal to the point the data are invalid or cannot be analyzed.

Although the algorithm in most commercially available devices today has improved accuracy in both beat detection and beat classification with enhanced noise reduction techniques, it is extremely difficult to design a system that accurately analyzes 100 percent of all arrhythmias. Algorithm accuracy is a potential safety and effectiveness issue; however, it is not frequently reported as an adverse event. Approximately 6 percent of the MDR and complaint data are attributed to algorithm accuracy (Ref. 1). The ability of ST-segment measurement algorithm performance to predict clinical conditions has not been completely validated. Literature indicates that this capability is helpful for patients who have the potential of experiencing ischemic episodes and some clinicians believe changes in the ST segment can be indicative of myocardial ischemia (Refs. 11 through 15).

The performance of an automated, computerized, arrhythmia monitor system is dependent on the accuracy of the arrhythmia detection and identification algorithm. If inaccurate diagnostic data are used in managing the patient, the physician may prescribe a course of treatment that places the patient at risk.

### *B. Incorrect Pacemaker Pulse Detection*

Many patients on ECG monitoring systems also have pacemakers. This condition poses a particular problem as the detection of pacemaker pulse artifact during ''loss of capture'' (heart does not respond to the pacing pulse stimulus), may inappropriately be interpreted as a normal beat. Failure of a heart rate alarm to occur during loss of capture compromises the patient's condition and may result in death. In the early 1990s, Emergency Care Research Institute (ECRI) investigated the difficulties in monitoring pacemaker patients (Ref. 16). Their initial testing of the patient monitors demonstrated the devices' limited ability to reliably reject simulated pacemaker signals. A

subsequent 1994 publication reported concerns about the ability of telemetry arrhythmia monitoring systems to accurately and reliably identify pacemaker pulses (Ref. 17). Another type of problem encountered when monitoring patients with pacemakers is a false alarm due to a ''no detect'' time window (a brief period when the device is not sensing the patient's ECG) that occurs when the monitor sees the pacemaker spike, but fails to see the patient's own ECG signal. Although the potential risk associated with pacemakers is high, the incidence of incorrect pacemaker pulse detection is low based on the relatively small number of reports. A review of manufacturers' MDRs between 1984 and 1995 showed that approximately 14 percent of MDRs were attributed to pace pulse detection capability (Ref. 1).

*C. Delayed Response to Life Threatening Arrhythmias Due to User Error, Improper Training, and Unattended Monitors*

The level of training and quality of user training greatly affect the safe and effective operation of arrhythmia monitoring systems. An unattended monitor, or use by untrained or improperly trained clinical staff, can adversely affect system performance. In a system where excessive false alarms occur (from causes described in previous paragraphs), this may result in user failure to respond promptly to critical alarms. Furthermore, caregivers could develop a negative attitude from the false alarms, eroding user confidence in the device and resulting in deactivation of the alarm or failure to reset the alarm. HIMA (Advamed) indicated that approximately 15 percent (9 of 59) of the MDRs from 1984 to 1995 were attributed to alarm functionality (i.e., alarms turned off by the staff) (Ref. 1). Other device performance concerns are difficulty in using the device and the device taking too much time to use (i.e., setting up the patient and ensuring that the algorithm has learned the appropriate rhythms) (Ref. 18).

*D. Loss of Alarm at Central Station or Bedside*

Loss of alarm at central station or bedside may occur due to software crash, hardware failure preventing communication, and/or the inability of central station to receive data/alarms from the bedside monitor.

*E. Excessive Patient Leakage Current*

Excessive patient leakage current may result in electrically induced cardiac arrhythmias.

## VI. Summary of the Reasons for Reclassification

After considering the data and information contained in the petitions, 515(i) submissions of safety and effectiveness information, published literature, and over 20 years of device experience in the clinical environment, FDA believes that the arrhythmia detector and alarm can be reclassified into class II. Special controls, in addition to general controls, can address the risks described above and provide reasonable assurance of the safety and effectiveness of the device. FDA believes there is sufficient information to establish special controls to provide such assurance.

## VII. Summary of Data Upon Which the Reclassification is Based

In addition to the potential risks of the arrhythmia detector and alarm described in section V of this document, there is reasonable knowledge of the benefits of the device. Specifically, arrhythmia detector and alarm monitoring systems allow cardiac monitoring of patients who are at significant risk of immediate life-threatening arrhythmias, such as patients suspected of having acute myocardial infarction, patients who have been recently resuscitated from cardiac arrest, and patients with unstable angina (Ref. 19). When monitoring for evidence of cardiac ischemia, the ST-segment monitoring feature in the arrhythmia detector and alarm devices allows timely notification of ST- segment changes. The integrated alarm system alerts caregivers to any life threatening arrhythmias that require their immediate attention and assessment of the patient's condition before treatment intervention. In addition to patient cardiac monitoring in critical areas, it is also frequently used in noncritical settings to improve patient care management and serve as a labor saving device. The computerized documentation or trending of arrhythmia events is far more efficient than piecing together pages of ECG strips.

Based on the available information, FDA believes that the special controls discussed in section VII of thus document are capable of providing reasonable assurance of the safety and effectiveness of the arrhythmia detector and alarm with regard to the identified risks to health of this device.

## VIII. Proposed Special Controls

FDA believes that the special control guidance document entitled ''Class II Special Controls Guidance Document: Arrhythmia Detector and Alarm; Draft Guidance for Industry and FDA,'' in addition to general controls, can address the risks to health described in section V of this document. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of this guidance document. FDA is also revising § 870.1 to inform the reader as to the availability of the guidance document.

If adopted, following the effective date of a final rule classifying the device, any firm submitting a 510(k) premarket notification for the device would need to address the issues covered in the special control guidance. However, the firm would need to show only that its device meets the recommendations of the guidance or in some other way provides equivalent assurances of safety and effectiveness.

The guidance document contains specific recommendations with regard to the information and testing in the premarket notification application. Particular sections of the guidance document address the following topics:

- Safety testing (software validation, electrical safety and environmental handling testing, electromagnetic compatibility),
- Performance testing, and
- Labeling.

*A. Safety Testing*

Safety testing as described in the guidance document includes software validation, electrical safety and environmental handling testing, and electromagnetic compatibility. The in vitro safety testing can help control the risks of incorrect pacemaker pulse detection and other risks associated with the use of the device, such as loss of alarm at central station or bedside monitor, excessive patient leakage current, injury to patient's skin, and electrical shock to the operator. Proper design can improve the paced patient algorithm performance. For example, the pace pulse detection should be implemented on the unfiltered ECG signal prior to processing of the waveform by the QRS beat detector. Most of the other concerns addressed in this section of the guidance are well known and are generic to microprocessor-controlled, software-driven, electromedical devices. This section of the guidance makes recommendations on the qualification testing to evaluate the device electrical safety requirements, its ability to function after exposure to environmental hazards, electromagnetic compatibility in the intended environment of use, and software validation based on the use of relevant

consensus standards and/or other FDA guidance documents.

*B. Performance Testing*

The section on performance testing of the guidance document can help control the risks of misdiagnosis from inaccurate ECG signal measurement and misclassified waveforms. The availability of annotated arrhythmia databases has allowed detection algorithms to be tested on the same data. It is recommended that manufacturers properly test the accuracy of the automated arrhythmia detection and ST-segment measurement algorithms, and disclose the results of those tests. This section of the guidance document also emphasizes testing to demonstrate conformance to relevant ECG standards, testing alarm accuracy within a few seconds of the onset of critical life threatening arrhythmias, and testing other alarms functions including those related to system tasks. The guidance also recommends comparative testing to a legally marketed predicate device. If the device incorporates significant new features, additional testing may be necessary. These tests may be conducted in the laboratory and/or clinical settings.

*C. Labeling*

As described in the guidance, labeling can help control the delayed responses to life threatening arrhythmias due to user error, improper training, and unattended monitors. In addition to conformance to the labeling regulations at 21 CFR part 801, the user (operator) manual should contain detailed operating instructions designed to reduce risks from user error with the device. Furthermore, the device should be operated only by persons with specific training in the use of the device.

## IX. FDA's Tentative Findings

FDA believes that the arrhythmia detector and alarm can be reclassified into class II because special controls, in addition to general controls, would provide reasonable assurance of the safety and effectiveness of the device, and there is sufficient information to establish special controls to provide such assurance.

## X. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this proposed classification action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## XI. Analysis of Impacts

FDA has examined the impacts of the proposed rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform act of 1995 (Public Law 104–4). Executive order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety and other advantages, distributive impacts, and equity). The agency believes that this proposed rule is consistent with the regulatory philosophy and principles identified in the Executive order. In addition, the proposed rule is not a significant regulatory action as defined by the Executive order and so is not subject to review under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Reclassification of this device from class III to class II will relieve all manufacturers of the device of the cost of complying with the premarket approval requirements in section 515 of the act. Manufacturers of class III arrhythmia detectors and alarms currently are required to submit premarket notifications. The guidance document reflects existing FDA practice in the review of these premarket notifications. FDA expects that manufacturers of cleared arrhythmia detectors and alarms will not have to take any additional action in response to this rule, if FDA finalizes this rule. This rule will help expedite the review process for any new manufacturers of these devices. Because reclassification will reduce regulatory costs with respect to this device, it will impose no significant economic impact on any small entities, and it may permit small potential competitors to enter the marketplace by lowering their costs. The agency therefore certifies that this proposed rule, if issued, will not have a significant economic impact on a substantial number of small entities. In addition, this proposed rule will not impose costs of $100 million or more on either the private sector or state, local, and tribal governments in the aggregate, and therefore a summary statement of analysis under section 202(a) of the Unfunded Mandates Reform Act of 1995 is not required.

## XII. Submission of Comments and Proposed Dates

Interested persons may submit to the Dockets Management Branch (see **ADDRESSES**) written comments regarding this proposal by (see **DATES**). Two copies of any comments are to be submitted except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. FDA proposes that any find regulation based on this proposed rule become effective 30 days after its date of publication in the **Federal Register**.

## XIII. References

The following references have been placed on display in the Dockets Management Branch (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. HIMA (Health Industry Manufacturers Association), reclassification petition, Docket No. 94N–0418, vol. 1–7, Washington, DC, August 14, 1996.

2. Quinton Instrument Co., reclassification petition, Docket No. 94N–0418, vol. 1, WA, August 14, 1996.

3. Zymed Medical Instrumentation, reclassification petition, Docket No. 96P–0276/CCP 1, vol. 1, CA, August 7, 1996.

4. Datascope Corp., submission of safety and effectiveness information, Docket No. 94N–0418, vol. 1, NJ, October 2, 1996.

5. Hogan and Hartson L. L. P. for Cardiac Telecom Corp., submission of safety and effectiveness information, Docket No. 94N–0418, vol. 1, Washington, DC, August 14, 1996.

6. Life Sensing Instrument Co., Inc., submission of safety and effectiveness information, Docket No. 94N–0418, vol. 1, TN, July 15, 1996.

7. Medical Data Electronics, Inc., submission of safety and effectiveness information, Docket No. 94N–0418, vol. 1, CA, August 14, 1996.

8. Mennen Medical Ltd., submission of safety and effectiveness information, Docket No. 94N–0418, vol. 1, October 25, 1996.

9. Mortara Instrument, Inc., submission of safety and effectiveness information, Docket No. 94N–0418, vol. 1, WI, August 14, 1996.

10. Olsson, Frank and Weeda, P. C. for QMED, Inc., submission of safety and effectiveness information, Docket No. 94N–0418, vol. 1, Washington, DC, August 15, 1996.

11. Ellis, J. et al., ''Comparison of Two Automated ST-Segment Analysis Systems, EKG (Including T Wave Inversion Analysis), and Transesophageal Echocardiography for the Diagnosis of Intraoperative Myocardial Ischemia,'' abstract (included in Ref. 1).

12. Gottlieb, S. et al., ''Silent Ischemia on Holter Monitoring Predicts Mortality in High-Risk Postinfarction Patients,'' *Journal of the American Medical Association*, vol. 259, pp. 1030–1035, 1988 (included in Ref. 1).

13. Krucoff, M., ''Identification of High Risk Patients with Silent Myocardial Ischemia After Percutaneous Transluminal Coronary Angioplasty by Multilead Monitoring,'' *American Journal of Cardiology,* vol. 61, pp. 29F–24F, 1988 (included in Ref. 1).

14. Muller, J. and Barash, P., ''Automated ST-Segment Monitoring,'' *International Anesthesioogy Clinics*, vol. 31, pp. 45–55, 1993 (included in Ref. 1).

15. Nademanee, K. et al., ''Characteristics and Clinical Significance of Silent Myocardial Ischemia in Unstable Angina,'' *American Journal of Cardiology*, vol. 58, pp. 26B–33B, 1986 (included in Ref. 1).

16. ECRI, ''Physiologic Patient Monitors,'' update, *Health Devices*, vol. 21, Nos. 3–4, pp. 123–128, March-April 1992.

17. ECRI, ''Ambulatory Telemetry Arrhythmia Monitoring Systems (including Guidance Section: Implementation and Effective Use of Telemetry Arrhythmia Monitoring Systems,'' *Health Devices*, vol. 23, No. 7, pp. 267–305, July 1994.

18. Badura, F., ''Nurse Acceptance of a Computerized Arrhythmia Monitoring System,'' *Instrumentation for Critical Care*, vol. 9, pp. 1044–48, 1980 (included in Ref. 1).

19. Emergency Cardiac Care Committee of the American College of Cardiology, ''Recommended Guidelines for In-Hospital Cardiac Monitoring of Adults for Detection of Arrhythmias,'' *Journal American of College Cardiology*, vol. 18, pp. 1431–1433, 1991 (included in Refs. 1 and 8).

### List of Subjects in 21 CFR Part 870

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 870 be amended follows:

## PART 870—CARDIOVASCULAR DEVICES

1. The authority citation for 21 CFR part 870 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

2. Section 870.1 is amended by adding paragraph (e) to read as follows:

### § 870.1 Scope.

* * * * *

(e) Guidance documents referenced in this part are available on the Internet at http://www.fda.gov/cdrh/guidance.html.

2. Section 870.1025 is revised to read as follows:

### § 870.1025 Arrhythmia detector and alarm.

*(a) Arrhythmia detector and alarm (including ST-segment measurement and alarm)*—(1) *Identification.* An arrhythmia detector and alarm is system that monitors the electrocardiogram and is designed to produce a visible or audible signal or alarm when an atrial or ventricular arrhythmia, such as a premature contraction or ventricular fibrillation, exists.

(2) *Classification.* Class II (special controls). The special control for this device is the FDA guidance document entitled ''Class II Special Controls Guidance Document: Arrhythmia Detector and Alarm; Guidance for Industry and FDA.'' See § 870.1 for the availability of this guidance document.

(b) *Automated external defibrillator*—(1) *Identification.* An automated external defibrillator is a low-energy device with a rhythm recognition detection system that delivers into a 50 ohm test load an electrical shock of a maximum of 360 joules of energy used for defibrillating (restoring normal heart rhythm) the atria or ventricles of the heart. The device analyzes the patient's electrocardiogram, interprets the cardiac rhythm and automatically delivers an electrical shock (fully automated AED), or advises the user to deliver the shock (semi-automated or shock advisory AED) to treat ventricular fibrillation or pulseless ventricular tachycardia.

(2) *Classification.* Class III (premarket approval).

(3) *Date PMA or notice of PDP is required.* No effective date has been established of the requirement for premarket approval.

Dated: October 23, 2002.

**Linda S. Kahan,**

*Deputy Director, Center for Devices and Radiological Health.*

[FR Doc. 02–31440 Filed 12–12–02; 8:45 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF STATE

## 22 CFR Part 41

**[Public Notice 4215]**

## Documentation of Nonimmigrants Under the Immigration and Nationality Act, As Amended—Elimination of Crew List Visas

**AGENCY:** Department of State.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** Under current regulations, crewmen working on vessels and aircraft bound for the United States are able to obtain crew list visas without submitting individual application forms or undergoing background checks that would apply to many if they applied for individual visas. In light of the security concerns resulting from the events of September 11, 2001, the Department can no longer justify issuance of a visa without the full application process. This rule proposes to amend the regulations to eliminate the crew list visa.

**DATES:** Written comments must be received on or before February 11, 2003.

**ADDRESSES:** Written comments may be submitted to the Chief, Legislation and Regulations Division, Visa Services, Department of State, Washington, DC 20520–0106, by fax to 202–663–3898 or by e-mail to *VisaRegs@state.gov.*

**FOR FURTHER INFORMATION CONTACT:** Pam Chavez, Legislation and Regulations Division, Visa Services, Department of State, Washington, DC 20520–0106, 202–663–1206 or e-mail *chavezpr@state.gov.*

**SUPPLEMENTARY INFORMATION:**

### What Is a Crew List Visa?

The Department's current regulation at 22 CFR 41.42(a) defines crew list visa as follows: ''A crew list visa is a nonimmigrant visa issued on a manifest of crewmen of a vessel or aircraft and includes all aliens listed in the manifest unless otherwise stated. It constitutes a valid nonimmigrant visa within the meaning of INA 212(a)(7)(B)(i)(II).''

### What Are the Statutory Authorities Pertaining to the Crew List Visa?

Authority for the issuance of a crew list visa is derived from sections 101(a)(15)(D) and 221(f) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(D) and 1201(f), respectively. Section 101(a)(15)(D) exempts aliens serving in good faith as crewmen on board a vessel (other than a fishing vessel having its home port or an operating base in the United States, unless temporarily landing in Guam), or aircraft from being deemed immigrants. Section 221(f) permits an alien to enter the United States on the basis of a crew manifest that has been visaed by a consular officer. However, the latter section does not require a consular officer to visa a crew manifest and in those cases where the consular officer does agree to do so, it authorizes the officer to deny admission to any alien from the crew list visa. Further, the use of the visaed crew list appears to have been intended principally as a temporary or emergency measure to be used only until such time as it becomes practicable to issue individual documents to each member of a vessel's or aircraft's crew.

### What Are the Requirements for Obtaining a Crew List Visa?

To obtain a crew list visa, the representative or agent of a foreign vessel or aircraft must submit a master list of all crewmen employed on the

vessel or aircraft along with whatever other information the consular officer finds necessary to determine eligibility.

Applicants applying for crew list visas are not required to complete the Forms DS–156, Nonimmigrant Visa Application, or DS–157, Supplemental Nonimmigrant Visa Application or submit a passport, nor are they required to undergo an interview.

**Are Such Crewmen Subject to Background Checks?**

While consular officers are required to conduct background checks, including a check of the computerized name check system, for applicants for crew list visas, background checks are not as reliable for crew list applicants since it is not possible to verify with certainty that the names submitted on the crew list are spelled correctly. In addition, since crew list visa applicants ordinarily are not interviewed, consular officers have no opportunity to question them regarding such things as employment history or knowledge of their trade.

**Why Does the Department Want To Amend Its Regulations?**

The Enhanced Border Security and Visa Entry Reform Act of 2002 (Pub. L. 107–173) requires that all visas issued after October 26, 2004 have a biometric indicator. This means crew list visas would necessarily be eliminated by that date. Additionally, since September 11, the Department has been amending its regulations to ensure that every effort is made to screen out undesirable aliens. The Department is, therefore, amending its regulations to eliminate crew list visas and ensure that each crewmember entering the United States will complete the nonimmigrant visa application forms, submit a valid passport and undergo an interview and background checks.

**What Will Be the Economic Impact and the Impact on Manning of Vessels and Aircraft if This Rule Goes Into Effect?**

In terms of the actual cost of a visa, per crewman, in general the cost of an individual visa will be no more than it is, per crewman, on a crew list visa, and in most cases over a period of years will average out to be less. For crew list visas each crewman already pays an individual processing, *i.e.*, machine-readable visa (MRV) fee of $100.00. Although reciprocity fees are waived for individuals on a crew list visa and are not for individual visas, that cost should be more than offset in most cases by the fact that the crewman will be receiving (depending upon reciprocity for each individual's country of nationality) a multiple entry, long term visa instead of the one entry, 6 month crew list visa.

Nevertheless, in preliminary discussions with representatives of the shipping industry, most comments about the economic impact of this proposed rule have been associated with the difficulties and costs that will be presented to the industry should issuance of individual visas result in long and expensive delays waiting in port for visas to be issued. These representatives say that tight and sometimes erratic scheduling, and a constant shifting of crew members are features of the industry that need to be taken into consideration in implementing a requirement for individual visas. Therefore, the Department invites all interested parties to comment specifically on the economic and manning impacts of this rule, as proposed, and to suggest measures the Department might consider when implementing the rule that would minimize any negative impacts of this type.

**How Does the Department Propose To Amend Its Regulations?**

This rule proposes to remove the Department's regulations at 22 CFR 41.42 that establish the crew list visa. By doing so, all crewmembers entering the United States would be required to apply for individual crew visas.

**Regulatory Analysis and Notices**

*Administrative Procedure Act*

The Department is publishing this rule as a proposed rule with a 60-day provision for post-promulgation public comments.

*Regulatory Flexibility Act*

The Department of State, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities.

*Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

*Executive Order 12866*

The Department of State considers this rule to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Therefore, it has been submitted for review by the Office of Management and Budget.

*Executive Order 13132*

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

**List of Subjects in 22 CFR Part 41**

Aliens, Nonimmigrants, Passports, Visas.

In view of the foregoing, 22 CFR Part 41 is amended as follows:

## PART 41—[AMENDED]

1. The authority citation for Part 41 continues to read:

**Authority:** 8 U.S.C. 1104; Pub. L. 105–277, 112 Stat. 2681–795 through 2681–801.

**§ 41.42 [Removed and Reserved]**

Remove and reserve section 41.42.

Dated: December 2, 2002.

**Maura Harty,**

*Assistant Secretary for Consular Affairs, Department of State.*

[FR Doc. 02–31482 Filed 12–12–02; 8:45 am]

BILLING CODE 4710–06–P

# Notices

Federal Register
Vol. 67, No. 240
Friday, December 13, 2002

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.

## AGENCY FOR INTERNATIONAL DEVELOPMENT

### Senior Executive Service (SES) Performance Review Board: Updating

**AGENCY:** Agency for International Development, Office of the Inspector General.

**ACTION:** Notice.

**SUMMARY:** This notice is hereby given of the appointment of members of the updated USAID OIG SES Performance Review Board.

**EFFECTIVE DATE:** November 26, 2002.

**FOR FURTHER INFORMATION CONTACT:** Michael G. Carroll, Assistant Inspector General for Management, Office of Inspector General, U.S. Agency for International Development, 1300 Pennsylvania Avenue, NW, Room 8.08–029, Washington, DC 20523–8700; telephone 202–712–0010; fax 202–216–3392; Internet e-mail address: *mcarroll@usaid.gov* (for e-mail messages, the subject line should include the following reference—USAID OIG SES Performance Review Board).

**SUPPLEMENTARY INFORMATION:** 5 U.S.C. 4314(b)(c) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management at 5 CFR part 430, subpart C and § 430.307 thereof in particular, one or more Senior Executive Service performance review boards. In order to ensure an adequate level of staffing and to avoid a constant series of recusals, these newly designated members of USAID's OIG SES Performance Review Board are being drawn, as in the past, primarily from the SES ranks of other agencies because USAID OIG only has five SES members. The board shall review and evaluate the initial appraisal of each USAID OIG senior executive's performance by his or her supervisor, along with any recommendations to the appointing authority relative to the performance of the senior executive. This notice updates the membership of the USAID OIG's SES Performance Review Board as it was last published.

Approved: November 26, 2002.

The following have been selected as regular members of the SES Performance Review Board of the U.S. Agency for International Development, Office of Inspector General:

James R. Ebbitt, Deputy Inspector General.

Adrienne Rish, Assistant Inspector General for Investigations.

Michael G. Carroll, Assistant Inspector General for Management.

Robert S. Perkins, Legal Counsel.

Bruce Crandlemire, Assistant Inspector General for Audit.

Aletha Brown, Inspector General, Equal Employment Opportunity Commission.

Melissa Heist, Assistant Inspector General for Audit, Environmental Protection Agency.

Edward Blansitt, Deputy Inspector General, Department of Commerce.

Michael Speedling, Assistant Inspector General for Investigations, Environmental Protection Agency.

Kwai Chan, Assistant Inspector General for Program Evaluation, Environmental Protection Agency.

**Everett L. Mosley,**

*Inspector General, Agency for International Development.*

[FR Doc. 02–31475 Filed 12–12–02; 8:45 am]

BILLING CODE 6116–01–P

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Forest Plan Amendment for Travel Management of the Road and Trail System on the Gallatin National Forest, Montana; Gallatin National Forest; Sweet Grass, Park, Carbon, Gallatin, Madison, and Meagher Counties, Montana

**AGENCY:** Forest Service USDA.

**ACTION:** Notice; intent to prepare environmental impact statement.

**SUMMARY:** The USDA, Forest Service, will prepare an environmental impact statement (EIS) to disclose the environmental effects of a proposed amendment to the Gallatin National Forest Land and Resource Management Plan (Forest Plan) that will establish direction for public recreational use and access using the Forest's road and trail system. For each road and trail the Amendment will specify the types of uses that are appropriate including pleasure driving, high clearance and off-road vehicle use, motorcycle use, biking, horseback riding, snowmobiling, hiking, skiing and snowshoeing. The amendment will also establish travel management goals, objectives and standards for sub-areas within the Gallatin National Forest.

The Gallatin National Forest Land and Resource Management Plan (Forest Plan) provides overall guidance for land management activities that occur on the Forest. Forest plans are developed, revised, and amended in compliance with the National Forest Management Act of 1976 (NFMA); and the regulations for National Forest Land and Resource Management Planning at 36 CFR part 219. This amendment would remove some existing Forest Plan provisions pertaining to travel management and replace them with an overall travel management plan specific to roads and trails. A range of 4 to 6 alternatives are targeted for consideration in the travel planning process.

**DATES:** Alternatives are expected to be ready for public review and comment by February or March, 2003. Requests to receive information and notification of opportunities to provide comments should be received prior to that time.

**ADDRESSES:** Requests to be placed on the travel planning mailing list should be sent to Pam Bentley, Gallatin National Forest Supervisors Office, P.O. Box 130, Bozeman, Montana, 59771–0130.

**FOR FURTHER INFORMATION CONTACT:** Steve Christiansen, Travel Planning Interdisciplinary Team Leader, Gallatin National Forest Supervisors Office, (406) 587–6750.

**SUPPLEMENTARY INFORMATION:** The Gallatin National Forest includes approximately 1.9 million acres of public land adjacent to the northern and western boundaries of Yellowstone National Park. It lies within all or portions of Sweet Grass, Park, Carbon, Meagher, Gallatin, and Madison Counties, Montana. Local communities include Bozeman, Big Sky, West Yellowstone, Livingston, Big Timber, Gardiner, and Cooke City, Montana. There are over 1300 miles of road and

2300 miles of trail accessing the Forest that facilitate a variety of management activities and provide opportunities for public recreation use. In general, the road and trail system and recreation use of the Forest has evolved incrementally over many decades based on site-specific demands and capabilities. There has never been a comprehensive evaluation on whether it is the best way to provide for these demands in conjunction with other resources uses and land stewardship needs. Due to changing and increasing trends in recreation use, recent acquisitions of over 150,000 acres of land into public ownership, and other resource and environmental issues, the Forest Service believes that it is timely to establish a forest-wide travel management plan and incorporate it into the Forest Plan.

The purpose for a Gallatin National Forest Travel Management Plan and Amendment are to: (1) Provide for public access and recreational demand of the road and trail system on the Forest considering both the quantity and quality of opportunity to be provided. (2) Bring road and trail use into compliance with laws, regulations, and other higher level management direction. (3) Correct unacceptable resource damage that may be occurring due to the use of or condition of Forest roads and trails. (4) Provide for public understanding of the types of use and season of use allowed for each road and trail. (5) Identify administrative access routes to facilitate management of a variety of resources on the Gallatin National Forest. (6) Replace outdated, ineffective, and/or unclear Forest Plan standards and other direction applicable to road and trail management.

As a beginning to the travel planning process the Forest Service has prepared a ''benchmark'' travel management plan alternative. The benchmark is not considered an agency proposal or preferred alternative because it does not have the benefit of public input or preliminary environmental analysis. It has been developed as a conceptual travel management plan to focus interested citizen and user group participation and initial environmental analysis from Forest Service specialists. Based on early public comment and analysis the benchmark will be used to develop a range of 4 to 6 alternatives that represent various interests and respond to environmental issues. The alternatives will represent ''proposed options'' for a travel management plan and will be made available for review, comment, and modification during the late winter/early spring of 2003. The benchmark can be viewed on the Gallatin National Forest Web site at *http://www.fs.fed.us/rl/gallatin/travel_planning*. A copy can also be obtained on CD by calling or writing the contact persons identified above.

Comments on the alternatives from the public and other agencies will be used in preparation of a Draft Environmental Impact Statement (DEIS). More specifically, comments will be used to modify and refine the alternatives and identify potential resource issues (environmental effects) that should be considered in analysis.

The Draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and available for public review on January of 2004. At that time, the EPA will publish a Notice of Availability of the Draft EIS in the **Federal Register**. The comment period on the Draft EIS will be 90 days from the date the EPA's notice of availability appears in the **Federal Register**. The Final EIS is scheduled for completion in the spring of 2004.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519,553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980).

Because of these court rulings, it is very important that those interested in this proposed action participate during comment periods provided so that substantive comments and objections are made available to the Forest Service at a time when they can meaningfully consider them. To assist the Forest Service in identifying and considering issues, comments should be specific to concerns associated with the management of roads and trails on the Gallatin National Forest. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in structuring comments.

I am the responsible official for this Environmental Impact Statement and the ultimate decision for a Gallatin National Forest Travel Management Plan and Forest Plan Amendment. My address is Forest Supervisor, Gallatin National Forest, P.O. Box 130, Federal Building, Bozeman, MT 59771.

Dated: December 4, 2002.

**Rebecca Heath,**

*Forest Supervisor.*

[FR Doc. 02–31397 Filed 12–12–02; 8:45 am]

BILLING CODE 3410–11–M

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## DEPARTMENT OF AGRICULTURE

### Forest Service

### Lincoln Ranger District, Helena National Forest, Lewis & Clark County, Montana Copper Creek Road Improvements

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare environmental impact statement.

**SUMMARY:** The USDA, Forest Service will prepare an environmental impact statement (EIS) on a proposal to improve the Copper Creek Road, which includes repaving existing pavement, paving existing gravel, upgrading dirt surface to gravel, and widening a single-lane bridge to a two lane-bridge on an existing two-lane road. This project includes 14.2 miles of Copper Creek Road from the junction at State Highway 200 passing through Forest Service, State, and private land.

The Copper Creek Road provides access to Snowbank Lake, Copper Creek Campground, and the Indian Meadow Trailhead for accessing the Scapegoat Wilderness.

**DATES:** Comments concerning the proposal and scope of the analysis must be received in writing by January 17, 2003. The draft EIS is expected to be completed in summer of 2003 with the final EIS slated for fall/winter of 2003.

**ADDRESSES:** Send written comments to Martie Schramm, Acting District Ranger, Helena National Forest, Lincoln Ranger District, 7269 Highway 200, Lincoln, MT 59644. Phone: (406) 362–3425. Martie Schramm is also the responsible official for this project.

**FOR FURTHER INFORMATION, CONTACT:** Charlie McKenna, Forest Engineer, Helena National Forest, 2880 Skyway Drive, Helena, MT 59601. Phone (406) 449–5201.

**SUPPLEMENTARY INFORMATION:**

#### Purpose and Need for Action

The Lincoln Ranger District of the Helena National Forest has identified the need for reduced sedimentation produced from erosion of the Copper

Creek Road and for improved traffic safety for recreation and management uses to the areas accessed by this road system.

Concerns for fish occupying this drainage include sediment running off the aggregate surface of the road and adjacent road cuts as-well-as several locations of the drainage that are cutting towards the roadbed, and fish passage barriers existing at two locations cutting off potential fish habitat.

In addition, Copper Creek Road in its current configuration has several traffic hazards including a one-lane bridge that constricts traffic flow and has approaches with poor visibility, roadbed alignment with several narrow curves where driver vision is limited, and the aggregate-surface segment of the road frequently develops washboards and large potholes creating unsafe conditions for drivers.

**Proposed Action**

The Lincoln Ranger District, Helena National Forest, proposes to make improvements to 14.2 mi of Copper Creek Road, located in the Lincoln Ranger District, in Lewis and Clark County, Montana. The project would include re-paving the existing 2.6 mi of paved road, paving an additional 5.9 mi of the existing aggregate-surface (gravel) road, improving the 5.7 mi of single-lane native-surface road above Copper Creek Campground, replacing a one-lane bridge with a two-lane bridge, replacing culverts to reestablish fish passage and to withstand 100-year flood events, and realigning some segments away from Copper Creek. These realignments may require construction of retaining walls for some road cuts and where space is limited, engineered structures may be installed between the active stream channel and the road fill to minimize further encroachment.

The segment from the junction with State Highway 200 to Copper Creek Campground would meet the minimum standards necessary to support the intended uses and improve user safety, while protecting affected resources. The Lincoln Ranger District proposes to reconstruct the road to an American Association of State Highway and Transportation Officials design standard corresponding to ''Rural Recreational and Scenic Roads.'' This design standard includes an overall width (including shoulders) of 20 ft (6 m). The proposed design speed would be low (0 to 45 mph).

The project includes mitigation measures to reduce impacts to riparian areas, wildlife habitat and other resources. These measures would include but not limited to:

a. Revegetating all disturbed areas with approved native vegetation.

b. Controlling sediment movement by use of temporary structures such as fabric fences and straw bales during construction.

c. Reducing impacts to streams by minimizing activities within the active stream channel, and temporarily diverting the stream when activities within the active stream channel can not be avoided.

d. Avoiding or minimizing removal of desirable woody debris and disturbance to existing vegetation adjacent to streams to maintain filter strips

e. Timing all construction activities to minimize disturbance to wildlife.

f. Halting construction and stabilizing the activity area prior to winter to minimize sediment yield at peak flows during spring thaw, as required by the Forest Plan.

**Preliminary Issues**

Copper Creek provides critical spawning habitat for upper Blackfoot River fluvial bull trout, a species listed as threatened under the Endangered Species Act. Bull trout spawning occurs both upstream and downstream of Snowbank Lake. Westslope cutthroat trout (a sensitive species) are also found in Copper Creek.

**Possible Alternatives**

Alternatives being considered at this time are this proposal and the no action (proceed with current maintenance).

**Scoping Process**

The Forest Service is seeking information and comments from Federal, State and local agencies as well as individuals and organizations that may be interested in, or affected by, the proposed action. Preparation of the Draft Environmental Impact Statement will use information from responses received from this NOI, a public meeting this December in Lincoln, MT, and through a mailing informing the public of this proposal. The Forest Service invites written comments and suggestions related to and within the scope of this proposal.

**Permits or Licenses Required**

In order to proceed, this proposal may require the following permits from the State of Montana:

- Application for Short-Term Water Quality Standard for Turbidity Related to Construction Activity (318 Authorization).
- Stream Protection Act 124 Permit.
- Clean Water Act Section 401 Water Quality Certification.

**Comment Requested**

The comment period on the draft environmental impact statement will be a minimum of 45-days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points (*http://www.epa.gov/epahome/cfr40.htm*).

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, section 21).

**Implementation**

The Lincoln Ranger District anticipates beginning construction on the project in late summer 2004, stopping construction during the winter months, and resuming construction the following year. The project is expected to take 12 months to complete, including winter shutdown.

No change to travel restrictions associated with this road or other roads and trails accessed by this road would occur, as part of this action.

**Nature of Decision To Be Made**

The decision framework refers to the scope of the decision that will be issued at the conclusion of this analysis by the responsible official. The decision will be based on information disclosed in the environmental document, contained in the Project Analysis File, and comments submitted during the scoping of the proposed action and the comment period.

The Responsible Official may decide whether or not to:

- Select the Proposed Action,
- Select an alternative to the Proposed Action, or
- Select portions from the developed range of alternatives and combine them in a logical package.

In selecting one of the above options, the terms and conditions of the selection will be fully displayed and understood. Within the parameters of this decision space, it will also be determined if a Helena Land and Resource Management Plan amendment would be necessary. The decision maker will take into consideration relationships of alternatives to the identified significant issues.

Dated: December 9, 2002.

**Dwight Chambers,**

*Acting Forest Supervisor.*

[FR Doc. 02–31414 Filed 12–12–02; 8:45 am]

**BILLING CODE 3410–11–P**

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## DEPARTMENT OF AGRICULTURE

## Forest Service

## Manti-La Sal National Forest; State of Utah; State Institutional Trust Lands Administration Access Routes on East Mountain, Emery County, UT; Revision of Notice of Intent to Prepare an Environmental Impact Statement

**AGENCY:** Forest Service, USDA.

**ACTION:** Revision of notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Forest Service (FS) issued a notice of intent (NOI) published in the **Federal Register** on May 3, 2002, on pages 22392–22393. The NOI discussed that the Forest Service (FS) would prepare an Environmental Impact Statement (EIS) to disclose the impacts of authorizing adequate access across National Forest System lands to the State of Utah School & Institutional Trust Lands Administration (SITLA) lands within the Manti-La Sal National Forest, Emery County, Utah.

This NOI amends the original NOI of May 3, 2002, by adding two additional projects and opening a new round of public scoping.

**DATES:** Comments concerning issues, alternatives and the scope of the analysis must be received within 30 days from the date of publication of this revision of notice of intent in the **Federal Register**. The Draft Environmental Impact Statement is expected by April 2003, and a Final Environmental Impact Statement (FEIS) is expected by August 2003.

**ADDRESSES:** Send written comments to Elaine J. Zieroth, Forest Supervisor, Manti-La Sal National Forest, 599 West Price River Drive, Price, Utah 84501, ATTN: Leland Matheson.

**FOR FURTHER INFORMATION CONTACT:** Aaron Howe, Mineral and Lands Staff Officer, Manti-La Sal National Forest, 599 West Price River Drive, Price, Utah 84501.

**SUPPLEMENTARY INFORMATION:** The previous NOI stated that the FS was going to prepare an EIS to ''decide whether to authorize SITLA to construct a new road and reconstruct existing roads'', so that SITLA could have access to their land which is surrounded by the Manti-La Sal National Forest. This revised NOI is outlining expanded activities associated with SITLA (timber harvest to the North and a natural gas well to the South) and Prima Oil Company natural gas well in the same East Mountain area of the National Forest.

**SITLA**

The Forest Service will prepare an EIS to disclose effects and provide the basis for deciding whether to authorize SITLA to construct a new road and reconstruct existing Forest Service roads across National Forest System Lands, for access to their inholdings on East Mountain for project activities. A segment of the new access route and a portion of the existing roads to be reconstructed traverse portions of the East Mountain Inventoried Roadless Area. SITLA inholdings addressed in this revision consist of one section: Section 36, Township 16 South (T16S), Range 6 East (R6E), Salt Lake Median (SLM) about 640 acres. Provisions of the Alaska National Interest Lands Conservation Act (ANILCA) of 1980, section 1323(a) (16 U.S.C. 3210) provides that the owners of non-Federal land within the National Forest shall be provided adequate access to their land. Regulations implementing section 1323(a) are set forth in title 36, Code of Federal Regulations, part 251, subpart D—Access to Non-Federal Lands. The Forest Service Policy is further explained in the Forest Service Manual (FSM) 5400 and 2700. Access must comply with other laws and regulations such as the Threatened and Endangered Species Act, Clean Water Act, Historic Preservation Act, and the National Environmental Protection Act.

**Prima Oil & Gas**

Prima Oil and Gas Company has proposed to drill a natural gas exploration well on National Forest System Lands southwest of the Inventoried Roadless Area adjacent to an existing Forest Service Road. The proposed well site is located as follows: NE ¼, Section 23 Township 16 South, Range 6 East, SLM, Emery County, Utah.

**Purpose and Need for Action**

The purpose and need for this action is three fold, SITLA, Prima Oil & Gas and the Forest Service. SITLA's purpose and need is to have an adequate access route across National Forest System Lands to SITLA inholdings for resource management activities on these lands.

Prima Oil & Gas Company's purpose and need is to explore for and produce any economic reserves of natural gas within their lease agreement. The responsible agencies must provide reasonable opportunities to accomplish this consistent with the rights granted by the Leases consistent with Forest Plan direction.

The Forest Service purpose and need is to evaluate the requests from SITLA and Prima Oil & Gas and then to determine whether to authorize permits for access, consistent with applicable laws, regulations, and Forest Service Policy.

**Proposed Action**

*SITLA*

The FS is proposing to authorize SITLA to construct a private road and reconstruct Forest Service Roads 50145 (Flat Canyon Road) and 50244 (Big East Road). The Flat Canyon Road will be reconstructed from Forest Service Road 50040 to the SITLA inholdings at Section 36, T16S, R6E, SLM. Forest Service Road 50244 will be reconstructed from the intersection of

Forest Service Road 50145. To its termini near the center of Section 11, T16S R6E. A private road will be constructed from Section 11 Northward to SITLA inholdings, in Section 36, T15S R6E. The private road construction will continue through the SITLA land in Section 2, T16S R6E and cross the National Forest in Section 35 T15S R6E, SLM for the purpose of connecting to SITLA land located at Section 36 T15S R6E, SLM.

*Prima Oil & Gas Company*

The Forest Service also proposes to allow Prima Oil & Gas Company access to their lease via Forest Service Roads and use of National Forest System Lands to construct an oil and gas drill pad consistent with the conditions of Primas lease and the Manti La Sal Land Management and Resource Plan. The drill pad is proposed to be located at the intersection of Forest Service Roads 50244 and 50145.

**Responsible Official**

The Responsible Official for the Record of Decision is Elaine J. Zieroth, Forest Supervisor, Manti-LaSal National Forest, 599 West Price River Drive, Price, Utah 84501.

**Scoping Process**

This revised notice of intent initiates a new scoping process which guides the development of the EIS. Scoping will be by newspaper legal notice, mailings to interested parties and quarterly schedule of proposed actions. No public meetings are planned.

**Preliminary Issues**

Preliminary issues have been identified. They include the effects to the undeveloped character of the East Mountain Inventoried Roadless Area, land stability and effects to wildlife.

**Comment Requested**

If you choose to participate, your comments should be in writing and as specific as possible. All comments will be considered. Please note: comments submitted, as well as the names and addresses of those who comment, are considered part of the public record and will be released if requested under the Freedom of Information Act. If you provide a comment, you will remain on our mailing list for this project. If you do not comment but want to remain on the mailing list, please notify us. Those who do not comment or otherwise notify us will be dropped from the mailing list for this project. The estimated dates for filing the draft EIS is April 2003 and the FEIS is August 2003.

**Early Notice of Importance of Public Participation in Subsequent Environmental Review**

A DEIS will be prepared for comment. The comment period on the DEIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of DEIS must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the DEIS stage but that are not raised until after completion of the FEIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the FEIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the DEIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the DEIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

**Authority:** 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, section 21 and 21.2.

Dated: December 5, 2002.

**Elaine J. Zieroth,**

*Forest Supervisor, MantiLaSal National Forest.*

[FR Doc. 02–31413 Filed 12–12–02; 8:45 am]

BILLING CODE 3410–11–M

## DEPARTMENT OF AGRICULTURE

### Rural Telephone Bank

### Sunshine Act Meeting

**AGENCY:** Rural Telephone Bank, USDA.

**ACTION:** Privatization discussion meeting.

**TIME AND DATE:** 10 a.m., Friday, December 20, 2002.

**PLACE:** Room 4062, South Building, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC.

**STATUS:** Open.

**MATTERS TO BE DISCUSSED:** The business advisor will report on the status of current privatization projects. A teleconference will be arranged for out-of-town Board members' participation.

**FOR FURTHER INFORMATION CONTACT:** Roberta D. Purcell, Assistant Governor, Rural Telephone Bank, (202) 720–9554.

Dated: December 11, 2002.

**Hilda Gay Legg,**

*Governor, Rural Telephone Bank.*

[FR Doc. 02–31632 Filed 12–11–02; 3:53 pm]

BILLING CODE 3410–15–M

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Additions

**AGENCY:** Committee for Purchase from People Who Are Blind or Severely Disabled.

**ACTION:** Additions to Procurement List.

**SUMMARY:** This action adds to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**EFFECTIVE DATE:** January 12, 2003.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

**FOR FURTHER INFORMATION CONTACT:** Sheryl Kennerly (703) 603–7740.

**SUPPLEMENTARY INFORMATION:** On October 11 and October 18, 2002, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (67 FR 63376 and 64351) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions

on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4. I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. The action will result in authorizing small entities to furnish the services.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

Accordingly, the following services are added to the Procurement List:

*Services*

*Service Type/Location:* Custodial and Refuse Removal Services/Fort Johnson Military Family Housing, Southport, NC.

*NPA:* Coastal Enterprises of Jacksonville, Inc, Jacksonville, NC.

*Contract Activity:* 597th U.S. Army Transportation Terminal Group, Southport, NC.

*Service Type/Location:* Custodial and Refuse Removal Services/U.S. Army Military Ocean Terminal (Sunny Point (MOTSU)), NC.

*NPA:* Coastal Enterprises of Jacksonville, Inc, Jacksonville, NC.

*Contract Activity:* 597th U.S. Army Transportation Terminal Group, Southport, NC.

*Service Type/Location:* Switchboard Operation/Shaw Air Force Base, Shaw AFB, SC.

*NPA:* Goodwill Industries of Lower SC, Inc., North Charleston, SC.

*Contract Activity:* 20th Contracting Squadron/LGCA, Shaw AFB, SC.

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

**Sheryl D. Kennerly,**

*Director, Information Management.*

[FR Doc. 02–31476 Filed 12–12–02; 8:45 am]

**BILLING CODE 6353–01–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A-549–813]**

### Notice of Final Results of Antidumping Duty Administrative Review, Rescission of Administrative Review in Part, and Final Determination to Revoke Order in Part: Canned Pineapple Fruit from Thailand

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On August 7, 2002, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on canned pineapple fruit (CPF) from Thailand. This review covers eight producers/exporters of the subject merchandise. The period of review (POR) is July 1, 2000, through June 30, 2001. Based on our analysis of the comments received, these final results differ from the preliminary results. The final results are listed below in the *Final Results of Review* section. Furthermore, the preliminary results for one exporter/producer, Siam Food Products Public Co. Ltd. (SFP), are adopted in our final results of this administrative review; therefore, we will revoke the antidumping duty order with respect to SFP, based on three consecutive review periods of sales at not less than normal value. *See Revocation of the Order (in Part)* section of this notice. Consistent with the preliminary results, we are rescinding the review with respect to one exporter/producer, Prachuab Fruit Canning Company (Praft) based on our determination that this company had no shipments of subject merchandise to the United States during the POR.

**EFFECTIVE DATE:** December 13, 2002.

**FOR FURTHER INFORMATION CONTACT:** David Layton or Charles Riggle, Office 5, Group II, AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0371 and (202) 482–0650, respectively.

**SUPPLEMENTARY INFORMATION:**

### 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 regulations are references to the provisions codified at 19 CFR Part 351 (2001).

### Background

This review covers the following producers/exporters of merchandise subject to the antidumping duty order on canned pineapple fruit from Thailand: Vita Food Factory (1989) Co., Ltd. (Vita), Kuiburi Fruit Canning Co., Ltd. (Kuiburi), Malee Sampran Public Co., Ltd. (Malee), Siam Food Products Public Co., Ltd. (SFP), The Thai Pineapple Public Co., Ltd. (TIPCO), Thai Pineapple Canning Industry Corp., Ltd. (TPC), Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd. (collectively, Dole), and Siam Fruit Canning (1988) Co., Ltd. (SIFCO).

On August 7, 2002, the Department published the preliminary results of this review and invited interested parties to comment on those results. *See Notice of Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review and Preliminary Determination to Revoke Order in Part: Canned Pineapple Fruit From Thailand*, 67 FR 51171 (*Preliminary Results*). On September 6, 2002, we received case briefs from Dole, TPC, and the petitioners.[1] On September 13, 2002, we received rebuttal briefs from Dole, Malee, and the petitioners. TIPCO also submitted a rebuttal brief on September 25, 2002, but it was rejected by the Department as an untimely submission.[2]

On September 6, 2002, Malee and SFP requested a public hearing, but withdrew their requests on September 19, 2002. As a result, no public hearing was held.

### Scope of the Order

The product covered by this order is CPF, defined as pineapple processed and/or prepared into various product forms, including rings, pieces, chunks, tidbits, and crushed pineapple, that is packed and cooked in metal cans with either pineapple juice or sugar syrup added. CPF is currently classifiable under subheadings 2008.20.0010 and 2008.20.0090 of the Harmonized Tariff Schedule of the United States (HTSUS). HTSUS 2008.20.0010 covers CPF packed in a sugar-based syrup; HTSUS 2008.20.0090 covers CPF packed without added sugar (*i.e.*, juice-packed). Although these HTSUS subheadings are provided for convenience and for

[1] The petitioners in this case are Maui Pineapple Company and the International Longshoremen's and Warehousemen's Union.

[2] *See* Letter to Anurat Tiamtan from Gary Taverman, Director, Office 5, Import Administration (September 30, 2002)

customs purposes, the written description of the scope is dispositive.

**Recission**

On September 17, 2001, in response to the Department's questionnaire, Praft stated that it made no shipments of subject merchandise to the United States during the POR. We received no comments regarding our preliminary decision to rescind the review with respect to Praft and, consistent with the preliminary results, we are rescinding the review with respect to Praft.

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties to this review are addressed in the ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Canned Pineapple Fruit from Thailand'' from Bernard T. Carreau, Deputy Assistant Secretary for Group II, Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, dated December 5, 2002 (Decision Memorandum), which is hereby adopted by this notice.

A list of the issues which parties have raised and to which we have responded, all of which are addressed in the Decision Memorandum, is attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit (CRU), room B-099 of the main Commerce building.

In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at http://ia.ita.doc.gov/. The paper copy and electronic version of the Decision Memorandum are identical in content.

**Fair Value Comparisons**

Except for the calculations for Dole and Malee, we calculated export price and normal value based on the same methodology used in the preliminary results. Changes to the export price calculation for Dole and the indirect selling expenses for Malee are detailed in their respective analysis memoranda.

**Cost of Production**

Except for Malee, we calculated the cost of production (COP) for the merchandise based on the same methodology used in the preliminary results. Changes to the general and administrative expense ratio for Malee are detailed in the Decision Memorandum.

**Revocation of the Order (in Part)**

On July 31, 2001, SFP requested that the Department revoke the antidumping order in part as regards SFP based on the absence of dumping pursuant to 19 CFR 351.222(b)(2). SFP submitted, along with its revocation request, a certification stating that: (1) the company sold subject merchandise at not less than normal value during the POR, and that in the future it would not sell such merchandise at less than normal value (*see* 19 CFR 351.222 (e)(1)(i)); (2) the company has sold the subject merchandise to the United States in commercial quantities during each of the past three years (*see* 19 CFR 351.222(e)(1)(ii)); and (3) the company agreed to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Department concludes that the company, subsequent to the revocation, sold the subject merchandise at less than normal value. *See* 19 CFR 351.222(b)(2)(i)(B), and as referenced at 19 CFR 351.222(e)(1)(iii). No comments were filed by any party on our preliminary decision to revoke the order with respect to SFP.

Based on the final results of this review and the final results of the two preceding reviews (*see Notice of Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part: Canned Pineapple Fruit From Thailand*, 65 FR 77851 (December 13, 2000) and *Notice of Final Results of Antidumping Duty Administrative Review and Recission of Administrative Review in Part: Canned Pineapple Fruit from Thailand*, 66 FR 52744, (October 17, 2001), SFP has demonstrated three consecutive years of sales at not less than normal value.

Furthermore, the Department has found that SFP's aggregate sales to the United States have been made in commercial quantities during the last three segments of this proceeding. See Memorandum to Bernard Carreau, Deputy Assistant Secretary for Group II, Import Administration from David Layton, Import Compliance Specialist, Office 5, Import Administration: ''Preliminary Determination to Revoke in Part the Antidumping Duty Order on Canned Pineapple Fruit from Thailand'' dated July 31, 2002, on file in the CRU.

Based on the above facts, the Department determines that the continued application of the antidumping duty order is not necessary to offset dumping by SFP. SFP has also agreed in writing to its immediate reinstatement in the order, as long as any producer or exporter is subject to the order, should the Department conclude that SFP, subsequent to the revocation, sold the subject merchandise at less than normal value. Therefore, we will revoke the order with respect to merchandise produced and exported by SFP. In accordance with 19 CFR 351.222(f), we will terminate the suspension of liquidation for any such merchandise entered, or withdrawn from warehouse, for consumption on or after July 1, 2001. The Department will further instruct the Customs Service to refund with interest any cash deposit on entries made after June 30, 2001.

**Final Results of Review**

As a result of our review, we determine that the following weighted-average percentage margins exist for the period July 1, 2000, through June 30, 2001:

| Manufacturer/exporter | Margin (percent) |
|---|---|
| Dole Food Company, Inc. (Dole) | 0.27 |
| The Thai Pineapple Public Company, Ltd. (TIPCO) | 0.44 |
| Kuiburi Fruit Canning Co. Ltd. (Kuiburi) | 0.39 |
| Thai Pineapple Canning Industry (TPC) | 2.43 |
| Siam Fruit Canning (1988) Co. Ltd. (SIFCO) | 0.64 |
| Vita Food Factory (1989) Co. Ltd. (Vita) | 1.94 |
| Malee Sampran Public Co., Ltd. (Malee) | 0.74 |
| Siam Food Products Public Co., Ltd. (SFP) | 0.09 |

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated importer-specific assessment rates by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise. Where the importer-specific assessment rate is above *de minimis* we will instruct the Customs Service to assess antidumping duties on that importer's entries of subject merchandise. The Department will issue appropriate assessment instructions directly to the Customs Service within 15 days of publication of these final results of review.

Furthermore, the following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results of administrative review, as provided by section 751(a) of the Act: (1) for the

companies named above (with the exception of SFP, for whom we are revoking the order), the cash deposit rate will be the rate listed above, except where the margins are zero or *de minimis* no cash deposit will be required, (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in a previous segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published in the most recent final results in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review or in any previous segment of this proceeding, but the manufacturer is, the cash deposit rate will be that established for the manufacturer of the merchandise in these final results of review or in the most recent segment of the proceeding in which that manufacturer participated; and (4) if neither the exporter nor the manufacturer is a firm covered in this review or in any previous segment of this proceeding, the cash deposit rate will be 24.64 percent, the all-others rate established in the less-than-fair-value investigation. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) 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 in the subsequent assessment of double antidumping duties.

This notice also is the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return/destruction or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to comply is a violation of the APO.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 5, 2002.

**Faryar Shirzad,**

*Assistant Secretary for Import Administration.*

## APPENDIX

### List of Comments in the Issues and Decision Memorandum

I. ISSUES SPECIFIC TO DOLE
*Comment 1:* Royalty Payments
*Comment 2:* Indirect Selling Expenses
*Comment 3:* Surrogate Canadian-dollar Interest Rate
*Comment 4:* Clerical Error Allegation
II. ISSUES SPECIFIC TO MALEE
*Comment 5:* Indirect Selling Expense Ratio
*Comment 6:* Net Realizable Value Calculation
*Comment 7:* General and Administrative Expenses
III. ISSUES SPECIFIC TO TIPCO
*Comment 8:* Calculation of G & A Expenses
*Comment 9:* Income Offsets
*Comment 10:* Packing Overhead
IV. JOINT ISSUE: DOLE, MALEE, & TIPCO
*Comment 11:* Fruit Cost Allocation
V. ISSUE SPECIFIC TO TPC
*Comment 12:* Affiliation

[FR Doc. 02–31479 Filed 12–12–02; 8:45 am]

BILLING CODE 3510–DS–S

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A-570–831]**

### Fresh Garlic From the People's Republic of China: Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of extension of time limit for the final results of antidumping duty administrative review.

**SUMMARY:** The Department of Commerce is extending the time limit for the final results of the administrative review of the antidumping duty order on fresh garlic from the People's Republic of China until no later than January 21, 2003. The period of review is November 1, 2000, through October 31, 2001. This extension is made pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended.

**EFFECTIVE DATE:** December 13, 2002.

**FOR FURTHER INFORMATION CONTACT:** Edythe Artman, AD/CVD Enforcement 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–3931.

**SUPPLEMENTARY INFORMATION:**

### Background

On August 9, 2002, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on fresh garlic from the People's Republic of China. See *Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Administrative Review, and Intent to Rescind Administrative Review in Part*, 67 FR 51822 (August 9, 2002) (*Preliminary Results*). We invited parties to comment on our *Preliminary Results*. We received comments from the petitioner and three of the respondents, Clipper Manufacturing Ltd., Taian Fook Huat Tong Kee Foods Co., Ltd., and Golden Light Trading Co., Ltd. The final results for this review are currently due on December 9, 2002.

### Extension of Time Limit for Final Results of Administrative Review

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), provides that the Department will issue the final results of an administrative review within 120 days after the date on which the preliminary results were published. It further provides that, if it is not practicable to complete the review within the 120-day period, the Department may extend the period by 60 days.

The Department has determined that it is not practicable to complete the administrative review within the 120-day period because the comments received from the parties with regard to the preliminary results present a number of complex factual and legal questions about the assignment of antidumping duty margins and, in particular, the application of facts available. Therefore, in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2) (2002), the Department is extending the time limit for completion of the final results by 43 days. The final results of review will be due no later than January 21, 2003.

Dated: December 9, 2002.

**Susan Kuhbach,**

*Acting Deputy Assistant Secretary for AD/CVD Enforcement I.*

[FR Doc. 02–31478 Filed 12–12–02; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A-475–703]**

### Granular Polytetrafluoroethylene Resin from Italy: Notice of Rescission of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of Rescission of Antidumping Duty Administrative Review.

**EFFECTIVE DATE:** December 13, 2002.

**SUMMARY:** On September 25, 2002, the Department of Commerce (the Department) published in the **Federal Register** (67 FR 60211) a notice announcing the initiation of an administrative review of the antidumping duty order on granular polytetrafluoroethylene resin from Italy, covering the period August 1, 2001, through July 31, 2002. The review was requested by both E.I. DuPont de Nemours & Company (DuPont), a U.S. producer of the domestic like product and Ausimont SPA and Ausimont USA, Inc., collectively Ausimont, an Italian producer of the subject merchandise under review and its United States subsidiary. We are now rescinding this review as a result of both DuPont's and Ausimont's withdrawal of their requests for an administrative review.

**FOR FURTHER INFORMATION CONTACT:** Vicki Schepker or Keith Nickerson, at (202) 482–1756 or (202) 482–3813, respectively, AD/CVD Enforcement Office V, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

#### 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 19 CFR Part 351 (April 2002).

#### Background

In accordance with 19 CFR 351.213(b), on August 27 and August 30, 2002, respectively DuPont and Ausimont requested an administrative review of the antidumping duty order on granular polytetrafluoroethylene resin from Italy. On September 25, 2002, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review of this order for the period August 1, 2001, through July 31, 2002 (67 FR 60211). DuPont and Ausimont withdrew their requests for this review on October 18 and 28, 2002, respectively.

#### Rescission of Review

The Department's regulations at 19 CFR 351.213(d)(1) provide that the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation of the requested review, or withdraws its request at a later date if the Department determines that it is reasonable to extend the time limit for withdrawing the request. Both DuPont and Ausimont withdrew their requests within the 90-day period. Accordingly, we are rescinding this review. The Department will issue appropriate assessment instructions to the U.S. Customs Service within 15 days of publication of this notice. This notice is issued and published in accordance with section 751 of the Act (19 U.S.C. 1675) and 19 CFR 351.213(d)(4).

Dated: December 9, 2002.

**Bernard T. Carreau,**

*Deputy Assistant Secretary, Group II Import Administration*

[FR Doc. 02–31480 Filed 12–12–02; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**A-583–831**

### Stainless Steel Sheet and Strip in Coils From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of final results and partial rescission of antidumping duty administrative review of stainless steel sheet and strip in coils from Taiwan.

**SUMMARY:** SUMMARY: On July 9, 2002, the Department of Commerce (''the Department'') published in the Federal Register the preliminary results and partial rescission of its administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Taiwan. *See Stainless Steel Sheet and Strip in Coils From Taiwan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 45742 (July 9, 2002) (''*Preliminary Results*''). This review covers imports of subject merchandise from Tung Mung Development Co. Ltd. (''Tung Mung''), Ta Chen Stainless Pipe Co. Ltd. (''Ta Chen''), Chia Far Industrial Factory Co. Ltd. (''Chia Far''), and Yieh United Steel Company (''YUSCO''). The period of review (''POR'') is July 1, 2000 through June 30, 2001.

Based on our analysis of the comments received, we have made changes in the margin calculations for Chia Far. Therefore, the final results differ from the *Preliminary Results*. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled ''Final Results of the Review.'' In addition, we are rescinding the review with respect to Ta Chen.

**EFFECTIVE DATE:** December 13, 2002.

**FOR FURTHER INFORMATION CONTACT:** FOR FURTHER INFORMATION CONTACT: Laurel LaCivita (Ta Chen) (YUSCO); Cheryl Werner (Chia Far); Marlene Hewitt (Tung Mung); or Bob Bolling, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–4243, (202) 482–2667, (202) 482–1385 or (202) 482–3434, respectively.

**SUPPLEMENTARY INFORMATION:**

#### The Applicable Statute

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 Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations at 19 CFR part 351 (2001).

#### Background

On July 9, 20021, the Department published the *Preliminary Results*. As we stated in that notice, we preliminarily rescinded this review with respect to Ta Chen, pursuant to its claim of no shipments of the subject merchandise during the POR. We are now rescinding this review with respect to Ta Chen, since no information on the record indicates that Ta Chen made any shipments during the POR.

We invited parties to comment on the *Preliminary Results*. We received written comments on September 4,

2002, from petitioners[1] on YUSCO, Tung Mung, Ta Chen, and Chia Far. Also, on September 4, 2002, we received written comments from Chia Far. On September 16, 2002, we received rebuttal comments from YUSCO and Chia Far on petitioners' comments. Also on September 16, 2002, we received rebuttal comments from petitioners on Chia Far's comments. On September 18, 2002, we received a submission from petitioners concerning Chia Far, alleging new information. On September 25, 2002, the Department rejected petitioners' September 18, 2002, submission finding that the second portion of the letter included new factual information that was untimely filed for this review. *See* Department's Letter to Petitioners dated September 25, 2002. On September 27, 2002, petitioners resubmitted, pursuant to instructions received from the Department on September 25, 2002, the letter of September 18, 2002, with the requested modifications. On October 8, 2002, the Department rejected petitioners' request to remove from the record certain passages contained in Chia Far's rebuttal brief. The Department determined that Chia Far's rebuttal brief contained only information already on the written record of review, and was therefore, not rejecting any passages contained in Chia Far's rebuttal brief. The Department found that Chia Far submitted its rebuttal brief in accordance with 19 CFR 351.309(d).

On October 7, 2002, the Department informed petitioners that it was rejecting its case brief with respect to YUSCO, filed on September 18, 2002, which contained new and untimely-filed information. On October 9, 2002, petitioners submitted a revised case brief concerning YUSCO, which excluded certain new factual information.

Under section 751(a)(3)(A) of the Act, the Department may extend the deadline for completion of an administrative review if it determines that it is not practicable to complete the review within the statutory time limit. On October 8, 2002, the Department extended the time limit for the final results to December 6, 2002. *See Stainless Steel Sheet and Strip in Coils from Taiwan: Extension of Final Results of Review*, 67 FR 62697 (October 8, 2002). We have now completed the administrative review in accordance with section 751 of the Act.

**Scope of the Review**

For purposes of this administrative review, the products covered are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.*, cold-rolled, polished, aluminized, coated, etc.) provided that it maintains the specific dimensions of sheet and strip following such processing.

The merchandise subject to this review is classified in the *Harmonized Tariff Schedule of the United States* (HTS) at subheadings: 7219.13.0031, 7219.13.0051, 7219.13.0071, 7219.1300.81[2], 7219.14.0030, 7219.14.0065, 7219.14.0090, 7219.32.0005, 7219.32.0020, 7219.32.0025, 7219.32.0035, 7219.32.0036, 7219.32.0038, 7219.32.0042, 7219.32.0044, 7219.33.0005, 7219.33.0020, 7219.33.0025, 7219.33.0035, 7219.33.0036, 7219.33.0038, 7219.33.0042, 7219.33.0044, 7219.34.0005, 7219.34.0020, 7219.34.0025, 7219.34.0030, 7219.34.0035, 7219.35.0005, 7219.35.0015, 7219.35.0030, 7219.35.0035, 7219.90.0010, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.12.1000, 7220.12.5000, 7220.20.1010, 7220.20.1015, 7220.20.1060, 7220.20.1080, 7220.20.6005, 7220.20.6010, 7220.20.6015, 7220.20.6060, 7220.20.6080, 7220.20.7005, 7220.20.7010, 7220.20.7015, 7220.20.7060, 7220.20.7080, 7220.20.8000, 7220.20.9030, 7220.20.9060, 7220.90.0010, 7220.90.0015, 7220.90.0060, and 7220.90.0080. Although the HTS subheadings are provided for convenience and Customs purposes, the Department's written description of the merchandise under review is dispositive.

Excluded from the scope of this review are the following: (1) sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (2) sheet and strip that is cut to length, (3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (*i.e.*, cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm), and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. *See* Chapter 72 of the HTS, ''Additional U.S. Note'' 1(d).

In response to comments by interested parties, the Department has determined that certain specialty stainless steel products are also excluded from the scope of this review. These excluded products are described below.

Flapper valve steel is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of this review.

[1] Allegheny Ludlum, AK Steel Corporation (formerly Armco, Inc.), J&L Specialty Steel, Inc., North American Stainless, Butler-Armco Independent Union, Zanesville Armco Independent Union, and the United Steelworkers of America, AFL-CIO/CLC.

[2] Due to changes to the HTS numbers in 2001, 7219.13.0030, 7219.13.0050, 7219.13.0070, and 7219.13.0080 are now 7219.13.0031, 7219.13.0051, 7219.13.0071, and 7219.13.0081, respectively.

This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless strip is also excluded from the scope of this review. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as ''Arnokrome III.''[3]

Certain electrical resistance alloy steel is also excluded from the scope of this review. This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials (''ASTM'') specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as ''Gilphy 36.''[4]

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of this review. This high-strength, ductile stainless steel product is designated under the Unified Numbering System (''UNS'') as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as ''Durphynox 17.''[5]

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of this review. These include stainless steel strip in coils used in the production of textile cutting tools (*e.g.*, carpet knives).[6] This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as ''GIN4 Mo.'' The second excluded stainless steel strip in coils is similar to AISI 420-J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is ''GIN5'' steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, ''GIN6''.[7]

[3] ''Arnokrome III'' is a trademark of the Arnold Engineering Company.

[4] ''Gilphy 36'' is a trademark of Imphy, S.A.

[5] ''Durphynox 17'' is a trademark of Imphy, S.A.

[6] This list of uses is illustrative and provided for descriptive purposes only.

[7] ''GIN4 Mo,'' ''GIN5'' and ''GIN6'' are the proprietary grades of Hitachi Metals America, Ltd.

**Rescission of Review**

In the *Preliminary Results*, we stated that Ta Chen reported, and the Department confirmed through independent U.S. Customs Service data, that it had no shipments of subject merchandise during the POR. *See* memorandum from Laurel LaCivita to the file dated October 9, 2002. Since Ta Chen did not report any shipments during the POR, we had no basis for determining a margin. Consequently, in accordance with 19 CFR 351.213(d)(3) and consistent with the Department's practice, we preliminarily rescinded our review with respect to Ta Chen. Because we have received no information since the *Preliminary Results* that contradicts the decision made in the *Preliminary Results*, we are rescinding the review with respect to Ta Chen. Since Ta Chen did not participate in the original investigation, its cash deposit rate will remain at 12.12 percent, which is the all others rate established in the less than fair value (''LTFV'') investigation.

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the ''Issues and Decision Memorandum'' (''*Decision Memorandum*'') from Joseph A. Spetrini, Deputy Assistant Secretary, Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, dated December 6, 2002, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the *Decision Memorandum*, is attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in the Central Records Unit, Room B-099 of the main Department building. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the Web at http://ia.ita.doc.gov/. The paper copy and electronic version of the *Decision Memorandum* are identical in content.

**Total Adverse Facts Available**

In our *Preliminary Results*, we explained that Tung Mung did not participate in this review and therefore, we applied an adverse facts available (''AFA'') rate of 21.10 percent to all sales and entries of Tung Mung's subject merchandise during the POR. Since the *Preliminary Results*, we have received no information on the record that contradicts our finding in the *Preliminary Results*. As a result, we will

make no changes to Tung Mung's margin of 21.10 percent for the final results.

**Sales Below Cost**

We disregarded sales below cost for both YUSCO and Chia Far during the course of the review.

**Changes Since the Preliminary Results**

Based on our analysis of comments received, we have made changes in the margin calculations for Chia Far. The changes to the margin calculations are listed below:

1. We included all of the depreciation expense incurred in the common service department at Pu-Shin and allocated it to the rolling department in the calculation of the cost of production.
2. We used Chia Far's 2001 financial statements to calculate the net interest expense ratio and G&A expense ratio. We also included miscellaneous losses in the G&A expense ratio.
3. We used Chia Far's reported inventory carrying costs incurred in Taiwan.

**Final Results of Review**

We determine that the following percentage margin exists for the period July 1, 2000 through June 30, 2001:

STAINLESS STEEL SHEET AND STRIP IN COILS FROM TAIWAN

| Manufacturer/exporter/reseller | Margin (percent) |
|---|---|
| YUSCO | 0.0 |
| Chia Far | 1.11 |
| Tung Mung | 21.10 |

The Department will determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated an exporter/importer (or customer)-specific assessment rate for merchandise subject to this review. The Department will issue appropriate assessment instructions directly to the Customs Service within 15 days of publication of these final results of review. We will direct the Customs Service to assess the resulting assessment rates against the entered customs values for the subject merchandise on each of the importer's/customer's entries during the review period. For duty-assessment purposes, we will calculate importer-specific assessment rates by dividing the dumping margins calculated for each importer by the total entered value of sales for each importer during the period of review.

**Cash Deposit Requirements**

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of stainless steel sheet and strip in coils from Taiwan entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) The cash deposit rates for YUSCO, Chia Far and Tung Mung will be the rates shown above; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) 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) if neither the exporter nor the manufacturer is a firm covered in these or any previous reviews conducted by the Department, the cash deposit rate will be the ''all others'' rate, which is 12.12 percent.

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

**Notification of Interested Parties**

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties or countervailing 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 the antidumping duties or countervailing duties occurred and the subsequent assessment of double antidumping duties or countervailing duties.

This notice also serves as a reminder to parties subject to administrative protective orders (''APOs'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. 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 terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 771(i) of the Act.

Dated: December 6, 2002.

**Faryar Shirzad,**

*Assistant Secretary for Import Administration.*

**APPENDIX 1 -- ISSUES IN THE DECISION MEMORANDUM**

**Issues with Respect to Tung Mung and Ta Chen**

*Comment 1*: Total Adverse Facts Available (''AFA'') for Tung Mung and Ta Chen
*Comment 2*: Whether Ta Chen Should Be Granted a Partial Recision of Review

**Issues with Respect to YUSCO**

*Comment 3*: Sales to Affiliated Parties in the United States
*Comment 4*: Affiliation With China Steel
*Comment 5*: Classification of Home Market Sales
*Comment 6*: The Use of AFA

**Issues with Respect to Chia Far**

*Comment 7*: Total AFA
*Comment 8*: Affiliated-Party Purchases
*Comment 9*: General and Administrative (''G&A'') Expenses
*Comment 10*: Appropriate Period for G&A and Interest Expense Ratios
*Comment 11*: Inventory Carrying Costs Incurred in Taiwan for U.S. Sales
*Comment 12*: Constructed Export Price (''CEP'') Transactions

[FR Doc. 02–31481 Filed 12–12–02; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 120902C]**

### Proposed Information Collection; Comment Request; Gulf of Mexico Shrimp Economic Data Collection

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA).

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before February 11, 2003.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Michael Travis, Department of Commerce, NOAA, National Marine Fisheries Service, 9721 Executive Center Drive North, St, Petersburg, FL 33702–2439, (727)570–5335.

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

NMFS proposes to collect information on fishing vessel expenses and earnings on a voluntary and continuous basis in the Gulf of Mexico offshore shrimp fishery in order to conduct socioeconomic analyses that will: improve fishery management making in that fishery; satisfy NMFS' legal mandates under Executive Order 12866, the Magnuson-Stevens Fishery Conservation and Management Act (U.S.C. 1801 et. seq.), the Regulatory Flexibility Act, the Endangered Species Act, and the National Environmental Policy Act; and quantify achievement of the performances measures in the NMFS Strategic Operating Plans. Used in conjunction with catch and effort data already being collected in this fishery as part of its dealer reporting program, as well as Coast Guard and fishing permit data on vessel characteristics, this data will be used to assess how fishermen will be impacted by and respond to any regulation likely to be considered by fishery managers. In addition, this data will be used to determine how fishing communities will be impacted by proposed fishing regulations. In the program's first year, the program will only cover vessels that primarily port in the state of Texas, with vessels from the other Gulf States being included in the second year.

## II. Method of Collection

Data will be collected using personal interviews and a formal survey instrument. Compared to phone interviews and mail surveys, personal interviews have been shown to generally produce higher response rates and higher quality data. Interviews will be conducted once each year in regards to the previous year's activities. Vessel owners will be asked questions pertaining to the variable costs of their fishing operations, such as price and amount of fuel used, price and amount of ice used, groceries, processing/selling fees, and labor costs. Vessel owners will also be asked questions regarding their vessel's annual or fixed costs, such as expenditures for vessel repair and maintenance, gear repair and maintenance, fishing licenses and permits, insurance, dock fees, repayment on boat and business loans, office expenses and so forth. Vessel owners will also be asked questions pertaining to the capital investment in their vessels, such as purchase price, cost of subsequent investments in the vessel and its fishing technology, and current market or replacement value. Finally, vessel owners will be asked questions regarding their socio-demographic status, such as household size, income, dependence on fishing, alternative employment opportunities, level of fishing experience, age, education level, ethnicity/race, marital status, and so forth. In instances where vessels are not operated by the owner, socio-demographic data will be solicited from both the owner and captain. Though unknown at this time, it is assumed that nearly 50 percent of these vessels are operated by hired captains.

## III. Data

*OMB Number:* None.
*Form Number:* None.
*Type of Review:* Regular submission.
*Affected Public:* Business or other for-profit organizations (vessel owners and captains).
*Estimated Number of Respondents:* 185.
*Estimated Time Per Response:* 20 minutes for variable cost and price questions; 30 minutes for annual/fixed cost and capital investment questions; and 10 minutes for socio-demographic questions.
Estimated Total Annual Burden Hours: 135.
Estimated Total Annual Cost to Public: $0.

## IV. Request for Comments

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 6, 2002.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 02–31448 Filed 12–12–02; 8:45 am]

BILLING CODE 3510–22–S

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 120902D]**

### Proposed Information Collection; Comment Request; Pacific Billfish Angler Survey

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA).

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before February 11, 2003.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to David Holts, Southwest Fishery Science Center, 8604 La Jolla Shores Drive, P.O. Box 271, La Jolla, CA 92038–0271 (phone 858–546–7186).

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

The National Oceanic and Atmospheric Administrations's Southwest Fishery Science Center operates a billfish resource and

assessment program. As part of this program, billfish anglers in the Pacific and Indian Oceans are asked to respond to a voluntary annual post card survey to list the number of days spent fishing for billfish, where they fished, and what they caught. This information is used to help determine changes in areas of local abundance of Pacific billfish and is useful in the management of billfish resources.

### II. Method of Collection

A paper form the size of a postcard is used.

### III. Data

*OMB Number:* 0648–0020.

*Form Number:* NOAA Form 88–10.

*Type of Review:* Regular submission.

*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 750.

*Estimated Time Per Response:* 5 minutes.

*Estimated Total Annual Burden Hours:* 63.

*Estimated Total Annual Cost to Public:* $0.

### IV. Request for Comments

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 6, 2002.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 02–31449 Filed 12–12–02; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

**[I.D. 120902E]**

## Proposed Information Collection; Comment Request; Hurricane Forecast Economic Valuation Study

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA).

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before February 11, 2003.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed Dr. Rodney Weiher, U.S. Dept. of Commerce/NOAA/PSP, Room 6117, 14th and Constitution Ave NW, Washington DC, 20234. (or via Internet at *Rodney.F.Weiher@noaa.gov*).

**SUPPLEMENTARY INFORMATION:**

### I. Abstract

The purpose of this data collection is to provide information on the value of current and improved hurricane forecasts to specific segments of the U.S. population. The study will measure total economic values for current hurricane forecasts and improved hurricane forecasts. This effort is designed to provide information on the uses and values of hurricane forecasts in order to improve product design and delivery systems as well as information for managers on the value of undertaking programs to improve hurricane forecasting capabilities.

This effort will involve development of extensive knowledge about how hurricane forecasts are perceived, understanding the implications of alternative forecast improvement actions, designing original survey instruments, interviewing of a large number of respondents (1200–1500), and conducting formal statistical analysis of the data. A regionally-oriented survey will be conducted using stated-preferences methods. Cognitive interviews will be used in survey development to examine individuals' understanding of hurricane forecasts and the words and meanings they may use to discuss hurricanes. The interviews will be used to examine the relative importance of hurricane forecast attributes, to assess the presentation of information on hurricane forecasts, and developing approaches for eliciting economic values for improvements in hurricane forecasting.

### II. Method of Collection

Up to 96 one-on-one cognitive interviews will be conducted. In addition, one pretest of the full survey instrument will be tested for a response of up to 100 usable observations. The final survey instrument will be administered to a sample of up to 1500 people.

### III. Data

*OMB Number:* None.

*Form Number:* None.

*Type of Review:* Regular submission.

*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 1,696.

*Estimated Time Per Response:* 2 hours for an interview; 45 minutes for a pretest; and 45 minutes for a final survey.

*Estimated Total Annual Burden Hours:* 1,392.

*Estimated Total Annual Cost to Public:* $0.

### IV. Request for Comments

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection;

they also will become a matter of public record.

Dated: December 6, 2002.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 02–31450 Filed 12–12–02; 8:45 am]

BILLING CODE 3510–12–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 112602C]**

### Endangered Species; File No. 1377

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

**ACTION:** Issuance of permit.

**SUMMARY:** Notice is hereby given that Ms. Tracey Mueller, Mote Marine Laboratory, Sea Turtle Conservation and Research Program, Sarasota, FL has been issued a permit to take threatened and endangered green turtles (*Chelonia mydas*), endangered hawksbill turtles (*Eretmochelys imbricata*), endangered Kemp's ridley turtles (*Lepidochelys kempii*), and threatened loggerhead turtles (*Caretta caretta*) for purposes of scientific research.

**ADDRESSES:** The permit and related documents are available for review upon written request or by appointment in the following office(s):Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; andSoutheast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727)570–5301; fax (727)570–5320.

**FOR FURTHER INFORMATION CONTACT:** Dr. Tammy Adams or Ruth Johnson, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** On April 19, 2002, notice was published in the **Federal Register** (67 FR 19416) that a request for a scientific research permit to take green, loggerhead, Kemp's ridley, and hawksbill turtles had been submitted by the above-named individual. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The permit authorizes annual takes of 150 juvenile and subadult green turtles, 100 juvenile and sub-adult loggerhead, 150 juvenile and sub-adult Kemp's ridley, and 5 juvenile and sub-adult hawksbill turtles by capture, tagging, blood and tissue sampling for a five year population assessment of the juvenile sea turtles inhabiting Charlotte Harbor on the west coast of Florida. Up to 10 green, 10 Kemp's ridley, 10 loggerhead, and 5 hawksbill turtles will also be collected annually incidental to the Center for Shark Research gill netting for sharks in the areas of Pine Island Sound and the Gulf waters near Crystal River, FL. These turtles will be measured, flipper tagged and released. In the second through fifth years of the permit, up to 5 green and/or Kemp's ridley turtles will also have satellite tags attached.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of the endangered species which is the subject of this permit, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 4, 2002.

**Eugene T. Nitta,**

*Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 02–31446 Filed 12–12–02; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 111802C]**

### Marine Mammals; File No. 995–1608

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

**ACTION:** Issuance of permit amendment.

**SUMMARY:** Notice is hereby given that Mr. Thomas F. Norris, Science Applications International Corp., 3990 Old Town Avenue, Suite 105A, San Diego, California 92110 has been issued an amendment to scientific research Permit No. 995–1608.

**ADDRESSES:** The amendment and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376;

Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426;

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018; and

Protected Species Coordinator, Pacific Area Office, NMFS, 1601 Kapiolani Blvd., Rm, 1110, Honolulu, HI 96814–4700; phone (808)973–2935; fax (808)973–2941.FOR FURTHER INFORMATION CONTACT: Dr. Tammy Adams or Ruth Johnson, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** On December 21, 2000, notice was published in the **Federal Register** (65 FR 80420) that a request for a scientific research permit to take gray (*Eschrichtius robustus*), minke (*Balaenoptera acutorostrata*), Bryde's (*Balaenoptera edeni*), blue (*Balaenoptera musculus*), fin (*Balaenoptera physalus*), and humpback (*Megaptera novaengliae*) whales had been submitted by the above-named individual. Permit No. 995–1608 was issued on May 4, 2001 (66 FR 23884, May 10, 2001) for takes of gray, minke, and Bryde's whales by attachment of scientific instruments, photo-identification, behavioral observation, and incidental harasment. Authorization to take endangered blue, fin and humpback whales was deferred pending receipt of additional information and consultation required under Section 7 of the Endangered Species Act. The amendment to include takes of these endangered species has been granted under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The amended permit authorizes takes of up to 11 each of blue, fin, and humpback whales per year by attachment of scientific instruments, photo-identification, and behavioral observation and up to 20 whales of each species by harassment incidental to these activities.

Issuance of this amendment, as required by the ESA was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of the endangered species which is the subject of this

permit, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

December 4, 2002.

**Eugene T. Nitta,**

*Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 02–31445 Filed 12–12–02; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 120302B]**

### Marine Mammals; File No.782–1676–00

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

**ACTION:** Issuance of permit.

**SUMMARY:** Notice is hereby given that National Marine Mammal Laboratory, 7600 Sand Point Way N.E., BIN C15700, Seattle, WA, 98115 has been issued a permit to take Alaskan harbor seals and spotted seals for purposes of scientific research.

**ADDRESSES:** The permit and related documents are available for review upon written request or by appointment in the following office(s): Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376;Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907)586–7221; fax (907)586–7249;

**FOR FURTHER INFORMATION CONTACT:** Carrie Hubard or Ruth Johnson, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** On July 12, 2002, notice was published in the **Federal Register** (67 FR 46179) that a request for a scientific research permit to take Alaskan harbor seals (*Phoca vitulina*) and spotted seals (Phoca largha) had been submitted by the National Marine Mammal Laboratory. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and, the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

Permit No. 782–1676–00 authorizes aerial surveys and live captures of harbor seals and spotted seals in Alaskan waters. Annually, 1000 seals of each species may be captured, sampled, and released. Sampling includes measuring, weighing, flipper punch and tag, pulling vibrissae, and blood sampling. All seals will have a VHF tag applied either as a separate unit or, where possible, embedded in another type of tag. Subsets of the captured animals will also receive time-depth-recorders (TDR), satellite-linked TDRs, blubber/muscle biopsies, and/or still/video packages. The permit also authorizes the incidental harassment of an additional 3500 seals in association with capturing operations and scat collection. Over the course of the 5 year permit, 50 seals may be inadvertently captured a second time. Maximum accidental injury or mortality is three animals per species per year.

Dated: December 9, 2002.

**Eugene T. Nitta,**

*Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 02–31451 Filed 12–12–02; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Submission for OMB Review; Comment Request

**ACTION:** Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**DATES:** Consideration will be given to all comments received by January 13, 2003.

*Title, Form, and OMB Number:* Signature and Tally Record; DD Form 1907; OMB Number 0702–0027.

*Type of Request:* Reinstatement.

*Number of Respondents:* 130.

*Responses per Respondent:* 577.

*Annual Responses:* 75,000.

*Average Burden per Response:* 3 minutes.

*Annual Burden Hours:* 3,750.

*Needs and Uses:* Signature and Tally Record (STR) is an integral part of the Defense Transportation System and is used for commercial movements of all sensitive and classified material. The STR provides continuous responsibility for the custody of shipments in transit and requires each person responsible for the proper handling of the cargo to sign their name at the time they assume responsibility for the shipment, from point of origin, and at specified stages until delivery at destination. A copy of the STR, along with other transportation documentation, if forwarded by the carrier to the appropriate finance center for payment.

*Affected Public:* Business or Other For-Profit.

*Frequency:* On Occasion.

*Respondent's Obligation:* Required to Obtain or Retain Benefits.

*OMB Desk Officer:* Ms. Jackie Zeiher.

Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

*DOD Clearance Officer:* Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: December 4, 2002.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 02–31389 Filed 12–12–02; 8:45 am]

BILLING CODE 5001–08–M

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Defense Science Board

**AGENCY:** Department of Defense.

**ACTION:** Notice of Advisory Committee meeting.

**SUMMARY:** The Defense Science Board Task Force on Seabasing will meet in closed session on December 11–12, 2002; January 27–28, 2003; February 25–26, 2003; and March 25–26, 2003, at Strategic Analysis Inc., 3601 Wilson Boulevard, Arlington, VA. The Task Force will assess how seabasing of expeditionary forces can best serve the nation's defense needs through at least the first half of the 21st century.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Defense Science Board Task Force will examine the broadest range of alternatives for seabasing of expeditionary forces and be guided by: The expected naval environment for the next 20–50 years; the role of naval forces in enabling access for joint forces through the world's littorals; assets and technologies needed to establish a robust and capable

Enhanced Networked Seabase; the timing of the acquisition of the technologies, platforms and systems which replace the legacy systems; and the function of new hardware and opportunities to reallocate functionality to improve effectiveness, or efficiency, or economy.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. II), it has been determined that these Defense Science Board Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly, these meetings will be closed to the public.

Due to critical mission requirements, there is insufficient time to provide timely notice required by Section 10(a)(2) of the Federal Advisory Committee Act and Subsection 101–6.1015(b) of the GSA Final Rule on Federal Advisory Committee Management, 41 CFR Part 101–6, which further requires publication at least 15 calendar days prior to the first meeting of the Task Force on Seabasing scheduled for December 11–12, 2002.

Dated: December 4, 2002.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 02–31390 Filed 12–12–02; 8:45 am]

BILLING CODE 5001–08–M

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Defense Science Board

**AGENCY:** Department of Defense.

**ACTION:** Notice of Advisory Committee meeting data change.

**SUMMARY:** On Friday, November 29, 2002 (67 FR 71144), the Department of Defense announced closed meetings of the Defense Science Board Task Force on Joint Experimentation. The meeting scheduled for December 18, 2002, has been rescheduled for January 9–10, 2003; it will be held at Strategic Analysis Inc., 3601 Wilson Boulevard, Suite 600, Arlington, VA.

Dated: December 4, 2002.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 02–31391 Filed 12–12–02; 8:45 am]

BILLING CODE 5001–08–M

## DEPARTMENT OF DEFENSE

### Department of Army

### Availability for Non-Exclusive, Exclusive, or partially Exclusive Licensing of U.S. Patent Application Concerning Teledentistry Consult Management System and Method

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice.

**SUMMARY:** In accordance with 37 CFR 404.6 and 404.7, announcement is made of the availability for licensing of U.S. Patent Application No. 10/159,984 entitled ''Teledentistry Consult Management System and Method,'' filed June 3, 2002. Foreign rights are also available (PCT/US02/17197). The United States Government, as represented by the Secretary of the Army, has rights in this invention.

**ADDRESSES:** Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

**FOR FURTHER INFORMATION CONTACT:** For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research & Technology Assessment, (301) 6196664, both at telefax (301) 619–5034.

**SUPPLEMENTARY INFORMATION:** The invention relates generally to the field of telemedicine and, more particularly, to systems, methods and articles of manufacture for facilitating consultation/communication between referring and consulting providers in the field of dentistry.

**Luz D. Ortiz,**

*Army Federal Register Liaison Officer.*

[FR Doc. 02–31455 Filed 12–12–02; 8:45 am]

BILLING CODE 3710–08–M

## DEPARTMENT OF DEFENSE

### Department of the Army

### Performance Review Boards Membership

**AGENCY:** Department of the Army, DoD

**ACTION:** Notice.

**SUMMARY:** Notice is given of the names of members of a Performance Review Board for the Department of the Army.

**EFFECTIVE DATE:** December 5, 2002.

**FOR FURTHER INFORMATION CONTACT:** Marilyn Ervin, U.S. Army Senior Executive Service Office, Assistant Secretary of the Army, Manpower & Reserve Affairs, 111 Army Pentagon, Washington, DC 20310–0111.

**SUPPLEMENTARY INFORMATION:** Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations, one or more Senior Executive Service performance review boards. The boards shall review and evaluate the initial appraisal of senior executives' performance by supervisors and make recommendations to the appointing authority or rating official relative to the performance of these executives.

(a) The members of the Performance Review Board for the U.S. Army Chief of Staff are:

1. MG Lawrence R. Adair, Assistant G–1.
2. MG Dorian Anderson, Commander, Total Army Personnel Command.
3. BG Harry Axson, Director, Military Personnel Policy.
4. Mr. Brian Barr, Technical Director.
5. Ms. Jean M. Bennett, Director, Resources and Infrastructure.
6. Mr. Vernon Bettencourt, Director, Analysis and Chief, Information Office.
7. Mr. Joseph R. Billman, Director of Program Development.
8. MG Robert W. Chesnut, Assistant Deputy Chief of Staff, G–3 (Mobilization).
9. MG Peter Chiarelli, Director, Operations, Readiness, and Mobilization.
10. MG Claude V. Christianson, Assistant Deputy Chief of Staff, G–4.
11. Dr. Craig E. College, Assistant Deputy Chief of Staff for Programs.
12. Mr. William F. Crain, Technical Director.
13. BG Bruce Davis, Deputy Director, Operations, Readiness, and Mobilization.
14. Mr. Thomas Dillon, Director, Counterintelligence, Foreign Disclosure, and Security.
15. MG B. Sue Dueitt, Director, Personnel Transformation.
16. Mr. Terrance M. Ford, Assistant Deputy Chief of Staff, G–2.
17. MG James J. Grazioplene, Director, FD.
18. LTG Benjamin S. Griffin, G–8.
19. Mr. James Gunlicks, Deputy Director, Training.
20. BG Dennis Hardy, Director, Force Management.
21. MG David Huntoon, Director, Strategy, Plans and Policy.
22. BG Kenneth W. Hunzeker, Deputy Director, PAE.
23. BG Jerome Johnson, Director of Plans, Operations and Readiness.
24. LTG John M. Le Moyne, Deputy Chief of Staff, G–1.
25. Mr. Mark R. Lewis, Director of Plans, Resources & Operations.

26. Ms. Maureen T. Lischke, PEO for Information Systems & Chief Information Officer.
27. MG James Lovelace, Assistant Deputy Chief of Staff, G3.
28. Mr. Wendell Lunceford, Director, Army Model and Simulation Office.
29. LTG Charles S. Mahan, Jr., Deputy Chief of Staff, G–4.
30. BG Jesus A. Mangual, Director of Force Projection and Distribution.
31. Mr. John W. Matthews, Director, Army Records Management and Declassification Activity.
32. MG David F. Melcher, Director, PAE.
33. Mr. William P. Neal, Associate Director of Force Projection and Distribution.
34. LTG Robert W. Noonan, Jr., Deputy Chief of Staff for Intelligence.
35. Mr. Mark J. O'Konski, Director of Logistics Integration Agency.
36. Mr. Eric A. Orsini, Special Assistant to the DCS, G–4.
37. BG(P) Elbertt N. Perkins, Director, DOI.
38. BG Steve Schook, Director, Human Resource and Policy.
39. Ms. Donna L. Shands, Associate Director for Sustainment.
40. Dr. Zita Simutis, Director, Manpower & Personnel Research Laboratory & Associate Director, ARI.
41. Mr. David L. Snyder, Deputy Asst Sec of the Army (Civ Personnel Policy).
42. Mr. John C. Speedy, III, Deputy Director, Strategy, Plans and Policy.
43. Mr. Lewis S. Steenrod, Director of Modernization.
44. Mr. James J. Streilein, Director, Army Evaluation Center.
45. Ms. Elizabeth B. Throckmorton, Assistant Deputy Asst Sec of the Army (Civilian Personnel Policy).
46. MG James Thurman, Director, Training.
47. Mr. Donald C. Tison, Deputy Director, Program Analysis and Evaluation.
48. Mr. Edgar B. Vandiver, III, Director, Center for Army Analysis.
49. BG Lloyd T. Waterman, Director of Sustainment.
50. Mr. Daniel F. Wiener, II, Chief Information Officer.

(b) The members of the Performance Review Board for the U.S. Army, Office of the Secretary of the Army are:

1. Dr. Benson D. Adams, Special Assistant to the ASA(IE) for Policy and Economic Analysis.
2. Dr. A. Michael Andrews, II Deputy Asst Secretary for Research & Technology/Chief Scientist.
3. Mr. William A. Armburuster, DASA for Privatization and Partnership.
4. Ms. Diane J. Armstrong, Director, Resource Integration.
5. MG William L. Bond, Deputy for Systems Management.
6. Mr. David Borland, Deputy CIO/G–6.
7. MG Stephen W. Boutelle, Director, IONS.
8. Mr. Fredrick R. Budd, Director, Single Agency Manager for Pentagon Information Technology Services.
9. Mr. Delbert F. Bunch, Deputy Program Manager for Chemical Demilitarization Operations.
10. Ms. Kathryn A. Condon, Interagency Coordinator of Military Support to Civil Authorities.
11. Mr. James C. Cooke, Special Assistant for Systems.
12. LTG Peter M. Cuviello, CIO/G–6.
13. Mr. Donald L. Damstetter, Jr., DASA (Plans, Programs & Resources).
14. Mr. Daniel B. Denning, PDASA (M&RA) & DASA (TR&M).
15. Mr. Thomas Druzgal, Deputy Auditor General, Acquisition and Material Management.
16. Mr. George S. Dunlop, Deputy ASA (Legislation).
17. Mr. Raymond J. Fatz, Deputy Assistant Secretary of the Army for Environment, Safety, and Occupational Health.
18. Mr. Patrick J. Fitzgerald, Deputy Auditor General, Policy and Operations Management.
19. MG Warren L. Freeman, Director, DC National Guard.
20. Mr. Ernest J. Gregory, Principal DASA (Financial Mgt & Comptroller).
21. Ms. Judity A. Guenther, Director of Investments.
22. MG Lynn Hartsell, Director, Operations & Support.
23. Mr. Jack E. Hobbs, Project Dir, Army Workload & Performance Systems.
24. Mr. Walter W. Hollis, Deputy Under Secretary of the Army (Operations Research).
25. Mr. Joel B. Hudson, Administrative Assistant to the Secretary of the Army.
26. Mr. Craig D. Hunter, DASA (Defense Exports and Cooperation).
27. Dr. Daphne K. Kamely. Special Assistant to the Deputy Assistant Secretary of the Army for Environment, Safety, and Occupational Health.
28. Mr. Stephen E. Keefer, Deputy Auditor General, Installations Management.
29. Mr. John A. Kelley, Special Assistant to ASA(IE) for Asset Management.
30. Mr. Thomas E. Kelley, III, Special Assistant to the Secretary of the Army for Science & Technology.
31. Mr. John R. Kohler, Director of Business & Investments.
32. Mr. Charles A. Krohn, Principal Deputy to the Chief of Public Affairs (Media Relations),
33. Ms. Joann H. Langston, Competition Advocate of the Army.
34. Mr. John W. McDonald, Deputy Under Secretary of the Army.
35. Mr. John P. McLaurin, III, DASA (Military Personnel Mgt. & EO Policy).
36. Mr. John L. Miller, Director for Business Resources.
37. Ms. Joyce E. Morrow, Deputy Auditor General, Forces and Financial Management.
38. Mr. Levator Norsworthy, Jr., Deputy General Counsel (Acquisition).
39. Mr. Eric A Orsini, Deputy ASA (Logistics).
40. Ms. Tracey L. Pinson, Director of Small & Disadvantage Business Utilization.
41. Mr. Geoffrey G. Prosch, Principal DASA (Installation & Environment).
42. Mr. Francis E. Reardon, Auditor General.
43. Mr. Matt Reres, Deputy General Counsel (Ethics and Fiscal).
44. BG Velma L. Richardson, Deputy CG NETCOM (FWD).
45. Ms. Sandra R. Riley, Deputy Administrative Assistant/Executive Director, Headquarters Services—Washington.
46. BG Lewis S. Roach, Deputy for Services & Operations & US Army Services & Operations Agency.
47. Mr. Nels Running, DUSA (IA/Commemoration of 50th Ann Korean War).
48. Mr. Luther L. Santiful, Director of Equal Employment Opportunity/Civil Works.
49. Mr. Richard G. Sayre, Special Assistant for Systems.
50. Mr. Karl F. Schneider, DASA (Army Review Boards Agency).
51. MG John L. Scott, Chief Integration Officer.
52. Mr. C Russell H. Shearer, Special Assistant to ASA (IE).
53. MG Jerry L. Sinn, Deputy ASA (Budget).
54. Mr. Douglas Sizelove, Assistant Deputy Under Secretary of the Army (Operations Research).
55. Mr. James J. Smyth, Deputy ASA (Project Planning and Review).
56. Mr. David L. Snyder, Deputy ASA (Civilian Personnel Policy).
57. Dr. Barbara J. Sotirin, Acting Director, Research & Laboratory Management.
58. Mr. Earl H. Stockdale, Jr., Deputy General Counsel (Civil Works and Environment).
59. Dr. Larry B Stotts, Director for Technology.
60. Mr. Thomas W. Taylor, Senior Deputy General Counsel.

61. Ms. Elizabeth B. Throckmorton, Assistant DASA (Civilian Personnel Policy).
62. Ms. Claudia L. Tornblom, Deputy ASA (Management and Budget).
63. Mr. Michael L. Vajda, Director, Civilian Personnel Operations Center Management Agency.
64. Mr. Patrick J. Wakefield, DASA (Chemical Demilitarization) (Advisory).
65. Mr. C. Richard Whiston, Special Assistant to Secretary of the Army for Business Transformation.
66. Mr. Joseph W. Whitaker, Jr., DASA (Installations & Housing) (Advisory).
67. Miss Sarah F. White, DASA (Force Mgt, Manpower & Reserve Affairs).
68. Mr. Avon N. Williams, Principal Deputy General Counsel.
69. Mr. Robert J. Winchester, Assistant for Intelligence Liaison.
70. Mr. Robert W. Young, Deputy for Cost Analysis.

(c) The members of the Performance Review Board for the U.S. Army, Office of the Surgeon General are:

1. MG Kenneth L. Farmer, Deputy Surgeon General.
2. Dr. Charles N. Davidson, Director, US Army Nuclear & Chemical Agency.
3. Dr. James J. Streilein, Director, Army Evaluation Center.

(d) The members of the Performance Review Board for the U.S. Mission to the North Atlantic Treaty Organization are:

1. Mr. Alfred G. Volkman, Director, International Cooperation, OUSD, AT&L.
2. Mr. Barry Pavel, Director for Strategy, OSD.
3. Mr. Bernd McConnell, Director of the Office of Foreign Disaster Assistance, USAID.
4. Ms. Pamela Frazier, Foreign Policy Advisor to Chief of Staff, AF/ Department of State.

**Luz D. Ortiz,**

*Army Federal Register Liaison Officer.*

[FR Doc. 02–31454 Filed 12–12–02; 8:45 am]

**BILLING CODE 3710–08–M**

## DEPARTMENT OF DEFENSE

### Defense Logistics Agency

### Notice of Proposed Solicitation for Cooperative Agreement Applications

**AGENCY:** Defense Logistics Agency, DOD.

**ACTION:** Proposed solicitation for cost sharing cooperative agreement applications.

**SUMMARY:** On March 17, 1999, the Defense Logistics Agency (DLA) issued a solicitation for cooperative agreement applications (SCAA) to assist state and local governments and other nonprofit eligible entities in establishing or maintaining procurement technical assistance centers (PTACs) pursuant to chapter 142, title 10, United States Code. These centers help business firms market their goods and service to the Department of Defense (DoD), other federal agencies, and state and/or local government agencies. Cooperative agreement awards made as a result of applications submitted in response to this solicitation contained provisions for the award of additional option awards through 2002. DLA now intends to issue another solicitation as a follow-on action to the March 17, 1999, SCAA in order to maintain continuity of the Procurement Technical Assistance Program. This solicitation, when issued, will govern the submission of applications for calendar years 2003 through 2007, inclusive. This proposed SCAA is available for review on the Internet Web site: *http://www.dla.mil/db/scaa2003.pdf.* Printed copies are not available for distribution.

You are invited to submit written comments concerning this proposed SCAA to: Headquarters, Defense Logistics Agency, Office of Small and Disadvantaged Business Utilization, 8727 John J. Kingman Road, Suite 1127, Ft. Belvoir, VA 22060–6221. Attn: Grants Officer.

All comments must be received by January 31, 2003, in order for them to be considered. DLA intends to post the proposed SCAA, when finalized, on the Internet in early March 2003. A future notice to be published in the **Federal Register** will announce this posting and the website address to be utilized in accessing the final SCAA and to submit applications.

**FOR FURTHER INFORMATION CONTACT:** Ms. Diana Maykowskyj at (703) 767–1656.

**Anthony J. Kuders,**

*Program Manager, DoD Procurement Technical Assistance Program.*

[FR Doc. 02–31412 Filed 12–12–02; 8:45 am]

**BILLING CODE 3620–01–M**

## DEPARTMENT OF DEFENSE

### Department of the Army; Corps of Engineers

### Intent To Prepare a Joint Environmental Impact Statement and Environmental Impact Report for the Sacramento and San Joaquin River Basins Comprehensive Study, Hamilton City Flood Damage Reduction and Ecosystem Restoration, Glenn County, CA

**AGENCY:** Department of the Army, U.S. Army Corps of Engineers, DoD.

**ACTION:** Notice of intent.

**SUMMARY:** A combined Feasibility Report and joint Environmental Impact Statement/Environmental Impact Report (EIS/EIR) will be prepared to satisfy the requirements of the National Environmental Policy Act and the California Environmental Quality Act. The U.S. Army Corps of Engineers (Corps), Sacramental District, will serve as the Federal lead agency for the EIS with The Reclamation Board of the State of California (the Board), the non-federal sponsor, serving as the State lead agency for the EIR. The combined Feasibility Report and joint EIS/EIR will evaluate the environmental effects of a potential flood damage reduction and ecosystem restoration project at Hamilton City. The Hamilton City Flood Damage Reduction and Ecosystem Restoration is the first site-specific evaluation to be initiated as a result of the Sacramento and San Joaquin River Basins Comprehensive Study conducted by the Corps and the Board. Concurrently with the release of this notice of intent (NOI), the Board is issuing a notice of preparation (NOP) to initiate the CEQA process.

Scoping and public involvement activities were conducted under the original NOI issued for the Comprehensive Study. A series of scoping and outreach meetings were held in February through May 1998, November through December 1998, February 1999, June 1999, October through November 2001, and August through September 2002. Development of the EIS/EIR for the Comprehensive Study was at a programmatic level with the preliminary site-specific evaluation for Hamilton City Flood Damage Reduction and Ecosystem Restoration packaged as an attachment to the main programmatic document. The Comprehensive Study has since discontinued the environmental documentation effort and therefore this NOI is being submitted to establish that the Feasibility Report and EIS/EIR for Hamilton City Flood Damage Reduction

and Ecosystem Restoration will continue as a separate and complete document.

**FOR FURTHER INFORMATION CONTACT:** Questions about the combined Feasibility Report and joint EIS/EIR can be answered by Erin Taylor at (916) 557–6862 or by mail at U.S. Army Corps of Engineers, Planning Division, ATTN: Erin Taylor, 1325 J Street, Sacramento, CA 95814–2922, or e-mail: *Erin.A.Taylor@usace.army.mil*.

**SUPPLEMENTARY INFORMATION:**

**1. Proposed Action**

The combined Feasibility Report and joint EIS/EIR will evaluate ways to reduce the risk of flooding and restore the Sacramento River's connection with its flood plain, natural flood plain processes, and riparian and associated flood plain habitat.

**2. Alternatives**

Alternatives include the no-action, reinforcing the existing levee, several setback levee alignments at some distance from the river, and flood-proofing or relocating structures at risk of flooding, with different habitat configurations and methods of establishment. Maximum area of potential effect is estimated to be 2,600 acres currently held by a combination of private, State, and Federal agencies. Fee title and/or conservation and flood easements would likely be required to implement any project. The Corps will conduct site-specific hydrologic, hydraulic and geotechnical analyses, to determine the most suitable potential levee alignments and the feasibility of repairing the existing levee in place. The Feasibility Study will focus on the economic feasibility and will run a risk analysis of the alternatives. Ecosystem restoration would consist of either planting native habitat or allowing native habitats to establish naturally in the area between any new levee and the river. Selection of a preferred alternative will depend on the result of these studies and the desires of the local community.

**3. Scoping Process**

a. This notice re-initiates the scoping process whereby the Corps and the Board will identify the scope of issues to be addressed in the EIS/EIR and identify the significant environmental issues related to the flood damage reduction and ecosystem restoration at Hamilton City. The Corps and the Board have initiated a process of involving Federal, State, and local agencies, and concerned individuals under the Comprehensive Study.

b. Significant issues to be analyzed in depth include; agricultural resources, air quality, biological resources, cultural resources, geology and soils, hazardous, toxic, and radioactive materials, hydrology and water quality, and land use.

**4. Public Meeting Scoping**

Community meeting will be held during scoping, after the release of the draft EIS/EIR, and after release of the final EIS/EIR. A public scoping meeting will be held the week of January 6, 2003. The purpose of the meeting is to explain the NOI/NOP, and to solicit suggestions, recommendations, and comments to help refine the issues, measures, and alternatives to be addressed in the EIS/EIR. The public is asked to submit any issues (points of concern, dispute or disagreement) regarding potential effects of the proposed action or alternatives by mail to Corps (see **FOR FURTHER INFORMATION CONTACT** above for address).

**5. Availability**

The draft EIS/EIR is scheduled to be available for public review and comment in August 2003. The comment period on the draft EIS/EIR will be 45 days from the date the notice of availability is published in the **Federal Register** by the Environmental Protection Agency. All interested parties should respond to this notice and provide a current address if they wish to be notified of the draft EIS/EIR circulation and future scoping meeting dates.

Dated: November 26, 2002.

**Michael J. Conrad, Jr.,**

*Col, EN, Commanding.*

[FR Doc. 02–31456 Filed 12–12–02; 8:45 am]

**BILLING CODE 3710–EZ–M**

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## DEPARTMENT OF DEFENSE

### Department of the Army; Corps of Engineers

### Intent To Prepare a Draft Programmatic Environmental Impact Statement for the Upper Mississippi and Illinois Rivers Comprehensive Plan

**AGENCY:** Department of the Army, U.S. Army Corps of Engineers, DoD.

**ACTION:** Notice of intent.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) is preparing a Draft Programmatic Environmental Impact Statement (EIS) for the Upper Mississippi River Comprehensive Plan to identify problems, opportunities, and potential measures to reduce flood damages in the floodplains of the Upper Mississippi and Illinois Rivers. A Programmatic EIS will be prepared to address potential effects of any recommendations for further action resulting from this study effort, and to provide a broad review of general issues for incorporation by reference in subsequent National Environmental Policy Act (NEPA) documents, if future actions are undertaken as a result of recommendations in the Comprehensive Plan.

**FOR FURTHER INFORMATION CONTACT:** Questions about the proposed action and Draft Programmatic EIS can be answered by: David R. Gates, U.S. Army Corps of Engineers, St. Louis District (CEMVS–PM–F), 1222 Spruce Street, St. Louis, MO 63103, telephone (314) 331–8478, or by Charlene Carmack, U.S. Army Corps of Engineeers, Rock Island District (CEMVR–PM–A), Clock Tower Building, P.O. Box 2004, Rock Island, IL 61204–2004, telephone (309) 794–5570.

**SUPPLEMENTARY INFORMATION:** 1. Section 459 of the Water Resources Development Act of 1999 directed the Secretary of the Army to develop a plan to address water resource and related land resource problems in the study area in the interest of systemic flood damage reduction. Section 459 also directed the Secretary to submit a report to Congress detailing the results of this planning effort and addressing recommendations for authorization of further Federal actions or follow-on studies concerning systemic flood control.

The Comprehensive Plan will be developed as a collaborative effort among three Corps Districts (St. Paul, Rock Island, and St. Louis); other Federal agencies (including the Federal Emergency Management Agency [FEMA], the U.S. Fish and Wildlife Service [USFWS], the Natural Resources Conservation Service (NRCS), the U.S. Environmental Protection Agency [USEPA], the U.S. Geological Survey [USGS], and the U.S. Department of Agriculture [USDA]); the States of Illinois, Iowa, Minnesota, Missouri, and Wisconsin; and appropriate non-Federal organizations. The plan will identify future management actions and make recommendations for systemic improvements that provide flood damage reduction and associated environmental benefits.

*The Comprehensive Plan will include recommendations addressing:* (1) Construction of a systemic multipurpose water resources and flood management/damage reduction project; (2) floodplain management alternatives; and (3) follow-on design and construction

requirements. This plan will include overall systemic recommendations, not optimized recommendations for specific sites. Follow-on implementation studies, including NEPA documentation, would be necessary at specific sites where additional analysis is required to develop the National Economic Development (NED) plan. Site-specific NEPA documentation would be tiered from the Programmatic EIS currently in preparation and would be developed in association with follow-on implementation studies, preconstruction engineering and design (PED).

2. Alternatives, including both structural and nonstructural measures, will be identified and investigated for their potential to accomplish systemic flood damage reduction. It is anticipated that between three to five systemic flood damage reduction alternatives will be formated and evaluated for their potential to contribute to National Ecosystem Development.

3. *Scoping:* This notice solicits input and assistance from the interested public and invites participation by affected Federal and State agencies having special jurisdiction and/or expertise.

An initial set of public meetings (open house format) was held September 9–12 in St. Louis, MO; Quincy, IL; Peoria, IL; and Dubuque, IA. These meetings were announced in mailed newsletters (also posted on the study Web site *http://www.mvr.usace.army.mil/UMRCP/*) as scoping meetings intended to help fulfill the scoping requirements of the NEPA, as well as overall study scoping requirements.

4. The scoping process is expected to continue through December 2002 to facilitate early input to the NEPA process and identify significant issues to be evaluated in depth in the Programmatic EIS.

5. Based on current study schedules, the Draft Programmatic EIS is anticipated to be available for public review late in the first quarter of Calendar Year 2004.

Dated: October 25, 2002.

**William J. Bayles,**

*Colonel, EN, Commanding.*

[FR Doc. 02–31452 Filed 12–12–02; 8:45 am]

BILLING CODE 3710–HV–M

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Leader, Regulatory Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before February 11, 2003.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 9, 2002.

**John D. Tressler,**

*Leader, Regulatory Management Group, Office of the Chief Information Officer.*

**Office of Elementary and Secondary Education**

*Type of Review:* Reinstatement.

*Title:* Annual Performance Reporting Form for Office of Indian Education (OIE) Local Grantees.

*Frequency:* Annually.

*Affected Public:* State, local or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

*Responses:* 1,272.

*Burden Hours:* 17,808.

*Abstract:* Application for funding for Indian Education discretionary programs of Demonstration Grants for Indian Children and Professional Development. The information is used to determine applicant eligibility and amount of awards for projects selected for funding.

Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivian_reese@ed.gov.* Requests may also be faxed to 202–708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address *Kathy.Axt@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 02–31405 Filed 12–12–02; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Leader, Regulatory Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before February 11, 2003.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision,

extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 10, 2002.

**John D. Tressler,**

*Leader, Regulatory Management Group, Office of the Chief Information Officer.*

### Office of Elementary and Secondary Education

*Type of Review:* Revision.

*Title:* Consolidated State Performance Report.

*Frequency:* Annually.

*Affected Public:* State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:* Responses: 52. *Burden Hours:* 134,768.

*Abstract:* This information collection package contains the Consolidated State Performance Report (CSPR). The Elementary and Secondary Education Act (ESEA), in general, and its provision for submission of consolidated plans, in particular (see section 14301 of the ESEA), emphasize the importance of cross-program coordination and intergration of federal programs into educational activities carried out with State and local funds. States would use the instrument for reporting on activities that occur during the 2001–2002 school year. The proposed CSPR requests some of the same information as in 2000–2001, with a few modifications to eliminate certain sections. The Department is working actively to revise the content of these documents and develop an integrated information collection system that responds to No Child Left Behind (NCLB), uses new technologies, and better reflects how federal programs help to promote State and local reform efforts.

Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivian_reese@ed.gov.* Requests may also be faxed to 202–708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address *Kathy.Axt@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 02–31429 Filed 12–12–02; 8:45 am]

BILLING CODE 4000–01–P

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## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.

**SUMMARY:** The Leader, Regulatory Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before January 13, 2003.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Lauren Wittenberg, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address *Lauren.Whittenberg@omb.eop.gov.*

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: December 9, 2002.

**John Tressler,**

*Leader, Regulatory Management Group, Office of the Chief Information Officer.*

### Office of Postsecondary Education

*Type of Review:* Reinstatment.

*Title:* TRIO Dissemination Partnership Program (84.344).

*Frequency:* Once every three years.

*Affected Public:* Businesses or other for-profit; Not-for-profit institutions; State, local or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

*Responses:* 50.

*Burden Hours:* 500.

*Abstract:* The application form is needed to conduct a national competition for the TRIO Dissemination Partnership Program for program year 2003–04. The program provides Federal financial assistance in the form of grants to institutions of higher education and organizations funded before October 7, 1998 for one of the Federal TRIO programs. The program provides discretionary grants for the purpose of replicating successful practices of TRIO projects to other institutions and organizations that are serving TRIO-eligible students, but that do not have TRIO grants.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1890–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or directed to her e-mail address *Vivian.Reese@ed.gov.* Requests may also be faxed to (202) 708–9346. Please specify the complete title of the information collection when making your request. Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at his e-mail address *Joe.Schubart@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 02–31406 Filed 12–12–02; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF ENERGY

### DOE Request for a 45-Day Extension To Respond To Recommendation 2002–2 of the Defense Nuclear Facilities Safety Board, Weapons Laboratory Support of the Defense Nuclear Complex

**AGENCY:** Department of Energy, DOE.

**ACTION:** Notice.

**SUMMARY:** The Defense Nuclear Facilities Safety Board Recommendation 2002–2, concerning weapons Laboratory support of the DOE nuclear complex at Department of Energy Defense Nuclear Facilities was published in the **Federal Register** on October 10, 2002 (67 FR 63081). In accordance with section 315(b) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2286d(b), the Secretary transmitted the following response to the Defense Nuclear Facilities Safety Board on November 21, 2002.

**DATES:** Comments, data, views, or arguments concerning the Secretary's response are due on or before January 6, 2003.

**ADDRESSES:** Send comments, data, views, or arguments concerning the Secretary's response to: Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., Suite 700, Washington, DC 20004.

**FOR FURTHER INFORMATION CONTACT:** Ms. Karen L. Boardman, Director, Office of Complex Readiness, Albuquerque Operations Office, Pennsylvania & H Street, Kirtland Air Force Base, Albuquerque, NM 87116.

Issued in Washington, DC, on December 6, 2002.

**Mark B. Whitaker, Jr.,**

*Departmental Representative to the Defense Nuclear Facilities Safety Board.*

BILLING CODE 6450–01–P

**The Secretary of Energy**
**Washington, DC 20585**

November 21, 2002

The Honorable John T. Conway
Chairman
Defense Nuclear Facilities Safety Board
625 Indiana Avenue, NW, Suite 700
Washington, D.C. 20004

Dear Mr. Chairman:

On October 3, 2002, the Defense Nuclear Facilities Safety Board issued recommendation 2002-2, *Weapons Laboratory Support of the Defense Nuclear Complex*. The Department agrees that providing the defense nuclear complex with appropriate support is an essential priority. The Department will require additional time to evaluate your recommended changes.

In accordance with 42 U.S.C. § 2286d(b)(1), the Department requests an additional 45 days to respond to this recommendation. If the extension is granted, I will provide my response no later than January 8, 2003.

Sincerely,

Spencer Abraham

Spencer Abraham

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[FR Doc. 02–31432 Filed 12–12–02; 8:45 am]
BILLING CODE 6450–01–C

## DEPARTMENT OF ENERGY

### DOE Response to Recommendation 2002–1 of the Defense Nuclear Facilities Safety Board, Quality Assurance for Safety-Related Software

**AGENCY:** Department of Energy.

**ACTION:** Notice.

**SUMMARY:** The Defense Nuclear Facilities Safety Board Recommendation 2002–1, concerning quality assurance for safety-related software at Department of Energy Defense Nuclear Facilities was published in the **Federal Register** on October 9, 2002 (67 FR 62960). In accordance with section 315(b) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2286d(b), the Secretary transmitted the following response to the Defense Nuclear Facilities Safety Board on November 21, 2002.

**DATES:** Comments, data, views, or arguments concerning the Secretary's response are due on or before January 6, 2003.

**ADDRESSES:** Send comments, data, views, or arguments concerning the Secretary's response to: Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., Suite 700, Washington, DC 20004.

**FOR FURTHER INFORMATION CONTACT:** Mr. Raymond J. Hardwick, Jr., Associate Deputy Assistant Secretary for Operations, Office of Corporate Safety Assurance, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

Issued in Washington, DC, on December 6, 2002.

**Mark B. Whitaker, Jr.,**

*Departmental Representative to the Defense Nuclear Facilities Safety Board.*

BILLING CODE 6450–01–P

**The Secretary of Energy**
**Washington, DC 20585**

November 21, 2002

The Honorable John T. Conway
Chairman
Defense Nuclear Facilities Safety Board
625 Indiana Avenue, NW, Suite 700
Washington, D.C. 20004

Dear Mr. Chairman:

The Department acknowledges receipt of the Defense Nuclear Facilities Safety Board's (Board) recommendation 2002-1, *Quality Assurance for Safety-Related Software,* issued on September 23, 2002, and published in the *Federal Register* on October 9, 2002. The Department accepts recommendation 2002-1 and will develop an implementation plan that results in the following:

- Clear assignment of organizational roles, responsibility, and authority for safety-related software.
- Creation of infrastructure necessary to ensure an effective software quality assurance program, including personnel with the appropriate skill and expertise.
- Implementation of processes to identify safety analyses and design codes and ensure that they are subject to verification and validation appropriate for the application.
- Establishment of requirements and guidance for a rigorous software quality assurance process, which will include the use of industry standards where practicable.
- Creation of a process that will track continuous improvements and initiatives in software technology. This information will be used as a basis for maintaining safety-related software and will be shared across the complex.

The Department has initiated activities to improve the implementation of quality management systems at its defense nuclear facilities. Many of these activities resulted from the deficiencies documented in the Board's Technical Report DNFSB/TECH-25, *Quality Assurance for Safety-Related Software at Department*

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*of Energy Defense Nuclear Facilities*, and discussed at several of your public meetings on quality assurance. The Department considers its efforts to improve software quality assurance as a key element in the overall improvement of our quality management system, and the implementation plan will include and build on the actions that were previously undertaken as part of this initiative.

Ms. Beverly Cook, Assistant Secretary for Environment, Safety and Health, is the Department of Energy official responsible for safety-related quality assurance and for ensuring the successful completion of the implementation plan we will develop in response to your recommendation. Mr. Ray Hardwick, Office of Environment, Safety and Health, (301) 903-4244, is the responsible manager for the preparation of the Department's implementation plan.

Please feel free to contact either of them with any questions you may have as the Department moves forward with development of the implementation plan.

Sincerely,

Spencer Abraham

[FR Doc. 02–31431 Filed 12–12–02; 8:45 am]

BILLING CODE 6450–01–C

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–6635–7]**

## Environmental Impact Statments; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements filed December 2, 2002, through December 6, 2002.

Pursuant to 40 CFR 1506.9.

*EIS No. 020498, Draft EIS, SFW, WA,* Daybreak Mine Expansion and Habitat Enhancement Project, Habitat Conservation Plan, Issuance of a Multiple Species Permit for Incidental Take, Implementation, Clark County, WA , Comment Period Ends: February 21, 2003. Contact: Tim Romanski (360) 753–4371.

*EIS No. 020499, Final EIS, BLM, OR,* Coos County Natural Gas Transmission Pipeline, Construction, Operation and Maintenance, Proposed Natural Gas Pipeline from Roseburg to Coos Bay, Right-of-Way Grant, Coos Bay District, Coos County, OR , Wait Period Ends: January 13, 2003, Contact: Bob Gunther (541) 751–4295.

*EIS No. 020500, Draft EIS, AFS, CA,* Giant Sequoia National Monument Management Plan, Implementation, To Establish Management Direction for the Land and Resources, Sequoia National Forest, Fresno, Kern and Tulare Counties, CA , Comment Period Ends: March 13, 2003, Contact: Jim Whitfield (559) 784–1500.

*EIS No. 020501, Final EIS, FHW, KS,* U.S. 59 Highway Construction Improvements, Lawrence to Ottawa, Funding, NPDES Permit Issuance and Possible US Army COE Permit Issuance, Douglas and Franklin Counties, KS, Wait Period Ends: January 24, 2003, Contact: J. Michael Bowen (785) 267–7287.

*EIS No. 020502, Draft EIS, MMS, AK,* Cook Inlet Planning Area Oil and Gas Lease Sales 191 and 199, Outer Continental Shelf, Offshore Marine Environment, Cook Inlet, AK, Comment Period Ends: January 27, 2003, Contact: George Valiulis (703) 787–1662.

*EIS No. 020503, Draft EIS, STB, TX,* Bayport Loop New Rail Line, Construction and Operation, Finance Docket No. 34079, Houston, Harris County, TX , Comment Period Ends: January 27, 2003, Contact: Dana White (202) 565–1552. This document is available on the Internet at: *http://www.stb.dot.gov.*

*EIS No. 020504, Draft EIS, AFS, ID,* Gaylord North Timber Sale Project, Harvesting Timber, Council Ranger District, Payette National Forest, Adam County, ID, Comment Period Ends: January 27, 2003, Contact: Michael Hutchins (208) 253–0100.

*EIS No. 020505, FINAL EIS, NAS,* 00, Programmatic—Mars Exploration Rover-2003 (MER–2003) Project, Continuing the Long-Term Exploration of Mars, Implementation, Wait Period Ends: January 13, 2003, Contact: David Lavery (202) 358–4800.

*EIS No. 020506, Final EIS, NRC, VA,* Generic EIS—Surry Power Station, Unit 1 and 2, Supplement 6 to NUREG–1437, License Renewal of Nuclear Plants, COE Section 404 Permit and NPDES Permit, James River, VA, Wait Period Ends: January 13, 2003, Contact: Andrew Kugler (301) 415–2828.

*EIS No. 020507, Final EIS, NRC, VA,* Generic EIS—North Anna Power Station, Units 1 and 2, Supplement 7 to NUREG–1437, License Renewal, VA, Wait Period Ends: January 13, 2003, Contact: Andrew Kugler (301) 415–2828.

*EIS No. 020508, Final EIS, DOE, KY,* Kentucky Pioneer Integrated Gasification Combined Cycle Demonstration Project, Constructing and Operating a 540 megawatt-electric Plant, Clean Coal Technology Program, Clark County, KY, Wait Period Ends: January 13, 2003, Contact: Roy Spears (304) 285–5460.

### Amended Notices

*EIS No. 020421, Draft EIS, FHW, OR,* Newberg-Dundee Transportation Improvement Project (TEA 21 Prog. #37), Proposal to Relieve Congestion on Ore. 99W through the Cities of Newberg and Dundee, Bypass Element Location (Tier 1), Yamhill County, OR , Comment Period Ends: December 16, 2002, Contact: Jim Cox (503) 986–3013. Revision of FR notice published on October 18, 2002: CEQ Comment Period Ending December 2, 2002 has been extended to December 16, 2002.

Dated: December 10, 2002.

**Joseph C. Montgomery,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 02–31462 Filed 12–12–02; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–6635–8]**

## Environmental Impact Statements and Regulations; Availability of EPA Comments; Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended

Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 12, 2002 (67 FR 17992).

### Draft EISs

*ERP No. D–FHW–E40796–NC Rating EC2,* U.S. 64 Corridor Project, Transportation Improvements in the vicinity of the City of Asheboro and Access Improvements to the NC Zoological Park, Funding and U.S. Army COE section 404 Permit Issuance, Randolph County, NC.

*Summary:* EPA expressed environmental concerns regarding primary impacts as a result of project implementation. These include a large number of residential relocations, with many residences experiencing excessive noise increases and the loss of deciduous forest and surface water habitat. EPA requested that deletion of one or two proposed interchanges be evaluated.

*ERP No. D–FHW–F40409–IN Rating LO,* IN–25 Transportation Corridor Improvements from I–65 Interchange to U.S. 24, Funding, Right-of-Way and U.S. Army COE section 404 Permit Issuance, Hoosier Heartland Highway, Tippecanoe, Carroll and Cass Counties, IN.

*Summary:* EPA believes that the proposed project will result in minimum adverse impacts to the environment with the appropriate mitigation. No additional analyses are required.

*ERP No. D–FHW–K40253–CA Rating 3,* Riverside County Integrated Project, Winchester to Temecula Corridor Construction of a New Multi-Modal Transportation Facility, Route Location and Right-of-Way Preservation, Riverside County, CA.

*Summary:* EPA found that the DEIS was inadequate to satisfy the requirements of NEPA and lead to the selection of a preferred alignment containing the least environmentally damaging practicable alternative to satisfy section 404 of the Clean Water

Act. The DEIS evaluated the two CETAP corridors in isolation of one another and of other major pending highway projects, did not adequately analyze a No Build alternative, and lacked adequate assessment of indirect and cumulative impacts on aquatic and biological resources as well as water and air quality. EPA recommends that these concerns be addressed in a revised DEIS.

*ERP No. D–FHW–K40254–CA Rating 3,* Riverside County Integrated Project, Hemet to Corona/Lake Elsinore Corridor a New Multi-Modal Transportation Facility, Route Location and Right-of-Way Preservation, Riverside County, CA.

*Summary:* EPA found that the DEIS was inadequate to satisfy the requirements of NEPA and lead to the selection of a preferred alignment containing the least environmentally damaging practicable alternative to satisfy section 404 of the Clean Water Act. The DEIS evaluated the two CETAP corridors in isolation of one another and of other major pending highway projects, did not adequately analyze a No Build alternative, and lacked adequate assessment of indirect and cumulative impacts on aquatic and biological resources as well as water and air quality. EPA recommends that these concerns be addressed in a revised DEIS.

**Final EISs**

*ERP No. F–BLM–K67054–NV,* Phoenix Project, Current Mining Operations and Processing Activities Expansion, Battle Mountain, Plan of Operations Approval, Lander County, NV.

*Summary:* The final EIS does not address EPA's concern that the long-term post-closure mitigation will not be adequately funded. The environmental acceptability of the project depends on adequate funding of the mitigation plan to prevent degradation of water quality and impacts to biological resources. The final EIS continues to be inadequate since it does not include an itemized cost estimate for the mitigation or assurance that funds will be available in perpetuity to perform the project startup.

*ERP No. F–COE–C30011–NJ,* New Jersey Shore Protection Study to Determine a Feasible Hurricane and Storm Damage Reduction Plan from Manasquan Inlet to Barnegat Inlet, Boroughs of Point Pleasant Beach, Bay Head, Mantoloking, Lavallette, Seaside Heights and Seaside Park, and Townships of Buck, Dover and Berkeley, NJ.

*Summary:* EPA continues to have environmental concerns and requests an opportunity to review a complete cumulative impacts and analysis and General Conformity Determination prior to the signing of the Record of Decision for the project.

*ERP No. F–FHW–J40149–CO,* Colorado Forest Highway 80, Guanella Pass Road (also known as Park County Road 62/Clear Creek County Road 381/ Forest Development Road 118) from U.S. 285 in Grant to Georgetown, Improvements, Funding and U.S. Army COE Section 404, NPDES and Special Use Permits Issuance, Park and Clear Creek Counties, CO.

*Summary:* EPA expressed environmental concerns about wetland impacts and mitigation implementation.

*ERP No. F–FHW–K40244–CA,* CA–120 Oakdale Expressway Project, Construction and Operation, Post Mile 3.0 to Post Mile R12.9 near Oakdale, Funding, U.S. Army COE Section 404 and NPDES Permits Issuance, Stanislaus County, CA.

*Summary:* EPA expressed environmental concerns and recommended that FHWA request and obtain EPA's written concurrence on the least environmentally damaging practicable alternative and conceptual mitigation plan prior to the signing of the record of decision (ROD) in accordance with the NEPA/404 Memorandum of Understanding. EPA believes that the FEIS lacks sufficient information on indirect and cumulative impacts and a qualitative PM–10 analysis. In addition, the conceptual mitigation plan presented in the FEIS does not clearly show how it will adequately offset the project's wetland impacts.

*ERP No. FS–AFS–E65036–00,* Vegetation Management in the Coastal Plain/Piedmont, Proposal to Clarify Direction for Conducting Project-Level Inventories for Biological Evaluations (BEs), U.S. Forest Service Southern Region, AL, GA, FL, SC, NC, LA, MS and TX.

*Summary:* No formal comment letter was sent to the preparing agency.

*ERP No. FS–AFS–E65037–00,* Vegetation Management in the Appalachian Mountains, Proposal to Clarify Direction for Conducting Project-Level Inventories for Biological Evaluations (BEs), AL, GA, KY, NC, SC, TN, VA and WV.

*Summary:* No formal comment letter was sent to the preparing agency.

Dated: December 10, 2002.

**Joseph C. Montgomery,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 02–31463 Filed 12–12–02; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7421–6]**

## Office of Research and Development, Board of Scientific Counselors, Executive Committee Meeting

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

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C., App.2) notification is hereby given that the Environmental Protection Agency, Office of Research and Development (ORD), Board of Scientific Counselors (BOSC), will hold an Executive Committee meeting.

**DATES:** The meeting will be held on January 9–10, 2003. On Thursday, January 9th, the meeting will begin at 1 p.m., and will recess at 5:30 p.m. On Friday, January 10th, the meeting will reconvene at 9 a.m. and will adjourn at approximately 4 p.m. All times noted are eastern time.

**ADDRESSES:** The meeting will be held at the Lowe's L'Enfant Plaza Hotel, 480 L'Enfant Plaza, SW., Washington, DC 20024.

**SUPPLEMENTARY INFORMATION:** Agenda items to include, but not be limited to: Consultation on ORD's Homeland Security Research Strategy, Briefing on EPA's Report on the Environment, Discussion of BOSC Future Issues and Plans, and BOSC Communications Ad-Hoc Committee Report Update.

Anyone desiring a draft BOSC agenda may fax their request to Shirley R. Hamilton (202) 565–2444. The meeting is open to the public. Any member of the public wishing to make a presentation at the meeting should contact Shirley Hamilton, Designated Federal Officer, Office of Research and Development (8701R), 1200 Pennsylvania Avenue, NW., Washington, DC 20460; or by telephone at (202) 564–6853. In general, each individual making an oral presentation will be limited to a total of three minutes.

**FOR FURTHER INFORMATION CONTACT:** Shirley R. Hamilton, Designated Federal Officer, U.S. Environmental Protection Agency, Office of Research and Development, National Center for Environmental Research (MC 8701R), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 564–6853.

Dated: December 5, 2002.

**Peter W. Preuss,**

*Director, National Center for Environmental Research.*

[FR Doc. 02–31466 Filed 12–12–02; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7422–2]**

## New Hanover County Burn Pit Superfund Site; Notice of Proposed Settlement

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of proposed settlement.

**SUMMARY:** The United States Environmental Protection Agency is proposing to enter into an Administrative Order on Consent pursuant to section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended regarding the New Hanover County Burn Pit Superfund Site located in Wilmington, New Hanover County, North Carolina. This agreement is made and entered into by EPA and by Axel Johnson, Inc., Sprague Energy Corporation, and Unocal Corporation (''Settling Parties''). EPA will consider public comments on the proposed settlement for 30 days. EPA may withdraw from or modify the proposed settlement should such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

Copies of the proposed settlement are available from: Ms. Paula V. Batchelor, U.S. EPA, Region 4, Sam Nunn Atlanta Federal Center, Waste Management Division, 61 Forsyth Street, SW., Atlanta, Georgia 30303. (404) 562–8887.

Written comments may be submitted to Ms. Batchelor within 30 calendar days of the date of this publication.

Dated: November 26, 2002.

**Anita L. Davis,**

*Acting Chief, CERCLA Program Services Branch, Waste Management Division.*

[FR Doc. 02–31464 Filed 12–12–02; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7421–7; CWA–HQ–2002–6001; EPCRA–HQ–2002–6001; CAA–HQ–2002–6001; RCRA–HQ–2002–6001]**

## Clean Water Act Class II: Proposed Administrative Settlement, Penalty Assessment and Opportunity To Comment Regarding NEXTEL Communications, Inc., et al. and NII Holdings, Inc.

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

**ACTION:** Notice.

**SUMMARY:** On October 30, 2002, EPA published in the **Federal Register** information concerning a proposed settlement with NEXTEL Communications Inc., et al. and NII Holdings, Inc. The purpose of this correction is to provide additional information about this settlement. EPA has entered into a consent agreement with NEXTEL Communications, Inc., and its subsidiaries, and NII Holdings, Inc., collectively referred to as ''NEXTEL'', to resolve violations of the Clean Water Act (''CWA''), the Clean Air Act (''CAA''), the Resource Conservation and Recovery Act (''RCRA''), and the Emergency Planning and Community Right-to-Know Act (''EPCRA'') and their implementing regulations.

The Administrator is hereby providing public notice of this consent agreement and final order and providing an opportunity for interested parties to comment on the CWA portions, as required by CWA section 311(b)(6)(C), 33 U.S.C. 1321(b)(6)(C).

NEXTEL failed to prepare Spill Prevention Control and Countermeasure (''SPCC'') plans for forty-eight facilities where they stored diesel oil in above ground tanks. EPA, as authorized by CWA section 311(b)(6), 33 U.S.C. 1321(b)(6), has assessed a civil penalty for these violations. NEXTEL failed to obtain the appropriate operating permits or exemptions at eight facilities in violation of CAA section 110, 42 U.S.C. 7410, and various state implementation plan (''SIP'') requirements for emergency generators. EPA, as authorized by CAA section 113(d)(1), 42 U.S.C. 7413(d)(1), has assessed a civil penalty for these violations. NEXTEL failed to file an emergency planning notification with the State Emergency Response Commission (''SERC'') and to provide the name of an emergency contact to the Local Emergency Planning Committee (''LEPC''). NEXTEL failed to submit Material Safety Data Sheets (''MSDS'') or a list of chemicals to the LEPC, the SERC, and the fire department with jurisdiction over each facility for seventy-five facilities in violation of EPCRA section 311, 42 U.S.C. 11021. At sixty-six facilities, NEXTEL failed to submit an Emergency and Hazardous Chemical Inventory form to the LEPC, the SERC, and the fire department with jurisdiction over each facility in violation of EPCRA section 312, 42 U.S.C. 11022. EPA, as authorized by EPCRA section 325, 42 U.S.C. 11045, has assessed a civil penalty for these violations. NEXTEL failed to make a hazardous waste determination and improperly disposed of hazardous waste at one facility in violation of 9 VAC 20–60–261(A), (40 CFR 261.5(g)(1) and (g)(3)). NEXTEL violated RCRA section 9003(d), 42 U.S.C. 6991b(d) and 30 TAC sections 334 and 37.801, when the insurance policy for underground storage tanks failed to use the terms ''corrective action'' or ''sudden, non-sudden or accidental release'' to describe coverage for four facilities. At one facility NEXTEL failed to notify the State or local agency or department of the existence of an underground storage tank in violation of RCRA section 9002(a), 42 U.S.C. 6991(a)(1). NEXTEL failed to follow all of the relevant underground storage tank regulations in violation of RCRA section 9003, 42. U.S.C. 6991b at one facility.

**DATES:** Comments are due on or before January 13, 2003.

**ADDRESSES:** Send written comments to the Docket Office, Enforcement and Compliance Docket and Information Center (2201T), Docket Number EC–2002–021, U.S. Environmental Protection Agency, EPA West, 1200 Pennsylvania Avenue NW., Room B133, Washington, DC 20460 (in triplicate if possible.)

Please use a font size no smaller than 12. Comments may also be sent electronically to *docket.oeca@epa.gov* or faxed to (202) 566–1511. Attach electronic comments as a text file and try to avoid the use of special characters and any forms of encryption. Please be sure to include the Docket Number EC–2002–021 on your document.

In person, deliver comments to U.S. Environmental Protection Agency, EPA West, 1301 Constitution Avenue, NW., Room B133, Washington, DC 20460. Parties interested in reviewing docket information may do so by calling (202) 566–1512 or (202) 566–1513. A reasonable fee may be charged by EPA for copying docket materials.

**FOR FURTHER INFORMATION CONTACT:** Beth Cavalier, Multimedia Enforcement Division (2248–A), U.S. Environmental Protection Agency, 1200 Pennsylvania

Avenue, NW., Washington, DC 20460; telephone (202) 564–3271; fax: (202) 564–9001; e-mail: *cavalier.beth@epa.gov.*

**SUPPLEMENTARY INFORMATION:** *Electronic Copies:* Electronic copies of this document are available from the EPA Home Page under the link ''Laws and Regulations'' at the **Federal Register**—Environmental Documents entry (*http://www.epa.gov/fedrgstr*).

## I. Background

NEXTEL Communications, Inc., its subsidiaries, and NII Holdings, Inc., collectively referred to as ''NEXTEL'', are telecommunications companies incorporated in the States of Delaware, Georgia, and Texas. NEXTEL is located at 2001 Edmond Halley Drive, Reston, Virginia, 20191 and NII Holdings, Inc. is located at 10700 Parkridge Boulevard, Suite 600, Reston, Virginia, 20191. NEXTEL disclosed, pursuant to the EPA ''Incentives for Self-Policing: Discovery, Disclosures, Correction and Prevention of Violations'' (''Audit Policy''), 65 FR 19618 (April 11, 2000), that they failed to prepare SPCC plans for forty-eight facilities where they stored diesel oil in above ground storage tanks, in violation of the CWA section 311(b)(3) and 40 CFR part 112. NEXTEL disclosed that for eight facilities they had failed to obtain operating permits or exemptions in violation of CAA section 110, 42 U.S.C. 7410, and various SIP requirements for emergency generators. NEXTEL disclosed that at seventy-two facilities they had failed to file emergency planning notifications with the SERC and failed to provide the name of an emergency contact to the LEPC, in violation of EPCRA sections 302 and 303, 42 U.S.C. 11002 and 11003. NEXTEL further disclosed that at seventy-five facilities they had failed to submit MSDS or a list of chemicals to the LEPC, SERC, and the fire departments with jurisdiction over the facilities, in violation of EPCRA section 311, 42 U.S.C. 11021; and that at sixty-six facilities had failed to submit an Emergency and Hazardous Chemical Inventory to the LEPC, SERC, and fire departments with jurisdiction over the facilities, in violation of EPCRA section 312, 42 U.S.C. 11022. At four facilities NEXTEL failed to ensure that the language in their financial assurance insurance policies for underground storage tanks was exactly as required by regulation, in violation of 30 TAC sections 334 and 37.801 and RCRA section 9003(d), 42 U.S.C. 6991b(d). NEXTEL violated RCRA section 9002(a)(1), 42 U.S.C. 6991(a)(1) when it failed to notify the state of the existence of an underground storage tank at one facility; and NEXTEL violated RCRA section 9003, 42 U.S.C. section 6991b and all of the relevant underground storage tank regulations at one facility. NEXTEL failed to make a hazardous waste determination and improperly disposed of hazardous waste at one facility in violation of 9–VAC 20–60–261(A).

Pursuant to 40 CFR 22.45(b)(2)(iii), the following is a list of facilities at which NEXTEL self-disclosed violations of CWA section 311(b)(3): 3719 East LaSalle St., Phoenix, AZ; 984 Walsh Ave., Santa Clara, CA; 475 14th Street, Oakland, CA; 11423 Sunrise Gold Circle, Rancho Cordova, CA; 17275 Derian Ave., Irvine, CA; 5996 Gleason Drive, Dublin, CA; 11175 Inland Ave., Mira Loma, CA; 9800 East Easter Ave., Englewood, CO; 10002 Park Meadows Drive, Lone Tree, CO; 4643 South Ulster Street, Denver, CO; 333 Inverness Drive South, Englewood, CO; 1370 Park Central Blvd., Pompano Beach, FL; 200 Avenue B, NW., Winter Haven, FL; 1101 N. Keller Road, Orlando, FL; 1150 Emma Oaks Trail, Lake Mary, FL; 400 Embassy Row, Atlanta, GA; 5952 Peachtree Industrial Blvd., Norcross, GA; 5295 Brookhollow Parkway, Norcross, GA; 2975 Breakinridge Blvd., Duluth, GA; 4150 Shackleford Rd., Norcross, GA; 880 Ashbury Drive, Buffalo Grove, IL; 40 Hartwell Ave., Lexington, MA; 135 Forbes Blvd., Mansfield MA; 11900 Bournefield Way, Silver Spring, MD; 7249 National Drive, Hanover, MD; 39200 Schoolcraft Rd., Livonia, MI; 6435 Hix Road, Westland, MI; 11322 Lackland Road, St. Louis, MO; 610 Industrial Ave., Greensboro, NC; 2 Industrial Road, Fairfield, NJ; One South Street, Garden City, NY; 175 Clearbrook Road, Elmsford, NY; 400 Bursca Drive, Building 400, Bridgeville, PA; 401 North Broad Street, Philadelphia, PA; 901 Jefferson Blvd., Norristown, PA; 4740 Perrin Creek, San Antonio, TX; 4407 Alpha Road, Farmers Branch, TX; 1600 Eberhardt Road, Temple, TX; 1412 East North Belt, Houston, TX; 1766 Old Meadow Road, McLean, VA; 421 Butler Farm Road, Hampton, VA; 400 Butler Farm Road, Hampton, VA; 593 Herndon Parkway, Herndon, VA; 2001–2003 Edmund Halley Drive, Reston, VA; 1505 Farm Credit Drive, McLean, VA; 11710 118th Avenue, NE., Kirkland, WA; 1400 NE McWilliams Road, Bremerton, WA. These facilities are not required to obtain water permits for these requirements.

In addition, violations of EPCRA sections 302, 303, 311 and/or 312 were reported at facilities in the following states: Arizona, California, Colorado, Florida, Georgia, Illinois, Kansas, Massachusetts, Maryland, Michigan, Minnesota, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia and Washington. Violations of CAA section 110 were reported at facilities in Arizona, California, Kansas, New Jersey and Pennsylvania. Violations of RCRA section 9003(d) were reported in California and Illinois, and violations of RCRA section 9003(d) and 30 TAC sections 334 and 37.801 were reported in Texas. A violation of RCRA section 9002(a)(1) was reported in Pennsylvania. In Virginia, NEXTEL reported a violation of 9 VAC 20–6—261(A).

EPA determined that NEXTEL met the criteria set out in the Audit Policy for a 100% waiver of the gravity component of the penalty. As a result, EPA proposes to waive the gravity based penalty ($1,994,810) and proposes a settlement penalty amount of thirty-five thousand and four dollars ($35,004). This is the amount of the economic benefit gained by NEXTEL, attributable to their delayed compliance with the CWA, CAA, RCRA, and EPCRA regulations. NEXTEL Communications, Inc. has agreed to pay this amount. EPA and NEXTEL negotiated and signed an administrative consent agreement, following the Consolidated Rules of Practice, 40 CFR 22.13(b), on October 18, 2002 (*In Re: NEXTEL Communications, Inc. et. al. and NII Holdings, Inc.,* Docket Nos. CWA–HQ–2002–6001, EPCRA–HQ–2002–6001, CAA–HQ–2002–6001, and RCRA–HQ–2002–6001). This consent agreement is subject to public notice and comment under CWA section 311(b)(6), 33 U.S.C. 1321(b)(6).

Under CWA section 311(b)(6)(A), 33 U.S.C. 1321 (b)(6)(A), any owner, operator, or person in charge of a vessel, onshore facility, or offshore facility from which oil is discharged in violation of the CWA section 311(b)(3), 33 U.S.C. 1321(b)(3), or who fails or refuses to comply with any regulations that have been issued under CWA section 311(j), 33 U.S.C. 1321(j), may be assessed an administrative civil penalty of up to $137,500 by EPA. Class II proceedings under CWA section 311(b)(6) are conducted in accordance with 40 CFR part 22.

Under CAA section 113(d), the Administrator may issue an administrative order assessing a civil penalty against any person who has violated an applicable implementation plan or any other requirement of the Act, including any rule, order, waiver, permit or plan. Proceedings under CAA

section 113(d) are conducted in accordance with 40 CFR part 22.

Under EPCRA section 325, the Administrator may issue an administrative order assessing a civil penalty against any person who has violated applicable emergency planning or right to know requirements, or any other requirement of the Act. Proceedings under EPCRA section 325 are conducted in accordance with 40 CFR part 22.

Under RCRA section 3008, the Administrator may issue an administrative order assessing a civil penalty against any person who has violated applicable hazardous waste requirements, or any other requirement of the Act. Proceedings under RCRA section 3008 are conducted in accordance with 40 CFR part 22.

Under RCRA section 9006, the Administrator may issue an administrative order assessing a civil penalty against any person who has violated applicable underground storage tank requirements, or any other requirement of the Act. Proceedings under RCRA section 9006 are conducted in accordance with 40 CFR part 22.

The procedures by which the public may comment on a proposed Class II penalty order, or participate in a Clean Water Act Class II penalty proceeding, are set forth in 40 CFR 22.45. The deadline for submitting public comment on this proposed final order is January 13, 2003. All comments will be transferred to the Environmental Appeals Board (''EAB'') of EPA for consideration. The powers and duties of the EAB are outlined in 40 CFR 22.4(a).

Pursuant to CWA section 311(b)(6)(C), EPA will not issue an order in this proceeding prior to the close of the public comment period.

Dated: December 2, 2002.

**Rosemarie A. Kelley,**

*Acting Director, Multimedia Enforcement Division, Office of Enforcement and Compliance Assurance.*

[FR Doc. 02–31467 Filed 12–12–02; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7421–8; CWA–HQ–2002–6000; EPCRA–HQ–2002–6000; CAA–HQ–2002–6000]**

## Clean Water Act Class II: Proposed Administrative Settlement, Penalty Assessment and Opportunity To Comment Regarding ADT Security Services, Inc.

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

**ACTION:** Notice.

**SUMMARY:** EPA has entered into a consent agreement with ADT Security Services, Inc. (''ADT'') to resolve violations of the Clean Water Act (''CWA''), the Clean Air Act (''CAA''), and the Emergency Planning and Community Right-to-Know Act (''EPCRA'') and their implementing regulations.

The Administrator is hereby providing public notice of this consent agreement and final order and providing an opportunity for interested persons to comment on the CWA portions, as required by CWA section 311(b)(6)(C), 33 U.S.C. 1321(b)(6)(C).

ADT failed to prepare Spill Prevention Control and Countermeasure (''SPCC'') plans for eight facilities where they stored diesel oil in above ground tanks. EPA, as authorized by CWA section 311(b)(6), 33 U.S.C. 1321(b)(6), has assessed a civil penalty for these violations. ADT failed to obtain the appropriate operating permits or exemptions at seven facilities in violation of CAA section 110, 42 U.S.C. 7410, and various state implementation plan (''SIP'') requirements for emergency generators. EPA, as authorized by CAA section 113(d)(1), 42 U.S.C. 7413(d)(1), has assessed a civil penalty for these violations. ADT failed to file an emergency planning notification with the State Emergency Response Commission (''SERC'') and to provide the name of an emergency contact to the Local Emergency Planning Committee (''LEPC''). ADT failed to submit Material Safety Data Sheets (''MSDS'') or a list of chemicals to the LEPC, the SERC, and the fire department with jurisdiction over each facility for ninety-two facilities in violation of EPCRA section 311, 42 U.S.C. 11021. At ninety-two facilities, ADT failed to submit an Emergency and Hazardous Chemical Inventory form to the LEPC, the SERC, and the fire department with jurisdiction over each facility in violation of EPCRA section 312, 42 U.S.C. 11022. EPA, as authorized by EPCRA section 325, 42 U.S.C. 11045, has assessed a civil penalty for these violations.

**DATES:** Comments are due on or before January 13, 2003.

**ADDRESSES:** Send written comments to the Docket Office, Enforcement and Compliance Docket and Information Center (2201T), Docket Number EC–2002–020, U.S. Environmental Protection Agency, EPA West, 1200 Pennsylvania Avenue NW., Room B133, Washington, DC 20460 (in triplicate if possible.)

Please use a font size no smaller than 12. Comments may also be sent electronically to *docket.oeca@epa.gov* or faxed to (202) 566–1511. Attach electronic comments as a text file and try to avoid the use of special characters and any forms of encryption. Please be sure to include the Docket Number EC–2002–020 on your document.

In person, deliver comments to U.S. Environmental Protection Agency, EPA West, 1301 Constitution Avenue, NW., Room B133, Washington, DC 20460. Parties interested in reviewing docket information may do so by calling (202) 566–1512 or (202) 566–1513. A reasonable fee may be charged by EPA for copying docket materials.

**FOR FURTHER INFORMATION CONTACT:** Beth Cavalier, Multimedia Enforcement Division (2248–A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone (202) 564–3271; fax: (202) 564–9001; e-mail: *cavalier.beth@epa.gov.*

**SUPPLEMENTARY INFORMATION:** *Electronic Copies:* Electronic copies of this document are available from the EPA Home Page under the link ''Laws and Regulations'' at the Federal Register—Environmental Documents entry (*http://www.epa.gov/fedrgstr*).

### I. Background

ADT Security Services, Inc. a security services company incorporated in the State of Delaware and located at One Town Center Road, Boca Raton, Florida 33064, disclosed, pursuant to the EPA ''Incentives for Self-Policing: Discovery, Disclosures, Correction and Prevention of Violations'' (''Audit Policy''), 65 FR 19618 (April 11, 2000), that they failed to prepare SPCC plans for eight facilities where they stored diesel oil in above ground storage tanks, in violation of the CWA section 311(b)(3) and 40 CFR part 112. ADT disclosed that for seven facilities they had failed to obtain operating permits or exemptions in violation of CAA section 110, 42 U.S.C. 7410, and various SIP requirements for emergency generators. ADT disclosed that at sixty-eight facilities they had failed to file emergency planning notifications with the SERC and failed to provide the name of an emergency contact to the LEPC, in violation of EPCRA section 302, 42 U.S.C. 11002. ADT further disclosed that at ninety-two facilities they had failed to submit MSDS' or a list of chemicals to the LEPC, SERC, and the fire departments with jurisdiction over the facilities, in violation of EPCRA section 311, 42 U.S.C. 11021; and that at ninety-two facilities had failed to submit an

Emergency and Hazardous Chemical Inventory to the LEPC, SERC, and fire departments with jurisdiction over the facilities, in violation of EPCRA section 312, 42 U.S.C. 11022.

Pursuant to 40 CFR 22.45(b)(2)(iii), the following is a list of facilities at which ADT self-disclosed violations of CWA section 311(b)(3): 5400 West Rosecrans Avenue, Hawthorne, California; 14200 Exposition Avenue, Aurora, Colorado; 9000 Town Center Parkway, Bradenton, Florida; 1052 South Powerline Road, Deerfield, Florida; 9512 Sunbeam Center Drive, Jacksonville, Florida; 7805 NW 97th Terrace, Kansas City, Missouri; 502 Fortune Drive, Papillion, Nebraska; and 285 Thruway Park Drive, West Henrietta, New York. These facilities are not required to obtain water permits for the requirements relating to the SPCC violations disclosed.

In addition, ADT self-disclosed violations of EPCRA sections 302 and/or sections 311 and 312 at facilities located in the following states: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Missouri, North Carolina, Nebraska, New Hampshire, New Jersey, New York, Nevada, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and the District of Columbia. ADT self-disclosed violations of CAA section 110 at facilities located in California.

EPA determined that ADT met the criteria set out in the Audit Policy for a 100% waiver of the gravity component of the penalty. As a result, EPA proposes to waive the gravity based penalty ($1,914,965) and proposes a settlement penalty amount of thirty-one thousand, seven hundred and forty-one dollars ($31,741). This is the amount of the economic benefit gained by ADT, attributable to their delayed compliance with the SPCC, CAA and EPCRA regulations. ADT Security Services, Inc. has agreed to pay this amount. EPA and ADT negotiated and signed an administrative consent agreement, following the Consolidated Rules of Practice, 40 CFR 22.13(b), on October 18, 2002 (*In Re: ADT Security Services, Inc.,* Docket Nos. CWA–HQ–2002–6000, EPCRA–HQ–2002–6000, CAA–HQ–2002–6000). This consent agreement is subject to public notice and comment under CWA section 311(b)(6), 33 U.S.C. 1321(b)(6).

Under CWA section 311(b)(6)(A), 33 U.S.C. 1321 (b)(6)(A), any owner, operator, or person in charge of a vessel, onshore facility, or offshore facility from which oil is discharged in violation of the CWA section 311 (b)(3), 33 U.S.C. 1321 (b)(3), or who fails or refuses to comply with any regulations that have been issued under CWA section 311 (j), 33 U.S.C. 1321(j), may be assessed an administrative civil penalty of up to $137,500 by EPA. Class II proceedings under CWA section 311(b)(6) are conducted in accordance with 40 CFR part 22.

Under CAA section 113(d), the Administrator may issue an administrative order assessing a civil penalty against any person who has violated an applicable implementation plan or any other requirement of the Act, including any rule, order, waiver, permit or plan. Proceedings under CAA section 113(d) are conducted in accordance with 40 CFR part 22.

Under EPCRA section 325, the Administrator may issue an administrative order assessing a civil penalty against any person who has violated applicable emergency planning or right to know requirements, or any other requirement of the Act. Proceedings under EPCRA section 325 are conducted in accordance with 40 CFR part 22.

The procedures by which the public may comment on a proposed Class II penalty order, or participate in a Clean Water Act Class II penalty proceeding, are set forth in 40 CFR 22.45. The deadline for submitting public comment on this proposed final order is January 13, 2003. All comments will be transferred to the Environmental Appeals Board (''EAB'') of EPA for consideration. The powers and duties of the EAB are outlined in 40 CFR 22.4(a).

Pursuant to CWA section 311(b)(6)(C), EPA will not issue an order in this proceeding prior to the close of the public comment period.

Dated: December 4, 2002.

**Rosemarie A. Kelley,**

*Acting Director, Multimedia Enforcement Division, Office of Enforcement and Compliance Assurance.*

[FR Doc. 02–31468 Filed 12–12–02; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice and request for comment.

**SUMMARY:** The FDIC, 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 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comments concerning an information collection titled ''Certification of Compliance with Mandatory Bars to Employment.''

**DATES:** Comments must be submitted on or before February 11, 2003.

**ADDRESSES:** Interested parties are invited to submit written comments to Tamara R. Manly, Management Analyst (Consumer and Compliance Unit), (202) 898–7453, Legal Division, Room MB–3109, Attention: Comments/Legal, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. All comments should refer to ''Certification of Compliance with Mandatory Bars to Employment.'' Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. (Internet address: *comments@ fdic.gov*). Comments may also be submitted to the OMB desk officer for the FDIC: Joseph F. Lackey, Jr., Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10236, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Tamara R. Manly, at the address identified above.

**SUPPLEMENTARY INFORMATION:** Proposal to renew the following currently approved collection of information:

*Title:* Certification of Compliance with Mandatory Bars to Employment.

*OMB Number:* 3064–0121.

*Frequency of Response:* On occasion.

*Affected Public:* Persons interested in being employed or providing services to the FDIC.

*Estimated Number of Respondents:* 248.

*Estimated Time per Response:* 10 minutes.

*Estimated Total Annual Burden:* 41.34 hours.

*General Description of Collection:* Prior to an offer of employment, job applicants to the FDIC must sign a certification that they have not been convicted of a felony or been in other circumstances that prohibit persons from becoming employed by or providing services to the FDIC.

### Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of

the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the collection should be modified prior to submission to OMB for review and approval.

Comments submitted in response to this notice also will be summarized or included in the FDIC's requests to OMB for renewal of this collection. All comments will become a matter of public record.

Dated in Washington, DC, this 4th day of December, 2002.

Federal Deposit Insurance Corporation.

**Leneta G. Gregorie,**

*Counsel and Special Assistant.*

[FR Doc. 02–31411 Filed 12–12–02; 8:45 am]

BILLING CODE 6714–01–P

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisition of Shares of Bank 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. The notices also will be available for inspection at the office 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 December 30, 2002.

**A. Federal Reserve Bank of Kansas City** (Susan Zubradt, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

*1. Connie f. Rose, individually and as trustee of the Jon F. Rose Revocable Trust, Hastings, Nebraska; Paul H. and Faye E. Powers, Hastings, Nebraska; and Larry W. Coffey, Lincoln, Nebraska;* to acquire voting shares of Hastings Bancorp, Inc., Hastings, Nebraska, and thereby indirectly acquire voting shares of Hastings State Bank, Hastings, Nebraska.

Board of Governors of the Federal Reserve System, December 9, 2002.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 02–31392 Filed 12–12–02; 8:45 am]

BILLING CODE 6210–01–S

## FEDERAL RESERVE SYSTEM

### 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 ownerships 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. The application also will 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 (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *http//www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 10, 2003.

*A. Federal Reserve Bank of Dallas* (W. Arthur Tribble, Vice President), 2200 North Pearl Street, Dallas, Texas 75201–2272:

*1. OSB Financial Services, Inc., Orange, Texas, and OSB Delaware Financial Services, Inc., Dover, Delaware;* to acquire 100 percent of the voting shares of Mauriceville National Bank, Mauriceville, Texas.

Board of Governors of the Federal Reserve System, December 9, 2002.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 02–31393 Filed 12–12–02; 8:45 am]

BILLING CODE 6210–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration on Aging

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; State Program Report for Title III of the Older Americans Act

**AGENCY:** Administration on Aging, HHS.

**ACTION:** Notice.

**SUMMARY:** The Administration on Aging (AoA) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Submit written comments on the collection of information by January 13, 2003.

**ADDRESSES:** Submit written comments on the collection of information to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW., rm. 10235, Washington, DC 20503, Attn: Allison Herron Eydt, Desk Officer for AoA.

**FOR FURTHER INFORMATION CONTACT:** Saadia Greenberg, Office of Evaluation, Administration on Aging, Room 5607, Washington, DC 20201, (202) 357–3554.

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, AoA has submitted the following proposed collection of information to OMB for review and clearance.

State Program Reports provide state totals of the number of persons served for each type of service under the Older Americans Act Title III and Title VII programs as well as the number units of services provided and some characteristics of the clients. Information is also reported on expenditures for each type of service, staffing levels of state and area agencies on aging.

AoA estimates the burden of this collection of information as approximately 1 hour per state agency.

In the **Federal Register** of December 21, 2001 (Vol. 66, No. 246), the agency requested comments on the proposed collection of information. The

comments received were numerous and very technical in nature. They will require extensive research and evaluation before implementation and have been referred to a workgroup for that purpose. As a result, we are seeking and extension on the use of the existing collection with no change at this time.

Dated: November 13, 2002.

**Josefina G. Carbonell,**

*Assistant Secretary for Aging.*

[FR Doc. 02–31477 Filed 12–12–02; 8:45 am]

BILLING CODE 4154–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30DAY–12–03]**

### 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 Officer at (404) 498–1210. 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.

*Proposed Project:* A and B Reader Surveys—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC). Since 1970, under the U.S. Code of Federal Regulations (42 CFR part 37), screening chest radiographic examinations have been provided to underground miners at approximate five-year intervals. As part of the mandated Coal Workers' X-ray Surveillance Program (CWXSP), the NIOSH B Reader Program requires x-ray classification by physicians who have demonstrated proficiency in the International Labour Office (ILO) radiographic classification system.

Competence in the ILO system is demonstrated by physicians who have completed a NIOSH approved educational seminar (A Reader) or have passed the NIOSH B Reader certification examination (B Reader). The ILO has recently completed a revision of its radiographic classification system (ILO 2000) that will soon be published. As a result, modifications of the B Reader examinations and related training activities and materials will be needed. These revisions provide an opportunity to evaluate the current B Reader Program by surveying A and B Readers. The survey responses from these physicians will be used to develop a workshop agenda and contract specifications to improve the B Reader Program. The annual burden for this data collection is 617 hours.

| Respondents | Number of respondents | Number of responses/respondent | Avg. burden/response (in hrs.) |
|---|---|---|---|
| Physicians/B Reader | 531 | 1 | 10/60 |
| Physicians/Former B Reader | 333 | 1 | 10/60 |
| Physicians/A Reader | 2834 | 1 | 10/60 |

Dated: December 9, 2002.

**Nancy E. Cheal,**

*Acting Associate Director for Policy, Planning and Evaluation, , Centers for Disease Control and Prevention.*

[FR Doc. 02–31417 Filed 12–12–02; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30DAY–10–03]**

### 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 Officer at (404) 498–1210. 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.

*Proposed Project:* State Influenza Coordinators Survey—New—National Center for Infectious Diseases (NCID), Centers for Disease Control and Prevention (CDC). Influenza epidemics in the United States are associated with approximately 20,000 deaths and 114,000 hospitalizations each year; influenza pandemics are responsible for dramatic increases in morbidity and mortality worldwide. In order to detect ''novel'' viruses, changes in circulating strains, and the clinical impact of circulating strains, surveillance systems must present a broad picture of influenza activity. Data on morbidity and mortality are essential and must be reported in a timely manner.

Influenza Surveillance at CDC consists of four components: U.S. Sentinel Physician Network, State and Territorial Epidemiologist Reports, 122 Cities Mortality Report, and the WHO/NRVESS Laboratory Reports. Each of the 50 states as well as the District of Columbia participate in at least one of the CDC's four surveillance components, however, additional surveillance activities within the states are currently unclear. In order to develop or enhance current Influenza surveillance activities at CDC and prepare for the future, including possible pandemics, it is crucial that we are aware of any existing surveillance systems at the state level. We are proposing a survey of state health departments, specifically each state's Influenza Surveillance Coordinator in order to ascertain the nature of flu surveillance in his/her state as well as how prepared the state is for things to come. The data collected will be used to improve and/or enhance national surveillance efforts.

The questionnaire that will be used focuses on state surveillance systems as well as pandemic preparedness. Questions will be asked regarding current surveillance including: Sentinel Physicians Systems, Nursing home surveillance, and School Absenteeism. The annual burden hours are estimated to be 27.

| Respondents | Number of respondents | Number of responses/respondent | Average burden/response (in hours) |
|---|---|---|---|
| State health departments | 53 | 1 | 30/60 |

Dated: December 9, 2002.

**Nancy E. Cheal,**

*Acting Associate Director for Policy, Planning and Evaluation, Centers for Disease Control and Prevention.*

[FR Doc. 02–31418 Filed 12–12–02; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Mine Safety and Health Research Advisory Committee (MSHRAC): Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–463) of October 6, 1972, that the Mine Safety and Health Research Advisory Committee, National Institute for Occupational Safety and Health, of the Department of Health and Human Services, has been renewed for a 2-year period extending through November 30, 2004.

For further information, contact Lewis V. Wade, Ph.D., Executive Secretary, Mine Safety and Health Research Advisory Committee, Centers for Disease Control and Prevention, of the Department of Health and Human Services, HHH Building, 200 Independence Avenue, SW., Room 715–H, M/S P–12, Washington, DC 20201. Telephone 202/401–2192, fax 202/260–4464, e-mail *lhg9@cdc.gov.*

The Director, Management Analysis and Services office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: December 8, 2002.

**Alvin Hall,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 02–31472 Filed 12–12–02; 8:45 am]

**BILLING CODE 4163–19–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### Anti-Infective Drugs Advisory Committee; Notice of Meeting

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

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

*Name of Committee*: Anti-Infective Drugs Advisory Committee.

*General Function of the Committee*: To provide advice and recommendations to the agency on FDA's regulatory issues.

*Date and Time*: The meeting will be held on January 8, 2003, from 8 a.m. to 5 p.m., and on January 9, 2003, from 9 a.m. to 5 p.m.

*Location*: Marriott Washingtonian Center, Grand Ballroom, 9751 Washingtonian Blvd., Gaithersburg, MD.

*Contact Person*: Tara P. Turner, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, e-mail: TurnerT@cder.fda.gov, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 12530. Please call the Information Line for up-to-date information on this meeting.

*Agenda*: On January 8, 2003, the committee will discuss new drug application (NDA) 21–144, KETEK (telithromycin), Aventis Pharmaceuticals, Inc., proposed for treatment of community-acquired pneumonia, acute exacerbation of chronic bronchitis, and acute maxillary sinusitis. On January 9, 2003, the committee will discuss issues pertaining to the contents in the document entitled ''Ranking of Antimicrobial Drugs According to Their Importance in Human Medicine (Appendix A of the ''Draft Guidance for Industry: Evaluating the Safety of Antimicrobial New Animal Drugs With Regard to Their Microbiological Effects on Bacteria of Human Health Concern'') (see the FDA Internet site at: http://www.fda.gov/cvm/guidance/dguide152.doc) as it relates to the process for evaluating antimicrobial resistance concerns for the Center for Veterinary Medicine's preapproval safety evaluation of a new animal drug.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by December 31, 2002. Oral presentations from the public will be scheduled between approximately 1 p.m. and 1:30 p.m. on January 8, 2003, and between approximately 1 p.m. and 2 p.m. on January 9, 2003. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before December 31, 2002, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Tara P. Turner at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 4, 2002.

**Linda Arey Skladany,**

*Associate Commissioner for External Relations.*

[FR Doc. 02–31443 Filed 12–12–02; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 02D–0421]**

### Medical Devices; Class II Special Controls Guidance Document: Arrhythmia Detector and Alarm; Availability

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled ''Class II Special Controls Guidance Document: Arrhythmia Detector and Alarm; Draft Guidance for Industry and FDA.'' Elsewhere in this issue of the **Federal Register**, FDA is publishing a proposed rule to reclassify the arrhythmia detector and alarm from class III (premarket approval) to class II (special controls). If the device is reclassified, FDA intends that this guidance document will serve as the special control. This guidance is neither final nor is it in effect at this time.

**DATES:** Submit written or electronic comments concerning this guidance by March 13, 2003.

**ADDRESSES:** Submit written requests for single copies on a 3.5″ diskette of the draft guidance document entitled ''Class II Special Controls Guidance Document: Arrhythmia Detector and Alarm; Draft Guidance for Industry and FDA,'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send two self-addressed adhesive labels to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document. Submit electronic comments to http://www.fda.gov/dockets/ecomments.

**FOR FURTHER INFORMATION CONTACT:** Carole C. Carey, Center for Devices and Radiological Health (HFZ- 450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8609.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Elsewhere in this issue of the **Federal Register**, FDA is publishing a proposed rule to reclassify the arrhythmia detector and alarm from class III (premarket approval) to class II (special controls). This draft guidance document describes a means by which arrhythmia detector and alarm (including ST-segment measurement and alarm) devices may comply with the requirement of special controls for class II devices. Designation of this guidance document as a special control means that manufacturers attempting to establish that their device is substantially equivalent to a predicate arrhythmia detector and alarm (including ST-segment measurement and alarm) device should demonstrate that the proposed device complies with either the specific recommendations of this guidance or some alternate control that provides equivalent assurances of safety and effectiveness.

### II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on special controls for the arrhythmia detector and alarm. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

### III. Electronic Access

In order to receive ''Class II Special Controls Guidance Document: Arrhythmia Detector and Alarm; Draft Guidance for Industry and FDA'' via your fax machine, call the CDRH Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt press 1 to order a document. Enter the document number (1363) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

You may obtain a copy of the draft guidance from the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that you may download to a personal computer. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturers' assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. You may access the CDRH home page at http://www.fda.gov/cdrh. You may search for all CDRH guidance documents at http://www.fda.gov/cdrh/guidance.html. Guidance documents are also available on the Dockets Management Brach Internet site at http://fda/gov/ohrms/dockets.

### IV. Comments

Interested persons may submit to Dockets Management Branch (see **ADDRESSES**) written or electronic comments on this draft guidance by (see **DATES**). Two copies of any comment are to be submitted except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance document and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: October 23, 2002.

**Linda S. Kahan,**

*Deputy Director, Center for Devices and Radiological Health.*

[FR Doc. 02–31439 Filed 12–12–02; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 01D–0577]**

### Medical Devices; Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide and Oxygen Monitors; Availability

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCO_2$) and Oxygen ($PcO_2$) Monitors; Guidance for Industry and FDA.'' This guidance document describes a means by which $PcCO_2$ monitors and the $PcO_2$ monitor may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule reclassifying the $PcCO_2$ monitor from class II (performance standards) into class II (special controls), the $PcO_2$ monitor for an infant

patient who is not under gas anesthesia from class II (performance standards) into class II (special controls), and the $PcO_2$ monitor for all other uses from class III (premarket approval) into class II (special controls).

**DATES:** Submit written or electronic comments on this guidance at any time. General comments on agency guidances are welcome at any time.

**ADDRESSES:** Submit written requests for single copies on a 3.5'' diskette of the guidance document entitled ''Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide (PcCO2) and Oxygen (PcO2) Monitors; Guidance for Industry and FDA'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send two self-addressed adhesive labels to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Comments should be identified with the docket number found in brackets in the heading of this document. Submit electronic comments to http://www.fda.gov/dockets/ecomments.

**FOR FURTHER INFORMATION CONTACT:** William A. Noe, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8609, ext. 174.

**SUPPLEMENTARY INFORMATION:**

## I. Background

In the **Federal Register** of February 12, 2002 (67 FR 6444), FDA published a proposed rule to reclassify the $PcCO_2$ monitor from class II (performance standards) into class II (special controls), the $PcO_2$ monitor for an infant patient who is not under gas anesthesia from class II (performance standards) into class II (special controls), and the $PcO_2$ monitor for all other uses from class III (premarket approval) into class II (special controls).

In the **Federal Register** of February 12, 2002 (67 FR 6544), FDA also identified the document ''Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCO_2$) and Oxygen ($PcO_2$) Monitors; Draft Guidance for Industry and FDA'' as the special control capable of providing reasonable assurance of safety and effectiveness for these devices. This guidance document describes a means by which $PcCO_2$ and $PcO_2$ monitors may comply with the requirement of special controls for class II devices. Designation of this guidance document as a special control means that a manufacturer attempting to establish that its device is substantially equivalent to a predicate class II monitor must demonstrate that the proposed device complies with either the specific recommendations of this guidance or some alternate control that provides equivalent assurances of safety and effectiveness.

Interested persons were invited to comment on the draft guidance by May 13, 2002. FDA received two comments on the draft guidance document. The comments, from manufacturers, suggested that the draft guidance does not cite current voluntary consensus standards applicable to the devices subject to this guidance. FDA considered the comments and revised the guidance where we believe appropriate. FDA also clarified the description of the risks to health, in order to relate the risks more directly to the recommended mitigation measures.

## II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on ''Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCO_2$) and Oxygen ($PcO_2$) Monitors; Guidance for Industry and FDA.'' It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

## III. Electronic Access

In order to receive ''Class II Special Controls Guidance Document: Cutaneous Carbon Dioxide ($PcCO_2$) and Oxygen ($PcO_2$) Monitors; Guidance for Industry and FDA,'' via your fax machine, call the CDRH Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt press 1 to order a document. Enter the document number (1335) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

Persons interested in obtaining a copy of the guidance may also do so using the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturers' assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH home page may be accessed at http://www.fda.gov/cdrh. A search capability for all CDRH guidance documents is available at http://www.fda.gov/cdrh/guidance.html. Guidance documents are also available on the Dockets Management Branch Internet site at http://www.fda.gov/ohrms/dockets.

## IV. Paperwork Reduction Act of 1995

The premarket notification information collections addressed in the guidance have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) under OMB control number 0910–0120. The labeling provisions addressed in the guidance have been approved by OMB under the PRA under OMB control number 0910–0485.

## V. Comments

Interested persons may submit to the Dockets Management Branch (see **ADDRESSES**) written or electronic comments on the guidance. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance document and received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 2, 2002.

**Linda S. Kahan,**

*Deputy Director, Center for Devices and Radiological Health.*

[FR Doc. 02–31441 Filed 12–12–02; 8:45 am]

**BILLING CODE 4160–01–S**

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–4730–N–50]**

## Federal Property Suitable as Facilities To Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

**FOR FURTHER INFORMATION CONTACT:** Mark Johnston, room 7266, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

**SUPPLEMENTARY INFORMATION:** In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Shirley Kramer, Division of Property Management, Program Support Center, HHS, room 58–41, 5600 fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register,** the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.,* acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: Army: Ms. Julie Jones-Conte, Department of the Army, Office of the Assistant Chief of Staff for Installation Management, Attn: DAIM–MD, Room 1E677, 600 Army Pentagon, Washington, DC 20310–600; (703) 692–9223; DOT: Mr. Rugene Spruill, Principal, Space Management, SVC–140, Transportation Administrative Service Center, Department of Transportation, 400 7th Street, SW, Room 2310, Washington, DC 20590; (202) 366–4266; Energy: Mr. Tom Knox, Department of Energy, Office of Engineering & Construction Management, CR–80, Washington, DC 20585; (202) 586–8715; GSA: Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW., Washington, DC 20405; (202) 501–0052; Navy: Mr. Charles C. Cocks, Director, Department of the Navy, Real Estate Policy Division, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9200; (These are not toll-free numbers).

Dated: December 6, 2002.

**John D. Garrity,**

*Director, Office of Special Needs Assistance Programs.*

**Title V. Federal Surplus Property Program Federal Register Report for 12/13/02**

**Suitable/Available Properties**

*Buildings (by State)*

Missouri

Old Custom House/P.O.
815 Olive Street
St. Louis Co: MO 63101–
Landholding Agency: GSA
Property Number: 54200240016
Status: Surplus
Comment: 6-story office building, restrictive use due to Historical Landmark status
GSA Number: 7–G–MO–074

Pennsylvania

Bldg. 00634
Carlisle Barracks
Carlisle Co: Cumberland PA 17013–
Landholding Agency: Army
Property Number: 21200240089
Status: Unutilized
Comment: 113 sq. ft., presence of asbestos, most recent use—plant/utility bldg., off-site use only

California

Bldgs. 18017, 18018
SATCOM
Paso Robles Co: San Luis Obispo CA 93451–
Landholding Agency: Army
Property Number: 212002240081
Status Unutilized
Comment: 1440 sq. ft., most recent use—storage, off-site use only

Bldg. 18300
SATCOM
Paso Robles Co: San Luis Obispo CA 93451–
Landholding Agency: Army
Property Number: 212002240082
Status: Unutilized
Comment: 864 sq. ft., presence of asbestos, most recent use—admin., off-site use only

Georgia

Bldg. T–920
Fort Stewart
Hinesville Co: Liberty GA 31314–
Landholding Agency: Army
Property Number: 212002240083
Status: Excess
Comment: 13,337 sq. ft., most recent use—office, off-site use only

North Carolina

Bldgs. A2245, A2345
Fort Bragg
Ft. Bragg Co: Cumberland NC 28310–

Landholding Agency: Army
Property Number: 21200240084
Status: Excess
Comment: 3444 sq. ft. each, possible asbestos/lead paint, most recent use—vehicle maint. shop, off-site use only

Bldg. A2544
Fort Bragg
Ft. Bragg Co: Cumberland NC–
Landholding Agency: Army
Property Number: 21200240085
Status: Excess
Comment: 4000 sq. ft., possible asbestos/lead paint, most recent use—admin. facility, off-site use only

Bldg. D2826
Fort Bragg
Ft. Bragg Co: Cumberland NC–28310–
Landholding Agency: Army
Property Number: 21200240086
Status: Excess
Comment: 41,520 sq. ft., possible asbestos/lead paint, most recent use—barracks, off-site use only

Bldg. N4116
Fort Bragg
Ft. Bragg Co: Cumberland NC–28310–
Landholding Agency: Army
Property Number: 21200240087
Status: Excess
Comment: 3944 sq. ft., possible asbestos/lead paint, most recent use—community facility, off-site use only

103 Bldgs.
Fort Bragg
Ft. Bragg Co: Cumberland NC–28310–5000
Location: WS001–WS02A, PE001–PE031, 002F1–02F36, 00651, 1101, DT001–DT035, DT052–DT056, 09051
Landholding Agency: Army
Property Number: 21200240088
Status: Excess
Comment: Multi-use structures, various sq ft., possible asbestos/lead paint, off-site use only

Virginia

Bldgs. T0107–T0111
Fort Pickett
Blackstone Co: Nottoway VA 23824–
Landholding Agency: Army
Property Number: 2120024090
Status: Unutilized
Comment: 9017 sq. ft., poor condition, presence of asbestos, most recent use—warehouse, off-site use only

Washington

Bldg. 04180
Fort Lewis
Ft. Lewis Co: Pierce WA 98433–9500
Landholding Agency: Army
Property Number: 21200240091
Status: Unutilized
Comment: 72 sq. ft., most recent use—guard shack, off-site use only

Bldg. 05904
Fort Lewis
Ft. Lewis Co: Pierce WA 98433–9500
Landholding Agency: Army
Property Number: 21200240092
Status: Excess
Comment: 82 sq. ft., most recent use—guard shack, off-site use only

Bldgs. 9003, 9517
Fort Lewis
Ft. Lewis Co: Pierce WA 98433–9500
Landholding Agency: Army
Property Number: 21200240093
Status: Excess
Comment: 80 and 82 sq. ft., most recent use—guard shack, off-site use only

**Unsuitable properties**

*Buildings (by State)*

Hawaii

Bldg. 329
NCTAMS PAC
Wahiawa Co: HI 96786–
Landholding Agency: Navy
Property Number: 77200240058
Status: Excess
Reason: Secured Area

Mississippi

Bldgs. 239, 240
Naval Air Station
Meridian Co: Lauderdale MS 39309–
Landholding Agency: Navy
Property Number: 77200240060
Status: Unutilized
Reason: Secured Area

Bldg. 248
Naval Air Station
Meridian Co: Lauderdale MS 39309–
Landholding Agency: Navy
Property Number: 77200240061
Status: Unutilized
Reason: Secured Area

Bldg. 412
Naval Air Station
Meridian Co: Lauderdale MS 39309–
Landholding Agency: Navy
Property Number: 77200240062
Status: Unutilized
Reason: Secured Area

New Jersey

4 Bldgs.
Naval Air Engineering Station 26, 75, 126, 303
Lakehurst Co: Ocean NJ 08733–5000
Landholding Agency: Navy
Property Number: 77200240059
Status: Unutilized
Reason: Extensive deterioration

Sheds OV1, OV2, OV3
U.S. Coast Guard
Shark River
Avon by the Sea Co: Monmouth NJ 13640–
Landholding Agency: DOT
Property Number: 87200240001
Status: Unutilized
Reason: Secured Area

Unit 13
USCG Station Barnegat Light
Station Barnegat Co: Ocean NJ
Landholding Agency: DOT
Property Number: 87200240002
Status: Unutilized
Reason: Secured Area

Units 9–12
USCG Station Barnegat Light
Station Barnegat Co: Ocean NJ
Landholding Agency: DOT
Property Number: 87200240003
Status: Unutilized
Reason: Secured Area

New Mexico

Bldg. 805
Kirtland Air Force Base
Albuquerque Co: Bernalillo NM 87185–
Landholding Agency: Energy
Property Number: 41200240001
Status: Unutilized
Reason: Secured Area

Bldg. 8898
Kirtland Air Force Base
Albuquerque Co: Bernalillo NM 87185–
Landholding Agency: Energy
Property Number: 41200240002
Status: Unutilized
Reason: Secured Area

8 Bldgs., TA–16
Los Alamos National Lab
195, 220–226
Los Alamos Co: NM 87545–
Landholding Agency: Energy
Property Number: 41200240003
Status: Unutilized
Reason: Secured Area

Bldg. 2, TA–11
Los Alamos National Lab
Los Alamos Co: NM 87545–
Landholding Agency: Energy
Property Number: 41200240004
Status: Unutilized
Reason: Secured Area

Bldg. 4, TA–41
Los Alamos National Lab
Los Alamos Co: NM 87545–
Landholding Agency: Energy
Property Number: 41200240005
Status: Unutilized
Reason: Secured Area

Bldg. 16, TA–41
Los Alamos National Lab
Los Alamos Co: NM 87545–
Landholding Agency: Energy
Property Number: 41200240006
Status: Unutilized
Reason: Secured Area

Bldg. 30, TA–41
Los Alamos National Lab
Los Alamos Co: NM 87545–
Landholding Agency: Energy
Property Number: 41200240007
Status: Unutilized
Reason: Secured Area

Bldg. 53, TA–41
Los Alamos National Lab
Los Alamos Co: NM 87545–
Landholding Agency: Energy
Property Number: 41200240008
Status: Unutilized
Reason: Secured Area

North Carolina

Frying Pan Schoals Light
USCG
Cape Fear Co: NC
Landholding Agency: DOT
Property Number: 87200240004
Status: Unutilized
Reason: Secured Area

Diamond Schoals Light
USCG
Cape Hatteras Co: NC
Landholding Agency: DOT
Property Number: 87200240005
Status: Unutilized
Reason: Secured Area

**Unsuitable Properties**

*Land (by State)*

Washington

Hanford Training Site #2
Horn Rapids Road
Benton Co: Benton WA
Landholding Agency: GSA
Property Number: 54200240017
Status: Excess
Reason: Within 2000 ft. of flammable or explosive material GSA Number: 9–B–WA–1198B

[FR Doc. 02–31257 Filed 12–12–02; 8:45 am]

BILLING CODE 4210–29–M

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

### John H. Chafee Blackstone River Valley National Heritage Corridor Commission; Notice of Meeting

Notice is hereby given in accordance with section 552b of title 5, United States Code, that a meeting of the John H. Chafee Blackstone River Valley National Heritage Corridor Commission will be held on Thursday, November 21, 2002.

The Commission was established pursuant to Public Law 99–647. The purpose of the Commission is to assist federal, state and local authorities in the development and implementation of an integrated resource management plan for those lands and waters within the Corridor.

The meeting will convene at 7 p.m. at Leicester Town Hall located at 3 Washburn Square in Leicester, MA for the following reasons:

1. Approval of Minutes.
2. Chairman's Report.
3. Executive Director's Report.
4. Financial Budget.
5. Public Input.

It is anticipated that about twenty-five people will be able to attend the session in addition to the Commission members.

Interested persons may make oral or written presentations to the Commission or file written statements. Such requests should be made prior to the meeting to: Michael Creasey, Executive Director, John H. Chafee Blackstone River Valley National Heritage Corridor Commission, One Depot Square, Woonsocket, RI 02895. Tel.: (401) 762–0250.

Further information concerning this meeting may be obtained from Michael Creasey, Executive Director of the Commission at the aforementioned address.

**Michael Creasey,**

*Executive Director BRVNHCC.*

[FR Doc. 02–31573 Filed 12–12–02; 8:45 am]

BILLING CODE 4310–RK–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Proposed Information Collection Under the Paperwork Reduction Act; Comment Request

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Bureau of Indian Affairs (BIA) invites comments on two information collection requests which will be renewed. The two collections are: Class III Gaming Procedures, 1076–0149, and Tribal Revenue Allocation Plans, 1076–0150.

**DATES:** Submit your comments and suggestions on or before February 11, 2003, to be assured of consideration.

**ADDRESSES:** Comments should be sent to: George Skibine, Bureau of Indian Affairs, Office of Indian Gaming Management, Mail Stop 4543–MIB, 1849 C Street, NW., Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** Interested persons may get copies of the information collection requests without charge by contacting George Skibine at 202–219–4066 or facsimile number 202–273–3153.

**SUPPLEMENTARY INFORMATION:** The Paperwork Reduction Act of 1995 provides an opportunity for interested parties to comment on proposed information collection requests. The Bureau of Indian Affairs, Office of Indian Gaming Management is proceeding with this public comment period as the first step in getting a normal information collection clearance from the Office of Management and Budget (OMB). Each request contains (1) type of review, (2) title, (3) summary of the collection, (4) respondents, (5) frequency of collection, (6) reporting and recordkeeping requirements.

Please note that we will not sponsor nor conduct, and you need not respond to, a request for information unless we display the OMB control number and the expiration date.

**Class III Gaming Procedures**

*Type of review:* Extension of a currently-approved collection.

*Title:* Class III Gaming Procedures, 25 CFR part 291.

*Summary:* The collection of information will ensure that the provisions of IGRA, the relevant provisions of State laws, Federal law and the trust obligations of the United States are met when federally recognized tribes submit Class III procedures for review and approval by the Secretary of the Interior. Sections 291.4, 291.10, 291.12 and 291.15 of 25 CFR part 291, Class III Gaming Procedures, specifies the information collection requirement. An Indian tribe must ask the Secretary to issue Class III gaming procedures. The information to be collected includes: name of Tribe and State; tribal documents, State documents, regulatory schemes, the proposed procedures and other documents deemed necessary. Collection of this information is currently authorized under an approval by OMB (OMB Control Number 1076–0149). All information is collected when the tribe makes a request for Class III gaming procedures. Annual reporting and recordkeeping burden for this collection of information is estimated to occur one time on an annual basis. The estimated number of annual requests is 12 tribes seeking Class III gaming procedures. The estimated time to review instructions and complete each application is 320 hours. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 3,840 hours.

*Frequency of Collection:* Annually.

*Description of Respondents:* Federally recognized tribes.

*Total Respondents:* 12.

*Response Hours per Application:* 320.

*Total Annual Burden Hours:* 3,840 hours.

**Tribal Revenue Allocation Plans**

*Type of review:* Extension of a currently-approved collection.

*Title:* Tribal Revenue Allocation Plans, 25 CFR part 290.

*Summary:* In order for Indian tribes to distribute net gaming revenues in the form of per capita payments, information is needed by the BIA to ensure that Tribal Revenue Allocation Plans include assurances that certain statutory requirements are met, a breakdown of the specific uses to which net gaming revenues will be allocated, eligibility requirements for participation, tax liability notification and the assurance of the protection and preservation of the per capita share of

minors and legal incompetents. Sections 290.12, 290.17, 290.24 and 290.26 of 25 CFR part 290, Tribal Revenue Allocation Plans, specifies the information collection requirement. An Indian tribe must ask the Secretary to approve a Tribal Revenue Allocation Plan. The information to be collected includes: name of Tribe, tribal documents, the allocation plan and other documents deemed necessary. Collection of this information is currently authorized under an approval by OMB (OMB Control Number 1076–0152). All information is collected when the tribe submits a Tribal Revenue Allocation Plan. Annual reporting and recordkeeping burden for this collection of information is estimated to average between 75–100 hours for approximately 50 respondents, including the time for reviewing instructions, researching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 3,750–5,000 hours. We are using the higher estimate for purposes of estimating the public burden.

*Frequency of Collection:* Annually.

*Description of Respondents:* Federally recognized tribes.

*Total Respondents:* 50.

*Total Annual Responses:* 50.

*Total Annual Burden Hours:* 5,000 hours.

**Request for Comments**

The Bureau of Indian Affairs solicits comments in order to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the bureau, including whether the information will have practical utility;

(2) Evaluate the bureau's 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 the information on those who are to respond.

Any public comments received will be addressed in the Bureau of Indian Affairs' submission of the information collect request to the Office of Management and Budget.

All comments will be available for public review during regular business hours. There may be an instance when we decide to withhold information, but if you wish us to withhold your name and address, you must state this prominently at the beginning of your comment. We will honor your request to the extent allowed by law. We will not consider anonymous comments, and we will make public all comments from businesses and from individuals who represent businesses.

Dated: December 3, 2002.

**Neal A. McCaleb,**

*Assistant Secretary—Indian Affairs.*

[FR Doc. 02–31474 Filed 12–12–02; 8:45 am]

BILLING CODE 4310–4N–P

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## DEPARTMENT OF THE INTERIOR

## Bureau of Land Management

**[UT–080–1430–BG]**

## Closure of Public Lands: Utah

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Temporary Emergency Closure of Public Land in Uintah County, Utah.

**SUMMARY:** Notice is hereby given that the Vernal Field Office is re-issuing a temporary emergency closure of public land in Uintah County, Utah, effective January 1, 2003. This order temporarily closes 1,320 acres of public land to public land to public use and entry. This temporary closure area encompasses the following public land:

**Salt Lake Meridian, Utah**

T.10 S., R. 24 E.,
Sec. 22, E½, E½NW¼, SW¼NW¼, SW¼;
Sec. 23, W½;
Sec. 26, NW¼, NW¼;
Sec. 27, NE¼, E½NW¼, NE¼SW¼, N½SE¼.

The authorized officer has determined that the underground methane generation occurring at the abandoned White River Oil Shale Mine is a safety hazard making the facility and surrounding area unsafe for human occupation of activity. The closure area effects the above described public land presently encumbered by the abandoned White River Oil Shale Mine, ancillary support facilities, and associated ventilation shafts. The closure prohibits all use, entry, or access onto the affected public lands; however, the access restriction may be waived under extraordinary circumstances where limited, short term, emergency access is warranted and appropriate clearances and authorization are obtained from the authorized officer.

If BLM authorizes emergency access, it will be conditioned on the following provisions:

All persons entering and leaving the closure area must be accompanied by personnel from the BLM's Vernal Field Office and only after BLM has determined that the area is safe for a site visit.

All persons allowed emergency access into the closure area must waive and release all direct and indirect claims that my occur against the United States for liability for any loss, damage, personal injury, or death that may occur as a result of their access to the closure area and will indemnify and hold harmless the United States. All such incidents shall immediately be reported to the BLM Vernal Field Office.

The purpose of this closure is to protect human life, ensure public safety, and prevent human contact with a known hazardous situation. A map of the area affected by this closure is on file and may be viewed at the BLM Vernal Field Office.

**EFFECTIVE DATE:** The closure order is effective from January 1, 2003, through December 31, 2004, unless it is rescinded or modified by the authorized officer before that date.

**SUPPLEMENTARY INFORMATION:** This closure is done under the authority of 43 CFR 8364.1. Persons violating this closure shall be subject to the penalties provided in 43 CFR 8360.0–7, including a fine not to exceed $1,000.00 and/or imprisonment not to exceed one year.

**FOR FURTHER INFORMATION CONTACT:** The BLM Vernal Field office, 170 South 500 East, Vernal, Utah 84078, (435) 781–4400.

Dated: October 2, 2002.

**David E. Howell,**

*Field Manager.*

[FR Doc. 02–31404 Filed 12–12–02; 8:45 am]

BILLING CODE 4310–DQ–M

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## DEPARTMENT OF THE INTERIOR

## Bureau of Land Management

**[CO–01–134–1610–241A]**

## Colorado Canyons National Conservation Area Advisory Council Meeting

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of meetings.

**SUMMARY:** The Colorado Canyons National Conservation Area (CCNCA) Advisory Council will hold its first monthly meeting of 2003 on January 9, 2003. The meeting will begin at 3 p.m. and will be held at the Mesa County Administration Building; 544 Rood Avenue, Grand Junction, CO; in the main floor Multipurpose Room. Throughout the remainder of calendar year 2003, the CCNCA Advisory Council meetings will be held the first Thursday of each month in the same location and at the same time. The CCNCA was established on October 24, 2000, when the Colorado Canyons National Conservation Area and Black Ridge Wilderness Act of 2000 (the Act) was signed by the President. The Act required that the CCNCA Advisory

Council be established to provide advice in the preparation and implementation of the CCNCA resource management plan and environmental impact statement.

**DATES:** January 9, 2002.

**ADDRESSES:** For further information or to provide written comments, please contact Greg Gnesios, Bureau of Land Management (BLM), 2815 H Road, Grand Junction, Colorado 81506; Telephone (970) 244–3049; e-mail *Gregory_Gnesios@co.blm.gov.*

**SUPPLEMENTARY INFORMATION:** The CCNCA Advisory Council will meet on Thursday, January 9, 2003, at the Mesa County Administration Building; 544 Rood Avenue, Grand Junction, CO; in the main floor Multipurpose Room, Grand Junction, Colorado, beginning at 3 p.m. The agenda topics for this meeting are:

(1) The re-election of council officials.

(2) Recommendations from working groups.

(3) Land health recommendations.

(4) Public comment period.

(5) Agenda for next meeting.

Beginning February 2003 the CCNCA Advisory Council meetings will be held monthly on the first Thursday of each month at the same time and location. The dates for these meetings are February 6, 2003; March 6, 2003; April 3, 2003; May 1, 2003; June 5, 2003; July 3, 2003; August 7, 2003; September 4, 2003; October 2, 2003; November 6, 2003; and December 4, 2003.

Topics of discussion for future meetings will include recommendations on management alternatives, including the preferred management alternative, potential environmental consequences of all identified alternatives, completion of the draft resource management plan, partnerships, interpretation, adaptive management, socioeconomics, and other issues as appropriate.

All meetings will be open to the public and will include a time set aside for public comment. Interested persons may make oral statements at the meetings or submit written statements at any meeting. Per-person time limits for oral statements may be set to allow all interested persons an opportunity to speak.

Summary minutes of all Council meetings will be maintained at the Bureau of Land Management Office in Grand Junction, Colorado. They are available for public inspection and reproduction during regular business hours within 30 days of the meeting. In addition, minutes and other information concerning the CCNCA Advisory Council can be obtained from the CCNCA website at: *http://www.co.blm.gov/cocanplan* which will be updated following each Advisory Council meeting.

Dated: December 6, 2002.

**Greg Gnesios,**

*Manager, Colorado Canyons National Conservation Area.*

[FR Doc. 02–31415 Filed 12–12–02; 8:45 am]

**BILLING CODE 4310–AG–P**

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[CA–670–03–1220–DU–064B]**

### Notice of Proposed Amendment to the California Desert Conservation Area Plan and Effective Date for Off-Road Vehicle Trail (Route of Travel) Designations in the Western Colorado Desert (WECO) Portion of Imperial County, CA

**AGENCY:** Department of Interior, Bureau of Land Management, California Desert District.

**ACTION:** Notice of amendment to the California Desert Conservation Area (CDCA) Plan and effective date for off-road vehicle trail (route of travel) designations in the Western Colorado Desert (WECO) portion of Imperial County, California.

**DATES:** Written protests on the Proposed Plan Amendment will be accepted if received by January 13, 2003. Instructions for filing protests are contained below under **SUPPLEMENTARY INFORMATION.**

**SUMMARY:** The Proposed Plan Amendment establishes or revises off-road vehicle designations of areas and trails (routes of travel) in accordance with part 43 Code of Federal Regulations subpart 8342. Trails (routes of travel) for inclusion in the State of California's Discovery Trail System and a segment of the Juan Bautista de Anza National Historic Trail are identified and authorized. The proposed designations pertain to public lands addressed by the California Desert Conservation Area Plan in the Western Colorado Desert (WECO) portion of Imperial County that lie west of the Imperial Sand Dunes Recreation Management Area.

**ADDRESSES:** The proposed amendment and environmental assessment are available for review on line at *http://www.ca.blm.gov/elcentro* and at the following address and telephone number: Bureau of Land Management, El Centro Field Office, 1661 South 4th Street, El Centro, CA 92243, (760) 337–4400.

**FOR FURTHER INFORMATION CONTACT:** Arnold Schoeck, Bureau of Land Management, 1661 South 4th Street, El Centro, CA 92243; (760) 337–4441.

**SUPPLEMENTARY INFORMATION:** The Bureau of Land Management published in the **Federal Register** on March 25, 2002, the Notice of Intent to prepare an Environmental Assessment and Plan Amendment to the California Desert Conservation Area Plan by making off-road vehicle trail (route of travel) designations in the Western Colorado Desert portion of Imperial County. The public scoping period for the project began March 25, 2002 and the **Federal Register** on May 23, 2002 extended the comment period until May 31, 2002. On October 18, 2002, in the **Federal Register**, the Notice of Availability for the Environmental Assessment and the plan amendment was published in the **Federal Register** on October 18, 2002. The **Federal Register** Notice started a 30-day public comment period that ended on November 18, 2002.

Any person who has participated in the plan amendment process and has an interest that is or may be adversely affected by the proposed amendment may protest such approval or amendment. A protest may raise only those issues that were submitted for the record during the planning process. Protests must be filed in writing with the BLM Director in accordance with 43 CFR 1610.5–2:

(i) The name, mailing address, telephone number and interest of the person filing the protest;

(ii) A statement of the issue or issues being protested;

(iii) A statement of the part or parts of the plan or amendment being protested;

(iv) A copy of all documents addressing the issue or issues that were submitted during the planning process by the protesting party or an indication of the date the issue or issues were discussed for the record; and

(v) A concise statement explaining why the State Director's decision is believed to be wrong. The decision of the Director on any protest shall be the final decision for the Department of the Interior.

Mailing address for filing a protest: *Regular mail:* Director (210), Attn: Brenda Williams, P.O. Box 66538, Washington, DC 20035.

*Overnight mail:* U.S. Department of the Interior, Director, Bureau of Land Management, Protest Coordinator (WO–

210), 1620 ''L'' Street, NW., Rm 1075, Washington, DC 20036.

**Greg Thomsen,**

*Field Manager, El Centro Field Office.*

[FR Doc. 02–31517 Filed 12–12–02; 8:45 am]

BILLING CODE 4310–40–P

## DEPARTMENT OF THE INTERIOR

## Bureau of Reclamation

## Closure Order Establishing Prohibitions On Shell Road Through Peoria Wildlife Area, New Melones Lake Project, Tuolumne County, CA

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of temporary closure to motorized vehicles.

**SUMMARY:** The Bureau of Reclamation's (Reclamation) New Melones Resource Office will temporarily close a portion of Shell Road to public vehicle traffic beginning December 15, 2002, and continuing through approximately April 15, 2003. The exact re-opening date will depend upon weather and resource conditions. The portion of Shell Road to be closed passes through Section 20, R14E, T1N, and continues through Section 19, R14E, T1N, MD Meridian, on property owned and managed by Reclamation. This section of the road passes through the Peoria Wildlife Mitigation Area, as defined in the Final Report, New Melones Lake Fish and Wildlife Resources Report, October 1991, page 16. The entire 2,500-acre Peoria Wildlife Mitigation Area will now be off-limits to public vehicular access—with the exception of authorized parking areas and turnarounds located outside new gates to be established at the closure points on both ends of Shell Road on Reclamation property.

**EFFECTIVE DATES:** The closure will be effective December 15, 2002, through approximately April 15, 2003. Exact re-opening date will be dependant upon weather and resource conditions.

**ADDRESSES:** A map is available for inspection at Reclamation's New Melones Lake Visitor Center, located at 6850 Studhorse Flat Road, Sonora, California 95370. The map may be viewed between the hours of 10 a.m. and 4 p.m. daily. To have a map mailed to your address, send your request to the above address, Attention: Shell Road Temporary Closure Map Request.

**FOR FURTHER INFORMATION CONTACT:** Reclamation, Mid-Pacific Region Public Affairs Office, at 916–978–5100 or Reclamation, New Melones Resource Office, 209–536–9094. Written comments will be accepted regarding this temporary closure now through December 15, 2002. Please send written comments to: Bureau of Reclamation, Attn: Jeff Laird, 6850 Studhorse Flat Road, Sonora, California 95370; Fax: 209–536–9652; E-mail: *jlaird@mp.usbr.gov.*

**SUPPLEMENTARY INFORMATION:** This action is being taken under 43 CFR Part 423 to protect public safety and prevent additional resource degradation. Reclamation will prohibit public vehicle traffic on Shell Road and off-road throughout the Peoria Wildlife Area during the winter months in an effort to protect sensitive resources and preserve the existing roadway, which has become severely eroded and unsafe. Significant maintenance will be required to return the road to a safe condition for public vehicles. Vegetation damage, habitat destruction, erosion and sedimentation, and related resource impacts are increasing in this area. Natural resources continue to be damaged and public safety compromised by illegal actions including target shooting, poaching, off-road driving, fires, littering, dumping of large debris and hazardous materials, poaching, vandalism, and illegal camping.

Planning for a draft Shell Road Corridor Management Plan to address these and other issues is currently in progress. By closing Shell Road temporarily this winter, further damage can be avoided while plans for improvements are devised and needed maintenance is performed.

Public access by foot, horseback, and bicycle will not be impeded. The area will remain open to authorized public recreational activities including but not limited to legal hunting, hiking, rock climbing, horseback riding, bicycling, wildlife viewing, and sightseeing. Parking and turnaround areas will be located outside new gates to be established at the closure points on both ends of Shell Road on Reclamation property. Signage will be installed to notify the public of the closure.

Exceptions to the vehicle closure will include Reclamation Operations and Maintenance personnel, law enforcement and fire department officers, and other agencies, entities, and individuals who have received express written authorization from Reclamation to enter the closure areas.

This order is posted in accordance with 43 CFR part 423.3(b). Violation of this prohibition or any prohibition listed in 43 CFR part 423 is punishable by fine or imprisonment for not more than six months or both.

Dated: November 14, 2002.

**Thomas J. Aiken,**

*Area Manager, Central California Area Office.*

[FR Doc. 02–31416 Filed 12–12–02; 8:45 am]

BILLING CODE 4310–MN–P

## DEPARTMENT OF THE INTERIOR

## Bureau of Reclamation

## Change in Discount Rate for Water Resources Planning

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of change.

**SUMMARY:** The Water Resources Planning Act of 1965 and the Water Resources Development Act of 1974 require an annual determination of a discount rate for Federal water resources planning. The discount rate for Federal water resources planning for fiscal year 2003 is 5.875 percent. Discounting is to be used to convert future monetary values to present values.

**DATES:** This discount rate is to be used for the period October 1, 2002, through and including September 30, 2003.

**FOR FURTHER INFORMATION CONTACT:** James R. Handlon, Economist, Office of Policy, Washington DC 20240; telephone: (202) 513–0603.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the interest rate to be used by Federal agencies in the formulation and evaluation of plans for water and related land resources is 5.875 percent for fiscal year 2003.

This rate has been computed in accordance with Section 80(a), Pub. L. 93–251 (88.Stat. 34) and 18 CFR 704.39, which: (1) Specify that the rate shall be based upon the average yield during the preceding fiscal year on interest-bearing marketable securities of the United States which, at the time the computation is made, have terms of 15 years or more remaining to maturity (average yield is rounded to nearest one-eighth percent); and (2) provide that the rate shall not be raised or lowered more than one-quarter of 1 percent for any year. The Treasury Department calculated the specified average to be 5.477 percent. Rounding this average yield to the nearest one-eighth percent is 5.500 percent, which exceeds the permissible one-quarter of 1 percent change from fiscal year 2002 to 2003. Therefore, the change is limited to one-quarter of 1 percent.

The rate of 5.875 percent shall be used by all Federal agencies in the formulation and evaluation of water and related land resources plans for the

purpose of discounting future benefits and computing costs or otherwise converting benefits and costs to a common time basis.

Dated: November 8, 2002.

**Elizabeth Cordova-Harrison,**

*Deputy Director, Office of Policy.*

[FR Doc. 02–31419 Filed 12–12–02; 8:45 am]

BILLING CODE 4310–MN–P

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review; Comment Request

October 22, 2002.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation contact Darrin King on 202–693–4129 or e-mail: *King-Darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for ETA, Office of Management and Budget, Room 10235, Washington, DC 20503 (202–395–7316), within 30 days from the date of this publication in the **Federal Register.**

The OMB is particularly interested in comments which:

* 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;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* 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.

*Agency:* Employment and Training Administration (ETA).

*Type of Review:* Extension of a currently approved collection.

*Title:* Experience Rating Report.

*OMB Number:* 1205–0164.

*Affected Public:* State, Local, or Tribal Government.

*Type of Response:* Reporting.

*Frequency:* Annually.

*Number of Respondents:* 53.

*Annual Responses:* 53.

*Average Response Time:* 15 minutes (.25 hours).

*Total Annual Burden Hours:* 13.

*Total Annualized Capital/Startup Costs:* $0.

*Total Annual Costs (operating/maintaining systems or purchasing services):* $0.

*Description:* The ETA–204, Experience Rating Report, provides ETA with the data needed to measure variations in assigned contribution rates that result from different experience rating systems. The data are used to provide an indication of whether solvency problems exist in State Trust Fund accounts and for analyzing factors that give rise to solvency problems. Section 303(a)(6) of the Social Security Act authorizes ETA to collect this information.

**Ira L. Mills,**

*Departmental Clearance Officer.*

[FR Doc. 02–31485 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–M

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review; Comment Request

October 4, 2002.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation, contact Darrin King on (202) 693–4129 or e-mail: *King-Darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Office of Disability Employment Policy, Office of Management and Budget, Room 10235, Washington, DC 20503 (202) 395–7316), within 30 days from the date of this publication in the **Federal Register.**

The OMB is particularly interested in comments which:

* 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;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* 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.

*Agency:* Office of Disability Employment Policy (ODEP).

*Type of Review:* New collection.

*Title:* Employment Assistance Referral Network (EARN) Employer and Provider Enrollment Forms, Employer Job Posting Form, and Employer and Provider Surveys.

*OMB Number:* 1230–ONEW.

*Frequency:* On occasion and Annually.

*Affected Public:* Businesses or other for-profit; Not-for-profit institutions; Farms; Federal Government; and State, Local, or Tribal Government.

*Number of Respondents:* 7,500

| Form | Number of responses | Average response time (hours) | Annual burden hours |
|---|---|---|---|
| Provider enrollment form (EARN–1) | 6,000 | .33 (20 min.) | 1,980 |
| Employer enrollment form (EARN–2) | 7,500 | .33 (20 min.) | 2,475 |
| Employer survey | 300 | .33 (20 min.) | 100 |
| Provider Survey | 300 | .33 (20 min.) | 100 |
| Total | 14,100 | | 4,655 |

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintaining):* $0.

*Description:* EARN is a referral service that links employers with service providers who refer appropriate candidates with disabilities. This information collection will enable ODEP to implement its responsibilities under Pub. L. 106–554 and Executive Order 13187 by providing necessary information for referrals as well as provide data on the effectiveness of the program.

**Ira L. Mills,**

*Departmental Clearance Officer.*

[FR Doc. 02–31486 Filed 12–12–02; 8:45 am]

**BILLING CODE 4510–CX–M**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Proposed Collection; Comment Request

**AGENCY:** Employment and Training Administration, DOL.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95 (44 U.S.C. 35069(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Interagency Federal Agency Team from the Departments of Labor, Education, Health and Human Services, Agriculture, and Housing and Urban Development is soliciting comments concerning the proposed reinstatement of the Workforce Investment Act: Final Unified State Planning Guidance (OMB Control No. 1205–0407), should states desire to submit a modification to their current plan. A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below.

**FOR FURTHER INFORMATION CONTACT:** Maria Flynn, Office of One-Stop Operations/ATTN: Dolores Hall-Beran, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210: (202) 693–3045 (phone) (this is not a toll-free number); e-mail at *dberan@doleta.gov*; fax at: (202) 693–3015, call TTD at: 1–800–326–2577. Information may also be found at the Web site—*http://www.doleta.gov/usworkforce/*

**SUPPLEMENTARY INFORMATION:**

### I. Background

Section 501 of the Workforce Investment Act (Public Law 105–220) provides the Governor of the state the option to submit a strategic Unified State Plan for two or more of the activities or programs listed in section 501(b)(2) of the Act, which include secondary vocational education programs authorized under the Carl D. Perkins Vocational and Applied Technology Education Act, programs authorized under the title I of the Rehabilitation Act of 1973, other programs administered by Federal agencies other than the Department of Labor (DOL) as well as title I of WIA and other programs administered by DOL. The Unified Planning process provides an opportunity for states to maximize joint planning and coordination among a variety of programs and activities. States have the option of submitting a single plan for up to 16 Federal education and training programs. The Unified Plan outlines a 5-year strategy for the statewide workforce investment system of the State.

Acting on behalf of the Secretaries from each agency whose program is included in the Plan, senior managers from these respective agencies, complete a comprehensive coordinated review of the Unified State Plan modification submitted by the Governor. Based upon this review, the appropriate Secretaries of the federal agencies listed above, make a determination of whether the Plan or its modification is consistent with each program or activities' governing legislation. If no outstanding issues are noted, the Unified Plan modification is approved; if deficiencies are noted, the Governor is advised that the state must submit clarification or additional information. Modifications to the Unified Plan during the 5-year period undergo a comparable review and determination followed by a letter indicating approval or the need for additional information or clarification.

### II. WIA Reauthorization

Reauthorization of the Workforce Investment Act is scheduled for 2003. The Administration is in the process of developing a reauthorization proposal which may impact the Unified Planning Process.

**Note:** Since the original publication date, several of the Interagency Federal staff contact information listed in Section C (Programs and Activities) of the Unified Planning Guidance has changed. Should State staff require information on the programs and activities listed WIA section 501(b)(2), please note the following new contact information:

*U.S. Department of Education, Office Vocational and Adult Education (OVAE)*

—Secondary Vocational Education Programs (Perkins III/Secondary);

—Postsecondary Vocational Education (Perkins II/Postsecondary;

—Tech-Prep Education (Title II of Perkins III); and

—Activities authorized under Title II of WIA (Adult Education and Family Literacy Programs):

*Contact:* Daniel Bonner, Director of Policy Analysis: 202–260–2517 (phone); 202–260–9183 (fax); (e-mail: *Daniel.Bonner@ed.gov).*

*U.S. Department of Labor, Employment and Training Administration (ETA)*

—Activities authorized under Title I (Workforce Investment Activities for Adults, Dislocated Workers and Youth or WIA Title I):

*Contact:* Maria Flynn, Office of Workforce Investment, Division of One-Stop Operations/ATTN: Dolores Hall-Beran: 202–693–3045 (phone); 202–693–6336 (fax); (e-mail: *mflynn@doleta.gov* or *dberan@doleta.gov).*

—Activities authorized under chapter 2 of title II of the Trade Act of 1974 as amended (Trade Act Programs):

*Contact:* Edward Tomchick: 202–693–3577 (phone); 202–693–3584); (e-mail: *etomchick@doleta.gov).*

—Programs authorized under the Wagner-Peyser Act (Employment Service):

*Contact:* Stephanie Cabell: 202–693–3171 (phone); 202–693–3015 (fax); (e-mail: *scabell@doleta.gov.*

—Programs authorized under State unemployment compensation laws (Unemployment Insurance):

*Contact:* William Coyne: 202–693–3202 (phone); 202–693–3975 (fax); (e-mail: *wcoyne@doleta.gov).*

—Programs authorized under title V of the Older Americans Act of 1965 (Senior Community Service Employment Program, or SCSEP):

*Contact:* Robert Lunz: 202–693–3762 (phone); 202–693–3817 (fax); (e-mail: *rlunz@doleta.gov).*

*U.S. Department of Labor, Veterans' Employment and Training Service (VETS)*

—Programs authorized under chapters 41 and 42 of Title 38, U.S.C., and 20 CFR parts 1001 and 1005 (Veterans Programs, including Veterans Employment, Disabled Veterans' Outreach Program and Local Veterans' Employment Representative Programs):

*Contact:* Miguel Hernandez: 202–693–4708 (phone); 202–693–4755 (fax); (e-mail: *Hernandez-miguel@dol.gov.*)

*U.S. Department of Housing and Urban Development (HUD)*

—Training activities funded by HUD under the Community Development Block Grants (CDBG) and Public Housing Programs:

*Contact:* Jeffery Lubell: 202–708–1537 ext. 5915 (phone); (e-mail: *Jeffery_m._lubell@hud.gov.*)

*U.S. Department of Health and Human Services (HHS)*

—Programs authorized under the Community Services Block Grant Act (Community Services Block Grant, or CSBG):

*Contact:* Brandy RayNor-Hill: 202–205–5926 (phone); 202–401–5718 (fax); (e-mail: *braynor@acf.hhs.gov).*

**III. Current Actions**

Section 501 of the Workforce Investment Act (Public Law 105–220) provides the Governor of the state the option to submit a strategic Unified State Plan for two or more of the activities or programs listed in section 501(b)(2) of the Act. The Unified State Planning Guidance Instructions outlines a strategy for the submission of a unified plan for the statewide workforce investment system that meets the requirements of Title V of the Act. This reinstatement is needed in order for state governments to submit modifications to their Unified State Plan. These modifications may be needed in order to keep the Plan a viable, living document over its five-year life. The Act gives states the authority to modify WIA Plans at any time and the recently issued Training and Employment Guidance Letter No. 4–02 encourages states to use the unified planning guidance to move from stand-alone planning to a unified planning process. This reinstatement is needed in order for state governments to have available the document used during their initial submission of State Plans, should the state need to submit a modification to its existing Plan.

**IV. Review Focus**

The Department of Labor is particularly interested in comments which:

(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 agency's 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 clarify 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, (*e.g,* electronic submissions of responses via e-mail submission, faxes, *etc.*).

*Type of Review:* Reinstatement.

*Agency:* Employment and Training Administration.

*Title:* State Unified Plan Planning Guidance (for State Unified Plans Submitted under section 501 of the Workforce Investment Act of 1998).

*OMB Number:* 1205–0407.

*Total Respondents:* 57.

*Frequency:* As Needed.

*Total Responses Received:* 23.

*Average Time per Response:* 25 hours.

*Estimated Total Burden Hours:* 734.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintaining):* $0.

Comments submitted in response to this comment request will be summarized and/or included in the request for the Office of Management and Budget's approval of the information collection request; they will also become a matter of public record.

Signed at Washington, DC this 10th day of December, 2002.

**Grace A. Kilbane,**

*Administrator, Office of Workforce Investment, Employment and Training Administration.*

[FR Doc. 02–31560 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6548]**

### State of Alaska Commercial Fisheries Entry Commission Permit #57327S, Aleknagik, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #57327S, Aleknagik, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31487 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6547]**

### State of Alaska Commercial Fisheries Entry Commission Permit #56585O, Aleknagik, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), Subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit # 56585O, Aleknagik, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31488 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6545]**

### State of Alaska Commercial Fisheries Entry Commission Permit #60381N, Aleknagik, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with Section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #60381N, Aleknagik, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31489 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6544]**

### State of Alaska Commercial Fisheries Entry Commission Permit #58534G, Aleknagik, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #58534G, Aleknagik, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31490 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6542]**

### State of Alaska Commercial Fisheries Entry Commission Permit #56175H, Aleknagik, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #56175H, Aleknagik, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31491 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6539]**

### State of Alaska Commercial Fisheries Entry Commission Permit #56739M, Aleknagik, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #56739M, Aleknagik, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31492 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6538]**

### State of Alaska Commercial Fisheries Entry Commission Permit #59511H, Aleknagik, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #59511H, Aleknagik, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31493 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–7097]**

### State of Alaska Commercial Fisheries Entries Commission Permit #64708K, Clarks Point, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of State of Alaska Commercial Fisheries Entry Commission Permit #64708K, Clarks Point, Alaska.

The workers stopped fishing in July of 2001, more than one year from the September 5, 2002, petition date. Section 223(b)(1) of the Trade Act of 1974, as amended, provides that a certification may not apply to a worker whose separation from employment occurred more than one year prior to the date the petition was filed.

Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31494 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–7074]**

### State of Alaska Commercial Fisheries Entry Commission Permit #55914X, Twin Hills, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of State of Alaska Commercial Fisheries Entry Commission Permit #55914X, Twin Hills, Alaska.

The workers stopped fishing in July of 2001, more than one year from the September 5, 2002, petition date. Section 223(b)(1) of the Trade Act of 1974, as amended, provides that a certification may not apply to a worker whose separation from employment occurred more than one year prior to the date the petition was filed.

Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31495 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6760]**

### State of Alaska Commercial Fisheries Entry Commission Permit #58675X, Goodnews Bay, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #58675X, Goodnews Bay, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31496 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6580]**

### State of Alaska Commercial Fisheries Entry Commission Permit #56790R, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #56790R, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31497 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6579]**

### State of Alaska Commercial Fisheries Entry Commission Permit #68167V, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #68167V, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31498 Filed 12–12–02; 8:45 am]

**BILLING CODE 4510–30–P**

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6577]**

### State of Alaska Commercial Fisheries Entry Commission Permit #55153C, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement

Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #55153C, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31499 Filed 12–12–02; 8:45 am]

**BILLING CODE 4510–30–P**

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6576]**

### State of Alaska Commercial Fisheries Entry Commission Permit #56946A, Dillingham, AK; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #56946A, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31500 Filed 12–12–02; 8:45 am]

**BILLING CODE 4510–30–P**

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6572]**

### State of Alaska Commercial Fisheries Entry Commission Permit #59194H, Dillingham, AK; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit # 59194H, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31501 Filed 12–12–02; 8:45 am]

**BILLING CODE 4510–30–P**

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6574]**

### State of Alaska Commercial Fisheries Entry Commission Permit #66280G, Dillingham, AK; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA-TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #66280G, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31502 Filed 12–12–02; 8:45 am]

**BILLING CODE 4510–30–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6573]**

### State of Alaska Commercial Fisheries Entry Commission Permit #65811Q, Dillingham, AK; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #65811Q, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31503 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6571]**

### State of Alaska Commercial Fisheries Entry Commission Permit #57803W, Dillingham, AK; Notice of Termination of Investigation

Pursuant to title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002, in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit # 57803W, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31504 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6575]**

### State of Alaska Commercial Fisheries Entry Commission Permit #55724E, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #55724E, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31505 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6582]**

### State of Alaska Commercial Fisheries Entry Commission Permit #55022I, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #55022I, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 22nd day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31506 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6759]**

### State of Alaska Commercial Fisheries Entry Commission Permit #57464Q, Ekwok, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #57464Q, Ekwok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington DC, this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31507 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6757]**

### State of Alaska Commercial Fisheries Entry Commission Permit #55836U, Ekwok, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #55836U, Ekwok, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31508 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6756]**

### State of Alaska Commercial Fisheries Entry Commission Permit #67876N, Egegik, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #67876N, Egegik, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31509 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6712]**

### State of Alaska Commercial Fisheries Entry Commission Permit #59609H, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #59609H, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31510 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6644]**

### State of Alaska Commercial Fisheries Entry Commission Permit #64514S, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #64514S, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31511 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6643]**

### State of Alaska Commercial Fisheries Entry Commission Permit #55694F, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #55694F, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance,*

[FR Doc. 02–31512 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6642]**

### State of Alaska Commercial Fisheries Entry Commission Permit #59541A, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #59541A, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31513 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6641]**

### State of Alaska Commercial Fisheries Entry Commission Permit #61907L, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #61907L, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31514 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6640]**

### State of Alaska Commercial Fisheries Entry Commission Permit #58284V, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit # 58284V, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31515 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[NAFTA–6639]**

### State of Alaska Commercial Fisheries Entry Commission Permit #61292S, Dillingham, AK; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), subchapter D, chapter 2, title II, of the Trade Act of 1974, as amended (19 U.S.C. 2273), an investigation was initiated on September 5, 2002 in response to a petition filed by the Bristol Bay Native Association on behalf of Bristol Bay salmon fishermen, State of Alaska Commercial Fisheries Entry Commission Permit #61292S, Dillingham, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 26th day of November, 2002.

**Linda G. Poole,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 02–31516 Filed 12–12–02; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Employment Standards Administration; Wage and Hour Division

### Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in

accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to the impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register,** or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon And Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department.

Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

## Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

*Volume I*

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None

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NV020009 (Mar. 1, 2002)

## General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under the Davis-Bacon And Related Acts''. This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

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Signed in Washington, DC this 4th day of December, 2002.

**Carl J. Poleskey,**

*Chief, Branch of Construction Wage Determinations.*

[FR Doc. 02–31216 Filed 12–12–02; 8:45 am]

**BILLING CODE 4510–27–M**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. STN 50–528]**

### Arizona Public Service Co.; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Arizona Public Service Company (the licensee) to withdraw its application dated September 26, 2002, and its supplement dated October 23, 2002, for proposed amendment to Facility Operating License No. NPF–41 for the Palo Verde Nuclear Generating Station, Unit No. 1, located in Maricopa County, Arizona.

The proposed amendment would have revised the definition of steam generator tube inspection in Section 5.5.9, ''Steam Generator (SG) Tube Surveillance Program,'' of the Technical Specifications.

The Commission had previously issued Notices of Consideration of Issuance of Amendment published in the **Federal Register** on October 3, 2002 (67 FR 62079) and on November 26, 2002 (67 FR 70763). The initial notice stated that the amendment had been submitted under exigent circumstances, to be issued on or about October 25, 2002, with the public comment period being less than the normal 30-day period. The basis for the exigent circumstances was provided in the notice. However, on October 25, 2002, the NRC staff issued a letter to the licensee stating that the proposed amendment was not needed on an exigent basis prior to plant restart. Therefore, the second notice was published to provide the normal 30-day public comment period for the amendment. By letter dated November 19, 2002, the licensee requested to withdraw the proposed amendment request, and by letter dated November 22, 2002, the NRC staff stated that it did not object to the licensee's withdrawal of the application. Therefore, the proposed change effectively has been withdrawn.

For further details with respect to this action, see the application for amendment dated September 26, 2002, and its supplement dated October 23, 2002; the licensee's letter dated November 19, 2002; and the staff's letter of November 22, 2002. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams/html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by email to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 4th day of December, 2002.

For the Nuclear Regulatory Commission.

**Jack Donohew,**

*Senior Project Manager, Section 2, Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.*

[FR Doc. 02–31437 Filed 12–12–02; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–338 and 50–339]**

### Virginia Electric and Power Co., North Anna Power Station, Units 1 and 2; Notice of Availability of the Final Supplement 7 to the Generic Environmental Impact Statement Regarding License Renewal for the North Anna Power Station, Units 1 and 2

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC) has published a final plant-specific Supplement 7 to the Generic Environmental Impact Statement (GEIS), NUREG–1437, regarding the renewal of operating licenses NPF–4 and NPF–7 for the North Anna Power Station, Units 1 and 2, for an additional 20 years of operation. The North Anna Power Station units are operated by Virginia Electric and Power Company (VEPCo). North Anna Power Station is located on the southern shore of Lake Anna, Louisa County, Virginia. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative methods of power generation.

In Section 9.3 of the report:

> Based on (1) the analysis and findings in the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG–1437; (2) the Environmental Report submitted by VEPCo; (3) consultation with Federal, State, and local agencies; (4) the staff's own independent review; and (5) the staff's consideration of public comments, the recommendation of the staff is that the Commission determine that the adverse environmental impacts of license renewal for North Anna Power Station, Units 1 and 2, are not so great that preserving the option of license renewal for energy planning decision-makers would be unreasonable.

The final Supplement 7 to the GEIS is available electronically for public inspection in the NRC Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, or from the Publicly Available Records (PARS) component of NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/* (the Public Electronic Reading Room). Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

**FOR FURTHER INFORMATION, CONTACT:** Mr. Andrew J. Kugler, License Renewal and

Environmental Impacts Program, Division of Regulatory Improvement Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Mr. Kugler may be contacted at 301–415–2828 or by writing to: Andrew J. Kugler, U.S. Nuclear Regulatory Commission, MS O–12D1, Washington, DC 20555.

Dated at Rockville, Maryland, this 4th day of December, 2002.

For the Nuclear Regulatory Commission.

**Pao-Tsin Kuo,**

*Program Director, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.*

[FR Doc. 02–31435 Filed 12–12–02; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–280 and 50–281]**

### Virginia Electric and Power Co., Surry Power Station, Units 1 and 2; Notice of Availability of the Final Supplement 6 to the Generic Environmental Impact Statement Regarding License Renewal for the Surry Power Station, Units 1 and 2

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC) has published a final plant-specific Supplement 6 to the Generic Environmental Impact Statement (GEIS), NUREG–1437, regarding the renewal of operating licenses DPR–32 and DPR–37 for the Surry Power Station, Units 1 and 2, for an additional 20 years of operation. The Surry Power Station units are operated by Virginia Electric and Power Company (VEPCo). Surry Power Station is located on the Gravel Neck Peninsula in Surry County, Virginia. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative methods of power generation.

As discussed in Section 9.3 of the report:

Based on (1) the analysis and findings in the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG–1437; (2) the Environmental Report submitted by VEPCo; (3) consultation with Federal, State, and local agencies; (4) the staff's own independent review; and (5) the staff's consideration of public comments, the recommendation of the staff is that the Commission determine that the adverse environmental impacts of license renewal for Surry Power Station, Units 1 and 2, are not so great that preserving the option of license renewal for energy planning decision-makers would be unreasonable.

The final Supplement 6 to the GEIS is available electronically for public inspection in the NRC Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, or from the Publicly Available Records (PARS) component of NRC's Agency wide Documents Access and Management System (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/* (the Public Electronic Reading Room). Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

**FOR FURTHER INFORMATION, CONTACT:** Mr. Andrew J. Kugler, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Mr. Kugler may be contacted at 301–415–2828 or by writing to: Andrew J. Kugler, U.S. Nuclear Regulatory Commission, MS O–12D1, Washington, DC 20555.

Dated at Rockville, Maryland, this 4th day of December, 2002.

For the Nuclear Regulatory Commission.

**Pao-Tsin Kuo,**

*Program Director, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.*

[FR Doc. 02–31436 Filed 12–12–02; 8:45 am]

BILLING CODE 7590–01–P

## PENSION BENEFIT GUARANTY CORPORATION

### Required Interest Rate Assumption for Determining Variable-Rate Premium; Interest Assumptions for Multiemployer Plan Valuations Following Mass Withdrawal

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Notice of interest rates and assumptions.

**SUMMARY:** This notice informs the public of the interest rates and assumptions to be used under certain Pension Benefit Guaranty Corporation regulations. These rates and assumptions are published elsewhere (or can be derived from rates published elsewhere), but are collected and published in this notice for the convenience of the public. Interest rates are also published on the PBGC's Web site (*http://www.pbgc.gov*).

**DATES:** The required interest rate for determining the variable-rate premium under part 4006 applies to premium payment years beginning in December 2002. The interest assumptions for performing multiemployer plan valuations following mass withdrawal under part 4281 apply to valuation dates occurring in January 2003.

**FOR FURTHER INFORMATION CONTACT:** Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

**SUPPLEMENTARY INFORMATION:**

#### Variable-Rate Premiums

Section 4006(a)(3)(E)(iii)(II) of the Employee Retirement Income Security Act of 1974 (ERISA) and § 4006.4(b)(1) of the PBGC's regulation on Premium Rates (29 CFR part 4006) prescribe use of an assumed interest rate (the ''required interest rate'') in determining a single-employer plan's variable-rate premium. The required interest rate is the ''applicable percentage'' (currently 100 percent) of the annual yield on 30-year Treasury securities for the month preceding the beginning of the plan year for which premiums are being paid (the ''premium payment year''). (Although the Treasury Department has ceased issuing 30-year securities, the Internal Revenue Service announces a surrogate yield figure each month—based on the 30-year Treasury bond maturing in February 2031—which the PBGC uses to determine the required interest rate.)

The required interest rate to be used in determining variable-rate premiums for premium payment years beginning in December 2002 is 4.96 percent.

The following table lists the required interest rates to be used in determining variable-rate premiums for premium payment years beginning between January 2002 and December 2002.

| For premium payment years beginning in: | The required interest rate is: |
|---|---|
| January 2002 | 5.48 |
| February 2002 | 5.45 |
| March 2002 | 5.40 |
| April 2002 | 5.71 |
| May 2002 | 5.68 |
| June 2002 | 5.65 |
| July 2002 | 5.52 |
| August 2002 | 5.39 |
| September 2002 | 5.08 |
| October 2002 | 4.76 |
| November 2002 | 4.93 |
| December 2002 | 4.96 |

**Multiemployer Plan Valuations Following Mass Withdrawal**

The PBGC's regulation on Duties of Plan Sponsor Following Mass Withdrawal (29 CFR part 4281) prescribes the use of interest assumptions under the PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044). The interest assumptions applicable to valuation dates in January 2003 under part 4044 are contained in an amendment to part 4044 published elsewhere in today's **Federal Register**. Tables showing the assumptions applicable to prior periods are codified in appendix B to 29 CFR part 4044.

Issued in Washington, DC on this 6th day of December, 2002.

**Joseph H. Grant,**

*Deputy Executive Director and Chief Operating, Officer, Pension Benefit Guaranty Corporation.*

[FR Doc. 02–31433 Filed 12–12–02; 8:45 am]

BILLING CODE 7708–01–P

## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

Upon written request, copy available from: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

**Extension**

Form N–54A, SEC File No. 270–182, OMB Control No. 3235–0237; Form N–54C, SEC File No. 270–184, OMB Control No. 3235–0236; Form N–6F, SEC File No. 270–185, OMB Control No. 3235–0238.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (the ''Act''), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget for extension and approval.

• *Form N–54A under the Investment Company Act of 1940; Notification of Election to be Subject to Sections 55 through 65 of the Investment Company Act of 1940 Filed Pursuant to Section 54(a) of the Act.*

Form N–54A (17 CFR 274.53) is a notification of election to the Commission to be regulated as a business development company. A company making such an election only has to file a form N–54A once.

It is estimated that approximately four respondents per year file with the Commission a form N–54A. Form N–54A requires approximately 0.5 burden hours per response resulting from creating and filing the information required by the form. The total burden hours for form N–54A would be 2.0 hours per year in the aggregate. The estimated annual burden of 2.0 hours represents an increase of 1.0 hour over the prior estimate of 1.0 hour. The increase in burden hours is attributable to an increase in the number of respondents from three to four.

• *Form N–54C under the Investment Company Act of 1940, Notification of Withdrawal of Election to be Subject to Sections 55 through 65 of the Investment Company Act of 1940 Filed Pursuant to Section 54(c) of the Investment Company Act of 1940.*

Form N–54C (17 CFR 274.54) is a notification to the Commission that a company withdraws its election to be regulated as a business development company. Such a company only has to file a form N–54C once.

It is estimated that approximately eight respondents per year file with the Commission a form N–54C. Form N–54C requires approximately 1 burden hour per response resulting from creating and filing the information required by the form. The total burden hours for form N–54C would be 8 hours per year in the aggregate. The estimated annual burden of 8 hours represents a decrease of 4 hours over the prior estimate of 12 hours. The decrease in burden hours is attributable to a decrease in the number of respondents from 12 to eight.

• *Form N–6F under the Investment Company Act of 1940, Notice of Intent to Elect to be Subject to Sections 55 through 65 of the Investment Company Act of 1940.*

Certain companies may have to make a filing with the Commission before they are ready to elect on form N–54A to be regulated as a business development company.[1] A company that is excluded from the definition of ''investment company'' by section 3(c)(1) of the Investment Company Act of 1940 because it has fewer than one hundred shareholders and is not making a public offering of its securities may lose such an exclusion solely because it proposes to make a public offering of securities as a business development company. Such a company, under certain conditions, would not lose its exclusion if it notifies the Commission on form N–6F (17 CFR 274.15) of its intent to make an election to be regulated as a business development company. The company only has to file a form N–6F once.

It is estimated that zero respondents per year file with the Commission a form N–6F. Form N–6F requires approximately 0.5 burden hours per response resulting from creating and filing the information required by the form. The total burden hours for form N–6F would be 0 hours per year in the aggregate but we are requesting one hour for administrative purposes. The estimated annual burden of 1.0 hour represents no change from the prior estimate of 1.0 hour.

The estimates of average burden hours for forms N–54A, N54–C and N–6F are made solely for the purposes of the Act and are not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

Dated: December 4, 2002.

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 02–31398 Filed 12–12–02; 8:45 am]

BILLING CODE 8010–01–P

[1] A company might not be prepared to elect to be subject to sections 55 through 65 of the Investment Company Act of 1940 because its capital structure or management compensation plan is not yet in compliance with the requirements of those sections.

## SECURITIES AND EXCHANGE COMMISSION

### Issuer Delisting; Notice of Application to Withdraw from Listing and Registration on the American Stock Exchange LLC (Drivetime Automotive Group, Inc. (Formerly Known as Ugly Duckling Corporation) 12% Subordinated Debentures (Due 2003) and 11% Subordinated Debentures (Due 2007)) File No. 1–14759

December 6, 2002.

Drivetime Automotive Group, Inc. (formerly known as Ugly Duckling Corporation), a Delaware corporation (''Issuer''), has filed an application with the Securities and Exchange Commission (''Commission''), pursuant to section 12(d) of the Securities Exchange Act of 1934 (''Act'') [1] and rule 12d2–2(d) thereunder,[2] to withdraw its 12% Subordinated Debentures (due 2003) and 11% Subordinated Debentures (due 2007) (''Securities''), from listing and registration on the American Stock Exchange LLC (''Amex'' or ''Exchange'').

The Issuer stated in its application that it has met the requirements of Amex rule 18 by complying with all applicable laws in State of Delaware, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Board of Directors (''Board'') of the Issuer unanimously approved a resolution on November 13, 2002, to withdraw the Issuer's Securities from listing on the Amex. The Board of the Issuer took such action based on the limited trading volume in the Securities and the costs associated with listing its Securities on the Amex. In addition, the Issuer states pursuant to the indentures under which the Securities were issued, it is not required to maintain the listing of its Securities on the Amex.

The Issuer's application relates solely to the withdrawal of the Securities from listing on the Amex and shall not affect its obligation to be registered under section 12(g) of the Act.[3]

Any interested person may, on or before December 30, 2002, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, facts bearing upon whether the application has been made in accordance with the rules of the Amex 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.[4]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 02–31399 Filed 12–12–02; 8:45 am]

BILLING CODE 8010–01–M

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(g).

[4] 17 CFR 200.30–3(a)(1).

## SECURITIES AND EXCHANGE COMMISSION

### Issuer Delisting; Notice of Application To Withdraw From Listing and Registration on the Pacific Exchange, Inc. (Telesoft Corp., Common Stock, No Par Value) File No. 1–13830

December 6, 2002.

Telesolf Corp., an Arizona corporation, (''Issuer''), has filed an application with the Securities and Exchange Commission (''Commission''), pursuant to section 12(d) of the Securities Exchange Act of 1934 (''Act'') [1] and rule 12d2–2(d) thereunder,[2] to withdraw its Common Stock, no par value (''Security''), from listing and registration on the Pacific Exchange, Inc. (''PCX'' or ''Exchange'').

The Board of Directors (''Board'') of the Issuer approved a resolution on November 4, 2002, to withdraw its Security from listing on the Exchange. In making the decision to withdraw its Security from the PCX, the Board considered the following: (i) The number of stockholders of record (54 holders of record as of October 14, 2002), (ii) the limited trading volume in the Security; and (iii) the cost associated with maintaining a listing on the Exchange. The Issuer's Security has traded on the OTC Bulletin Board since October 24, 2002.

The Issuer stated in its application that it has met the requirements of PCX rule 5.4(b) by complying with all applicable laws in effect in the State of Arizona, in which it is incorporated, and with the PCX's rules that govern the removal of securities from listing and registration on the Exchange. The Issuer's application relates solely to the withdrawal of the Security from listing on the PCX and shall not affect its obligation to be registered under section 12(g) of the Act.[3]

Any interested person may, on or before December 30, 2002, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, facts bearing upon whether the application has been made in accordance with the rules of the PCX 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.[4]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 02–31400 Filed 12–12–02; 8:45 am]

BILLING CODE 8010–01–M

[3] 15 U.S.C. 78*l*(g).

[4] 17 CFR 200.30–3(a)(1)..

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–46951; File No. SR–NASD–2002–121]**

### Self-Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. To Modify Application of Additional Circuit/SDP Charge Under Rule 7010(f) to Non-NASD Members

December 6, 2002.

On September 12, 2002, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market. Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify application of Additional Circuit/SDP Charge under NASD Rule 7010(f) to Non-NASD Members.[3] Specifically, Nasdaq proposes to impose the Additional Circuit/SDP Charge under NASD Rule 7010(f) on those subscribers who do not utilize existing T1 capacity efficiently

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Nasdaq also submitted a proposed rule change to modify the conditions under which members pay the Additional Circuit/SDP Charge. *See* Securities Exchange Act Release No. 46695 (October 21, 2002), 67 FR 65819 (October 28, 2002) (SR–NASD–2002–120).

by placing 18 service delivery platforms (''SDPs'') on each T1 circuit.[4]

The proposed rule change was published for comment in the **Federal Register** on October 28, 2002.[5] The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[6] The Commission finds specifically that the proposed rule change promotes the objectives of Section 15A(b)(6) of the Act,[7] which requires, among other things, that the rules of the association be designed to facilitate transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, because the increased efficiency of Nasdaq's T1 circuits, which will expand the available capacity of Nasdaq's Enterprise Wide Network II (''EWN II'') should enhance Nasdaq's ability to keep pace with future growth in trading volumes.

In addition, the Commission finds that the proposed rule change is consistent with Section 15A(b)(5) of the Act[8] which requires that the rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

The Commission notes that this fee applies to members and non-members equally.[9]

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (File No. SR–NASD–2002–121) is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 02–31402 Filed 12–12–02; 8:45 am]

**BILLING CODE 8010–01–P**

[4] Currently, the Additional Circuit/SDP Charge only applies if a subscriber does not place 6 SDPs on each T1 circuit.

[5] *See* Securities Exchange Act Release No. 46696 (October 21, 2002), 67 FR 65821 (October 28, 2002) (SR–NASD–2002–121).

[6] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78*o*–3(b)(6).

[8] 15 U.S.C. 78*o*–3(b)(5).

[9] *See supra* note 3.

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–46947; File No. SR–PCX–2002–55]**

## Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. Regarding Market Maker Quoting Obligations

December 4, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and rule 19b–4 thereunder,[2] notice is hereby given that on August 7, 2002, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I, II, and III below, which items have been prepared by the Exchange. On November 8, 2002, the Exchange submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt PCX rules 6.37(a)(5) and 6.37(c)(4), and amend commentary .05 to PCX rule 6.37 to require options market makers to vocalize a legal-width, two-sided market for a minimum of 10 contracts whenever a floor broker enters a trading crowd and calls for a market in an option series that is one of the 120 most actively traded equity options.[4]

The text of the proposed rule change appears below. New text is in italics.

* * * * *

### Text of the Proposed Rule Change

*Pacific Exchange, Inc.; Rules of the Board of Governors*

¶4935 Obligations of Market Makers

Rule 6.37(a)—No change.

(b) Appointment as a Primary Market Maker.—No change.

(1)–(4)—No change.

*(5) Whenever a Floor Broker enters a trading crowd and calls for a market in a particular option series, each Market Maker present at the trading post will be obligated to vocalize a two-sided, legal-width market (pursuant to rule 6.37(b)(1)) for a minimum of 10 contracts. This obligation only applies to:*

*(A) Market Makers who have executed a transaction in the issue, but not those who have been assigned contracts by the Order Book Official pursuant to Commentary .05, on the day of the Floor Broker's call for a market or on the previous business day;*

*(B) Option issues that are ranked in the 120 most actively traded equity options based on the total number of contracts traded nationally as reported by the Options Clearing Corporation. For each current month, the Exchange's determination of whether an equity option ranks in the top 120 most active issues will be based on volume statistics for the one month of trading activity that occurred two months prior to the current month;*

*(C) Non-broker-dealer orders; and*

*(D) Series not designated as LEAPS (pursuant to rule 6.4).*

(c) In Classes of Option Contracts Other Than Those to Which Appointed.—No change.

(1)–(3)—No change.

*(4) Whenever a Floor Broker enters a trading crowd and calls for a market in a particular option series, each Market Maker present at the trading post will be obligated to vocalize a two-sided, legal-width market (pursuant to rule 6.37(b)(1)) for a minimum of 10 contracts. This obligation only applies to:*

*(A) Market Makers who have executed a transaction in the issue, but not those who have been assigned contracts by the Order Book Official pursuant to Commentary .05, on the day of the Floor Broker's call for a market or on the previous business day;*

*(B) Option issues that are ranked in the 120 most actively traded equity options based on the total number of contracts traded nationally for a specified month based on volume as reported by the Options Clearing Corporation. For each current month, the Exchange's determination of whether an equity option ranks in the top 120 most active issues will be based on volume statistics for the one month of trading activity that occurred two months prior to the current month;*

*(C) Non-broker-dealer orders; and*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Steven B. Matlin, Senior Counsel, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated November 7, 2002 (''Amendment No. 1''). In Amendment No. 1, the Exchange amended the proposed rule change by: (i) Changing the quotation minimum from 20 contracts to 10 contracts; (ii) adding an exception for market makers where a transaction occurs as a result of being assigned contracts by the order book official; (iii) making technical corrections to the rule text; and (iv) offering a basis for requesting accelerated effectiveness for the proposal.

[4] Subject to the conditions set forth in proposed PCX rule 6.37(b)(5)(A)–(D).

*(D) Series not designated as LEAPS (pursuant to rule 6.4).*

(d)–(f)—No Change.

**Commentary .01–.04—No Change.**

Commentary .05—Whenever a Floor Broker enters a trading crowd and calls for a market in any class and series at that post, each Market Maker present at the post where the option is traded is obligated, at a minimum, to make a market for one contract *except as provided for in rule 6.37(b)(5) and rule 6.37(c)(4),* at the established price. In addition, the Options Floor Trading Committee may determine that Market Makers in trading crowds shall increase the depth of their markets as set forth in Options Floor Procedure Advice B–12. In the event a Floor Broker is unable to satisfy his order from bids and offers given in the crowd, the Order Book Official may assign one contract to every Market Maker present within the primary zone to assist the Floor Broker in satisfying his order. If a Market Maker at the post either bids lower or offers higher than the established market, such Market Maker shall be obligated to trade one contract at the price quoted by the Market Maker.

* * * * *

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, PCX included statements concerning the purpose of, and basis for, the proposed rule change, as amended, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to modify PCX rule 6.37 to provide that, subject to certain conditions, whenever a floor broker enters a trading crowd and calls for a market, certain market makers present at the trading post will be obligated to vocalize a two-sided, legal-width market for a minimum of 10 contracts. This obligation would apply to: (a) Market makers who have executed a transaction in the issue, but not those who have been assigned contracts by the Order Book Official pursuant to PCX rule 6.37, commentary .05, on either the day of the floor broker's call for a market or on the previous business day;[5] (b) option issues that are ranked in the top 120 most actively traded equity options; (c) non-broker dealer orders; and (d) series not designated as LEAPS.[6] The proposed rule change would apply to market makers regardless of whether the issue is included in their primary appointment zones.

The Exchange would determine whether an equity option ranks in the top 120 most active, nationally-traded issues, based on volume statistics reported by the Options Clearing Corporation.[7] The list of designated issues will be based on volume statistics for trading activity that occurred two months prior to the current month. For example, February's list of top 120 issues will be based on December's volume, March's list of top 120 issues will be based on January's volume, and so forth. Thereafter, the Exchange will continue to designate the top 120 issues based on a two-month lag time. The Exchange intends to notify its Members of the issues that are designated to be in the top 120 via a regulatory bulletin that will be published at the beginning of each month.

The Exchange represents that the proposed rule change is intended to enhance the quoting obligations of Exchange market makers. Currently, when floor brokers enter a trading crowd and request a market, market makers are only required to make a market for one contract.[8] The Exchange believes that the proposed rule change will also provide greater depth and liquidity to the marketplace, and will therefore benefit the public.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with section 6(b) of the Act,[9] in general, and furthers the objectives of section 6(b)(5) of the Act,[10] in particular, in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

PCX does not believe that the proposed rule change, as amended, would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments on the proposed rule change, as amended, were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Specifically, the Commission solicits comments on whether the proposal would have a detrimental effect on competition and liquidity on the Exchange. The Commission notes that the proposal to increase the quote size obligations for Top 120 options would apply to all market makers that have executed a trade on the same or previous day that a floor broker requests a market in a particular Top 120 option. The Commission understands that PCX market makers have continuous market making obligations in those options for which they have a primary appointment.[11] In addition, the Commission understands that PCX market makers are permitted to make markets in option issues that are outside of their primary appointment.[12] Accordingly, the Commission questions whether the proposal to increase market makers' quote size obligations would discourage some market makers from executing transactions in option issues

[5] *See* Amendment No. 1.

[6] *See* PCX rule 6.4.

[7] The Exchange notes that it intends to use the same procedure for designating the top 120 activity traded issues that it currently uses in designating such issues for purposes of its ''shortfall fee.'' *See* Securities Exchange Act Release No. 45351 (January 29, 2002), 67 FR 5631 (February 6, 2002) (SR–PCX–2001–51).

[8] *See* PCX rule 6.37, commentary .05.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] *See* PCX rule 6.37(b). *See also* PCX rule 6.35.

[12] *See* PCX rule 6.37(c).

that are outside of their primary appointment.

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal offices of the Exchange. All submissions should refer to File No. SR–PCX–2002–55 and should be submitted by January 3, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 02–31401 Filed 12–12–02; 8:45 am]

BILLING CODE 8010–01–P

[13] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Docket No. AB–279 (Sub-No. 4X)]**

### Canadian National Railway Company—Discontinuance of Trackage Rights Exemption—in Niagara County, NY

Canadian National Railway Company (CN) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments and Discontinuances of Service and Trackage Rights* to discontinue trackage rights over a 0.15-mile portion of trackage owned by Canada Southern Railway Company (CSR) from a point on the international railway bridge at Niagara Falls, milepost 0.15, to a point where the trackage joins the CSX Transportation, Inc. trackage, milepost 0.0, in Niagara County, NY.[1] The line traverses United States Postal Service Zip Code 14305.

CN has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any potential overhead traffic can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on January 14, 2003, unless stayed pending reconsideration. Petitions to stay and formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] must be filed by December 23, 2002. Petitions to reopen[3] must be filed by January 2, 2003, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423.

A copy of any petition filed with the Board should be sent to CN's representative: Michael J. Barron, Jr., Counsel for Canadian National Railway Company, Canadian National/Illinois Central, 455 North Cityfront Plaza Drive, Chicago, IL 60611–5317.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

[1] CN notes that the 0.15-mile trackage rights sought to be discontinued are overhead rights over trackage owned by CSR, for which CSR is seeking abandonment authority in *Canada Southern Railway Company—Abandonment Exemption—in Niagara County, NY*, STB Docket No. AB–584 (Sub-No. 1X) (STB served Oct. 22, 2002).

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,100. *See* 49 CFR 1002.2(f)(25).

[3] Because this is a discontinuance proceeding, trail use/rail banking and public use conditions are not appropriate. This proceeding is exempt from environmental and historic reporting requirements. CN only intends to discontinue service over the line. Because CN's discontinuance of trackage rights will merely result in the cessation of service over the line, and CN has not sought abandonment authority, this proceeding is exempt from the reporting requirements listed above and no environmental documentation will be prepared. *See* 49 CFR 1105.6(c)(6) and 1105.8(a) and (b). Because CSR is seeking abandonment authority with respect to this line in STB Docket No. AB–584 (Sub-No. 1X), *see supra* note 1, environmental issues related to abandonment will be addressed in that proceeding.

Decided: December 5, 2002.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 02–31459 Filed 12–12–02; 8:45 am]

BILLING CODE 4915–00–P

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34266]**

### Martin Marietta Materials, Inc.—Continuance in Control Exemption—Alamo North Texas Railroad Corporation

Martin Marietta Materials, Inc. (MMM), a noncarrier, has filed a verified notice of exemption to continue in control of Alamo North Texas Railroad Corporation (Alamo North) upon Alamo North's becoming a Class III railroad.[1]

The transaction was scheduled to be consummated on or after November 20, 2002, the effective date of the exemption (7 days after the notice was filed).

At the time this notice was filed, MMM indirectly controlled two railroads, Fredonia Valley Railroad, Inc., operating in Kentucky, and Alamo Gulf Coast Railroad Co., operating in Texas.

MMM states that: (i) The railroads do not connect with each other or any railroad in their corporate family; (ii) the continuance in control is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family; and (iii) the transaction does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval of requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for the labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of

[1] *See Alamo North Texas Railroad Corporation—Construction and Operation Exemption—Wise County, TX*, STB Finance Docket No. 34002 (STB served Sept. 3, 2002 and Nov. 16, 2001).

a petition to revoke will not automatically stay the transaction.

An original and ten copies of all pleadings referring to STB Finance Docket No. 34266, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Fritz R. Kahn, P.C., 1920 N Street, NW., 8th Floor, Washington, DC 20036–1601.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 6, 2002.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 02–31460 Filed 12–12–02; 8:45 am]

**BILLING CODE 4915–00–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34213]**

### Puget Sound & Pacific Railroad—Lease and Operation Exemption—Union Pacific Railroad Company

Puget Sound & Pacific Railroad (PSPR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to lease and operate approximately 1.85 miles of rail line from Union Pacific Railroad Company extending between milepost 2.41 at Blakeslee Junction, WA, and milepost 4.26 at Raisch, WA.

Because PSPR's projected annual revenues will exceed $5 million, PSPR certified to the Board on November 8, 2002, that, on October 2, 2002, it had posted the required notice of intent to undertake the proposed transaction at the workplace of the employees on the affected line and had served a copy of the notice of intent on the national offices of all labor unions with employees on the rail line. *See* 49 CFR 1150.42(e). PSPR stated in its verified notice that the transaction was scheduled to be consummated on or after December 1, 2002.[1]

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke does not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34213, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Gary A. Laakso, Vice President Regulatory Counsel, Puget Sound & Pacific Railroad, 5300 Broken Sound Boulevard NW., Boca Raton, FL 33487 and Louis E. Gitomer, Ball Janik LLP, 1455 F Street, NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 9, 2002.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 02–31457 Filed 12–12–02; 8:45 am]

**BILLING CODE 4915–00–P**

[1] Due to the timing of PSPR's certification to the Board, consummation under these circumstances would have had to be delayed until January 7, 2003 (60 days after PSPR's certification to the Board that it had complied with the requirements of 49 CFR 1150.42(e)). In a decision in this proceeding served on December 6, 2002, however, the Board granted the request by PSPR for waiver of the remainder of the 60-day notice period to allow consummation to occur as early as December 6, 2002.

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Docket No. AB–845X]**

### CHS Holdings, Inc.—Abandonment Exemption—in Pembina County, ND

On November 25, 2002, CHS Holdings, Inc. (CHS) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon its entire line of railroad extending from milepost 177.44 to the end of the line at milepost 179.55, a distance of 2.11 miles, in Pembina County, ND. The line traverses U.S. Postal Service Zip Code 58271 and includes no stations.

The line does not contain federally granted rights-of-way. Any documentation in CHS's possession will be made available promptly to those requesting it.

In this proceeding, CHS is proposing to abandon a line that constitutes its entire rail system. CHS seeks to extinguish its common carrier obligation and, following abandonment of the line, to operate it as a private carrier. When issuing abandonment authority for a railroad line that constitutes the carrier's entire system, the Board does not impose labor protection, except in specifically enumerated circumstances. *See Northampton and Bath R. Co.—Abandonment*, 354 I.C.C. 784, 785–86 (1978) (*Northampton*). Therefore, if the Board grants the petition for exemption, in the absence of a showing that one or more of the exceptions articulated in *Northampton* are present, no labor protective conditions will be imposed.

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by March 14, 2003.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,100 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than January 2, 2003. Each trail use request must be accompanied by a $150 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB–845X and must be sent to: (1) Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001; and (2) Fritz R. Kahn, 1920 N Street, NW., 8th Floor, Washington, DC 20036–1601. Replies to the CHS petition are due on or before January 2, 2003.

Persons seeking further information concerning abandonment and discontinuance procedures may contact the Board's Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 565–1552. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at ''*http://www.stb.dot.gov.*''

Decided: December 5, 2002.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 02–31458 Filed 12–12–02; 8:45 am]

BILLING CODE 4915–00–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

December 4, 2002.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before January 13, 2003 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–1505.

*Form Number:* IRS Form 8820.

*Type of Review:* Extension.

*Title:* Orphan Drug Credit.

*Description:* Filers use this form to elect to claim the orphan drug credit, which is 50% of the qualified clinical testing expenses paid or incurred with respect to low or unprofitable drugs for rare diseases and conditions, as designated under section 526 of the Federal Food, Drug, and Cosmetic Act.

*Respondents:* Business or other for-profit.

*Estimated Number of Respondents/Recordkeepers:* 100.

*Estimated Burden Hours Per Respondent/Recordkeeper:*

| | |
|---|---|
| Recordkeeping | 7 hr., 10 min. |
| Learning about the law or the form. | 1 hr. |
| Preparing and sending the form to the IRS. | 1 hr., 9 min. |

*Frequency of Response:* Annually.

*Estimated Total Reporting/Recordkeeping Burden:* 932 hours.

*Clearance Officer:* Glenn Kirkland (202) 622–3428, Internal Revenue Service, Room 6411–03, 1111 Constitution Avenue, NW., Washington, DC 20224.

*OMB Reviewer:* Joseph F. Lackey, Jr. (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Mary A. Able,**

*Departmental Reports, Management Officer.*

[FR Doc. 02–31461 Filed 12–12–02; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Bureau of Alcohol, Tobacco and Firearms

### Proposed Collection; Comment Request

**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 Bureau of Alcohol, Tobacco and Firearms is soliciting comments concerning the Labeling and Advertising Requirements Under the Federal Alcohol Administration Act.

**DATES:** Written comments should be received on or before February 11, 2003 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Bureau of Alcohol, Tobacco and Firearms, Linda Barnes, 650 Massachusetts Avenue, NW., Washington, DC 20226; (202) 927–8930.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form(s) and instructions should be directed to Edward A. Reisman, Alcohol Labeling and Formulation Branch, 650 Massachusetts Avenue, NW., Washington, DC 20226; (202) 927–8485.

**SUPPLEMENTARY INFORMATION:**

*Title:* Labeling and Advertising Requirements Under the Federal Alcohol Administration Act.

*OMB Number:* 1512–0482.

*Reporting Requirement ID Number:* 5100/1.

*Abstract:* The Federal Alcohol Administration Act specifically requires the Secretary of the Treasury to issue regulations controlling labeling and advertising of alcohol beverages. Bottlers and importers of alcohol beverages must adhere to numerous performance standards for statements made on labels and in advertisements of alcohol beverages. These performance standards include minimum mandatory labeling and advertising statements. In addition, the Act prohibits labeling and advertising statements which deceive or mislead the consumer. Under this prohibition, performance standards are necessary for all labeling and advertising statements, including optional statements.

*Current Actions:* There are no changes to this information collection and it is being submitted for extension purposes only.

*Type of Review:* Extension.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 6,060.

*Estimated Total Annual Burden Hours:* 1.

*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.

Dated: December 9, 2002.

**William T. Earle,**

*Assistant Director (Management) CFO.*

[FR Doc. 02–31438 Filed 12–12–02; 8:45 am]

BILLING CODE 4810–31–P

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### Proposed Agency Information Collection Activities; Comment Request—Privacy of Consumer Financial Information

**AGENCY:** Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Notice and request for comment.

**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 comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on the proposal.

**DATES:** Submit written comments on or before February 11, 2003.

**ADDRESSES:** Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

**FOR FURTHER INFORMATION CONTACT:** You can request additional information about this proposed information collection from Elizabeth C. Baltierra, Program Analyst (Compliance), Compliance Policy, (202) 906–6540, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

*Title of Proposal:* Privacy of Consumer Financial Information.

*OMB Number:* 1550–0103.

*Form Number:* N/A.

*Regulation requirement:* N/A.

*Description:* This information collection is needed to evidence compliance with Title V of the Gramm-Leach-Bliley Act.

*Type of Review:* Renewal.

*Affected Public:* Savings Associations.

*Estimated Number of Respondents:* 1,104.

*Estimated Frequency of Response:* Annually.

*Estimated Burden Hours Per Response:* 45 hours.

*Estimated Total Burden:* 49,680 hours.

*Clearance Officer:* Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

*OMB Reviewer:* Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Dated: December 9, 2002.

**Deborah Dakin,**

*Deputy Chief Counsel, Regulations and Legislation Division.*

[FR Doc. 02–31518 Filed 12–12–02; 8:45 am]

BILLING CODE 6720–01–P

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## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### Proposed Agency Information Collection Activities; Comment Request—Loan Application Register (HMDA)

**AGENCY:** Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Notice and request for comment.

**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 comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on the proposal.

**DATES:** Submit written comments on or before February 11, 2003.

**ADDRESSES:** Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

**FOR FURTHER INFORMATION CONTACT:** You can request additional information about this proposed information collection from Sheila Reid, Program Analyst (Compliance), Compliance Policy, (202) 906–6315, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is

soliciting comments concerning the following information collection.

*Title of Proposal:* Loan Application Register (HMDA).

*OMB Number:* 1550–0021.

*Form Number:* N/A.

*Regulation requirement:* N/A.

*Description:* Reporting is required by statute to assist OTS in monitoring compliance with fair lending laws.

*Type of Review:* Renewal.

*Affected Public:* Savings Associations.

*Estimated Number of Respondents:* 753.

*Estimated Frequency of Response:* Annually.

*Estimated Burden Hours Per Response:* .03 hours.

*Estimated Total Burden:* 90,000 hours.

*Clearance Officer:* Marilyn K. Burton, (202) 906–6467, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

*OMB Reviewer:* Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Dated: December 9, 2002.

**Deborah Dakin,**

*Deputy Chief Counsel, Regulations and Legislation Division.*

[FR Doc. 02–31519 Filed 12–12–02; 8:45 am]

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Federal Register

Friday,
December 13, 2002

# Part II

# Securities and Exchange Commission

## 17 CFR Parts 210, 240, 249, and 274
## Strengthening the Commission's Requirements Regarding Auditor Independence; Proposed Rule

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 210, 240, 249 and 274**

**[Release No. 33–8154; 34–46934; 35–27610; IC–25838; IA–2088, FR–64, File No. S7–49–02]**

**RIN 3235–AI73**

## Strengthening the Commission's Requirements Regarding Auditor Independence

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission (''SEC'' or ''Commission'') is proposing amendments to its existing requirements regarding auditor independence to enhance the independence of accountants that audit and review financial statements and prepare attestation reports filed with the Commission. The proposed rules recognize the critical role played by audit committees in the financial reporting process and the unique position of audit committees in assuring auditor independence. As directed by section 208(a) of the Sarbanes-Oxley Act of 2002, we are proposing rules to: Revise the Commission's regulations related to the non-audit services that, if provided to an audit client, would impair an accounting firm's independence; define the circumstances whereby an issuer's audit committee can and should pre-approve all audit and allowable non-audit services provided to the issuer by the auditor of an issuer's financial statements; prohibit partners on the audit engagement team from providing audit services to the issuer for more than five consecutive years; prohibit an accounting firm from auditing an issuer's financial statements if certain members of management of that issuer had been members of the accounting firm's audit engagement team within the one-year period preceding the commencement of audit procedures; and require that the auditor of an issuer's financial statements report certain matters to the issuer's audit committee, including ''critical'' accounting policies used by the issuer.

In addition to the provisions required by the Act, we also are proposing rules defining an accountant as not being independent from an audit client if any partner, principal or shareholder of the accounting firm who is a member of the engagement team received compensation based on any service provided or sold to that client other than audit, review and attest services. Further, we proposed to amend and require additional disclosures to investors of information related to the audit and non-audit services provided by, and fees paid by the issuer to, the auditor of the issuer's financial statements.

**DATES:** Comments should be received on or before January 13, 2003.

**ADDRESSES:** You should send three copies of your comments to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC, 20549–0609. You also may submit your comments electronically to the following address: *rule-comments@sec.gov.* To help us process and review your comments more efficiently, comments should be submitted by one method only. All comment letters should refer to File No. S7–49–02; this file number should be included in the subject line if you use electronic mail. Comment letters will be available for public inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549–0102. We will post electronically-submitted comment letters on the Commission's Internet Web site (*http://www.sec.gov*). We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. Submit only information you wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** Samuel L. Burke, Associate Chief Accountant, or Robert E. Burns, Chief Counsel, at (202) 942–4400, Office of the Chief Accountant, or, with respect to questions about investment companies, Brian D. Bullard, Chief Accountant, at (202) 942–0590, Division of Investment Management, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** We are proposing to add rule 2–07 to Regulation S–X [1] and to amend rule 2–01 of Regulation S–X,[2] to amend item 9 of Regulation S–K,[3] to amend forms 10–K, 10–KSB, 20–F and 40–F [4] and to amend proposed form N–CSR.[5]

### I. Introduction and Background

On July 30, 2002, the Sarbanes-Oxley Act of 2002 (''Sarbanes-Oxley Act'' or ''the Act'') was enacted.[6] Title II of the Sarbanes-Oxley Act, entitled ''Auditor Independence,'' requires the Commission to adopt, by January 26, 2003, final rules, under which certain non-audit services will be prohibited, conflict of interest standards will be strengthened, auditor partner rotation and second partner review requirements will be strengthened, and the relationship between the independent auditor and the audit committee will be clarified and enhanced.

As directed by the Sarbanes-Oxley Act, the proposed rules focus on key aspects of auditor independence:[7] the provision of certain non-audit services and the unique ability of the audit committee to insulate the auditor from the pressures that may be exerted by management, the potential conflict of interest that can be created when a former member of the audit engagement team accepts a key management position with the audit client, and the need for effective communications between the auditor and audit committee. The proposed rules also address the possibility of any partner, principal or shareholder who is a member of the audit engagement team being unduly influenced by financial incentives to sell non-audit services to the audit client.

Title II of the Sarbanes-Oxley Act adds new subsections (g) through (l) to section 10A of the Securities Exchange Act of 1934 as follows:

- Section 201 adds subsection (g), which specifies that a number of non-audit services are prohibited. Many of these services were previously prohibited by the Commission's independence standards adopted in November 2000 (with some exceptions and qualifications).[8] These proposed rules amend the Commission's existing rules on auditor independence and clarify the meaning and scope of the prohibited services under the Sarbanes-Oxley Act.
- Section 201 also adds subsection (h) and requires that non-audit services that are not prohibited under the Sarbanes-Oxley Act and the Commission's rules be subject to pre-approval by the registrant's audit committee. These proposed rules specify the requirements

[1] 17 CFR 210.2–07.

[2] 17 CFR 210.2–01.

[3] 17 CFR 240.14a–101.

[4] 17 CFR 249.310; 17 CFR 249.310b; 17 CFR 249.220f; 17 CFR 249.240f.

[5] 17 CFR 249.331; 17 CFR 274.128.

[6] Pub. L. 107–204, 116 Stat. 745 (2002).

[7] Consistent with the Commission's existing independence rules, these proposals would apply to foreign audit firms as well as firms domiciled in the United States. Additionally, these proposals coupled with the Commission's existing independence rules are proposed with the Principles of Auditor Independence and the Role of Corporate Governance in Monitoring an Auditor's Independence issued by the International Organization of Securities Commissions (IOSCO) in October 2002 in mind.

[8] The Commission adopted a comprehensive set of rules governing auditor independence on November 21, 2000. *See* Release No. 33–7919 (Nov. 21, 2000); 65 FR 76008 (Dec. 5, 2000) (hereinafter ''November 2000 release'').

for obtaining such pre-approval from the registrant's audit committee.

• Section 202 adds subsection (i), which requires an audit committee to pre-approve allowable non-audit services and specifies certain exceptions to the requirement to obtain pre-approval. These proposed rules specify the requirements of the registrant's audit committee for pre-approving non-audit services by the auditor of the registrant's financial statements.

• Section 203 adds subsection (j), which establishes mandatory rotation of the engagement partner, and the reviewing (or ''concurring'') partner every five years. These proposed rules expand the number of engagement personnel covered by the rotation requirement and clarify the ''time out'' period.

• Section 204 adds subsection (k), which requires that the auditor report on a timely basis certain information to the audit committee. In particular, the Sarbanes-Oxley Act requires that the auditor report to the audit committee on a timely basis (a) all critical accounting policies used by the registrant, (b) alternative accounting treatments that have been discussed with management along with the potential ramifications of using those alternatives, and (c) other written communications provided by the auditor to management, including a schedule of unadjusted audit differences.[9] These proposed rules strengthen the relationship between the audit committee and the auditor.

• Section 206 adds subsection (l) addressing certain conflict of interest provisions. The Sarbanes-Oxley Act prohibits an accounting firm from performing audit services for a registrant if certain key members of management have recently been employed in an audit capacity by the audit firm. These proposed rules clarify which members of management are covered by these conflict of interest rules.

In addition to the mandate under title II of the Act, these proposed rules address situations where partners, principals, or shareholders of the firm who work on the audit of a company are compensated for selling non-audit services to the same audit client.

As noted above, the proposed rules establish and clarify the important roles and responsibilities of registrant audit committees as well as the registrant's independent accountant.[10]

We have proposed a separate rule under Exchange Act section 10A (240.10A–2) to implement section 3(b)(1) of the Sarbanes-Oxley Act and clarify that our rules implementing title II of Sarbanes-Oxley not only define conduct that impairs independence but also constitute separate violations under the Exchange Act. We have otherwise drafted the proposed rules (except for the proxy disclosure changes) as part of Regulation S–X, and propose to place them among the current auditor independence provisions. These provisions are generally based on whether an accountant is ''independent'' in the conduct of the audit. We are considering changing the format from rules defining actions that impair the auditor's independence to rules prohibiting such actions and placing them with other Exchange Act rules. The Act supplemented section 10A of the Exchange Act and gave us express authority to adopt rules to implement these new statutory provisions. Among the reasons to move these rules under that provision is to: (1) Organize the related statutory and regulatory provisions more logically, and (2) make explicit that violations would be punishable as Exchange Act violations, as contemplated by sections 3(b)(1) and 208 of the Sarbanes-Oxley Act, with all the remedies available for Exchange Act violations, including penalties. Even if we were to move the rules out of Regulation S–X, we would intend for these provisions also to remain professional standards of independence. If we move them to be Exchange Act rules, we are considering a new provision in Regulation S–X that would state that a violation of these rules would also render the auditor not independent under Regulation S–X. Violations of these provisions could therefore also result in professional discipline in the event of a violation and cause the issuer's financial statement to fail to conform to Regulation S–X.

We seek comment on this alternative approach. We recognize that auditors have traditionally looked to Regulation S–X as the place where rules relating to audits are placed, and we do not intend to make reference to and compliance with the rules more difficult. We seek comment on whether any conforming changes in other parts of the securities laws would be necessary if we adopted these rules and made them Exchange Act rules. We also seek comment on whether any of the current auditor independence rules or definitions under Regulation S–X, the substance of which we do not propose to change in light of the Sarbanes-Oxley Act, should also be made into Exchange Act rules, or conversely, whether any of the particular proposed or existing rules relating to audits should stay in Regulation S–X even if all or most of the remaining proposed rules are adopted as Exchange Act rules.

## II. Discussion of Proposed Rules

### *A. Conflicts of Interest Resulting From Employment Relationships*

The Commission's existing rules deem a firm to not be independent with respect to an audit client if a former partner, principal, shareholder, or professional employee of an accounting firm[11] accepts employment with a client if he or she has a continuing financial interest in the accounting firm or is in a position to influence the firm's operations or financial policies. These proposed rules renumber, but do not otherwise change, that existing requirement.[12]

Consistent with section 206 of the Sarbanes-Oxley Act, we propose adding a restriction on employment with audit clients by former employees of the accounting firm. The Act specifies that an accounting firm cannot perform an audit for a registrant:

> * * * [i]f a chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in an equivalent position for the issuer, was employed by that registered independent public accounting firm and *participated in any capacity in the audit* of that issuer during the 1-year period preceding the date of the initiation of the audit.[13] (Emphasis added.)

Consistent with that directive, we propose that the employment of audit engagement team[14] members of an accounting firm in a financial reporting oversight role at an audit client within one year prior to the commencement of procedures for the current audit engagement would cause the accounting firm not to be independent with respect to that registrant. The rules that we are proposing would apply to employment relationships entered into between audit engagement team members and their audit clients.[15]

As discussed later in this release, the term ''financial reporting oversight role'' refers to any individual who has direct responsibility for oversight over those

[9] Statement on Auditing Standards No. 89, ''Audit Adjustments,'' (Dec. 1999).

[10] The Commission's proposals respond not only to the provisions of the Sarbanes-Oxley Act but also the rulemaking petitions filed by the AFL–CIO on December 11, 2001, and The Honorable H. Carl McCall on January 21, 2002. Both petitions are available on the Commission's Web site (*http://www.sec.gov*).

[11] The terms accounting firm and accountant are used interchangeably in this proposing release. The term ''accountant'' is defined in 210.2–01(f) below.

[12] 17 CFR 210.2–01(c)(2)(iii)(A).

[13] *See* section 206 of the Sarbanes-Oxley Act.

[14] 17 CFR 210.2–01(f)(7).

[15] 17 CFR 210.2–01(f)(6).

who prepare the registrant's financial statements and related information (*e.g.*, management's discussion and analysis) that are included in filings with the Commission.

The concept of a ''cooling-off'' period before an auditor can take a position at the audit client was previously considered by the Independence Standards Board.[16] In considering a cooling-off period, the Independence Standards Board noted that a mandated cooling-off period for partners and professional staff might create a greater appearance of independence between the accounting firm and the registrant.[17] Ultimately, however, the Independence Standards Board provided for an alternative to a strict cooling-off period. The Independence Standards Board concluded that:

> An audit firm's independence is impaired with respect to an audit client that employs a former firm professional who could, by reason of his or her knowledge of and relationships with the audit firm, adversely influence the quality or effectiveness of the audit, unless the firm has taken steps that effectively eliminate such risk.[18]

Independence Standards Board's Standard No. 3 specifically notes that additional caution is warranted when it has been less than one year since the professional disassociated him or herself from the firm.[19] The provisions of the Sarbanes-Oxley Act reflect the view that the passage of time is the only appropriate safeguard to reduce the perceived loss of independence for the audit firm caused by the acceptance of employment by a member of the engagement team with an audit client.

The Act specifies that the cooling off period must be one year. Under our proposed rules, the prohibition would commence one year prior to the earlier of either when the accountant began the current fiscal year's audit or when the accountant began review procedures necessary to conduct a timely review of the registrant's quarterly financial information associated with the current fiscal year. The measurement period is based upon the year the former employee commenced initial employment. For example, if audit engagement team member A last worked on the audit engagement on January 31, 2002 (audit report filed with the Commission on February 19, 2002), and joined audit client B on September 1, 2003, and the review procedures for B commenced on February 20, 2003, the accounting firm would not lose its independence with respect to the audit client since audit engagement team member A did not participate as an audit engagement team member subsequent to February 19, 2002. With respect to determining commencement dates, generally accepted auditing standards require that an audit engagement be properly planned. As such, procedures associated with the planning of the engagement constitute the commencement of an audit.[20] Additionally, SAS No. 71 establishes the procedures necessary to conduct a timely review of interim information.[21]

The Commission is also considering whether it should provide an exemption from these requirements for companies meeting certain criteria, in order to address the practical difficulties that some companies to hire qualified personnel. The criteria might include the available pool of candidates for a position, the size of the company, and the audit committee's role in ensuring the independence of the auditor.

- Is the one-year cooling-off period sufficiently long to achieve an appearance of independence by the accounting firm? If not, what period would be appropriate?
- Is the term audit engagement team sufficiently clear? If not, what changes would improve the description to describe the group of accountants who would be covered?
- Is the phrase commencement of the audit sufficiently clear? If not, what changes would improve the description? Is that the appropriate time to mark the commencement of the period? Is there a better mark?
- Is the phrase commencement of review procedures sufficiently clear? If not, what changes would improve the description?
- Is it appropriate that the cooling-off period provisions apply to employment relationships involving audit engagement team members and their audit clients? Should the requirements be limited to audit clients who are issuers as defined in section 205 of the Act?
- Are the appropriate officers covered by the proposed rule? If not, which additional individuals should be subject to the cooling-off period provision? For example, should national office personnel who would be excluded under the proposal be included?
- Should the proposed rules apply equally to large firms/companies as small firms/companies? Would the proposed rules impose a cost on smaller issuers that is disproportionate to the benefits that would be achieved? Why or why not? Should there be an exemption to this requirement for smaller businesses?
- The ''cooling off'' period applies to all entities in the investment company complex. Is this too broad? Why or why not?
- Should the Commission include exceptions subject to certain criteria? If so, what should these criteria be?

*B. Services Outside the Scope of the Practice of Auditors*

Section 201(a) of the Sarbanes-Oxley Act adds new section 10A(g) to the Securities Exchange Act of 1934. This section states that it shall be unlawful for a registered public accounting firm that performs an audit of an issuer's financial statements (and any person associated with such a firm) to provide to that issuer, contemporaneously with the audit, any non-audit service, including nine services set forth in the Act. There is an exception, however, for ''any non-audit service, including tax services, that is not described'' as a prohibited service ''only if'' the service has been pre-approved by the issuer's audit committee. The nine prohibited non-audit services included in the Act are:

- Bookkeeping or other services related to the accounting records or financial statements of the audit client;

[16] The Independence Standards Board was a private sector body that, from 1997 to 2001, was charged with the responsibility to set auditor independence standards for auditors of the financial statements of SEC registrants. *See* Financial Reporting Release Nos. 50 (February 18, 1998) and 50A (July 17, 2001).

[17] Independence Standards Board, ''Employment with Audit Clients,'' *Discussion Memorandum 99–1* (March 12, 1999).

[18] Independence Standards Board, ''Employment with Audit Clients,'' *Standard No. 3* (July 2000).

[19] Id., ¶2(b)(iii).

[20] Considerations necessary to plan an audit engagement are discussed in SAS Nos. 22, ''Planning and Supervision'' (AU § 311), 47, ''Audit Risk and Materiality in Conducting an Audit'' (AU§ 312), 48, ''The Effects of Computer Processing on the Audit of Financial Statements'' (AU §§ 311, 326), 54, ''Illegal Acts by Clients'' (AU § 317), 55, ''Consideration of Internal Control in a Financial Statement Audit'' (AU § 319), 56, ''Analytical Procedures'' (AU § 329), 65, ''The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements'' (AU § 322), 70, ''Service Organizations'' (AU § 324), 73, ''Using the Work of a Specialist'' (AU § 336), 78, ''Consideration of Internal Control in a Financial Statement Audit'' (AU § 319), 82, ''Consideration of Fraud in a Financial Statement Audit'' (AU § 312), 83, ''Establishing an Understanding With the Client'' (AU § 310), 84, ''Communications Between Predecessor and Successor Auditors'' (AU § 315), 89, ''Audit Adjustments'' (AU § 310), and 94, ''The Effect of Information Technology on the Auditor's Consideration of Internal Control in a Financial Statement Audit'' (AU § 319) as well as amendments to these documents.

[21] SAS No. 71, ''Interim Financial Information'' (AU § 722). In November 2002, the Auditing Standards Board issued SAS No. 100, ''Interim Financial Information.'' SAS No. 100 supercedes SAS No. 71 and is effective for interim periods within fiscal years beginning after December 15, 2002.

• Financial information systems design and implementation;
• Appraisal or valuation services, fairness opinions, or contribution-in-kind reports;
• Actuarial services;
• Internal audit outsourcing services;
• Management functions or human resources;
• Broker or dealer, investment adviser, or investment banking services;
• Legal services and expert services unrelated to the audit; and
• Any other service that the Board [22] determines, by regulation, is impermissible.

Many of these services are already the subject of our rules. As explained more fully below, we interpret the legislative history as indicating (1) Congress did not intend the rules to contain broad categorical exceptions and (2) the scope of the prohibited services should be judged against three basic principles. Those three broad principles are that an auditor cannot (1) audit his or her own work, (2) perform management functions, or (3) act as an advocate for the client. To do so would impair the auditor's independence.

Under section 201(b) of the Act, the Board,[23] on a case-by-case basis, may exempt any issuer, accounting firm or transaction from the prohibition on the provision of services under section 10A(g) to the extent that the exemption is ''necessary or appropriate in the public interest and is consistent with the protection of investors, and subject to review by the Commission.''

The Senate Report on the bill that was the primary foundation for the Act,[24] states, in part:

> The intention of this provision is to draw a clear line around a limited list of non-audit services that accounting firms may not provide to public company audit clients because their doing so creates a fundamental conflict of interest for the accounting firms. The list is based on simple principles. An accounting firm, in order to be independent of its audit client, should not audit its own work, which would be involved in providing bookkeeping services, financial information systems design, appraisal or valuation services, actuarial services, and internal audit outsourcing services to an audit client. The accounting firm should not function as part of management or as an employee of the audit client, which would be required if the accounting firm provides human resources services such as recruiting, hiring, and designing compensation packages for the officers, directors, and managers of an audit client. The accounting firm should not act as an advocate of the audit client, which would be involved in providing legal and expert services to an audit client in legal, administrative, or regulatory proceedings, or serving as a broker-dealer, investment adviser, or investment banker to an audit client, which places the auditor in the role of promoting a client's stock or other interests.[25]

In statements made on the floor of the Senate on July 25, 2002, the day the Senate passed the final bill, Senator Sarbanes discussed the auditor independence provisions in the bill and stated, in part:

> What has happened in recent years is that the fees earned from the consulting work have dwarfed the fees earned from the auditors, which inevitably leads to concerns that punches be pulled on the audit to accommodate the significant and remunerative involvement on the consulting side. Certain enumerated consulting practices are therefore not allowed, with the exception that a case-by-case exemption can be obtained from the oversight board that this legislation establishes.* * *
>
> Senator Gramm has suggested that the conference report should be changed to give the SEC or the Oversight Board authority to grant broad categorical exemptions from the list of non-audit services that section 201 of the bill prohibits registered public accounting firms to provide to public company audit clients. Such a change, in my view, would weaken one of the fundamental objectives of the conference report: to draw a bright line around a limited list of non-audit services that accounting firms may not provide to public company audit clients because their doing so creates a fundamental conflict of interest for the accounting firms.
>
> This list is based on a set of simple principles:
>
> A public company auditor, in order to be independent, *should not audit its own work* (as it would if it provided internal audit outsourcing services, financial information systems design, appraisal or valuation services, actuarial services, or bookkeeping services to an audit client).
>
> A public company auditor *should not function as part of management or as an employee of the audit client* (as it would if it provided human resources services such as recruiting, hiring, and designing compensation packages for the officers, directors, and managers of an audit client).
>
> A public company auditor, to be independent, *should not act as an advocate of its audit client* (as it would if it provided legal and expert services to an audit client in judicial or regulatory proceedings).
>
> A public company auditor *should not be a promoter of the company's stock or other financial interests* (as it would be if it served as a broker-dealer, investment adviser, or investment banker for the company).
>
> The exemptive authority provided to the Board is intentionally narrow to apply to individual cases where the application of the statutory requirement would impose some extraordinary hardship or circumstance that would merit an exemption consistent with the protection of the public interest and the protection of investors. But the fundamental presumption of the provision is that these non-audit services, by their very nature, present a conflict of interest for an accounting firm if provided to a public company audit client.* * *
>
> The conference report chose not to follow the approach of imposing a complete prohibition on the provision of non-audit services to audit clients. Instead it chose the approach of identifying the non-audit services which by their very nature pose a conflict of interest and should be prohibited.* * *
>
> In my view granting broad exemption authority to the Oversight Board or the SEC to permit these non-audit services would undermine the separation the conference report is intended to establish.[26]

(Emphasis added.)

The Commission last amended its auditor independence rules in November 2000. In so doing, the Commission identified many of the same services included in the Act that would impair an auditor's independence. In doing so, after public comment, the Commission included certain exceptions and qualifications to these services in those rules. As part of that rulemaking, the Commission utilized concepts similar to those expressed in the Senate Report in evaluating independence matters. Rule 2–01 of Regulation S–X [27] contains a preliminary note that is comprised of concepts that are similar to those outlined in the legislative history to the Sarbanes-Oxley Act. The preliminary note is used to evaluate independence matters that arise but that are not specifically addressed in rule 2–01. The proposals that we are considering are based on the same factors that have been utilized by the staff in evaluating independence matters.

The Commission had proposed more restrictive independence rules in June 2000.[28] In the period between

[22] As used in this section of the Act, the term Board refers to the Public Company Accounting Oversight Board.

[23] *Id.*

[24] Report of the Senate Comm. on Banking, Housing, and Urban Affairs to Accompany S. 2673, Public Company Accounting Reform and Investor Protection Act of 2002, S. Report 107–205, 107th Cong., 2d Sess. (July 3, 2002).

[25] Id. at 18.

[26] 148 Cong. Rec. S7351 and S7364 (July 25, 2002).

[27] *See* Release No. 33–7870 (June 30, 2000), proposed rules 2–01(b)(1)–(4), and preliminary note to rule 2–01 of Regulation S-X, 17 CFR 210.2–01. As stated in the preliminary note, in making independence determinations ''the Commission looks in the first instance to whether a relationship or the provision of a service: (a) Creates a mutual or conflicting interest between the accountant and the audit client; (b) places the accountant in the position of auditing his or her own work; (c) results in the accountant acting as management or an employee of the audit client; or (d) places the accountant in the position of being an advocate for the audit client.''

[28] Release No. 33–7870 (June 30, 2000); 65 FR 43148 (July 12, 2000).

publication of the proposed rules and the adoption of the final rules, the Commission conducted public hearings at which over 100 persons testified, a congressional hearing was held, and over 3,000 comment letters were received.

It seems clear that Congress did not intend to codify unchanged the current auditor independence rules, as the Commission adopted them in November 2000. In Senator Sarbanes' statements, quoted above, he notes the debate with Senator Gramm about the use of ''categorical exemptions'' from the prohibitions in the Act and states that the Act was not intended to give the Commission ''broad exemption authority.'' We assume, therefore, that Congress intended the Commission to revise its existing rules, at a minimum, to eliminate categorical exceptions and exemptions.

We note that the terms used by Congress could be construed very broadly. We nevertheless believe that Congress did not intend to ban any service that could conceivably fall within one of the prohibited categories of services. Both the language in the Act and the legislative history argue against such a broad construction. Each service as properly interpreted would be banned; however, proper interpretation must be made in light of the three basic principles. For example, the statute prohibits ''expert'' services. A broad interpretation of this prohibition could lead one to conclude that almost all services provided by a certified public accountant (CPA) could be considered to be ''expert'' services. For example, tax services would seem to be among the services that are provided by an ''expert.'' However, it is clear that Congress did not wish to ban all expert services because the Act specifically provided for an auditor to be able to perform certain services, including tax services, if the audit committee approves them in advance.

Both the Senate Report and Senator Sarbanes' statements on the Senate floor describe each service as fulfilling one of the enumerated ''simple principles.'' In the Senate Report, these principles are that an accounting firm should not (1) audit its own work, (2) function as a part of management or as an employee of the audit client, or (3) act as an advocate of the audit client. In his July 25th floor statement, Senator Sarbanes added a fourth principle, the notion that an accounting firm should not be a promoter of the issuer's stock or other financial interests.[29]

We therefore propose to amend the auditor independence rules to remove categorical exemptions and to define each term in the list of prohibitions in section 201(a) of the Act in relation to the ''simple principle'' that is at the foundation of that prohibition. In doing so, we intend to prohibit any service or scenario that reasonably could create one or more of the conflicts identified in the principles.

The proposed rules, like our current independence requirements, govern non-audit services provided by an accountant to an audit client during the audit and professional engagement period.[30] They do not govern non-audit services when provided to non-audit clients.

The proposed rule does not provide an all-inclusive list of the services that are incompatible with proposed rule 2–01(b). Whether the provision of a non-audit service not specified in the proposed rule impairs an accountant's independence will be measured against the four general principles set forth in the preliminary note to rule 2–01 and the ''simple principles'' in the legislative history noted above.

- Are there other non-audit services that are incompatible with rule 2–01(b) or that raise independence concerns? If so, what are they, and why do they raise independence concerns?
- Is the meaning of the general principles sufficiently clear?

1. Bookkeeping or Other Services Related to the Audit Client's Accounting Records or Financial Statements of the Audit Client

Currently, an auditor's independence is impaired if the auditor provides bookkeeping services to an audit client except in limited situations, such as in an emergency or where the services are provided in a foreign jurisdiction and certain conditions are met.[31] Proposed rule 2–01(c)(4)(i) continues the prohibition on bookkeeping, but we propose to eliminate the limited situations where bookkeeping services may be provided under the current rules. As noted earlier, the proposed rules are predicated on three basic principles. One of those principles is that an auditor cannot audit his or her own work and maintain his or her independence. When an auditor performs bookkeeping services for a client, he or she is placed in a situation of auditing his or her own work. Accordingly, we are proposing that all bookkeeping services would cause the auditor to lack independence.

The proposed rules utilize the existing definition of bookkeeping or other services, which focuses on the provision of services involving: (1) Maintaining or preparing the audit client's accounting records, (2) preparing financial statements that are filed with the Commission or the information which forms the basis of financial statements filed with the Commission, (3) preparing or originating source data underlying the audit client's financial statements.

When an accounting firm provides bookkeeping services for an audit client, the firm may be put in the position of later auditing the accounting firm's work. If, during an audit, an auditor must audit the bookkeeping work performed by his or her accounting firm, it is questionable that the auditor could, or that a reasonable investor would believe that the auditor could, remain objective and impartial. If the auditor found an error in the bookkeeping, the auditor could well be under pressure not to raise the issue with the client if raising the issue could jeopardize the firm's contract with the client for bookkeeping services or result in heightened litigation risk for the firm. In addition, keeping the books is a management function, the performance of which leads to an inappropriate mutuality of interests between the auditor and the audit client.[32]

We understand that auditors are sometimes asked to prepare statutory financial statements for foreign companies, and these are not filed with us. Consistent with the Commission's existing rules, an accountant's independence would be impaired where

[29] These principles are similar to those that the Commission proposed in June 2000 as part of the auditor independence rules and subsequently adopted as a preliminary note to those rules. *See* Release No. 33–7870 (June 30, 2000), proposed rules 2–01(b)(1)–(4), and preliminary note to rule 2–01 of Regulation S–X, 17 CFR 210.2–01. As stated in the preliminary note, in making independence determinations ''the Commission looks in the first instance to whether a relationship or the provision of a service: (a) Creates a mutual or conflicting interest between the accountant and the audit client; (b) places the accountant in the position of auditing his or her own work; (c) results in the accountant acting as management or an employee of the audit client; or (d) places the accountant in the position of being an advocate for the audit client.''

[30] Audit client is a term defined generally in § 2–01(f)(6) of Regulation S–X, as the entity whose financial statements or other information is being audited and any affiliates of the audit client. Affiliates of the audit client, as defined in § 2–01(f)(4), are entities that have control relationships or other significant influence relationships with the audit client, which in the case of registered investment companies includes all entities in the investment company complex, as defined under § 2–01(f)(14).

[31] 17 CFR 210.2–01(c)(4)(i).

[32] Letter of Samuel L. Burke, Associate Chief Accountant, SEC, to Florida Institute of Certified Public Accountants re: bookkeeping (March 4, 2002).

the accountant prepared the statutory financial statements if those statements form the basis of the financial statements that are filed with us. Under these circumstances, an auditor or accounting firm who has prepared the statutory financial statements of an audit client is put in the position of auditing its own work when auditing the resultant U.S. GAAP converted financial statements.

- Should the definition of bookkeeping be further clarified? If so, how?
- Does the definition cover all the bookkeeping services that would impair an accountant's independence?
- Should an auditor be permitted to provide bookkeeping services to an audit client if it is not reasonably likely that the results of those services will be subject to audit procedures during the audit of the client's financial statements? Why or why not?
- Is the standard of reasonably likely sufficiently clear? If not, should we use some other standard? If so, what standard should we use?
- Is the phrase ''preparing statutory statements which form the basis of U.S. GAAP statements'' sufficiently clear? If not, how might the phrase be revised?

2. Financial Information Systems Design and Implementation

Currently, paragraph (c)(4)(ii) identifies certain information technology services that, if provided to an audit client, impair the accountant's independence. The proposed rules identify the information technology services that would impair the auditor's independence. Under paragraph (c)(4)(ii)(A) of the proposed rule, an accountant is not independent if the accountant directly or indirectly operates or supervises the operation of the audit client's information system or manages the audit client's local area network or information system. Further, paragraph (c)(4)(ii)(B) of the proposed rule provides that an accountant is *not* deemed independent if the accountant designs or implements a hardware or software system that aggregates source data underlying the financial statements or generates information that is significant to the audit client's financial statements taken as a whole. These services impair an accountant's independence under existing Commission rules.[33] However, consistent with the Commission's existing rules, the proposed rules do not preclude an audit firm from working on hardware or software systems that are unrelated to the audit client's financial statements or accounting records as long as those services are pre-approved by the audit committee.

By ''significant'' to the financial statements taken as a whole, we refer to information that is reasonably likely to be material to the financial statements of the audit client. Since materiality determinations may not be complete before financial statements are generated, the audit client and accounting firm by necessity will need to evaluate the general nature of the information rather than only system output during the period of the audit engagement. An accountant, for example, would not be independent of an audit client for which it designed an integrated Enterprise Resource Planning (''ERP'') system.

Operating, designing or implementing systems affecting the financial statements may place the auditor in a management role, or result in the accountant auditing his or her own work or attesting to the effectiveness of internal control systems designed or implemented by that accountant.[34] For example, if an auditor designs and installs a computer system that generates the financial records, and that system generates incorrect data, the accountant is placed in a position of having to report on his or her firms' own work. Investors may perceive that the accountant would be unwilling to challenge the integrity and efficacy of the client's financial or accounting information collection systems that the accountant designed or installed.

- Is an auditor's independence impaired when the auditor helps select or test computer software and hardware systems that generate financial data used in or underlying the financial statements? Why or why not?
- Whether a system is used to generate information that is ''significant'' to the audit client's financial statements may depend on the size of the engagement. Does the magnitude as a percentage of either audit fees or total fees of the fees for such services make a difference on whether performance of the service impairs independence?

3. Appraisal or Valuation Services, Fairness Opinions, or Contribution-in-Kind Reports

Under the Commission's current independence rules, an accountant is deemed to lack independence when providing appraisal or valuations services, fairness opinions, or contribution-in-kind reports for audit clients. However, the current rules contain certain exemptions that we propose to eliminate.[35] These proposals would provide that the auditor is not independent if the auditor provides appraisal or valuation services, or contribution-in-kind reports,[36] where there is a reasonable likelihood that the results of the service will be subject to audit procedures by the auditor because the auditor is in a position of auditing his or her own work. Additionally, an auditor is not independent under the proposal if he or she provides a fairness opinion because to do so requires the auditor to function as a part of management and may require the auditor to audit the results of his or her own work.

Appraisal and valuation services include any process of valuing assets, both tangible and intangible, or liabilities. They include valuing, among other things, in-process research and development, financial instruments, assets and liabilities acquired in a merger, and real estate. Fairness opinions and contribution-in-kind reports are opinions and reports in which the firm provides its opinion on the adequacy of consideration in a transaction.

Providing these services to audit clients raises several auditor independence concerns. When it is time to audit the financial statements, the accountant could likely end up reviewing his or her own work, including key assumptions or variables that underlie an entry in the financial statements. Also, where the appraisal methodology involves projection of future results of operations and cash flows, some believe that the accountant that prepares the projection could have a mutuality of interest with the client in attaining forecast results.[37] The auditor may feel constrained by the valuation and appraisal issued by the firm, and as a result, the auditor may be unable to evaluate skeptically and without bias

[33] 17 CFR 210.2–01(c)(4)(ii).

[34] *See* Section 404(b) of the Sarbanes-Oxley Act.

[35] Current exemptions include: (1) Firm's valuation expert can review the work of a client's specialist; (2) firm's actuaries can value a client's pension or other post-retirement benefit obligation provided that the client assumes responsibility for significant assumptions; (3) valuations performed for planning and implementing tax-planning strategies; and (4) valuations for non-financial purposes which do not affect the financial statements.

[36] Contribution-in-kind reports in certain foreign countries require the auditor to express an opinion on the fairness of the transaction, the value of a security, or the adequacy of consideration to shareholders.

[37] As discussed in the preliminary note to rule 2–01, the Commission considers the impact on the auditor's independence of situations where the auditor has a mutuality of interest with its auditor client. This concept was not included in the legislation.

the accuracy of that valuation or appraisal.

Our proposals do not prohibit an accounting firm from providing such services for non-financial reporting (*e.g.*, transfer pricing studies, cost segregation studies) purposes.

The proposed rule does not limit an accounting firm from utilizing its own valuation specialist to review the work done by the audit client itself or an independent, third-party specialist employed by the audit client, provided the audit client or the client's specialist (and not the specialist used by the accounting firm) provides the technical expertise that the client uses in determining the required amounts recorded in the client financial statements. In those instances, because a third party or the audit client is the source of the financial information subject to the review or audit, the accountant will not be reviewing or auditing his or her own work. Additionally, the quality of the audit may be improved where specialists are utilized in such situations.

• Does providing valuation or appraisal services that are unrelated to the financial statements, such as for certain regulatory purposes, impair an accountant's independence?

• Does providing valuation or appraisal services for tax purposes impair an accountant's independence?

• Are there certain types of appraisal or valuation services, or certain instances in which they are provided, that do not raise auditor independence concerns? Are there circumstances in which an accounting firm may be required by law or regulation to provide such services, either in the United States or abroad?

• Should we provide an exemption for such services provided to a foreign private issuer by its accountant where local law requires such services (*e.g.* contribution in-kind reports)?

• The Commission staff, when providing interpretations of the application of the auditor independence rules to contribution in-kind reports, has worked with foreign jurisdictions to accommodate the statutory requirements in those jurisdictions.[38] Should the Commission's rules provide that similar practices or arrangements be permitted where contribution in-kind reports are required by foreign statute?

4. Actuarial Services

The current rules generally bar auditors only from providing actuarial services related to insurance company policy reserves and related accounts. Consistent with our approach to implementing the Act, we are proposing to broaden this prohibition by providing that the accountant is not independent if the auditor provides any advisory service involving the amounts recorded in the financial statements and related accounts for the audit client where it is reasonably likely that the results of these services will be subject to audit procedures during an audit of the audit client's financial statements because providing these services may cause an accountant later to audit his or her own work. Additionally, accountants providing these services assume a key management task. Stated differently, to perform these services would violate two of the three basic principles espoused in the legislative history of the Act. In addition, actuarially oriented advisory services may affect amounts reflected in some company's financial statements, such as an insurance company's financial statements. The proposed rules provide that the accountant may utilize his or her own actuaries to assist in conducting the audit provided the audit client uses its own actuaries or third-party actuaries to provide management with the primary actuarial capabilities.

• Are there certain circumstances under which an accountant can provide actuarial services to an audit client without impairing independence?

• Have we appropriately described the actuarial services prohibited by the Act?

5. Internal Audit Outsourcing

Our current rules allow a company to outsource part of its internal audit function to the independent audit firm subject to certain exemptions. For example, smaller businesses are exempted from the internal audit outsourcing prohibition because there have been concerns about the potentially disproportionate impact on such companies. The line between performing management functions and performing an audit is not always clear. Some companies ''outsource'' internal audit functions by contracting with an outside source to perform, among other things, all or part of their audits of internal controls. As emphasized by the Committee of Sponsoring Organizations (''COSO''), internal auditors play an important role in evaluating and monitoring a company's internal control system.[39] As a result, some argue that internal auditors are, in effect, part of a company's system of internal accounting control.[40]

Since the external auditor generally will rely, at least to some extent, on the internal control system when conducting the audit of the financial statements,[41] the auditor may be relying on his or her firm's own work, which was performed as part of the internal controls and internal audit function. In essence, by outsourcing the internal audit function, the auditor assumes a management responsibility and becomes part of the company's control system.

Proposed rule 2–01(c)(4)(v) provides that an auditor is not independent when the auditor performs internal audit services related to the internal accounting controls, financial systems, or financial statements, for an audit client. This does not include nonrecurring evaluations of discrete items or programs that are not in substance the outsourcing of the internal audit function. It also does not include operational internal audits unrelated to the internal accounting controls, financial systems, or financial statements.

We are concerned about the effect of the proposed rule on small businesses that have no internal audit department or staff. Smaller firms may not have sufficient need for full-time internal auditors but nonetheless, may need some services that internal auditors typically provide, which they obtain from their external auditors. We understand that, unless these companies can turn to their external auditors, the work may not be done at all or only at a significant cost to the company because the company would have to engage a separate accounting firm to provide these services.[42] Existing Commission independence rules contain an exception for small businesses identified as those with assets totaling less than $200 million.[43] However, our proposed rules contain no such exception because, regardless of the entity's size, the Act appears to view the auditor as being in a position of auditing his or her own work.

• Is the definition of the ''internal audit function'' sufficiently clear?

• We solicit comment on whether an exception should be provided for small

[38] Letter of Lynn Turner, Chief Accountant, SEC, to Commissione Nazionale per la Societa Sonieta e la Borsa re: statutory procedures (August 24, 2000).

[39] *See* Committee of Sponsoring Organizations of the Treadway Commission (COSO), *Internal Control—Integrated Framework,* at 7 (1992) (the ''COSO Report'').

[40] *See* SAS No. 65, ''The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements,'' AU§ 322.

[41] AICPA SAS No. 55, AU § 319 (effective for audits on or after January 1, 1990).

[42] *See* Release No. 33–7919.

[43] 17 CFR 2–01(c)(4)(v) currently includes a $200 million threshold.

businesses. If so, what criteria should we consider in providing such an exception?

• Does it impair an auditor's independence if the auditor does not provide to the client outsourcing services related to the internal audit function of the audit client, but rather performs individual audit projects for the client?

• Are there safeguards that can be established by the auditor that would allow the audit client to outsource the internal audit function to the auditor without impairing its independence?

• Would it impair the auditor's independence if the auditor performs only operational audits that are unrelated to the internal controls, financial systems, or financial statements?

• Is additional guidance necessary to distinguish the services that would be prohibited under this proposed rule from those services that would be permitted as operational audits?

6. Management Functions

We are not proposing any significant change to our current rule on management functions. Proposed rule 2–01(c)(4)(vi) provides that an accountant's independence is impaired with respect to an audit client for which the accountant acts, temporarily or permanently, as a director, officer, or employee of an audit client, or performs any decision-making, supervisory, or ongoing monitoring functions for the audit client. This provision is consistent with the provisions of existing rule 2–01(c)(4)(vi).[44]

We believe, however, that provided the auditor does not act as an employee or perform management functions, services in connection with the assessment of internal accounting and risk management controls as well as providing recommendations for improvements do not impair an auditor's independence. Accountants must gain an understanding of their audit clients' systems of internal accounting controls when conducting an audit in accordance with generally accepted auditing standards.[45] With this insight, auditors often become involved in diagnosing, assessing, and recommending to audit committees and management, ways in which their audit client's internal controls can be improved or strengthened.[46] These services can be extremely valuable to companies, and they may also facilitate the performance of a high quality audit. For these reasons, we are proposing to continue to allow auditors to assess the effectiveness of internal controls and to recommend improvements in the design and implementation of internal controls and risk management controls.

At the same time, we recognize that when an auditor designs and implements its audit client's internal accounting and risk management control systems, some believe that the auditor will lack objectivity if called upon to audit financial statements that are derived, at least in part, from data from those systems or when reporting on those controls or on management's assessment of those controls. As such, we believe that design and implementation of internal accounting and risk management controls are fundamentally different from obtaining an understanding of the controls and testing the operation of the controls which is an integral part of any audit of the financial statements of a company. Likewise, design and implementation of these controls is different from recommending improvements in the internal accounting and risk management controls of an audit client.

Because of this fundamental difference, we believe that designing and implementing internal accounting and risk management controls impairs the auditor's independence because it places the auditor in the role of management. Conversely, obtaining an understanding of, assessing effectiveness of, and recommending improvements to the internal accounting and risk management controls is fundamental to the audit process and does not impair the auditor's independence.

• Do services related to designing or implementing internal accounting controls and risk management controls result in the auditor auditing his or her own work? Would such services impair an auditor's independence when the auditor is required to issue an opinion on the effectiveness of the control systems that he or she designed or implemented?

• Do services related to assessing or recommending improvements to internal accounting controls and risk management controls result in the auditor auditing his or her own work? Would such services impair an auditor's independence when the auditor is required to issue an attestation report on the effectiveness of the control systems that he or she has assessed or evaluated for effectiveness?

• We request comment on whether there are circumstances under which an accounting firm can perform or assume management functions or responsibilities for an audit client without impairing independence?

7. Human Resources

Our current rules deem an auditor to lack independence when performing certain human resources functions, and we do not propose any significant change to those rules. Consistent with our current rules, proposed rule 2–01(c)(4)(vii) provides that an auditor's independence is impaired with respect to an audit client when the auditor searches for or seeks out prospective candidates for managerial, executive or director positions; acts as negotiator on the audit client's behalf, such as determining position, status, compensation, fringe benefits, or other conditions of employment; or undertakes reference checks of prospective candidates. Under the proposed rule, an auditor's independence also is impaired when the auditor advises an audit client about the design of its management or organizational structure, when it engages in psychological testing, or other formal testing or evaluation programs, or recommends or advises the audit client to hire a specific candidate for a specific job.

Assisting management in human resource selection or development places the auditor in the position of having an interest in the success of the employees that the auditor has selected, tested, or evaluated. Accordingly, observers may perceive that an auditor would be reluctant to suggest the possibility that those employees failed to perform their jobs appropriately, or at least reasonable investors might perceive the auditor to be reluctant, because doing so would require the auditor to acknowledge shortcomings in its human resource service. The auditor also would have other incentives not to report such employees' ineffectiveness, including that the auditor would identify and be identified with the recruited employees.

• Are there additional types of human resource and employee benefit services that impair an auditor's independence?

• Would an auditor's independence be impaired if the auditor provided personnel hiring assistance for only non-executive or non-financial personnel?

[44] 17 CFR 210.2–01(c)(4)(vi).

[45] AU 319, ''Consideration of Internal Control in a Financial Statement Audit.'' In addition, section 404(b) of the Act requires a company's audit to attest to the internal control report provided annually by management.

[46] AU 325, ''Communication of Internal Control Related Matters Noted in an Audit,'' requires the auditor to communicate reportable conditions and material weaknesses in internal control to the company's audit committee or equivalent.

• Does it impair an auditor's independence if the auditor provides consultation with respect to the compensation arrangements of the company's executives?

8. Broker-Dealer, Investment Adviser Or Investment Banking Services

Our current rules deem an auditor to lack independence when performing brokerage or investment advising services for an audit client.[47] We are proposing to add serving as an unregistered broker-dealer[48] to our rules that prohibit serving as a promoter or underwriter, making investment decisions on behalf of the audit client or otherwise having discretionary authority over an audit client's investments, or executing a transaction to buy or sell an audit client's investment, or having custody of assets of the audit client. The proposed rule is substantially the same as the Commission's existing rule related to the provision of these types of services to audit clients.[49] We are including unregistered broker-dealers within the proposed rules because the nature of the threat to independence is unchanged whether the entity is or is not a registered broker-dealer.

Selling—directly or indirectly—an audit client's securities is incompatible with the auditor's responsibility of assuring the public that the company's financial condition is fairly and accurately presented. When an accountant, in any capacity, recommends to anyone (including non-audit clients) that they buy or sell the securities of an audit client or an affiliate of the audit client, the accountant has an interest in whether those recommendations were correct. That interest could affect the audit of the client whose securities, or whose affiliate's securities, were recommended. These concepts are echoed in the ''simple principles'' included in the legislative history to the Sarbanes-Oxley Act.[50] For example, if an auditor uncovers an accounting error in a client's financialstatements, and the auditor, in an investment adviser capacity, had recommended that client's securities to investment clients, the auditor performing the audit may be reluctant to recommend changes to the client's financial statements if the changes could negatively affect the value of the securities recommended by the auditor to its investment adviser clients.

Broker-dealers[51] often give advice and recommendations on investments and investment strategies. The value of that advice is measured principally by the performance of a customer's securities portfolio. When the customer is an audit client, the accountant has an interest in the value of the audit client's securities portfolio, even as the accountant values the portfolio as part of an audit. Thus, the auditor would be placed in a position of auditing his or her own work. Furthermore, the auditor is placed in a position of acting as an advocate on behalf of the client.

• We solicit comment on the scope of the proposal. Are there other securities professional services that the rule should expressly identify as impairing independence?

• Would an auditor's independence be impaired if the auditor acted as a securities analyst covering the sector or industry of an audit client?

• Should we adopt rules that would clarify when the auditor is acting as an unregistered broker-dealer? If so, what should those rules be?

9. Legal Services

Our current rule states that an auditor is deemed to lack independence when he or she provides legal services to an audit client. The proposed rule provides that an accountant is not independent of an audit client if the accountant provides any service to the audit client that, under circumstances in which the service is provided, could be provided only by someone licensed, admitted or otherwise qualified to practice law in the jurisdiction in which the service is provided. The proposed rules would apply to foreign and U.S. accounting firms equally, minimizing the instances where legal services are provided by the auditor to the audit client.

A lawyer's core professional obligation is to advance clients' interests. Rules of professional conduct require the lawyer to ''represent a client zealously and diligently within the bounds of the law.''[52] The lawyer must ''take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. * * * In the exercise of professional judgment, a lawyer should always act in a manner consistent with the best interests of the client.''[53] Unlike an auditor, a lawyer takes basic direction from the client. We have long maintained that an individual cannot be both a zealous legal advocate for management or the client company, and maintain the objectivity and impartiality that are necessary for an audit.[54] The Supreme Court has agreed with our view. In *Arthur Young,* the Supreme Court emphasized, ''If investors were to view the auditor as an advocate for the corporate client, the value of the audit function itself might well be lost.''[55]

We recognize that there may be implications for some foreign registrants from this proposal. For example, we understand that in some jurisdictions it is mandatory that someone licensed to practice law perform tax work, and that an accounting firm providing such services, therefore, would be deemed to be providing legal services. Accordingly, we are interested in understanding the implications of this proposal on foreign private issuers.

• Are there any particular legal services that should be exempted from the rule?

• Would making the rule's application depend upon the jurisdiction in which the service is provided leave the rule subject to any

[47] These proposed rules are not meant to change the Commission's current position that an audit firm's broker-dealer division can cover an industry which includes an audit client when performing analyst functions. However, analysis of a specific audit client's stock places the auditor in the position of acting as an advocate for the client and would cause the auditor to lack independence.

[48] Accountants and the companies that retain them should recognize that the key determination required here is a functional one (*i.e.*, is the accounting firm or its employee acting as a broker-dealer?). The failure to register as a broker-dealer does not necessarily mean that the accounting firm is not a broker-dealer. In relevant part, the statutory definition of ''broker'' captures persons ''engaged in the business of effecting transactions in securities for the account of others.'' Securities Exchange Act of 1934 § 3(a)(4). Unregistered persons who provide services related to mergers and acquisitions or other securities-related transactions should limit their activities so they remain outside of that statutory definition. A person may ''effect transactions,'' among other ways, by assisting an issuer to structure prospective securities transactions, by helping an issuer to identify potential purchasers of securities, or by soliciting securities transactions. A person may be ''engaged in the business,'' among other ways, by receiving transaction-related compensation or by holding itself out as a broker-dealer. Involvement of accounting personnel as unregistered broker-dealers not only can impair auditor independence, but also would violate section 15(a) of the Exchange Act.

[49] 17 CFR 210.2–01(c)(4)(viii) and Release No. 33–7919, at Section D.

[50] Floor Statement of Senator Sarbanes, 148 Cong. Rec. S7364 (July 25, 2002) ''. * * * A public company auditor should not be a promoter of the company's stock or other financial interest (as it would be if it served as broker-dealer, investment adviser, or investment banker for the company).''

[51] In the past, some have expressed concern that terms such as ''securities professional'' and ''analyst'' are not defined in the securities laws and use of the terms could cause confusion. Because of that concern, we have not used those terms in these proposed rules. We note, however, that broker-dealers provide an array of services that may include certain analyst activities.

[52] *See, e.g.,* D.C. Rules of Professional Conduct, rule 1.3(a).

[53] *Id.* at rule 1.5.

[54] In the Matter of Charles Falk, AAER No. 1134 (May 19, 1999) (formally disciplining an attorney/accountant who gave legal advice to an audit client of another partner in his accounting firm).

[55] *United States* v. *Arthur Young,* 465 U.S 805 (1984) at 819–20 n.15.

significant uncertainty, or pose the prospect of any significant complexity or unfairness?

• Should there be any exception for legal services provided in foreign jurisdictions? For example, in some countries only a law firm may provide tax services. Should a foreign accounting firm be permitted to provide, through an affiliated law firm, tax or other services that a U.S. accounting firm could provide to a U.S. audit client without impairing the firm's independence? Why or why not?

• Should there be an exception for legal services provided to issuers in foreign jurisdictions? Should any such exception be tailored to avoid undermining the purpose of the restriction? For example, could fees for legal services be limited to a small percentage (*e.g.*, 5% or 10%) of the amount of fees for audit services? Could partners providing audit services be prohibited from being involved in the provision of legal services or from receiving compensation based on such services?

• Should any such exception have a ''sunset'' provision that would both allow foreign private issuers a transition period and allow the Commission to review the situation regarding legal services?

10. Expert Services

Our current rules do not provide that an auditor is deemed to lack independence when providing expert services to an audit client. The Act, however, includes expert services in the list of prohibited services. As discussed earlier, the legislative history, particularly related to expert services, is focused on the auditor's role when serving in an advocacy capacity. Our proposed rules interpret the legislative prohibition in light of the three basic principles of independence discussed previously.

During the Senate Floor debate, Senator Sarbanes stated, ''A public company auditor, to be independent, should not act as an advocate of its audit client (as it would if it provided legal and expert services to an audit client in judicial or regulatory proceedings).'' [56] The proposed rule, therefore, states that an accountant's independence is impaired as to an audit client if the accountant provides expert opinions for an audit client in connection with legal, administrative, or regulatory proceedings or acts as an advocate for an audit client in such proceedings.

Clients retain experts to lend authority to their contentions in various proceedings by virtue of the expert's specialized knowledge and experience. The provision of expert services by the accountant may create the appearance that the accountant is acting as the client's advocate in pursuit of the client's interests. The appearance of advocacy (and the corresponding appearance of mutual interest) created by providing expert services is sufficient to deem the accountant's independence impaired.

Our prohibition on the provision of expert services would include providing consultation and other services to an audit client's legal counsel in connection with litigation, administrative or regulatory proceedings. As discussed above in the context of the provision of legal services, legal counsel have an ethical duty to ''represent a client zealously and diligently within the bounds of the law'' and to ''take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.'' [57] An auditor who takes on such duties, either directly or by being engaged by the audit client's legal counsel, takes on a role as an advocate for the client.

The prohibition on providing ''expert'' services included in this rule proposal covers services that result in the accounting firm's specialized knowledge, experience and expertise being used to support the contentions of the audit client in various adversarial proceedings. Therefore, under our proposed rule, an auditor's independence would be impaired if the auditor were engaged by the audit client's legal counsel to provide expert witness or other services, including accounting advice, opinions, or forensic accounting services, in connection with the client's participation in a legal, administrative, or regulatory proceeding. For example, an auditor could not provide forensic accounting services to the audit client's legal representative in connection with an investigation by the Commission's Division of Enforcement. Nor could an accounting firm appear as an expert witness in a utility rate setting proceeding in support of an audit client's request for an increase in fees.

Our proposals, however, would not prohibit an auditor from assisting the audit committee in fulfilling its responsibilities in connection with the financial reporting process.[58] Although under our proposals, an auditor's independence would be impaired if it were engaged by the audit client's counsel to provide advice or forensic accounting services in connection with a legal, administrative or regulatory proceeding,[59] the auditor's independence would not be impaired if it were assisting the audit committee in fulfilling its responsibility to conduct its own investigation of a potential accounting impropriety, so long as the auditor did not take on the role of an advocate in such an investigation.[60] For example, an audit committee may engage the auditor to render forensic services, and should the audit committee choose to engage counsel, the work product of the auditor may be provided to the audit committee's counsel without impairing the auditor's independence. We believe it is important that auditors be allowed to assist the audit committee in their capacity as investors' representatives.

In this regard, our proposals also would not prohibit an auditor from testifying as a fact witness to its audit work for a particular audit client. In those instances, the auditor is merely

[56] *See* Floor Statement of Senator Sarbanes, 148 Cong. Rec. S7364 (July 25, 2002).

[57] *See, e.g.*, D.C. Rules of Professional Conduct, rule 1.3(a) and 1.5.

[58] For example, section 301 of the Act stipulates that each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

[59] In October 2001, we set forth some of the criteria that we considered important to assessing whether to credit self-policing, self-reporting, remediation and cooperation in SEC enforcement investigations. One of the criteria we identified related to whether the company had undertaken a thorough review of the conduct at issue:

10. Did the company commit to learn the truth, fully and expeditiously? Did it do a thorough review of the nature, extent, origins and consequences of the conduct and related behavior? Did management, the Board or committees consisting solely of outside directors oversee the review? Did company employees or outside persons perform the review? If outside persons, had they done other work for the company? Where the review was conducted by outside counsel, had management previously engaged such counsel? Were scope limitations placed on the review? If so, what were they?

Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Accounting and Auditing Enforcement Release (''AAER'') No. 1470 (Oct. 23, 2001).

Depending on the conduct at issue, it may be necessary for a company to engage an accountant to conduct a forensic accounting review or audit. While our proposal does not set forth independence requirements for forensic consultants, consistent with the principles we set forth in October 2001, we will consider the objectivity of the forensic accountant as to the issues being investigated in assessing whether to credit the forensic work.

[60] An auditor's independence would, however, be impaired if its assistance to the audit committee included defending, or helping to defend, the audit committee or the company generally in a shareholder class action or derivative lawsuit, other than as a fact witness.

providing a factual account of what he or she observed and the judgments he or she made. An accounting firm that, after receiving appropriate authorization from an audit client's audit committee, had prepared an audit client's tax returns, also could appear as a fact witness in tax court to explain how the returns were prepared.

- Are there circumstances in which providing audit clients with expert services in legal, administrative, or regulatory filings or proceedings should not be deemed to impair independence?
- Should an auditor be permitted to serve as a non-testifying expert for an audit client in connection with a proceeding?
- Is the definition of prohibited expert services appropriate? Why or why not?
- Is the distinction between advocacy and providing appropriate assistance to an audit committee sufficiently clear?

11. Tax Services

Section 201 of the Sarbanes-Oxley Act identifies specific categories of non-audit services that are prohibited for accounting firms to provide for their audit clients. Additionally, the Act specifies that the audit committee must pre-approve all non-prohibited non-audit services. In particular, the Act states that:

> A registered public accounting firm may engage in any non-audit service, *including tax services,* that is not described in any of paragraphs (1) through (9) of subsection (g) for an audit client, only if the activity is approved in advance by the audit committee of the issuer.[61] (Emphasis added.)

Nothing in these proposed rules is intended to prohibit an accounting firm from providing tax services to its audit clients when those services have been pre-approved by the client's audit committee. As discussed in our previously proposed rules[62] on independence, tax services are unique, not only because there are detailed tax laws that must be consistently applied, but also because the Internal Revenue Service has discretion to audit any tax return.[63] In addition, the Congressional intent behind the above quoted reference to ''tax services'' would appear to be that auditor independence is not impaired by an accountant providing traditional tax preparation services to an audit client or an affiliate of an audit client.

While we do not define ''tax services,'' we understand that tax services can include a range of activities including the preparation of tax returns, tax compliance, tax planning, tax recovery, and other tax-related services. In addition, many engagements will require that an auditor review the tax accrual that is included in the financial statements. Reviewing tax accruals is part of audit services and is not, in and of itself, deemed to be a tax compliance service.

Classifying a service as a ''tax service'' however, does not mean that the service may not be within one of the categories of prohibited services or may not result in an impairment of independence under rule 2–01(b). The accounting firm and the registrant's audit committee should consider, for example, whether the proposed non-audit service is an allowable tax service or constitutes a prohibited legal service or expert service. As part of this process, the accounting firm and the audit committee should be mindful of the three basic principles which cause an auditor to lack independence with respect to an audit client: (1) The auditor cannot audit his or her own work, (2) the auditor cannot function as a part of management, and (3) the auditor cannot serve in an advocacy role for the client.[64] For example, where an accountant provides representation before a tax court the accountant serves as an advocate for his or her client and the accountant's independence would be impaired. Another example would be the formulation of tax strategies (*e.g.* tax shelters) designed to minimize a company's tax obligations.[65] The provision of these types of services may require the accountant to audit his or her own work, to become an advocate for the client's position on novel tax issues, or to assume a management function.

We also are considering whether special considerations apply when the auditor provides a tax opinion for the use of a third party in connection with a business transaction between the audit client and the third party. The tax opinion may be vital in the audit client's efforts to induce the third party to enter into the transaction, particularly when the transaction is tax-driven. Under those circumstances, the auditor may be acting as an advocate for the audit client by actively promoting the client's interests.

- We request comment on whether providing tax opinions, including tax opinions for tax shelters, to an audit client or an affiliate of an audit client under the circumstances described above would impair, or would appear to reasonable investors to impair, an auditor's independence.
- Are there tax services that should be prohibited by the Commission's independence rules?
- Is it meaningful to categorize tax services into permitted and disallowed activities? If so, what categories and related definitions would make the demarcation meaningful?

*C. Partner Rotation*

Section 301 of the Sarbanes-Oxley Act specifies that the audit committee has the responsibility for appointment, compensation, and oversight of the work of the company's audit firm. In that capacity, the audit committee has the responsibility for evaluating and determining that the audit engagement team has the competence necessary to conduct the audit engagement in accordance with GAAS.

The Sarbanes-Oxley Act also requires rotation of certain audit partners on a five-year basis in order to continue to provide audit services for a registrant. Section 203 of the Sarbanes-Oxley Act of 2002 specifies that:

> It shall be unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner (having primary responsibility for the audit), or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the 5 previous fiscal years of that issuer.

The concept of audit partner[66] rotation is not new. Indeed, accounting firms that audit registrants are currently subject to audit partner rotation requirements. The current requirements of the AICPA's SEC Practice Section (''SECPS'') call for the engagement partner to rotate off the engagement after seven years to remain off the engagement for two years.[67]

[61] Sarbanes-Oxley Act of 2002, section 201.

[62] Release Nos. 33–7870, ''Revision of the Commission's Auditor Independence Requirements,'' (June 30, 2000) (65 FR 43148).

[63] *Id.*

[64] These principles are similar to the four governing principles included in the preliminary note to the Commission's current independence rules. The four governing principles are whether the accountant: (1) Has a mutual or conflicting interest with the audit client, (2) audits his or her firm's own work, (3) functions as management or an employee of the audit client, or (4) acts as an advocate for the audit client.

[65] *U.S.* v *KPMG LLP* (July 9, 2002) and *U.S.* v *BDO Seidman* (July 9, 2002).

[66] For purposes of this portion of the release, the term partner refers to an individual who is a proprietor, partner, principal, or shareholder of the accounting firm.

[67] American Institute of Certified Public Accountants (AICPA), SEC Practice Section, Requirements of Members, at item e. The membership requirements are available online at *http://www.aicpa.org/members/div/secps/require.htm.* Audit firms which are members of the SEC Practice Section must comply with its rules (*e.g.,* partner rotation) and undergo periodic peer review to ensure that the firms' audit practice is consistent with both the rules of the AICPA and those of the Commission.

The Sarbanes-Oxley Act clearly specifies that the lead audit partner and reviewing partner should serve on the engagement in that capacity for no more than five consecutive years. The Commission is proposing rules to clarify the five-year rotation requirement specified in the Sarbanes-Oxley Act.

As noted above, existing SECPS membership requirements stipulate that a rotated partner may not serve on the audit engagement for two consecutive years following rotation.[68] In addition to covering more partners,[69] the proposed rules expand this requirement and require that, following rotation, a partner may not provide such services for a period of five consecutive years. We believe that partners should not return to the engagement for five-years in order to ensure investors that there will be a periodic fresh look at the accounting and auditing issues confronting the company. If a shorter ''time-out'' provision is used, investors might believe that partners merely would be placed in secondary role for a year or two, only to resume the same roles that they previously occupied and to return to the prior engagement team's approach to the accounting and auditing issues. If a partner is removed from an engagement for five-years, it would appear more likely that the partner will be placed on a different engagement and not held in abeyance only to return to the previous engagement. While we anticipate that accounting firms, when possible, would stagger the rotation of partners to provide a continuity of knowledge about the company, we believe the five-year period in the proposed rule would assure a complete turnover of personnel every five years.

With respect to determining which partners, principals and shareholders should be included, the proposed rules would go beyond the minimum specified by the Act. As noted above, the Act requires that the lead or coordinating audit partner and the audit partner responsible for reviewing the audit rotate every five years. Clearly, the lead partner as well as the concurring review partner perform critical functions that affect the conduct and effectiveness of the engagement. However, in many larger engagements, the engagement team will include more than just the lead partner and the concurring review partner. Obviously, the larger the registrant and the more diversified the registrant's activities, the more likely that the engagement team will include multiple partners, principals or shareholders.

While under this proposal, firms would be required to rotate multiple partners in these situations, nothing in this proposal is intended to imply that all partners would need to be rotated at the same time. Indeed, we would expect that firms would stagger the rotation of partners to ensure that the engagement team continues to have appropriate expertise to allow the audit engagement to be conducted in accordance with GAAS.

Partners, principals or shareholders who are members of the audit engagement team[70] make significant decisions that can affect the conduct and effectiveness of the audit. As a result, the proposed rules would require rotation not just of the lead and reviewing partner,[71] but of partners who perform audit services for the issuer.[72] This rotation requirement would include the lead partner, the concurring review partner, the client service partner, and other ''line'' partners directly involved in the performance of the audit. The proposed rules ensure that professionals do not ''grow-up'' or spend their entire career on one engagement.

Since most registrants are taxable entities, an assessment of the registrant's tax provision accounted for in accordance with GAAP[73] is a necessary part of the audit engagement. As a consequence, there may be ''tax'' partners who perform significant services related to the audit engagement. To the extent that such services are a necessary part of the accounting firm's ability to complete the audit, partners providing those services would be subject to these rotation requirements. However, the accounting firm may also perform tax services for the registrant. These services can include tax compliance services as well as certain tax planning services.[74] Such services are not, in and of themselves, deemed to be part of the audit or other attest engagement.[75] Thus, a partner who only provides tax services for the registrant would not be subject to the rotation requirements. However, since the financial statements typically include the amount currently payable or refundable, the accounting firm must carefully evaluate whether ''tax'' partners are performing exclusively tax services or whether their services play a role in the audit engagement.

In many cases, registrants have complex business transactions and other situations which may require that the engagement team consult with the accounting firm's national office or others on technical issues. Partners assigned to ''national office'' duties (which can include both technical accounting and centralized quality control functions) who may be consulted on specific accounting issues related to a client are not considered members of the audit engagement team even though they may consult on client matters regularly.[76] While these partners play an important role in the audit process, they serve, primarily, as a technical resource for members of the audit team. Because these partners are not involved in the audit *per se* and do not routinely interact or develop relationships with the audit client, we do not believe that it is necessary to rotate the involvement of these personnel.

In addition to the audit, registrants are required to have their quarterly financial information subjected to a timely review by the accounting firm. Such review is typically conducted according to the provisions required by generally accepted auditing standards.[77] Furthermore, section 404 of the Sarbanes-Oxley Act, as well as the Commission's proposed rules,[78] would require the accounting firm to attest to management's report on the registrant's internal controls. Both a timely review engagement and an attestation engagement require the accounting firm to be independent with respect to the registrant. Accordingly, the Commission's proposed rules for partner rotation extend to partners who serve on the engagement team that conducts the timely review of the registrant's interim financial

[68] *Id.*

[69] The current SECPS membership requirements stipulate that the audit engagement partner be rotated every seven years except that firms with less five SEC audit clients and less than ten partners are exempted. The existing SECPS membership requirements also do not require that the concurring partner be rotated.

[70] 17 CFR 210.2–01(f)(7).

[71] For purposes of this requirement, references to partner include principals, shareholders and other positions with equivalent responsibility.

[72] Under these proposals, we believe that those partners who are involved on a continuous basis in the audit of material balances in the financial statements would be subject to the rotation requirements of this proposal. For example, an actuarial specialist who assists in auditing the loss reserves for an insurance company would be subject to the rotation requirement.

[73] Statement of Financial Accounting Standards No. 109, ''Accounting for Income Taxes'' (Feb 1992).

[74] These services would, of course, be subject to the audit committee pre-approval requirements specified in section 202 of the Sarbanes-Oxley Act and the accompanying rules proposed in this release.

[75] *See* the discussion in part B.11 of this release, *supra.*

[76] 17 CFR 210.2–01(f)(7).

[77] *See* Codification of Statements on Auditing Standards AU§ 722.

[78] Release No. 33–8138 (Oct. 22, 2002) (67 FR 66208).

information as well as the engagement team that conducts the attest engagement on management's report on the registrant's internal controls.

Under the proposed rules, a partner performing audit, review or attest services to an investment company could only do so if they had not performed such services for any entity within the investment company complex, as defined in rule 2–01(f)(14) of Regulation S–X during the previous five consecutive years. For example, the proposed rule would prohibit a partner from rotating between two separate investment company issuers within an investment company complex. The proposed rule also would prohibit a partner from rotating between an investment company issuer and any other entity within the investment company complex.

While we are proposing that all partners on the engagement team who perform a continuing audit function be subject to the partner rotation requirements, we are interested in understanding the implications of this proposed requirement on audit firms. For example, it has been suggested by some that the need for the audit firm to rotate its audit partners might be obviated by having a second audit firm periodically perform a forensic audit to evaluate the work of the existing auditor, the condition of the company's internal controls, the company's accounting and reporting practices, and other matters. Forensic audits are typically conducted by specialized accountants and are designed to go beyond the scope of a financial statement audit. Indeed, forensic audits are typically conducted when there is already reason to suspect wrongdoing or fraud. Some believe that having a separate set of examiners conduct periodic forensic audits would encourage financial statement auditors to take greater responsibility for the detection of fraud and illegal acts when auditing financial statements due to the fact that another set of auditors would be critically evaluating their role. Additionally, forensic audits conceivably could give the audit committees a tool to better evaluate the quality of the financial statement auditors.

A possible consequence of the auditor rotation requirement is that some firms may be unable staff the audit engagement team with sufficient partners who are qualified to understand some of the difficult issues that the audit client faces. This may be particularly true in industries where there are specialized transactions, regulatory processes, or accounting principles. Nonetheless, the auditor is required to conduct the audit in accordance with generally accepted auditing standards. In particular, the third general standard requires that the auditor exercise due professional care in the conduct of the audit (*see* AU 150.02). In order to exercise due professional care, it would be necessary to ensure that the engagement was properly staffed with individuals competent to understand the unique issues relevant to that audit. Additionally, the quality control standards require that the firm have processes in place to ensure that appropriate personnel are assigned to each audit engagement (*see* QC 20.13).

- Should the Commission adopt rules requiring that issuers engage forensic auditors periodically to evaluate the work of the financial statement auditors? If so, how often should the forensic auditors be engaged? What should be the scope of the forensic auditors' work? Would doing so obviate the need to require partner rotation for the audit firm? Alternatively, could the company obtain the necessary expertise by engaging other outside consultants? If so, what type of consultants should it engage?
- Would the establishment of rules requiring companies to engage forensic auditors periodically provide an opportunity to other firms to enter the market to provide these services?
- Should the Commission establish requirements for firms conducting forensic audits? If so, what should those requirements be?
- Should issuers be given a choice between engaging forensic auditors periodically and having the audit partners on their engagement team be subject to the rotation requirements? Why or why not?
- What are the costs and benefits of engaging forensic auditors to evaluate the work of the financial statement audit firm?
- This proposed rule would apply to the audits of the financial statements of ''issuers.'' Should the Commission consider applying this rule to a broader population such as audits of the financial statements of ''audit clients'' as defined in 2–01(f)(6) of Regulation S–X? Why or why not?
- For organizations other than investment companies, the rotation requirements would apply to significant subsidiaries of issuers. Should a different approach be considered? Is so, what approach would be appropriate?
- Should the rotation requirements apply to all partners on the audit engagement team? If not, which partners should be subject to the requirements?
- Is the proposed guidance sufficiently clear as to which audit engagement team partners would be covered by the rule? Is the proposed approach appropriate? If not, how can it be improved?
- Is the exclusion of certain ''national office partner'' personnel from the rotation requirements appropriate?
- Is the guidance on national office partners who are exempted from the rotation requirements sufficiently clear?
- Is the distinction between a member of the engagement team and a national office partner who consults regularly (or even continually) on client matters sufficiently clear?
- Should certain partners performing non-audit services for the client in connection with the audit engagement be excluded from the rotation requirements?
- Should additional personnel (such as senior managers) be included within the mandatory rotation requirements?
- Is it appropriate to provide transitional relief where the proposed rules are more restrictive that the provisions of the Sarbanes-Oxley Act?
- Are there situations in foreign jurisdictions that extended partner rotation could be modified with additional safeguards or limitations that would recognize the jurisdictional requirements as well as logistical limitations that may exist?
- Should the rotation requirements be different for small firms? What changes would be appropriate and why? If so, how should small firms be defined?
- Would the proposed rules impose a cost on smaller firms that is disproportionate to the benefits that would be achieved?
- Is the five-year ''time out'' period necessary or appropriate? Would some shorter time period be sufficient, such as two, three or four years? Should there be different ''time out'' periods based on a partner's role in the audit process?
- If a partner rotates off an engagement after fewer than five years, should the ''time out'' period also be reduced? Why or why not? If so, how much should the reduction in the time out period be?
- Are the partner rotation requirements, as proposed, for investment company issuer's or other entities in the investment company complex too broad? Should we only prohibit a partner from rotating between investment company issuers within the same investment company complex? Why or why not?
- The proposed rules would not require all partners on the audit engagement team to rotate at the same time. Should it? Why or why not?

*D. Audit Committee Administration of the Engagement*

The proposed rules recognize the critical role played by audit committees in the financial reporting process and the unique position of audit committees in assuring auditor independence. An effective audit committee may enhance the auditor's independence by, among other things, providing a forum apart from management where the auditors may discuss their concerns. It may facilitate communications among the board of directors, management, internal auditors and independent accountants. An audit committee also may enhance auditor independence from management by appointing, compensating and overseeing the work of the independent auditors.

The audit committee should approve the engagement of the independent accountant to audit the issuer and its subsidiary's financial statements and have ongoing communications with the accountant. The proposals would require that the audit committee pre-approve all permissible non-audit services and all audit, review or attest engagements required under the securities laws. The proposals require that either:

- Before the accountant is engaged by the audit client to provide services other than audit, review or attest services, the audit client's audit committee expressly approve the particular engagement; or
- Any such engagement be entered into pursuant to detailed pre-approval policies and procedures established by the audit committee and the audit committee is informed on a timely basis of each service.

As provided in the Sarbanes-Oxley Act, the proposed rules recognize audit services to be broader than those services required to perform an audit pursuant to generally accepted auditing standards. For example, the Act identifies services related to the issuance of comfort letters and services related to statutory audits required for insurance companies for purposes of state law as audit services.[79] We recognize that domestically and internationally there are various requirements for statutory audits. These proposals contemplate this fact; accordingly, such engagements are viewed as audit services in the context of these proposals. These rules require that the audit committee pre-approve all such services. These proposals do anticipate that the audit committee may approve broadly the provision of audit, review and attest services by the auditor to the issuer and its subsidiaries.

The audit committee also would have the sole authority to pre-approve the engagement of the company's independent accountant to expressly perform particular non-audit services. The audit committee also could establish policies and procedures provided they are detailed as to the particular service and designed to safeguard the continued independence of the auditor. Additionally, the Sarbanes-Oxley Act allows for one audit committee member to pre-approve the service.

Unlike other issuers, the investment adviser to the investment company issuer will generally engage the issuer's accountant to perform non-auditing services that might impact the accountant's independence. The proposed rule would require pre-approval not only of the non-auditing services provided to the investment company issuer, but also require pre-approval by the investment company issuer's audit committee of the non-auditing services provided to the investment adviser of an investment company issuer and any entity controlling, controlled by, or under common control with the investment adviser that provides services to the investment company. The proposed rule would not, however, require the audit committee of an investment company to approve the auditing or non-auditing services provided: (i) To another investment company registrant within an investment company complex as defined in rule 2–01(f)(14); (ii) to a sub-adviser that primarily provides portfolio management services and is under the direction of another investment adviser; and (iii) to other entities within the investment company complex that do not provide services to the fund.

Under the proposed rule, the investment company's audit committee would be able to establish policies and procedures for pre-approving non-auditing services provided not only to the investment company issuer, but also its investment adviser and related entities that provide services to the fund. The proposed rule would permit, for purposes of determining whether a non-auditing service meets the *de minimis* exception, the investment company's audit committee to aggregate the total amount of revenues paid to the investment company's accountant by the investment company, its investment adviser and any entity controlling, controlled by, or under common control with the investment adviser that provides services to the investment company.

Also, as discussed later in this release, these provisions are supplemented as a result of the proposed proxy disclosure requirements. We believe that disclosure of the procedures the audit committee uses to pre-approve audit services will provide investors valuable information that may be used to evaluate the relationships that exist between the auditor and the audit client.

- Should the Commission create other exceptions (beyond the *de minimis* exception) that would allow an audit committee to adopt a policy that contracts that are recurring (*e.g.*, due diligence engagements in connection with a series of insignificant acquisitions) and less than a stated dollar amount (such as $25,000) or less than a stated percentage of annual revenues (such as 1% or 5%) could be entered into by management and would be reviewed by the audit committee at its next periodic meeting?
- Is allowing the audit committee to engage an auditor to perform non-audit services by policies and procedures, rather than a separate vote for each service, appropriate? If so, how do we ensure that audit committees have rigorous, detailed procedures and do not, in essence, delegate that authority to management?
- Should more or fewer aspects be left to the discretion of the audit committee?
- Are there specific matters that should be communicated to or considered by the audit committee prior to its engaging the auditor?
- What, if any, audit committee policies and procedures should be mandated to enhance auditor independence, interaction between auditors and the audit committee, and communications between and among audit committee members, internal audit staff, senior management and the outside auditor?
- Our proposed rules do not contain exemptions for foreign filers. Are there legal or regulatory impediments which may make it difficult for certain foreign filers to comply? If so, what safeguards can these foreign filers employ to ensure that they comply with the proposed rules?
- Our proposed rules requiring the audit committee to pre-approve non-audit services to be provided by the company's auditor do not contain an exemption for foreign filers. Are there legal or regulatory impediments which may make it difficult for certain foreign filers to comply? If so, what safeguards can these foreign filers employ to ensure that there is an authorization process to

[79] Section 202 of the Sarbanes-Oxley Act; 15 U.S.C 78j–1(i)(1)(A).

pre-approve such services that is separate from management?

• In addition to legal or regulatory impediments, are there practical impediments which would make it difficult for certain foreign filers to comply with the pre-approval requirements? If so, what are these impediments? What safeguards can such an entity establish to better implement the proposed rules (which is to separate the decision to engage the auditor for non-audit services from management)?

• Should the Commission provide additional specific guidance to assist audit committees when deliberating auditor independence issues? What topics would be helpful?

• Our proposed rules would require the audit committee of an investment company to pre-approve the non-auditing services provided by the accountant of the investment company to the investment company's investment adviser and any entity controlling, controlled by, or under common control with the investment adviser that provides services to the investment company. Should the audit committee of an investment company registrant be required to approve any non-auditing services provided to the investment adviser and any entity controlled, controlled by, or under common control with the investment adviser that provides services to the fund? Should the scope of the pre-approval requirement be expanded or narrowed? Why or why not?

• Under the proposed rules, the pre-approval of non-auditing services would permit, for purposes of determining whether a non-auditing service meets the *de minimis* exception, the investment company's audit committee to aggregate total revenues paid to the investment company's accountant by the investment company, its investment adviser and any entity controlled, controlled by, or under common control with the investment adviser that provides services to the fund. Should the *de minimis* exception be determined separately based on the total revenues paid to the investment company's accountant by each entity?

• This proposed rule would apply to ''issuers.'' Should the Commission consider applying this rule to a broader population such as ''audit clients'' as defined in 2–01(f)(6) of Regulation S–X? Why or why not?

• In addition to the requirement that a majority of the directors who are not interested persons of the registered investment company appoint the independent accountant of a registered investment company under the Investment Company Act of 1940, the proposed rules would also require the audit committee of an investment company to separately approve the accountant. For registered investment companies, who should approve the selection of the accountant, *i.e.* independent directors, the audit committee, or both? If both, should the audit committee nominate the independent accountant with the independent directors making the selection?

*E. Compensation*

We propose to amend the auditor independence rules to address the practice of auditors being compensated by their firms for selling non-audit services to their audit clients. The new rule would provide that an accountant is not independent if, at any point during the audit and professional engagement period,[80] any partner, principal or shareholder of the accounting firm who is a member of the audit engagement team earns or receives compensation based on the performance of, or procuring of, engagements with that audit client, to provide any services, other than audit, review, or attest services.

Some accounting firms offer their professionals cash bonuses and other financial incentives to sell products or services, other than audit, review, or attest services to audit clients. We view such incentive programs as inconsistent with the independence and objectivity of external auditors that is necessary for them to maintain, both in fact and in appearance. The Commission believes that any partner, principal or shareholder who is a member of the audit engagement team could be influenced adversely as a result of the economic benefits that may be derived by promoting the firm's non-audit services to audit clients. We are concerned that an auditor might be viewed as compromising accounting judgments in order not to jeopardize the potential for increased income from sales of non-audit services.

''Compensation,'' as used in the proposed rule, would include any form of income or monetary benefit distributed to the partner, principal or shareholder. Compensation would be based on the performance or sale of non-audit services if the partner, principal, or shareholder were financially rewarded in any way for the performance or sale of such services. For example, this provision would result in accounting firms removing the sale of non-audit services to a partner's audit clients from the criteria used to allocate partnership ''units'' to that partner. It also would apply to any other vehicle used in determining compensation for any partner, principal or shareholder who is a member of the engagement team. This provision also reinforces the position that accountants at the partner level should be viewed as skilled professionals and not as conduits for the sale of non-audit services. This proposal recognizes and focuses on the need for independence of the most senior members of the engagement team as well as the accounting firm.

• We seek comments on all aspects of incentive compensation for audit partners, principals and shareholders and on the following:

• What economic impact will our proposal have on the current system of partnership compensation in accounting firms?

• Are there other approaches that should be considered with respect to compensation packages that pose a concern about auditor independence? If so, what are they?

• Would the proposed rule change be difficult to put into practice? If so, why? How could it be changed to be more effectively applied?

• Should managers, supervisors or staff accountants who are members of the audit engagement team also be covered by this proposal?

• Does this proposal cover the appropriate time period or should a measure other than the audit and professional engagement period be considered?

• Does the proposed rule cover the entire component of an audit partner's compensation that gives rise to independence concerns?

• Will this compensation limitation disproportionately affect some firms because of their size or compensation structure? If so, how may we accomplish our goal while taking these differences into account?

• Our proposal references compensation based on the performance or sale of non-audit services. Is there a better test that permits partners to participate in the overall success of the firm while addressing the influence that such services might have on a particular auditor-client relationship?

[80] ''Audit and professional engagement period'' includes both the period covered by the financial statements being audited or reviewed and the period of engagement to audit or review the client's financial statements or to prepare a report filed with the Commission. The period of engagement begins when the auditor signs an initial engagement letter or begins audit, review or attest procedures, and ends when the client or the auditor notifies the Commission that the client is no longer the auditor's audit client. *See* rule 2–01(f)(5) of Regulation S–X, 17 CFR 210.2–01(f)(5).

*F. Definitions*

1. Accountant

The term ''accountant'' currently is defined under the rules of the Commission as a ''certified public accountant or public accountant performing services in connection with an engagement for which independence is required.''[81] The proposed rules add to the definition the phrase a ''registered public accounting firm.'' Under the provisions of the Sarbanes-Oxley Act, public accounting firms must register with the Public Company Accounting Oversight Board (the ''Board'') in order to prepare or issue, or to participate in the preparation or issuance of any audit report with respect to any issuer.[82] Thus, the term ''registered public accounting firm'' refers to a firm that has registered in accordance with the requirements of the Sarbanes-Oxley Act. Accordingly, the proposals would include registered public accounting firms within the definition of accountants.

2. Accounting Role

Under the existing rules of the Commission, accounting role and financial reporting oversight role were included as a single definition. However, because the proposed rules that require a cooling-off period relate only to those performing a financial reporting oversight role, the Commission proposes to define separately ''accounting role'' and ''financial reporting oversight role.'' As proposed, the term ''accounting role'' refers to a role where a person can or does exercise more than minimal influence over the contents of the accounting records or over any person who prepares the accounting records. All persons in a ''financial reporting oversight role'' (defined below) are also in an ''accounting role.'' However, persons in an accounting role include individuals in clerical positions responsible for accounting records (*e.g.*, payroll, accounts payable, accounts receivable, purchasing, sales) as well as those who report to individuals in financial reporting oversight roles (*e.g.*, assistant controller, assistant treasurer, manager of internal audit, manager of financial reporting).

• Is this proposed definition sufficiently clear? If not, what changes would make the definition clearer and more operational?

3. Financial Reporting Oversight Role

The term ''financial reporting oversight role'' refers to a role in which an individual has direct responsibility or oversight of those who prepare the registrant's financial statements and related information (*e.g.*, management discussion and analysis), which will be included in a registrant's document filed with the Commission. As noted above, ''accounting role and financial reporting oversight role'' previously was one definition. In order to subject the appropriate individuals to certain portions of the proposed rules, we are proposing to bifurcate the definitions.

• Is this proposed definition sufficiently clear? If not, what changes would make the definition clearer and more operational?

4. Audit Committee

Section 205 of the Sarbanes-Oxley Act defines an audit committee as:

> A committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer.

The Act further stipulates that if no such committee exists, then the audit committee is the entire board of directors. The Commission proposes to adopt the same meaning for audit committee as used in the Act.

The audit committee serves as an important body, serving the interests of investors, to help ensure that the registrant and its auditors fulfill their responsibilities under the securities laws. Because the definition of an audit committee includes the entire board of directors if no such committee of the board exists, these rules do not require registrants to establish audit committees.

Some companies do not have boards of directors and therefore do not have audit committees. For example, some limited liability companies and limited partnerships that do not have a corporate general partner may not have an oversight body that is the equivalent of an audit committee. We do not propose to exempt these entities from the proposed requirements. Rather, such issuers should look through each general partner of the limited partnerships acting as general partner until a corporate general partner or an individual general partner is reached. With respect to a corporate general partner, the registrant should look to the audit committee of the corporate general partner or to the full board of directors as fulfilling the role of the audit committee. With respect to an individual general partner, the registrant should look to the individual as fulfilling the role of the audit committee.

We do, however, propose to exempt asset-backed issuers[83] and unit investment trusts[84] from this proposed requirement. Because of the nature of these entities, such issuers are subject to substantially different reporting requirements. Most significantly, asset-backed issuers are not required to file financial statements like other companies. Similarly, unit investment trusts are not required to provide shareholder reports containing audited financial statements. Also, such entities typically are passively managed pools of assets. Therefore, we do not propose to apply the requirements related to audit committees in this release to such entities.

• Some registrants may not have designated boards of directors or audit committees (*e.g.* benefit plans required to file form 11–K). Does the definition of audit committee sufficiently describe who should serve in this capacity where such situations exist? If not, what additional guidance would be appropriate?

• Our proposed rules exempt unit investment trusts and asset-backed issuers from the rule requiring the audit committee to approve auditing and non-auditing services. Should unit investment trusts and asset-backed issuers be subject to these requirements? If so, given that unit investment trusts and asset-backed issuers are not actively managed, who should be responsible for approving the auditing and non-auditing services? Are there other, similar entities that should be exempt from the pre-approval requirements?

• Are the existing definitions in Regulation S–X and rule 2–01 of Regulation S–X of audit client, issuer, and subsidiary sufficiently clear?

*G. Communication With Audit Committees*

Section 204 of the Sarbanes-Oxley Act directs the Commission to issue rules requiring timely reporting of specific information by auditors to audit committees. We are proposing to amend Regulation S–X to require each public accounting firm registered with the Public Company Accounting Oversight Board that audits an issuer's financial statements to report, prior to the filing of such report with the Commission, to the issuer or registered investment

[81] 17 CFR 2–01(f)(1).

[82] *See* section 102(a) of the Sarbanes-Oxley Act.

[83] As defined in 17 CFR 240.13a–14(g) and 240.15d–14(g).

[84] As defined by section 4(2) of the Investment Company Act (15 U.S.C. 80a–4(2)).

company's audit committee: (1) All critical accounting policies and practices used by the issuer or registered investment company, (2) all alternative accounting treatments of financial information within generally accepted accounting principles (''GAAP'') that have been discussed with management, including the ramifications of the use of such alternative treatments and disclosures and the treatment preferred by the accounting firm, and (3) other material written communications between the accounting firm and management of the issuer or registered investment company.

We believe that this section of the Sarbanes-Oxley Act and these proposed rules largely codify current requirements under Generally Accepted Auditing Standards (''GAAS'') for auditors of public companies to discuss matters with management and audit committees. We further believe that specifying the timing of these communications will facilitate more open dialogue between auditors and audit committees.

Certain specific oral or written communications with audit committees are currently required by GAAS, including:

(1) Methods used to account for significant unusual transactions,

(2) Effects of significant accounting policies in controversial or emerging areas for which there is a lack of authoritative guidance or consensus,

(3) Process used by management in formulating particularly sensitive accounting estimates and the basis for the auditor's conclusions regarding the reasonableness of those estimates,

(4) Material audit adjustments proposed and immaterial adjustments not recorded by management,

(5) Auditor's judgments about the quality of the company's accounting principles, and

(6) Disagreements with management over the application of accounting principles, the basis for management's accounting estimates, and the disclosures in the financial statements.[85]

Auditors are required under GAAS to provide these communications in a timely manner but not necessarily before the issuance of the audit report.[86] Auditors also may communicate with audit committees on matters in addition to those specifically required by AU § 380, including auditing issues, engagement letters, management representation letters, internal controls, auditor independence, and others.

- In light of the requirements for the CEO and CFO to certify information in the company's periodic filings,[87] should the auditor be required to communicate information on critical accounting policies and practices and alternative accounting treatments to management as well as to the audit committee?

1. Critical Accounting Policies and Practices

We are proposing rules requiring communication by auditors to audit committees of all critical accounting policies and practices. This communication can be oral or written. In December 2001, we issued cautionary advice regarding each issuer disclosing in the Management's Discussion and Analysis [88] Section of its annual report those accounting policies that management believes are most critical to the preparation of the issuer's financial statements.[89] The cautionary advice indicated that ''critical'' accounting policies are those that are both most important to the portrayal of the company's financial condition and results and require management's most difficult, subjective or complex judgments, often as a result of the need to make estimates about the effect of matters that are inherently uncertain.[90] As part of that cautionary advice, we stated:

> Prior to finalizing and filing annual reports, audit committees should review the selection, application and disclosure of critical accounting policies. Consistent with auditing standards, audit committees should be apprised of the evaluative criteria used by management in their selection of the accounting principles and methods. Proactive discussions between the audit committee and the company's senior management and auditor about critical accounting policies are appropriate.[91]

In May 2002, the Commission proposed rules to require disclosures that would enhance investors' understanding of the application of companies' critical accounting policies.[92] The May 2002 proposed rules cover (1) accounting estimates a company makes in applying its accounting policies and (2) the initial adoption by a company of an accounting policy that has a material impact on its financial presentation. Under the first part of those proposed rules, a ''critical accounting estimate'' is defined as an accounting estimate recognized in the financial statements (1) that requires the registrant to make assumptions about matters that are highly uncertain at the time the accounting estimate is made and (2) for which different estimates that the company reasonably could have used in the current period, or changes in the accounting estimate that are reasonably likely to occur from period to period, would have a material impact on the presentation of the registrant's financial condition, changes in financial condition or results of operations. The May 2002 proposed rules outline certain disclosures that a company would be required to make about its critical accounting estimates. In addition, under the second part of the May 2002 proposed rules, a company would be required to make certain disclosures about its initial adoption of accounting policies, including the choices the company had among accounting principles.

Auditors may want to read and refer to the December 2001 Cautionary Guidance as well as the May 2002 proposed rules as a guide to determining the types of matters that should be communicated to the audit committee under this proposed rule. We do not propose to require that those discussions follow a specific form or manner, but we expect, at a minimum, that the discussion of critical accounting estimates and the selection of initial accounting policies will include the reasons why certain estimates or policies are or are not considered critical and how current and anticipated future events impact those determinations. In addition, we anticipate that the communications regarding critical accounting policies will include an assessment of management's disclosures along with any significant proposed modifications by the auditors that were not included.

- Should the auditor be required to provide additional information to the audit committee regarding the company's critical accounting policies?
- When should the communication take place?
- Should the auditor be required to provide the communication in writing?
- Is it appropriate that investment companies would be subject to the rules regarding critical accounting policies?

[85] *See* Codification of Statement on Auditing Standards AU § 380, ''Communication with Audit Committees.''

[86] *Id.*

[87] *See* Release No. 33–8124, ''Certification of Disclosure in Companies' Quarterly and Annual Reports,'' (Aug. 29, 2002).

[88] Item 303 of Regulation S–K, (17 CFR 229.303), which requires disclosure about, among other things, trends, events or uncertainties known to management that would have a material impact on reported financial information.

[89] Release No. 33–8040 (Dec. 12, 2001) (66 FR 65013).

[90] *Id.*

[91] *Id.* (footnotes omitted).

[92] Release No. 33–8090 (May 10, 2002) (67 FR 35620).

2. Alternative Accounting Treatments

We recognize that the complexity of financial transactions results in accounting answers that are often the subject of significant debate between management and the auditors. We believe that these discussions of accounting alternatives that occur between management and the auditors should be shared with the audit committee in their oversight role. The report by the Senate Committee on Banking, Housing, and Urban Affairs on the bill that later became the foundation for the Sarbanes-Oxley Act, in addressing section 204, stated, in part:

> The Committee believes that it is important for the audit committee to be aware of key assumptions underlying a company's financial statements and of disagreements that the auditor has with management. The audit committee should be informed in a timely manner of such disagreements, so that it can independently review them and intervene if it chooses to do so in order to assure the integrity of the audit.[93]

Therefore, we are proposing rules requiring communication, either orally or in writing, by auditors to audit committees of alternative accounting treatments of financial information within GAAP that have been discussed with management, including the ramifications of the use of such alternative treatments and disclosures and the treatment preferred by the accounting firm. This proposed rule is intended to cover recognition, measurement, and disclosure considerations related to the accounting for specific transactions as well as general accounting policies.

We believe that communications regarding specific transactions should identify, at a minimum, the underlying facts, financial statement accounts impacted, and applicability of existing corporate accounting policies to the transaction. In addition, if the accounting treatment proposed does not comply with existing corporate accounting policies, or if an existing corporate accounting policy is not applicable, then an explanation of why the existing policy was not appropriate or applicable and the basis for the selection of the alternative policy should be discussed. Regardless of whether the accounting policy selected preexists or is new, the entire range of alternatives available under GAAP that were discussed by management and the auditors would be communicated along with the reasons for not selecting those alternatives. If the accounting treatment selected is not the preferred method in the auditor's opinion, we would expect that the reasons why the auditor's preferred method was not selected by management also would be discussed.

Communications regarding general accounting policies would focus on the initial selection of and changes in significant accounting policies, as required by AU § 380, and would include the impact of management's judgments and accounting estimates, as well as the auditor's judgments about the quality of the entity's accounting principles. The discussion of general accounting policies would include the range of alternatives available under GAAP that were discussed by management and the auditors along with the reasons for selecting the chosen policy. If an existing accounting policy is being modified, then the reasons for the change would also be communicated. If the accounting policy selected is not the auditor's preferred policy, then we would expect the discussions to include the reasons why the auditor considered one policy to be preferred but that policy was not selected by management.

The separate discussion of critical accounting policies and estimates is not considered a substitute for communications regarding general accounting policies, since the discussion about critical accounting policies and estimates might not encompass any new or changed general accounting policies and estimates. Likewise, this discussion of general accounting policies and estimates is not intended to dilute the communications related to critical accounting policies and estimates, since the issues affecting critical accounting policies and estimates, such as sensitivities of assumptions and others, may be tailored specifically to events in the current year, and the selection of general accounting policies and estimates should consider a broad range of transactions over time.

- Is the discussion of which accounting policies require communication with the audit committee sufficiently clear?
- Should additional matters be required to be communicated to the audit committee? If so, which matters?
- Is it appropriate that investment companies would be subject to the proposed rules regarding alternative accounting treatments?

3. Other Material Written Communications

We understand written communications between auditors and management range from formal documents, such as engagement letters, to informal correspondence, such as administrative items. We also acknowledge that not all forms of written communications provided to management also are provided to the audit committee. The decision whether to provide written communications to the audit committee is subjective and is influenced by auditing standards. Our proposed rule is intended to clarify the substance of information that would be provided by auditors to audit committees to facilitate auditor and management oversight by those committees. We anticipate that the proposed rule would result in auditors and audit committees having more robust discussions of accounting and auditing matters.

The Sarbanes-Oxley Act specifically cites the management letter and schedules of unadjusted differences as examples of material written communications to be provided to audit committees. Examples of additional written communications that we expect would be considered material to an issuer include:

- Management representation letter;[94]
- Reports on observations and recommendations on internal controls;[95]
- Schedule of material adjustments and reclassifications proposed, and a listing of adjustments and reclassifications not recorded, if any;[96]
- Engagement letter;[97] and
- Independence letter.[98]

These examples are not exhaustive, and auditors are encouraged to critically consider what additional written communications should be provided to audit committees.

4. Timing of Communications

The Act requires that the aforementioned communications should be timely reported to the audit committee. For purposes of the requirements of this provision, the proposed rule specifies that the proposed communications between the

[93] Report of the Senate Committee on Banking, Housing, and Urban Affairs, ''Public Company Accounting Reform and Investor Protection Act of 2002,'' Senate Report 107–205, 107th Cong., 2d Sess., at 21 (July 3, 2002).

[94] *See* SAS 85 AU§ 333, ''Management Representations.''

[95] *See* SAS 60 AU § Communication of Internal Control Related Matters Noted in an Audit.''

[96] *See* SAS 89, AU§ 333, ''Audit Adjustments,'

[97] *See* SAS 83 AU§ 310, ''Establishing an Understanding With the Client.''

[98] *See* SQCS 2 QC§ 20, ''System of Quality Control for a CPA Firm's Accounting and Auditing Practice.''

auditor and the audit committee occur prior to the filing of the audit report with the Commission pursuant to applicable securities laws. As a result, these discussions will occur, at a minimum, during the annual audit, but we expect that they could occur as frequently as quarterly or more often on a real-time basis.

The timing of these communications is intended to occur before any audit report is filed with the Commission pursuant to the securities laws. We believe that this proposed rule will ensure that these communications occur prior to filing of annual reports and proxy statements, as well as prior to filing registration statements and other periodic or current reports when audit reports are included.

- Should the timing of these communications be required to occur before any audit report is filed with the Commission or at some other time?
- Should these communications regarding critical accounting policies be required to be in writing? If so, why?
- Should we include specific instructions within the proposed rule regarding the nature of communications of critical accounting policies? If so, what instructions should be provided and why?
- Do these required communications fulfill existing GAAS requirements? If not, why?
- Should these communications regarding alternative accounting treatments be required to be in writing? If so, why?
- Do these required communications fulfill the statutory requirements? If not, why?
- Should the minimum requirements for discussion of alternative accounting treatments be expanded or reduced? If so, how?
- Should the list of recommended other communications be expanded or reduced? If so, what specific items should be added and why?
- Should the list of recommended other communications be required to be communicated to the audit committee? Why or why not?
- Are the appropriate entities included under the term ''issuer'' appropriate? If not, what entities should be included or excluded?
- Is it appropriate that investment companies are required to make these communications to their audit committees? Why or why not?
- This proposed rule would apply to ''issuers.'' Should the Commission consider applying this rule to a broader population such as ''audit clients'' as defined in 2–01(f)(6) of Regulation S–X? Why or why not?

*H. Expanded Disclosure*

1. Principal Accountants' Fees

To allow investors to be better able to evaluate the independence of the auditor of a company's financial statements in which they invest, the proxy disclosure rules currently require that a registrant disclose the professional fees it paid to its principal independent accountant in the most recent fiscal year. We propose to change both the types of fees that must be detailed and the years of service that are covered by the disclosure.[99] The proposed rules would increase the disclosed categories of professional fees paid for audit and non-audit services from three to four. The categories of reportable fees would be: (1) Audit Fees, (2) Audit-Related Fees, (3) Tax Fees, and (4) All Other Fees.[100] The new disclosure would show fees for each of the two most recent fiscal years, rather than just the most recent fiscal year. In addition, registrants will be required to describe in subcategories the nature of the services provided that are categorized as audit-related fees and all other fees. We are also proposing disclosure requirements related to audit committee pre-approval policies and procedures for audit and non-audit services provided by an independent public accountant as well as the percentage of fees that were pre-approved.

We are proposing these changes partly in response to public comment on this disclosure since we adopted the requirement in 2000. For example, the definition of ''Audit Fees'' restricts the fees reportable in that category to the services necessary only to complete the basic audit, sign the audit opinion and perform the required quarterly reviews. This category was intended to include fees for only those services specifically required under GAAS.[101] Some have suggested that the categories are not as clear as they can be and some commentators have questioned the usefulness of the current fee disclosures.

We recognize that there are certain accounting, audit, assurance and related services that accountants, in effect, must perform for their audit clients. Presently, registrants are required to combine fees for those services with fees paid for consulting and present the aggregate in the ''All Other Fees'' category. We recognize that this framework may make it difficult for shareholders to distinguish between fees for services traditionally performed by the accounting firm's auditors and fees for services performed by the accounting firm's consulting division. Some reporting companies have sought to add clarity by including further subcategories under ''All Other Fees'' to provide greater detail.

While the proposed rules continue to require issuers to disclose fees paid to the principal accountant for audit services, we are expanding the types of fees that should be included in this category. In addition to including fees for services necessary to perform an audit or review in accordance with GAAS,[102] this category also may include services that generally only the independent accountant can reasonably provide, such as comfort letters, statutory audits, attest services, consents and assistance with and review of documents filed with the Commission.

We believe that the addition of a new category, ''Audit-Related Fees,'' will enable registrants to present the audit fee relationship with the principal accountant in a more transparent fashion. In general, Audit-Related Fees are assurance and related services that are traditionally performed by the independent accountant. More specifically, these services would include, among others: employee benefit plan audits, due diligence related to mergers and acquisitions, accounting assistance and audits in connection with proposed or consummated acquisitions, internal control reviews, consultation concerning financial accounting and reporting standards.

We also believe it is appropriate to add transparency regarding a second category of fees: ''Tax Fees.'' Tax services traditionally have been viewed as closely related to audit services and as not being in conflict with an auditor's independence. However, such services would be subject to pre-approval by the audit committee. The review of a registrant's tax accruals and reserves is a task that requires extensive knowledge about the audit client—knowledge that has already been assimilated by the audit and tax professionals. In many public companies, the fee for tax services is substantial in relation to other services. Investors may benefit from being able to consider those fees

[99] *See* proposed item 9(e), schedule 14A.

[100] Currently, registrants need disclose only ''Audit Fees,'' ''Financial Systems Design and Implementation Fees'' and ''All Other Fees.'' (17 CFR 240.14a–101, item 9(e)). We are proposing to delete the category of ''Financial Systems Design and Implementation Fees'' because such services generally are prohibited. *See* section II.B.2 of this release.

[101] *See* Application of Revised Rules on Auditor Independence: Frequently Asked Questions. Office of the Chief Accountant, January 16, 2001, Question and answer no. 1.

[102] *See also* section 2(a)(2) the Sarbanes-Oxley Act which defines the term ''audit''.

separately from the ''All Other Fees'' category. The ''Tax Fees'' category would capture all services performed by professional staff in the independent accountant's tax division. Typically, it would include fees for tax compliance, consultation and planning. Tax compliance generally involves preparation of original and amended tax returns, claims for refund and tax payment-planning services. Tax consultation and tax planning encompass a diverse range of services, including assistance and representation in connection with tax audits and appeals, tax advice related to mergers and acquisitions, employee benefit plans and requests for rulings or technical advice from taxing authorities.

The category of ''All Other Fees'' would remain unchanged from the existing rule, except that to the extent that financial information systems implementation and design exist they would be disclosed as a component of ''All Other Fees.''

Thus, this proposal would add two new categories to the disclosures: (1) Audit-related fees and (2) tax fees. This proposal also would eliminate one of the current categories: financial information technology consulting fees. This category would be eliminated under this proposal because under the section of the proposal addressing nonaudit services, auditors would no longer be permitted to provide most of these consulting services to audit clients. Thus, the Commission believes that this disclosure of fees paid in this category would no longer be necessary.

For comparison purposes, two dollar amounts would be shown under each one of the four categories—one for each of the two most recent fiscal years. Each amount reported would represent the aggregate of all fees billed by the principal independent accountant that is appropriate to that category in one of those two years. As we note in the proposed Item, registrants also are required to describe each subcategory of services comprising the fees included in the ''audit related'' and ''all other fees'' categories.

The disclosures of the percentage of audit services that are not provided by permanent, full-time employees of the independent public accounting firm remain unchanged from previous rules.

2. Audit Committee Actions

We propose to require that registrants filing proxy statements disclose any policies and procedures developed by the audit committee of the board of directors concerning pre-approval of the independent accountant to perform both audit and non-audit services. Section 202 of the Sarbanes-Oxley Act states the pre-approval requirements for all auditing and non-audit services, with exceptions provided for *de minimis* amounts under certain circumstances, as described in the Act and the proposed rules. This section also describes the delegation authority of the audit committee related to pre-approvals. We believe that investors should be informed of audit committee pre-approval procedures and policies in place to give investors a better understanding of how audit committees are managing relationships with independent accountants, including evaluating engagements with the accountant that could impair the accountant's independence.

The proposed disclosure would set out in detail the audit committee's policies and procedures for engaging the independent accountant to perform services other than audit, review and attest services. We expect registrants to provide clear, concise and understandable descriptions of the policies and procedures. Alternatively, registrants could include a copy of those policies and procedures with the proxy statement delivered to investors and filed with the Commission. Either method should allow shareholders to obtain a complete and accurate understanding of the audit committee's policies and procedures. We expect the policies and procedures would address auditor independence oversight functions in a prudent and responsible manner. Additionally, these procedures would describe, if applicable, the specific processes in place that permit and monitor activities meeting the *de minimis* exception.

We also believe investors would benefit from knowing what percentage of the fees reported in each of the ''Audit-Related Fees,'' ''Tax Fees,'' and ''All Other Fees'' categories were pre-approved by the audit committee pursuant to the policies and procedures instituted by the audit committee. That disclosure would provide insight into the extent to which the audit committee takes an active, direct role in considering each category of non-audit fee engagements.

The Sarbanes-Oxley Act requires the Commission to promulgate rules requiring companies to disclose the required information together with periodic reports required pursuant to sections 13(a) and 15(d) of the Exchange Act. In accordance with this mandate, we propose to require the new disclosures in a company's annual report. However, because we believe that this information is relevant to a decision to vote for a particular director or to elect, approve or ratify the choice of an independent public accountant, we propose to require this disclosure in a company's proxy statement on schedule 14A or information statement on schedule 14C. Because the information is proposed to be included in part III of annual reports on forms 10–K and 10–KSB, domestic companies would be able to incorporate the required disclosures from the proxy or information statement into the annual report.

Our intent is that this information be made available to investors of all registrants. However, not all registrants are required to file proxy statements. Thus, consistent with the provisions in the Act, registrants that do not issue proxy statements would be required to include appropriate disclosures in their annual filing included in form 10–K, form 10–KSB, 20–F, form 40–F and proposed form N–CSR as appropriate. For the reasons noted previously in this release, we propose to exempt asset-backed issuers and unit investment trusts from such disclosure requirements.

In addition, we propose to require parallel disclosure for registered management investment companies (''funds'') in annual reports on proposed form N–CSR.[103] Like operating companies, registered management investment companies would also be required to include this information in proxy or information statements that relate to the election of directors, or the election, approval, or ratification of an independent public accountant.[104] However, in recent years, the proxy statement has become an ineffective vehicle for making information available to fund shareholders on a regular basis because many funds are no longer required to hold annual meetings.[105]

[103] Proposed form N–CSR would be used by registered management investment companies to file certified shareholder reports with the Commission under the Sarbanes-Oxley Act of 2002. *See* Investment Company Act Release No. 25723 (Aug. 30, 2002) (67 FR 57298 (Sept. 9, 2002)); Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745 (2002).

[104] 17 CFR 240.14a–101, item 9(e).

[105] For historical and other reasons, most funds are organized under the laws of Massachusetts or Maryland. The organizational and operational requirements of Massachusetts business trusts are not specified by statute, and a fund's essential structure is contained in the trust agreement, which generally includes a provision eliminating the need for annual shareholder meetings to elect directors. *See generally* Jones, Moret, and Storey, *The Massachusetts Business Trust and Registered Investment Companies,* 13 DEL. J. CORP. L. 421 (1988). Under Maryland corporate law, fund charters or by-laws are not required to provide that annual meetings be held in any year in which election of directors is not required by the

Continued

Accordingly, we believe that the disclosure regarding audit committee pre-approval policies and procedures for audit and non-audit services and professional fees billed by auditors should also be required in annual reports on proposed form N–CSR, which would be filed with the Commission and available to investors.

- Is the proxy statement the appropriate location for this disclosure? If not, why?
- Should we permit incorporation by reference into the company's annual report?
- Would expansion of the proxy disclosure of professional fees paid to the independent auditor from three categories to four provide more useful information to investors?
- Are the new categories of disclosure appropriate? Are they well defined, or should they be more accurately defined? Should there be additional (or fewer) categories?
- Is disclosure of two years of fees appropriate? Should the proposed additional fee disclosures be expanded to three years or remain at one year?
- What, if any, additional information about professional fees would be useful to investors?
- For a registrant not subject to the proxy disclosure rules, such as foreign private issuers, should we require that the same disclosures be placed in annual reports?
- Is there any additional disclosure concerning the activities of audit committees that would be beneficial to investors?
- Should companies be required to provide the information in their quarterly reports? Should it be required that the information be included in other filings such as form 10–Q or 10–QSB?
- Should registered investment companies be required to provide the information in their semi-annual report to shareholders on proposed form N–CSR?
- Registered investment companies are required to provide disclosure of audit fees billed for the registrant only, but are required to disclose other types of fees in the aggregate for the registrant, its investment adviser, and certain other parties.[106] Is this appropriate, or should we also require disclosure of audit fees on an aggregate basis? In the alternative, should we require disclosure of audit-related fees or any other fees for the registrant only and not on an aggregate basis?
- If we adopt such a requirement, should we require or permit registrants to recalculate and report fees already disclosed for more than two years so that all fee information is consistently reported and available?

*I. Transition Period*

While much of the current proposal implements title II of the Act, we are also proposing changes which go beyond the provisions of the Act. In those areas, we are proposing that the provisions would be effective upon adoption of final rules. However, for those situations, we are considering the appropriate timing for the implementation of final rules and how best to allow for an orderly transition as a result of the new requirements imposed by the proposals. We are considering whether the application of some of these provisions should be delayed to a later date. For example, we are considering transition provisions related to the rules concerning audit partner rotation, audit committee communications, disclosures of fees paid to auditors, and partner compensation.

- Would a period of time beyond the adoption date of the final rules be necessary or appropriate for compliance with the final rules by smaller companies or companies with whose securities currently are not listed or quoted? If so, which rules should we consider a delayed effective date?
- How should an effective date be determined with respect to each amendment?
- Are there special considerations that we should take into account in providing a transition period for foreign private issuers?

**III. General Request for Comments**

- We invite any interested person wishing to submit written comments on the proposals or any matters that may impact the proposals, to do so. We specifically request comments from investors, issuers, and accounting firms.
- We solicit comment on each component of the proposals.
- Would the proposals related to audit committees and partner compensation help alleviate the pressure that clients may place on engagement partners or accounting firms to acquiesce to the clients' views on accounting issues? What are some of the other scenarios where such pressures might exist?

**IV. Paperwork Reduction Act**

Certain provisions of the proposed amendments to Regulation S–X, schedule 14A and forms 10–K, 10–KSB, 20–F, 40–F and proposed form N–CSR contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), and the Commission has submitted them to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. 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. Compliance with the proposed requirements would be mandatory. There would be no mandatory retention period for the information disclosed under the rules being proposed in this release. Responses to the disclosure requirements would not be kept confidential.

The titles for the collections of information are: ''Regulation S–X''; ''Proxy Statements—Regulation 14A and Schedule 14A''; ''Form 10–K''; ''Form 10–KSB''; ''Form 20–F''; ''Form 40–F''; and ''Form N–CSR under the Investment Company Act of 1940 and Securities Exchange Act of 1934, Certified Shareholder Report.''

Regulation S–X (OMB Control No. 3235–0009) is the central repository for rules related to the form and content of financial statements filed with the Commission. Regulation S–X, however, does not direct registrants to file financial statements or to collect financial data. Regulation S–X indicates

Investment Company Act. MD. CODE ANN., CORPS. & ASS'NS Code 2–501(b)(1)(2002). In addition, Delaware, Minnesota, and California also have business trust or special corporate law structures that have the effect of not requiring shareholder meetings other than those required by the Investment Company Act. DEL. CODE ANN. tit. 12, § 3806 (2001); Minn Stat. 302A.431 (2001); CAL. CORP. CODE 600(b) (West 2001).

Closed-end funds registered on national securities exchanges, however, are required to hold an annual meeting to elect directors under the rules of the exchanges. *See, e.g.*, American Stock Exchange Company Guide Listing Standards, Policies and Requirements § 704; New York Stock Exchange Listed Company Manual 302.00. Closed-end fund shareholders therefore generally would receive annual proxy statements.

[106] Item 9(e)(1), (2), and (3) of schedule 14A (17 CFR 240.14a–101, item 9(e)(1), (2), and (3)) (requiring disclosure under the caption ''Audit Fees'' of fees billed for audit of registrant's financial statements and disclosure under the captions ''Financial Information Systems Design and Implementation Fees,'' and ''All Other Fees'' of fees billed for services rendered to the registrant, its investment adviser, and any entity controlling, controlled by, or under common control with the adviser that provides services to the registrant); proposed item 9(e)(1), (2), (3) and (4) of schedule 14A; proposed instruction 2 to item 9(e) of schedule 14A (proposing to require disclosure under the caption ''Audit Fees'' of fees billed for audit of registrant's financial statements, and disclosure under the captions ''Audit-Related Fees,'' ''Tax Fees,'' and ''All Other Fees'' of fees billed for services rendered to the registrant, the registrant's investment adviser, and any entity controlling, controlled by, or under common control with the adviser that provides services to the registrant).

what should be in the financial statements and how financial statements should be presented when they are required to be filed by other rules or forms under the securities laws. Because Regulation S–X does not require any information to be filed with the Commission, only one burden hour is assigned to cover a reading of the regulation. Burden hours and costs associated with the preparation of financial statements in accordance with Regulation S–X are allocated to the rules or forms that require the financial statements to be filed.

*A. Communication With Audit Committees*

As required by section 204 of the Sarbanes-Oxley Act, we are proposing to amend Regulation S–X to require each public accounting firm registered with the Public Company Accounting Oversight Board that audits an issuer's financial statements to report to the issuer's audit committee (1) all critical accounting policies and practices used by the issuer, (2) alternative accounting treatments within GAAP that have been discussed with management, including the ramifications of the use of the alternative treatments and the treatment preferred by the accounting firm, and (3) other material written communications between the accounting firm and management of the issuer such as any management letter or schedule of ''unadjusted differences.'' The required reports need not be in writing but the report would be required to be presented to the audit committee before the auditor's report on the financial statements is filed with the Commission.[107]

We believe that auditing standards currently require discussions between the auditors and the audit committee of significant unusual, controversial, or emerging accounting policies, of the process used by management to select certain estimates, and of disagreements over certain accounting matters.[108] We further believe that audit committees generally are aware of management's letter making representations to the auditors, which the auditor uses in conducting the audit of the issuer's financial statements. Audit committees also should be aware of ''unadjusted differences,'' if any, as a result of the enactment of section 401 of the Sarbanes-Oxley Act, which added section 13(i) to the Securities Exchange Act of 1934 (''Exchange Act'').[109] Under new section 13(i) of the Exchange Act, therefore, there should be no material ''unadjusted differences.''

Because of these GAAS and legal provisions, we believe that adoption of the proposed rules regarding auditor reports to audit committees would not increase significantly the burden hours on accounting firms or registrants.

*B. Disclosures of Audit and Non-Audit Services*

1. Proxy and Information Statements

Schedule 14A [110] (OMB Control No. 3235–0059) prescribes the information that a company must include in its proxy statement to ensure that shareholders are provided material information relating to voting decisions. The Commission currently estimates that 7,661 registrants annually file schedule 14A. Schedule 14C [111] (OMB Control No. 3235–0057) prescribes the information that a company that is registered under section 12 of the Exchange Act must include in its information statement in advance of a security holders' meeting when it is not soliciting proxies from its security holders. The Commission currently estimates that 464 registrants annually file schedule 14C.

Item 9 of schedule 14A requires the disclosure of certain information regarding the registrant's relationship with the independent auditor of the company's financial statements when there is a solicitation relating to (1) a meeting at which directors to the company's board of directors are to be elected (or the solicitation of consents or authorizations in lieu of such a meeting) or (2) the election of the auditor, or the approval or ratification of the company's selection of the auditor. We are proposing to amend paragraph (e) of item 9 to provide more detailed information regarding the categories of fees paid by the registrant to the auditor and to inform investors about the critical role that audit committees play in assuring the auditor's independence. We believe that the proposed disclosure would allow investors to better assess an auditor's independence and the certain activities of an audit committee.

Item 9(e) currently requires disclosure of fees billed by the auditor in the last fiscal year, with the fees broken down into three categories: Audit fees, financial information systems design and implementation fees, and all other fees. The proposals would add disclosure of two categories (tax fees and audit-related fees), while eliminating one category (financial information systems design and implementation), and require disclosure of one more past year of each of these fees. Because these fees are already being disclosed, repeating the prior year's disclosures for comparison purposes should not increase significantly a registrant's compliance burden. In addition, breaking tax fees and audit-related fees out of the ''all other'' category of fees currently being disclosed should not result in any significant incremental burden.

Under the proposals, registrants also would be required to disclose any policies and procedures adopted by an audit committee to be followed for auditor engagements for services other than audit, review and attest services in the event that the audit committee does not expressly pre-approve the particular engagements. In addition, the proposals would require registrants to disclose what percentage of fees in each of the categories noted above (audit, audit-related, tax, and other) relate to engagements that were pre-approved by the audit committee.

We estimate that the incremental disclosure of fees, the audit committee's policies and procedures for approval of audit engagements, and the percentage of fees pre-approved by the audit committee, would impose, on average, two additional burden hours on each of the 7,661 filers of schedule 14A, or an aggregate 15,322 additional burden hours. We estimate that most of this time would relate to consideration and review of the disclosures of the audit committee's policies and procedures. We further estimate that approximately 75% of the extra burden hours, or approximately 11,492 hours, would be expended by internal staff and the remaining 25%, or 3,830 hours, would be for outside legal costs associated with reviewing the proposed disclosures. Assuming that outside legal costs would be an average of $300 per hour, the aggregate annual legal costs would be $1,149,000. Similarly, we estimate that these proposed disclosures would

[107] Release No. 33–8040 (Dec. 12, 2001) (66 FR 65013). In May of this year, we proposed rules to require disclosures that would enhance investors' understanding of the application of companies' critical accounting policies. The proposed disclosures would focus on accounting estimates a company makes in applying its accounting policies and the initial adoption by a company of an accounting policy that has a material impact on its financial presentation. Release No. 33–8098 (May 10, 2002) (67 FR 35620).

[108] *See* SAS 61, AU§ 380, ''Communication with Audit Committees or Others with Equivalent Authority and Responsibility.''

[109] Each financial report that contains financial statements, and that is required to be prepared in accordance with (or reconciled to) generally accepted accounting principles under this title and filed with the Commission shall reflect all material correcting adjustments that have been identified by a registered public accounting firm in accordance with generally accepted accounting principles and the rules and regulations of the Commission.

[110] 17 CFR 240.14a–101.

[111] 17 CFR 240.14c–101.

impose, on average, two additional burden hours on each of the 464 filers of schedule 14C, or an aggregate 928 additional burden hours. Using the same allocation of hours and cost estimate of legal fees as for schedule 14A, we estimate that 696 hours would be expended by internal staff and the remaining 232 hours would be for outside legal assistance, producing an outside legal cost of $69,600.

2. Annual Reports on Form 10–K

The proposed disclosure generally should be presented in a company's proxy statement in accordance with item 9(e) of schedule 14A, and incorporated by reference into the form 10–K (OMB Control No. 3235–0063). Some companies that file forms 10–K, however, are not subject to the proxy disclosure requirements. These companies would, therefore, now be required to present the required disclosures in the form 10–K. We do not believe, however, that the disclosures would be burdensome to these companies because the information to be disclosed (fees billed to the company by the auditor in the last fiscal year, with the fees broken down into certain categories) should be readily available to the company.

We estimate that the incremental disclosure of fees, the audit committee's olicies and procedures for approval of audit engagements, and the percentage of fees pre-approved by the audit committee, would impose, on average, two additional burden hours per year on each of the 8,484 filers of form 10–K. Six thousand six hundred and seventy-six (6,676) of those filers, however, would provide the information under schedule 14A and 209 of those filers would provide the information under schedule 14C.[112] The burden hours for the disclosure by these filers therefore has been assigned to schedule 14A and schedule 14C, respectively. The burden imposed on the remaining 1,599 filers is being assigned to form 10–K. This results in 3,198 (2 hours x 1,599 filers) additional burden hours. We estimate that most of this time would relate to consideration and review of the disclosures of the audit committee's policies and procedures. We further estimate that approximately 75% of the extra burden hours, or approximately 2,399 hours, would be expended by internal staff and the remaining 25%, or 799 hours, would be for outside legal costs associated with reviewing the proposed disclosures. Assuming that outside legal costs would be an average of $300 per hour, the aggregate annual legal costs would be $239,700.

3. Annual Reports on Form 10–KSB

Form 10–KSB (OMB Control No. 3235–0420) is the annual report filed with the Commission by ''small businesses issuers.'' A ''small business issuer'' is an entity that (1) has revenues of less than $25,000,000, (2) is a U.S. or Canadian issuer, (3) is not an investment company, and (4) if a majority owned subsidiary, the parent corporation is also a small business issuer. An entity is not a ''small business issuer,'' however, if the aggregate market value of its outstanding voting and non-voting common stock held by non-affiliates is $25,000,000 or more.[113] We do not believe, however, that these disclosures would be burdensome to these companies because the information to be disclosed (fees billed to the company by the auditor in the last fiscal year, with the fees broken down into certain categories) should be readily available to the company.

We estimate that the incremental disclosure of fees, the audit committee's policies and procedures for approval of audit engagements, and the percentage of fees pre-approved by the audit committee, would impose, on average, two additional burden hours per year on each of the 3,820 filers of form 10–KSB. Nine hundred and eighty-five (985) of those filers, however, would provide the information under schedule 14A and 255 of those filers would provide the information under schedule 14C. The burden hours for the disclosure by these filers has been assigned to schedule 14A and schedule 14C, respectively. The burden imposed on the remaining 2,580 filers is being assigned to form 10–KSB. This results in 5,160 (2 hours x 2,580 filers) additional burden hours. We estimate that most of this time would relate to consideration and review of the disclosures of the audit committee's policies and procedures. We further estimate that approximately 75% of the extra burden hours, or approximately 3,870 hours, would be expended by internal staff and the remaining 25%, or 1,290 hours, would be for outside legal costs associated with reviewing the proposed disclosures. Assuming that outside legal costs would be an average of $300 per hour, the aggregate annual legal costs would be $387,000.

4. Annual Reports by Foreign Private Issuers on Form 20–F

Form 20–F (OMB Control No. 3235–0288) is used for the registration of securities of foreign private issuers pursuant to sections 12(b) or 12(g) of the Exchange Act and annual and transition reports filed with the Commission pursuant to sections 13(a) or 15(d) of the Exchange Act.[114]

Foreign private issuers generally are not subject to the proxy disclosure requirements and, therefore, would be required to present the required disclosures on form 20–F. We do not believe, however, that these disclosures would be burdensome to these companies because the information to be disclosed (fees billed to the company by the auditor in the last fiscal year, with the fees broken down into certain categories) should be readily available to the company.

We estimate that the incremental disclosure of fees, the audit committee's policies and procedures for approval of audit engagements, and the percentage of fees pre-approved by the audit committee, would impose, on average, two additional burden hours per year on each of the 1,194 filers of form 20–F, or 2,388 additional burden hours. We estimate that most of this time would relate to consideration and review of the disclosures of the audit committee's policies and procedures. We further estimate that approximately 25% of the extra burden hours, or approximately 597 hours, would be expended by internal staff and the remaining 75%, or 1,791 hours, would be for outside legal costs associated with reviewing the proposed disclosures because this form is prepared by foreign private issuers who rely more heavily on outside counsel for assistance. Assuming that outside legal costs would be an average of $300 per hour, the aggregate annual legal costs would be $537,300.

5. Reports by Certain Canadian Issuers on Form 40–F

Form 40–F is used by certain Canadian issuers to register securities with the Commission pursuant to section 12(b) or section 12(g) and for reports pursuant to section 15(d) of the Exchange Act. A Canadian issuer may use the form if it is subject to the reporting requirements solely by reason of having filed a registration statement on form F–7, F–8, F–9, F–10, or F–80 under the Securities Act of 1933. A Canadian issuer also may use the form if it has a reporting obligation under the Exchange Act and (1) the issuer is incorporated under the laws of Canada or any Canadian province or territory, (2) the issuer is a foreign private issuer

[112] These numbers are obtained by reviewing the number of filers that filed a form 10–K and schedule 14A or schedule 14C, respectively, between October 1, 2001, and September 30, 2002.

[113] 17 CFR 240.12b–2.

[114] 17 CFR 249.220f.

or a crown corporation, (3) the issuer has been subject to periodic reporting requirements of any securities commission or equivalent regulatory authority in Canada for a period of at least 12 calendar months immediately preceding the filing of the form and currently is in compliance with such obligations, and (4) the aggregate market value of the public float of the issuer's outstanding equity shares is $75 million or more (no market value threshold needs to be satisfied, however, in connection with non-convertible securities eligible for registration on form F–9).[115]

Canadian companies that file form 40–F generally are not subject to the proxy disclosure requirements and, therefore, would be required to present the required disclosures on form 40–F. We do not believe, however, that these disclosures would be burdensome to these companies because the information to be disclosed (fees billed to the company by the auditor in the last fiscal year, with the fees broken down into certain categories) should be readily available to the company.

We estimate that the incremental disclosure of fees, the audit committee's policies and procedures for approval of audit engagements, and the percentage of fees pre-approved by the audit committee, would impose, on average, two additional burden hours per year on each of the 134 filers of form 40–F, or 268 additional burden hours. We estimate that most of this time would relate to consideration and review of the disclosures of the audit committee's policies and procedures. Consistent with our treatment of foreign private issuers filing form 20–F, we further estimate that approximately 25% of the extra burden hours, or approximately 67 hours, would be expended by internal staff and the remaining 75%, or 201 hours, would be for outside legal costs associated with reviewing the proposed disclosures. Assuming that outside legal costs would be an average of $300 per hour, the aggregate annual legal costs would be $60,300.

6. Proposed Form N–CSR

We issued a release proposing form N–CSR on August 30, 2002, pursuant to section 30 of the Investment Company Act (15 U.S.C. 80a–29) and sections 13 and 15(d) of the Exchange Act (15 U.S.C. 78m and 78o(d)). The proposed disclosure would be required in a registered management investment company's annual report on proposed form N–CSR. We estimate that the additional disclosure of fees, the audit committee's policies and procedures for approval of audit engagements, and the percentage of fees pre-approved by the audit committee, would impose, on average, 1.5 additional burden hours per year on each of the anticipated 3,700 filers of proposed form N–CSR. This results in 5,550 (1.5 hours x 3,700 filers) additional burden hours. We estimate that most of this time would relate to consideration and review of the disclosures of the audit committee's policies and procedures. We estimate that the cost of these burden hours would $81 per hour, resulting in aggregate internal costs of $449,550.[116] Further, we estimate that this additional disclosure would require 0.5 hours in legal review by outside counsel at an average rate of $300 per hour, resulting in aggregate annual outside legal costs of $555,000.

Pursuant to 44 U.S.C. 3506(c)(2)(B), we solicit comments to: (1) Evaluate whether the proposed collections of information are 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 Commission's estimates of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, with reference to File No. S7–49–02. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No.S7–49–02, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is assured of having its full effect if OMB receives it within 30 days of publication.

## V. Cost—Benefit Analysis

We are sensitive to the costs and benefits imposed by our rules, and we have identified certain costs and benefits of these proposals. Additionally, certain of these costs are imposed by Congressional mandate through the enactment of the Sarbanes-Oxley Act. We request comments on all aspects of this cost-benefit analysis, including the identification of any additional costs or benefits. We encourage commenters to identify and supply relevant data concerning the costs or benefits of the proposed amendments.

### *A. Background*

The Sarbanes-Oxley Act was enacted on July 30, 2002. Title II to that Act adds sections 10A(g) through 10A(l) to the Securities Exchange Act of 1934 (''Exchange Act'') and requires that the Commission, within 180 days of enactment, adopt rules to carry out each of those sections.[117]

The proposed rules, in general, would:

- Revise the Commission's regulations related to the non-audit services that, if provided to an audit client, would impair an accounting firm's independence[118];
- Require that an issuer's audit committee pre-approve all audit and non-audit services provided to the issuer by the auditor of an issuer's financial statements[119];
- Prohibit any partner on the audit engagement team from providing audit services to the issuer for more than five consecutive years[120];
- Prohibit an accounting firm from auditing an issuer's financial statements if certain members of management of that issuer had been members of the accounting firm's audit engagement team within the one-year period preceding the commencement of audit procedures[121];
- Require that the auditor of an issuer's financial statements report certain matters to the issuer's audit committee, including ''critical'' accounting policies used by the issuer[122]; and

[115] 17 CFR 249.240f.

[116] *See* Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2002* (2002).

[117] Section 208(a) of the Sarbanes-Oxley Act of 2002.

[118] *See* section 201 of the Sarbanes-Oxley Act.

[119] *See* section 202 of the Sarbanes-Oxley Act.

[120] *See* section 203 of the Sarbanes-Oxley Act.

[121] See section 206 of the Sarbanes-Oxley Act.

[122] See section 204 of the Sarbanes-Oxley Act.

• Require disclosures to investors of information related to the audit and non-audit services provided by, and fees paid by the issuer to, the auditor of the issuer's financial statements.[123]

In addition, under the proposed rules, an accountant would not be independent from an audit client if any partner, principal or shareholder of the accounting firm who is a member of the engagement team received compensation based directly on any service provided or sold to that client other than audit, review and attest services. We believe that accounting firms should discontinue compensating these individuals for ''cross-selling'' services. While many of these proposed rules would respond directly to the provisions of title II of the Sarbanes-Oxley Act, certain of these proposals would go beyond the specific provisions of the Act to more fully address what we believe to be the Congressional intent. These provisions include:

• Our proposal requiring any partner on the audit engagement team be subject to the rotation requirements;

• Requiring a one-year cooling-off period for all audit client's employment of engagement team personnel; and

• Our proposal to limit an audit partner from receiving compensation for recommending non-audit services to an audit client.

*B. Potential Benefits of the Proposed Rules*

Potential benefits resulting from the proposed amendments include increased investor confidence in the independence of auditors, in the audit process, and in the reliability of reported financial information. As discussed below, clearer auditor independence regulations should provide investors with comfort that auditors are placing the interests of investors over financial or personal incentives. Proposed rules mandating that auditors communicate certain matters to audit committees should benefit investors by enhancing the opportunities for meaningful audit committee oversight of the financial reporting process. Investors also would benefit from the enhanced disclosure of the non-audit services provided by, and fees paid to, the accounting firm that audits and reviews the company's financial statements, and from better disclosure of the audit committee's role in approving the provision of non-audit services by the accounting firm that audits the company's financial statements. We believe that these factors could improve the efficiency of the markets and result in a lower cost of capital.

1. Auditor Independence

The amendments would facilitate the independence of the auditor from management in the following ways.

• Providing clearer definition of the lines of non-audit services that would impair an auditor's independence;

• Requiring that each engagement of the auditor to perform audit or non-audit services for the company be pre-approved by the audit committee, which serves as the representative of investors;

• Requiring the ''rotation'' of partners on the audit engagement to assure a periodic fresh look at the accounting and auditing issues presented in the engagement;

• Providing that the auditor's independence would be impaired if revenues to the accounting firm from the sale of non-audit services or products to a company were directly paid to any partner, principal, or shareholder of the firm who works on the audit of that company's financial statements. This provision should decrease the appearance of any pressure on the audit engagement partner to appease management during the audit process in order to facilitate sales of non-audit services and increase the appearance and reality of auditor independence; and

• Requiring a ''cooling off'' period between working on the audit engagement team and joining the client as a member of management in order to assure that personal relationships and the new member of management's knowledge of the audit plan do not negatively impact the audit process.

Strengthening auditor independence should provide investors with more comfort that the auditors would play their ''gatekeeper'' role in companies'' financial reporting and provide further assurance that the true financial condition of companies is reflected in their financial reporting thereby allowing public companies less costly access to the capital markets.

2. Auditor Reports to Audit Committees

The proposed rules would require that each public accounting firm registered with the Public Company Accounting Oversight Board that audits an issuer's financial statements report to the issuer's audit committee (1) All critical accounting policies and practices used by the issuer, (2) alternative accounting treatments within GAAP that have been discussed with management, including the ramifications of the use of the alternative treatments and the treatment preferred by the accounting firm, and (3) other material written communications between the accounting firm and management of the issuer such as any management letter or schedule of ''unadjusted differences.''

The report by the Senate Committee on Banking, Housing, and Urban Affairs on the bill that later became the foundation for the Sarbanes-Oxley Act, in addressing the need for such reports from the auditor to the audit committee, stated, in part:

> The Committee believes that it is important for the audit committee to be aware of key assumptions underlying a company's financial statements and of disagreements that the auditor has with management. The audit committee should be informed in a timely manner of such disagreements, so that it can independently review them and intervene if it chooses to do so in order to assure the integrity of the audit.[124]

Almost eight months before passage of the Sarbanes-Oxley Act, in December 2001, we issued cautionary advice regarding each issuer disclosing in the Management Discussion and Analysis[125] section of its annual report those accounting policies that management believes are most critical to the preparation of the issuer's financial statements.[126] The cautionary advice indicated that ''critical'' accounting policies are those that are both most important to the portrayal of the company's financial condition and results and require management's most difficult, subjective or complex judgments, often as a result of the need to make estimates about the effect of matters that are inherently uncertain.[127] As part of that cautionary advice, we stated:

> Prior to finalizing and filing annual reports, audit committees should review the selection, application and disclosure of critical accounting policies. Consistent with auditing standards, audit committees should be apprised of the evaluative criteria used by management in their selection of the accounting principles and methods. Proactive discussions between the audit committee and the company's senior

[123] *See generally,* section 202 of the Sarbanes-Oxley Act; section 10A(i)(2) of the Exchange Act, 15 U.S.C. 78j–1(i)(2).

[124] Report of the Senate Committee on Banking, Housing, and Urban Affairs, ''Public Company Accounting Reform and Investor Protection Act of 2002,'' Senate Report 107–205, 107th Cong., 2d Sess., at 21 (July 3, 2002).

[125] Item 303 of Regulation S–K (17 CFR 229.303), which requires disclosure about, among other things, trends, events or uncertainties known to management that would have a material impact on reported financial information.

[126] Release No. 33–8040 (Dec. 12, 2001) (66 FR 65013).

[127] *Id.*

management and auditor about critical accounting policies are appropriate.[128]

We continue to believe that such communications are appropriate and facilitate the audit committee's oversight of the financial reporting process. Investors should benefit by the audit committee being in a position to challenge what it may view as novel or aggressive use of GAAP to enhance reports of the company's financial results or financial condition.

The rules proposed in May 2002 provide additional information about the application of critical accounting policies, including ''critical accounting estimates'' and the initial adoption of material accounting policies. Auditors may want to refer to these proposed rules,[129] as well as the December 2001 cautionary advice, in determining the types of matters to be communicated to the audit committee.

3. Enhanced Disclosures About the Services Provided by Auditors to Registrants

Investors would receive more detailed information about:

- Any policies and procedures adopted by an audit committee that are designed to assure that the provision of non-audit services and products by the auditor do not impair the auditor's independence,
- The fees paid by the registrant to the auditor in each of the last two years for audit, audit-related, tax, and all other services, and
- The percentage of fees in each of those categories that were pre-approved by the audit committee.

The proposed disclosures will afford investors greater visibility into those aspects of the auditor-client relationship. Providing better, more complete information in cases where non-audit services occur allows investors to determine for themselves whether there are concerns related to the auditor's independence. It also may allow investors to ask more direct and useful questions of management and directors regarding their decisions to engage the auditors for such services.

4. Compensation

The proposed rules specify that audit partners that are compensated for cross-selling non-audit services are not independent. This would further enhance the independence of the audit function since the audit partner's focus would be on the conduct of the audit rather than on efforts to sell other services to management. The danger inherent in compensation to audit partners for cross-selling non-audit services is that it might create a temptation for auditors to compromise the quality of the audit in order to maintain their relationship with clients to whom they hope to cross-sell such services.[130]

*C. Potential Costs of the Proposals*

1. Auditor Independence

Changes in our auditor independence regulations may impose costs on accounting firms and on any issuers that engage, or would like to consider engaging, the auditor of an issuer's financial statements to perform non-audit services.

(a) *Non-audit services.* According to the information available to the staff in 2000, approximately 12,600 registrants did not purchase any consulting services from the auditor of their financial statements, and 4,100 registrants reported purchasing such services.[131] Based on the scrutiny that these services have received over the past year, the Commission staff believes that the number of companies purchasing non-audit services from their auditor might have decreased significantly.

The current auditor independence rules state that the performance of certain non-audit services will impair an auditor's independence. The proposed rules, in some cases, would redefine the limits of those services and would add one more item, ''expert services,'' to the list of prohibited services. These changes could impact the competitive markets for these services. Issuers would be precluded from engaging auditors to perform certain services in the categories of internal audit services, financial systems design and implementation services, appraisal and valuation services, actuarial services, and others, that may be performed under the current rules. These companies may incur costs from having to use a separate vendor for such services resulting in the possible loss of any synergistic benefits of having a single provider for both audit and non-audit services. In particular, the loss of company-specific information that might flow from the non-audit team to the audit engagement team, or vice versa, could in some instances lower the quality of either service. Issuers also may incur costs locating a new vendor and developing a business relationship with that vendor. In addition, issuers may incur costs from not being able to retain their preferred provider of non-audit services, if that preferred provider happens to also be their auditor. The difference in value between a preferred provider and a second choice may be substantial, particularly if the preferred provider has relatively unique service offerings or service offerings that are particularly well suited to the needs of the issuer.

Accounting firms may lose one or more sources of revenue if the proposed rules are adopted because they would no longer be able to sell certain non-audit services to their audit clients. We believe, however, that in view of the statements by the largest four accounting firms, and others, that they would no longer provide internal audit outsourcing services and financial system design and implementation services to audit clients,[132] costs associated with the proposed rules may be limited. Also, to the extent non-audit services are merely redistributed among the firms, there would be no net loss of revenue to public accounting firms as a whole.

(b) *Audit Committee Pre-approval of Services.* Under the proposed rules, all auditing and non-audit services to be provided by the auditor of an issuer's financial statements must be pre-approved by the issuer's audit committee.[133] There may be incremental

[128] *Id.* (footnotes omitted).

[129] Release Nos. 33–8098 (May 10, 2002) (67 FR 35620).

[130] Moreover, such compensation might increase the effect of any conflict of interest inherent in the provision of non-audit services. It would do this by inadvertently providing a mechanism by which an issuer may influence an audit partner short of the threat to change auditors. That is, if issuers are not pleased with the results of an audit, such a compensation structure gives them the option to ''punish'' the audit partner by discontinuing the purchase of (or by not purchasing) the *non-audit services* and thereby causing the audit partner's compensation to be directly reduced. Since this punitive action is apt to be less costly to the issuer than would be a change in auditors, it represents a more credible threat to the audit partner than does the threat to change auditors. As a consequence, issuers may be more willing to employ this avenue of improper influence than to actually change auditors, and, indeed, audit partners may be more responsive to such pressure, given its enhanced credibility.

[131] *Id.*; 65 FR at 43185.

[132] Report of the Senate Committee on Banking, Housing, and Urban Affairs, ''Public Company Accounting Reform and Investor Protection Act of 2002,'' Senate Report 107–205, 107th Cong., 2d Sess., at 18 (July 3, 2002).

[133] Section 301 of the Sarbanes-Oxley Act of 2002 requires the Commission to direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not meet certain criteria, including having an audit committee that performs certain functions. *See* section 10A(m) of the Exchange Act, 15 U.S.C. 78j–1(m). The Sarbanes-Oxley Act defines ''audit committee'' to be ''(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the

Continued

costs associated with audit committees performing this function. Such costs might include more frequent committee meetings, an increased workload on audit committee members, and having legal counsel review the audit committee's draft policies and procedures for engaging the auditors for non-audit services. The increased burden on audit committee members might result in the need to increase their compensation, resulting in additional costs to issuers. Some of these costs may be mitigated by the provisions in the Act and in the proposed rules that would allow the audit committee to delegate to one or more audit committee members the authority to grant pre-approvals of these services.[134]

Inadvertent violations of the Act and the proposed rules that would add to the costs of the rules also may be mitigated by the de minimus exception to the pre-approval requirement.[135] Under this exception, the pre-approval requirement is waived if: (1) The aggregate amount of the non-audit services is not more than five percent of the total amount of revenues paid by the issuer to the auditor during the fiscal year in which the non-audit services were provided, (2) at the time of the engagement the issuer did not recognize the services to be non-audit services, and (3) the services are approved by the audit committee prior to the completion of the audit.[136]

We also believe that as a result of the Commission's audit committee disclosure requirements adopted in 1999,[137] prior disclosures related to the involvement of the audit committee in recommending or approving changes in auditors and the resolution of disagreements between management and the auditors,[138] and professional standards that require communications between the auditor and audit committees on auditor independence issues,[139] many companies currently have audit committees that closely monitor issues related to the auditor's independence and the engagement of auditors to perform non-audit services. Accordingly, we believe that the incremental costs associated with the proposals would not be significant.

(c) *Rotation of Partners on the Audit Engagement.* Under the proposed rules, no partner would serve on an audit engagement team for more than five years.[140] Current professional requirements state that the partner in charge of an audit engagement should be replaced at least once every seven years.[141] The proposals, therefore, would require more partners to be rotated and the engagement partner to be rotated more often.

Costs associated with the periodic replacement of partners might include more frequent company-specific training, conducted by both the accounting firm and the company, as new partners join the team auditing that company's financial statements. For example, the new partners would need to learn the company's accounting and financial reporting procedures, controls and personnel. The proposed rules also might result in incremental costs related to some partners being required to relocate from one part of the country to another.

The costs related to these proposed rules would vary based on the proximity of an accounting firm's audit clients, the concentration of the firm's practice within an industry, and the availability of partners to whom the work may be redistributed, and similar factors.

Smaller firms that do not have sufficient partners to replace the partners on an audit engagement team may be particularly affected by the proposed rules in that they would have to accept more partners into the firm or lose the audit engagement.

It is difficult to calculate the costs associated with this portion of the proposed rules. However, it is likely that these costs may be passed on to issuers in the form of higher audit fees. As noted below, we request comments on the anticipated costs associated with all aspects of the proposed rules.

(d) *One-Year Cooling Off Period.* The proposed rules would indicate that an accounting firm is not independent with respect to an audit client if a former partner, principal, shareholder, or professional employee of an accounting firm is in a ''financial reporting oversight role'' at that client, unless the individual had not been a member of the audit engagement team for that client's financial statements during the one year period preceding the initiation of the audit.[142] A ''financial reporting oversight role'' is a role in which a person is in a position to or does influence the contents of financial statements or anyone who prepares them.[143] Such persons would include directors, chief executive officers, chief financial officers, chief accounting officers, controllers, and others.[144]

Currently, when a former professional employee of an accounting firm joins an audit client within one year of leaving the firm, and the individual has significant interaction with the accounting firm's audit engagement team, professional standards require the accounting firm to perform procedures to assure that the individual's knowledge of, or relationships with, the accounting firm do not adversely influence the quality of the audit.[145] These procedures include modifying the audit plan to adjust for the risk that the individual would be able to circumvent key aspects of the audit, and assuring that the people on the audit engagement team have the stature and objectivity not to be influenced by their former partner or co-employee and to be have the appropriate level of skepticism when evaluating the individual's representations and views. Because the proposed rules would limit the situations in which this situation could occur, accounting firms and audit

financial statements of the issuer; and (B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.'' Section 205(a) of the Sarbanes-Oxley Act, which, among other things, adds section 3(a)(58) to the Exchange Act.

[134] Section 202 of the Sarbanes-Oxley Act; section 10A(i)(3) of the Exchange Act, 15 U.S.C. 78j–1(i)(3).

[135] Section 202 of the Sarbanes-Oxley Act; section 10A(i)(1)(B) of the Exchange Act, 15 U.S.C. 78j–1(i)(1)(B).

[136] *Id.*

[137] Item 306 of Regulation S–K (17 CFR 229.306), and item 306 of Regulation S–B (17 CFR 228.306); *see* generally, Release No. 34–42266 (Dec. 22, 1999) (64 FR 73389). These disclosure requirements are discussed *supra*, in section II.C. of this release.

[138] Item 4 of form 8–K, 17 CFR 249.308 and item 304 of Regulation S–K, 17 CFR 229.304, which require disclosure of ''whether the decision to change accountants was recommended or approved by: (A) Any audit or similar committee of the board of directors, if the issuer has such a committee; or (B) the board of directors, if the issuer has no such committee'' and ''whether any audit or similar committee of the board of directors, or the board of directors, discussed the subject matter of each of such disagreements with the former accountant* * *.'' Item 304(a)(1)(iii)(A), (iii)(B), and (iv)(B). 17 CFR 229.304(a)(1)(iii)(A), (iii)(B) and (iv)(B). For small business issuers, item 304(a)(1)(iii) of Regulation S–B, 17 CFR 228.304(a)(1)(iii) requires disclosure of ''whether the decision to change accountants was recommended or approved by the board of directors or an audit or similar committee of the board of directors.''

[139] *See, e.g.,* American Institute of Certified Public Accountants (''AICPA''), ''Communications With Audit Committees,'' Statements on Auditing Standards No. (''SAS'') 61, as amended by SAS 89 and 90; AICPA, Codification of Statements on Auditing Standards (''AU'') § 380; Independence Standards Board, ''Independence Discussions with Audit Committees,'' Independence Standard No. 1 (Jan. 1999).

[140] *See generally*, section 203 of the Sarbanes-Oxley Act.

[141] *See* American Institute of Certified Public Accountants, SEC Practice Section, *Requirements of Members*, at item e. The membership requirements are available online at *http://www.aicpa.org/members/div/secps/require.htm.*

[142] *See* section 206 of the Sarbanes-Oxley Act.

[143] *See* 17 CFR 210.2–01(f)(3) and proposed rule 2–01(f)(3)(B).

[144] *Id.*

[145] Independence Standards Board, ''Independence Standard No. 3: Employment with Audit Clients'' (July 2000).

clients would not have to pay for the performance of these procedures.

Costs might occur, however, from the company being required to delay the hiring, or not being able to hire, the individual that it believes is the most qualified person to perform a ''financial reporting oversight role'' at the company. This may add to recruitment costs or less efficient operations. Such costs are difficult to estimate and would vary from one company to another.

(e) *Compensation.* The proposed rules would provide that an auditor is not independent with respect to an audit client if a partner, principal or shareholder of an accounting firm, who is a member of the audit engagement team conducting an audit of that client's financial statements, earns or receives compensation based on the performance of, or in consideration of procuring, engagements to provide any services to that client other than audit, review, or attest services. This provision might affect the compensation plans of those firms that currently reward partners, principals, and shareholders of the firm for generating sales of non-audit services to their respective audit clients. If the proposed rules were adopted, those revenues would be allocated to other persons within the accounting firm. Absent this incentive, auditors may be less inclined to inform issuers of ways to improve their performance or condition through non-audit services. We do not expect, however, that there would be any incremental costs to the firm or to the client.

2. Auditor Reports to Audit Committees

Under the proposed rules, each public accounting firm registered with the Public Company Accounting Oversight Board that audits an issuer's financial statements must report to the issuer's audit committee (1) all critical accounting policies and practices used by the issuer, (2) alternative accounting treatments within GAAP that have been discussed with management, including the ramifications of the use of the alternative treatments and the treatment preferred by the accounting firm, and (3) other material written communications between the accounting firm and management of the issuer such as any management letter or schedule of ''unadjusted differences.'' [146] The required reports need not be in writing but the report would be required to be presented to the audit committee before the auditor's report is filed with the Commission.

Because of existing GAAS and legal provisions,[147] we believe that adoption of the proposed rules regarding auditor reports to audit committees will not significantly increase costs for accounting firms or registrants. Any such costs may arise from the timing of the communications, which, under the proposed rules, must occur before the auditor's report is filed with the Commission.

3. Enhanced Disclosures About the Services Provided by Auditors to Registrants

The existing proxy disclosure rules require disclosure of all professional fees billed by the principal auditor in the last fiscal year, with the fees broken down into three categories: audit fees, financial information systems design and implementation fees, and all other fees. The proposals would divide the disclosure into two more categories—tax fees and audit-related fees—and add disclosure of one more year of these fees while eliminating separate disclosure of fees related to financial information systems design and implementation. The proposals also would require companies that do not file proxy statements to file this information with the Commission in their annual reports on forms 10–K and 10–KSB, foreign private issuers to file the information on form 20–F, certain Canadian issuers to file the information on form 40–F, and registered management investment companies to file the information on proposed form N–CSR.[148]

Registrants also would be required to disclose the audit committee's policies and procedures for approval of auditor engagements, and the percentage of fees in each of the four categories noted above (audit, audit-related, tax, and all other) that were pre-approved by the audit committee during each of the last two fiscal years.

Based on the staff's experience, we believe that the additional disclosure contemplated by the proposed rules would require, on average, approximately one-half of a page in a company's proxy statement or annual report. A financial printing company informed the staff that adding one-half of a page in the proxy statement would not be likely to increase the printing cost to the company because that much more text normally can be incorporated without increasing the page length by reformatting the document.[149] Accordingly, based on our preliminary estimates, there should be little, if any, additional printing costs from these additional disclosures.

For the purposes of the Paperwork Reduction Act, we have estimated that the incremental disclosure of fees, the disclosure of the audit committees policies and procedures for approval of audit engagements, and the percentage of fees pre-approved by the audit committee would impose, on average, two additional burden hours for each of the 7,661 filers of schedule 14A, or an aggregate annual burden of 15,322 additional burden hours. We estimate that most of this time would relate to consideration and review of the disclosures of the audit committee's policies and procedures. We further estimate that approximately 75% of the extra burden hours, or approximately 11,492 hours, would be expended by internal staff and the remaining 25%, or 3,830 hours, would be for outside legal costs associated with reviewing the proposed disclosures. Assuming that the internal staff costs the company an average of $125 per hour,[150] the aggregate annual cost for internal staff assistance would be approximately $1,436,500. If we assume that outside legal costs would be an average of $300 per hour, the aggregate annual legal costs would be $1,149,000. The total annual paperwork costs associated with the proposed disclosures, therefore, would be approximately $2,585,500. Similarly, we estimated that the 464 filers of schedule 14C would incur an additional annual burden of 928 hours, or which 696 hours would be imposed on the company itself and 232 would represent a cost for outside legal assistance. Based on these numbers, we estimate that the annual internal cost would be $87,000 (696 hours x $125 per

[146] *See* section 204 of the Sarbanes-Oxley Act.

[147] *See* item 303 of Regulation S-K, 17 CFR 229.303; Release No. 33–8040 (Dec. 12, 2001); and SAS 61, AU § 380, ''Communication with Audit Committees or Others with Equivalent Authority and Responsibility.''

[148] Form 10–K is the annual report that registrants file with the Commission pursuant to section 13 or 15(d) of the Exchange Act, if no other annual reporting form has been prescribed. Small business issuers may use abbreviated form 10–KSB. A ''small business issuer'' is an entity that (1) has revenues of less than $25,000,000, (2) is a U.S. or Canadian issuer, (3) is not an investment company, and (4) if a majority owned subsidiary, the parent corporation is also a small business issuer. An entity is not a ''small business issuer,'' however, if the aggregate market value of its outstanding voting and non-voting common stock held by non-affiliates is $25,000,000 or more. *See* 17 CFR 240.12b–2. Registered management investment companies would use proposed form N–CSR to file certified shareholder reports with the Commission under the Sarbanes-Oxley Act of 2002. *See* Investment Company Act Release No. 25723 (Aug. 30, 2002) (67 FR 57298 (Sept. 9, 2002)).

[149] *See* Release No. 34–41987 (Oct. 7, 1999) (64 FR 55648, at 55658).

[150] This cost estimate is based on data obtained from *The SIA Report on Management and Professional Earnings in the Securities Industry* (Oct. 2001).

hour) and the annual external cost would be $69,600 (232 hours x $300 per hour), for a total annual cost of $156,600.

For those registrants who would be providing the information on form 10–K, we estimated for the purposes of the Paperwork Reduction Act that the incremental disclosure of fees, the audit committee's policies and procedures for approval of audit engagements, and the percentage of fees pre-approved by the audit committee, would impose, on average, two additional burden hours per year on each of the 8,484 filers of form 10–K.[151] Six thousand six hundred and seventy-six (6,676) of those filers, however, would provide the information under schedule 14A and 209 of those filers would provide the information under schedule 14C. The burden hours for the disclosure by these filers therefore has been assigned to schedule 14A and schedule 14C, respectively. The burden imposed on the remaining 1,599 filers is being assigned to form 10–K. This results in 3,198 (2 hours x 1,599 filers) additional burden hours. We estimate that most of this time would relate to consideration and review of the disclosures of the audit committee's policies and procedures. We further estimate that approximately 75% of the extra burden hours, or approximately 2,399 hours, would be expended by internal staff and the remaining 25%, or 799 hours, would be for outside legal costs associated with reviewing the proposed disclosures. Assuming a cost of $125 per hour for internal costs results in aggregate internal costs of $299,875. Assuming that outside legal costs would be an average of $300 per hour, the aggregate annual legal costs would be $239,700. The total annual paperwork costs associated with the proposed disclosures, therefore, would be approximately $539,575.

For smaller companies that file forms 10–KSB[152] we estimated for the purposes of the Paperwork Reduction Act that the incremental disclosure of fees, the audit committee's policies and procedures for approval of audit engagements, and the percentage of fees pre-approved by the audit committee, would impose, on average, two additional burden hours per year on each of the 2,590 filers of form 10–KSB that do not file either schedule 14A or schedule 14C, or 5,180 additional burden hours. We estimate that most of this time would relate to consideration and review of the disclosures of the audit committee's policies and procedures. We further estimate that internal staff would expend approximately 75% of the extra burden hours, or approximately 3,885 hours. Assuming a cost $125 per hour for internal staff, the aggregate internal costs would be approximately $485,625. The remaining 25%, or 1,295 hours, would be for outside legal costs associated with reviewing the proposed disclosures. Assuming that outside legal costs would be an average of $300 per hour, the aggregate annual legal costs would be $388,500. The total annual paperwork costs associated with the proposed disclosures, therefore, would be approximately $874,125.

Using a similar analysis, we estimated an increase of 2,388 burden hours and $537,300 in annual legal costs (2,388 x .75 x $300) for form 20–F. This produces an estimate of $298,500 (2,388 hours x $125 per hour) for internal costs, or a total cost of $835,800 ($537,300 + $298,500) for such filers. For form 40–F filers, we estimated an increase of 268 burden hours and $60,300 in annual legal costs (200 x .25 x $300). This produces an estimate of $33,500 (268 hours x $125 per hour) for internal costs, or a total cost of $93,800 ($60,300 + $33,500).

*Proposed form N–CSR.* We issued a release proposing form N–CSR on August 30, 2002, pursuant to section 30 of the Investment Company Act (15 U.S.C. 80a–29) and sections 13 and 15(d) of the Exchange Act (15 U.S.C. 78m and 78o(d)). For registered management investment companies that would be providing the information on proposed form N–CSR, we estimate that the incremental disclosure of fees, the audit committee's policies and procedures for approval of audit engagements, and the percentage of fees pre-approved by the audit committee, would impose, on average, two additional burden hours per year on each of the estimated 3,700 filers of proposed form N–CSR. This results in 7,400 (2 hours x 3,700 filers) additional burden hours. We estimate that most of this time would relate to consideration and review of the disclosures of the audit committee's policies and procedures. We further estimate that approximately 75% of the extra burden hours, or approximately 5,550 hours, would be expended by internal staff and the remaining 25%, or 1,850 hours, would be for outside legal costs associated with reviewing the proposed disclosures. We estimate a cost of $40 per hour for internal staff review, resulting in aggregate internal costs of $222,000. Further, we estimate that outside legal costs would be an average of $300 per hour, resulting in aggregate annual legal costs of $555,000. The total annual paperwork costs associated with the proposed disclosures, therefore, would be approximately $1,004,550.

*D. Request for Comments*

As noted above, we request comments on all aspects of this cost-benefit analysis, including the identification of any additional costs or benefits. We encourage commenters to identify and supply relevant data concerning the costs or benefits of the proposed amendments. We request comments, including supporting data, on the magnitude of the costs and benefits mentioned in this section.

- Are there any other costs or benefits that we have not identified? For example, would the additional duties on audit committees increase the cost of maintaining those committees? Would the amount of compensation demanded by audit committee members increase? Would there be a shortage of potential audit committee members that would lead to higher costs related to finding and retaining such members? Would the cost of officer/director liability insurance increase? Please describe any such costs and provide relevant data.
- Are there additional costs related to the proposed disclosures? If there are, please identify them and provide supporting data.
- We request comments on the reasonableness of the burden hour, cost estimates, and underlying assumptions related to the proposed disclosures.
- Will the prohibition of certain non-audit services impose greater costs on companies? If so, what will those costs be and how significant will those costs be?
- How much cost will issuers incur from not being able to retain their preferred providers of non-audit service, when that preferred provider happens to also be their auditor?
- What will be the impact, if any, on audit fees from the proposal to prohibit certain non-audit services?
- Are there any economies of scope that will be lost due to implementation of the auditor independence rules?
- Are there any economies of scale that will be lost due to implementation of the auditor independence rules?

## VI. Consideration of Impact on the Economy, Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

For purposes of the Small Business Regulatory Enforcement Fairness Act of

[151] As noted previously, the proposed rules also would amend forms 20–F and 40–F. However, because the number of registrants which use these forms is very small, it is not expected to have a significant burden increase.

[152] 17 CFR 240.12b–2.

1996,[153] the Commission is requesting information regarding the potential impact of the proposals on the economy on an annual basis. Commentators should provide empirical data to support their views.

Section 23(a)(2) of the Exchange Act [154] requires the Commission, when adopting rules under the Exchange Act, to consider the anti-competitive effects of any rule it adopts. In this regard, we note that it may be possible that some small accounting firms would not have professionals, other than those working on the audit of a client's financial statements, with the expertise to provide non-audit services to that client. Because, under the proposed rules, receipt of fees by that professional from the provision of non-audit services would impair the auditor's independence, the accounting firm might not be in a position to provide non-audit services to that client. This proposal, therefore, could result in some companies seeking new providers of non-audit services. In addition, some companies that engage accounting firms for non-audit services permitted under the current rules, but not allowed under the Sarbanes-Oxley Act and the proposed rules, would be required to switch vendors for those services. This may have an impact on competition for those services, although to the extent the new vendor is another accounting firm, the result may a redistribution of services among firms rather than an increase or decrease in services. Small accounting firms also may be disadvantaged by the prohibition on partners providing auditing services to the issuer for more than five consecutive years, since they may not have other partners available to retain the client.

• Given that only larger clients have more than two partners as part of the audit process, would this provision impose higher costs on mid-tier firms?

In addition, section 2(b) of the Securities Act of 1933,[155] section 3(f) of the Exchange Act,[156] and section 2(c) of the Investment Company Act [157] require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation.

One possible adverse impact on capital formation may come from additional costs related to audit committees. Although the proposed rules do not require companies to have audit committees, many companies may choose to establish such committees to facilitate application of the rules. Additional costs may be associated with forming such committees and, if necessary, recruiting and retaining independent directors to serve on those committees.

We believe, however, that investors need to have confidence in the independence of auditors and in the integrity of the financial information that fuels our securities markets. The proposals are designed to bolster investor confidence in the securities markets by strengthening auditor independence, improving the transparency of the role of corporate audit committees, and enhancing the reliability and credibility of financial statements of public companies. Accordingly, on the whole, the proposals should promote capital formation and market efficiency.

• We request comment on the anti-competitive effects of the proposals.

• The possible effects of our rule proposals on efficiency, competition, and capital formation are difficult to quantify. We request comment on these matters in connection with our proposed rules.

## VII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to Regulation S–X and to item 9 of schedule 14A, and to forms 10–K, 10–KSB, 20–F, 40–F and proposed form N–CSR. The proposals would strengthen the Commission's requirements regarding the independence of auditors and related disclosures.

### *A. Reasons for the Proposed Action*

The proposed rules generally implement a congressional mandate. Some of the proposals, although not specifically required by the statute, are designed to implement the intent of the Sarbanes-Oxley Act and to assure investors that independent auditors critically are examining reported financial information. The proposed rules should provide greater assurance to investors that independent auditors are performing their public responsibilities and that the financial information published by registrants and issuers is reliable.

The proposed rules, in general, would:

• Revise the Commission's regulations related to the non-audit services that, if provided to an audit client, would impair an accounting firm's independence;[158]

• Require that an issuer's audit committee pre-approve all audit and non-audit services provided to the issuer by the auditor of an issuer's financial statements;[159]

• Prohibit any partner on the audit engagement team from providing audit services to the issuer for more than five consecutive years;[160]

• Prohibit an accounting firm from auditing an issuer's financial statements if certain members of management of that issuer had been members of the accounting firm's audit engagement team within the one-year period preceding the commencement of audit procedures;[161]

• Require that the auditor of an issuer's financial statements report certain matters to the issuer's audit committee, including ''critical'' accounting policies used by the issuer;[162] and

• Require disclosures to investors of information related to the audit and non-audit services provided by, and fees paid by the issuer to, the auditor of the issuer's financial statements.[163]

In addition, under the proposed rules, an accountant would not be independent from an audit client if any partner, principal or shareholder of the accounting firm who is a member of the engagement team received compensation based on any service provided or sold to that client other than audit, review and attest services.

### *B. Objectives*

Our objectives are to implement title II of the Sarbanes-Oxley Act in order to increase investor confidence in the independence of auditors, in the audit process, and in the reliability of reported financial information.[164] This would be accomplished by having: (1) Clearer auditor independence regulations that would provide investors with comfort that auditors are placing the interests of investors over financial or personal incentives, (2) rules mandating that auditors communicate certain matters to audit committees, which should enhance the opportunities for meaningful audit committee oversight of the financial reporting process, and (3) enhanced disclosure of

[153] Pub. L. 104–121, tit. II, 110 Stat. 857 (1996).

[154] 15 U.S.C 78w(a)(2).

[155] 15 U.S.C. 77b(b).

[156] 15 U.S.C. 78c(f).

[157] 15 U.S.C. 80a–2(c).

[158] *See* section 201 of the Sarbanes-Oxley Act.

[159] *See* section 202 of the Sarbanes-Oxley Act.

[160] *See* section 203 of the Sarbanes-Oxley Act.

[161] *See* section 206 of the Sarbanes-Oxley Act.

[162] *See* section 204 of the Sarbanes-Oxley Act.

[163] *See generally,* section 202 of the Sarbanes-Oxley Act; section 10A(i)(2) of the Exchange Act, 15 U.S.C. 78j–1(i)(2).

[164] *See* section 208 of the Sarbanes-Oxley Act.

the non-audit services provided by, and fees paid to, the accounting firm that audits and reviews the company's financial statements, and from better disclosure of the audit committee's role in approving the provision of non-audit services by the accounting firm that audits the company's financial statements. We believe that these factors may improve the efficiency of the markets and result in a lower cost of capital.

*C. Legal Basis*

We are proposing amendments to Regulation S–X and item 9 of schedule 14A and to forms 10–K, 10–KSB, 20–F, 40–F and proposed form N–CSR under the authority set forth in sections 3(a) and 208 of the Sarbanes-Oxley Act; schedule A and sections 7, 8, 10, 19 and 28 of the Securities Act, sections 3, 10A, 12, 13, 14, 17, 23 and 36 of the Exchange Act, sections 5, 10, 14 and 20 of the Public Utility Holding Company Act of 1935, sections 8, 30, 31 and 38 of the Investment Company Act of 1940, and sections 203 and 211 of the Investment Advisers Act of 1940.

*D. Small Entities Subject to the Proposed Rules*

The proposals would affect small registrants and small accounting firms that are small entities. Exchange Act rule 0–10(a) [165] and Securities Act rule 157 [166] define a company to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that approximately 2,500 companies were small entities, other than investment companies.

For purposes of the Investment Company Act, rule 0–10 [167] defines ''small business'' to be an investment company with net assets of $50 million or less as of the end of its most recent fiscal year. We estimate that approximately 225 investment companies met this definition.

Our rules do not define ''small business'' or ''small organization'' for purposes of accounting firms. The Small Business Administration defines small business, for purposes of accounting firms, as those with under $6 million in annual revenues.[168] We have only limited data indicating revenues for accounting firms, and we cannot estimate the number of firms with less than $6 million in revenues that practice before the Commission. We request comment on the number of accounting firms with revenue under $6 million.

*E. Reporting, Recordkeeping and Other Compliance Requirements*

1. Auditor Independence

The vast majority of registrants are audited by one of the four largest accounting firms, which clearly are not small entities. Nonetheless, changes in the auditor independence regulations may impose compliance requirements, recordkeeping and reporting requirements on small accounting firms and on any small registrant that engages, or would like to consider engaging, the auditor of an issuer's financial statements to perform non-audit services.

(a) *Non-audit services.* The current auditor independence rules state that the performance of certain non-audit services will impair an auditor's independence. The proposed rules, in some cases, would redefine the limits of those services and would add one more item, ''expert services,'' to the list of prohibited services. These changes could impact the competitive markets for these services. In particular, the Commission is considering withdrawing the specific exemption in the current rules that allows audit clients with less than $200 million in total assets to engage the auditors of their financial statements to perform internal audit services.[169] Under the proposed rules, small issuers also would be precluded from engaging auditors to perform certain services in the categories of financial systems design and implementation services, appraisal and valuation services, actuarial services, and others, that may be performed under the current rules. Small registrants, therefore, may have to use a separate vendor for such services. Small accounting firms may lose one or more sources of revenue if the proposed rules are adopted because they would no longer be able to sell certain non-audit services to their audit clients.

According to the information available to the staff in 2000, however, approximately 12,600 registrants did not purchase any consulting services from the auditor of their financial statements, and 4,100 registrants reported purchasing such services.[170] Based on the attention that has been drawn to this area over the past year, the Commission staff believes that the number of small registrants purchasing non-audit services from their auditor, and the amount of small accounting firms providing services to audit clients that are Commission registrants, might have decreased significantly. Also, to the extent non-audit services are merely redistributed among the firms, there would be no net loss of revenue to public accounting firms as a whole.

(b) *Audit Committee Pre-approval of Services.* Under the proposed rules, all auditing and non-audit services to be provided by the auditor of an issuer's financial statements must be pre-approved by the issuer's audit committee.[171] The definition of audit committee in the Sarbanes-Oxley Act, which is cited in the proposed rules, however, indicates that if no such committee exists, the entire board of directors of the issuer may perform this function.[172] The rules, therefore, would not require a small company to form an audit committee.

There are reasons to believe that many small entities currently have audit committees.[173] Any small entity that does not have such a committee and would form one to facilitate operation of the proposed rules, however, would incur costs to establish such a committee and, if necessary, to recruit and retain the required number of independent directors. Small entities also might spend time and incur costs to document the audit committee's activities in the areas covered by the proposed rules, including drafting and maintaining the audit committee's policies and procedures related to engaging the auditor to perform non-audit services. Small entities also might incur costs in seeking the help of outside experts, particularly outside legal counsel, in drafting the audit committee's policies and procedures.

(c) *Rotation of Partners on the Audit Engagement.* Under the proposed rules, no partner would serve on an audit engagement team for more than five

[165] 17 CFR 240.0–10(a).

[166] 17 CFR 230.157.

[167] 17 CFR 270.0–10.

[168] 13 CFR 121.201.

[169] 17 CFR 210.2–01(c)(4)(v)(A).

[170] *Id.;* 65 FR at 43185.

[171] Section 301 of the Sarbanes-Oxley Act of 2002 requires the Commission to direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not meet certain criteria, including having an audit committee that performs certain functions. *See* section 10A(m) of the Exchange Act, 15 U.S.C. 78j–1(m). The Sarbanes-Oxley Act defines ''audit committee'' to be ''(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and (B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.'' Section 205(a) of the Sarbanes-Oxley Act, which, among other things, adds section 3(a)(58) to the Exchange Act.

[172] *Id.*

[173] *See, e.g.*, NACD, *2001–2002 Public Company Governance Survey* (Nov. 2001).

years.[174] Current professional requirements state that the partner in charge of an audit engagement should be replaced at least once every seven years.[175] The proposals, therefore, would require more partners to be rotated and the engagement partner to be rotated more often.

Costs associated with the periodic replacement of partners might include more frequent company-specific training because new partners joining the audit engagement team would need to learn the company's accounting and financial reporting procedures, controls and personnel. The proposed rules also might result in incremental costs related to some partners being required to relocate from one part of the country to another.

Smaller firms that do not have sufficient partners to make the required replacements of the partners on an audit engagement team may be particularly affected by the proposed rules. These small accounting firms might have to accept more qualified partners into the firm or lose the audit engagement.

(d) *One-Year Cooling Off Period.* The proposed rules would deem an accounting firm as not independent with respect to an audit client if a former partner, principal, shareholder, or professional employee of an accounting firm is in a ''financial reporting oversight role'' at that client, unless the individual had not been a member of the audit engagement team for that client's financial statements during the one year period preceding the initiation of the audit.[176] A ''financial reporting oversight role'' is a role in which a person is in a position to or does influence the contents of financial statements or anyone who prepares them.[177] Such persons would include directors, chief executive officers, chief financial officers, chief accounting officers, controllers, and others.[178] A small registrant might incur costs from a delay in hiring, or not being able to hire, the individual that it believes is the most qualified person to perform a ''financial reporting oversight role'' at the company. This may add to recruitment costs or less efficient operations. We have solicited comment and are considering alternatives to minimize the impact of this proposed rule on small entities.

(e) *Compensation.* Under the proposed rules, an accounting firm's independence would be impaired if any partner, principal or shareholder of the firm, who is a member of an engagement team auditing a client's financial statements, receives any compensation directly based on any service provided or sold to that client other than audit, review and attest services. Thus, accounting firms would have to discontinue compensating these individuals for ''cross-selling'' services.

Some small accounting firms might have a relatively small number of partners, principals or shareholders of the firm available to serve each client. Such firms might not have personnel, other than the partner in charge of the audit of a small company's financial statements, with sufficient expertise to market and provide non-audit services to that company. In such cases, the proposed rule might result in a small company being forced to find another provider for those services. This might result in increased costs related to small entities locating and engaging additional service providers, and might decrease revenues to small accounting firms.

2. Auditor Reports to Audit Committees

Under the proposed rules, each public accounting firm registered with the Public Company Accounting Oversight Board that audits an issuer's financial statements must report to the issuer's audit committee (1) all critical accounting policies and practices used by the issuer, (2) alternative accounting treatments within GAAP that have been discussed with management, including the ramifications of the use of the alternative treatments and the treatment preferred by the accounting firm, and (3) other material written communications between the accounting firm and management of the issuer such as any management letter or schedule of ''unadjusted differences.''[179] The required reports need not be in writing, but must be provided to the audit committee before the auditor's report on the financial statements if filed with the Commission.

Auditing standards currently require discussions between the auditors and the audit committee of significant unusual, controversial, or emerging accounting policies, of the process used by management to select certain estimates, and of disagreements over certain accounting matters. Further, audit committees generally are aware of management's letter making representations to the auditors, which the auditor uses in conducting the audit of the issuer's financial statements, and the auditors' letters to management on reportable conditions in internal controls and other matters. Also, due to enactment of section 401 of the Sarbanes-Oxley Act, all material adjustments identified by the auditor should be reflected in the issue's financial statements and, therefore, there should be no material ''unadjusted differences.''

Because of these GAAS and legal provisions, we believe that adoption of the proposed rules regarding auditor reports to audit committees will not significantly increase costs, including costs for small accounting firms and small registrants. Some costs may be incurred, however, to the extent communications would be required before the auditor's report is filed with the Commission.

3. Enhanced Disclosures About the Services Provided by Auditors to Registrants

Currently, disclosure is required in proxy and information statements of the fees billed in the most recent fiscal year under the categories of audit fees, information systems design and implementation fees, and all other fees. The proposals would require disclosure of the fees billed in each of the two most recent years, instead of the current requirement for disclosure of only the most recent year's fees. The proposals also would add the categories of tax fees and audit-related fees but eliminate separate disclosure of information systems design and implementation form the current list of audit fees, information systems design and implementation fees, and all other fees. The proposed rules also would require disclosure of the percentage of fees in each category that were pre-approved by the audit committee as opposed to being entered into under the audit committee's policies and procedures. Finally, the proposals would extend the disclosure requirements to all entities filing forms 10–K, 10–KSB, 20–F, 40–F and proposed form N–CSR.[180]

[174] *See generally,* section 203 of the Sarbanes-Oxley Act.

[175] *See* American Institute of Certified Public Accountants, SEC Practice Section, *Requirements of Members,* at item e. The membership requirements are available online at *http://www.aicpa.org/members/div/secps/require.htm.*

[176] *See* section 206 of the Sarbanes-Oxley Act.

[177] *See* 17 CFR 210.2–01(f)(3) and proposed rule 2–01(f)(3)(B).

[178] *Id.*

[179] *See* section 204 of the Sarbanes-Oxley Act.

[180] Form 10–K is the annual report that registrants file with the Commission pursuant to section 13 or 15(d) of the Exchange Act, if no other annual reporting form has been prescribed. Small business issuers may use abbreviated form 10–KSB. A ''small business issuer'' is an entity that (1) has revenues of less than $25,000,000, (2) is a U.S. or Canadian issuer, (3) is not an investment company, and (4) if a majority owned subsidiary, the parent corporation is also a small business issuer. An entity is not a ''small business issuer,'' however, if the aggregate market value of its outstanding voting and non-voting common stock held by non-affiliates

Continued

The proposed rules would require all entities filing forms 10–K, 10–KSB, 20–F, 40–F and proposed form N–CSR to include the disclosure either in the proxy or information statement or, if the company does not issue a proxy or information statement, in forms 10–K, 10–KSB, 20–F, 40–F or proposed form N–CSR. The proposed rules, therefore, might require small entities to spend additional time and incur additional costs in preparing disclosures. Small entities also might incur costs to set up procedures to monitor the activities of the audit committee in order to collect and record the information to be disclosed under the proposed rules.

*F. Duplicative, Overlapping or Conflicting Federal Rules*

The Commission is not aware of any rules that duplicate, overlap, or conflict with the proposed rules.

*G. Significant Alternatives*

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

1. The establishment of differing compliance or reporting requirements or timetables that take into account the resources of small entities;
2. The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities;
3. The use of performance rather than design standards; and
4. An exemption from coverage of the proposed amendments, or any part thereof, for small entities.

We do not propose to exempt small business issuers from the proposals because Congress indicated that any exemptions should be on a case-by-case basis and not by categories. We, nevertheless, are considering whether any exception or classifications for small businesses would be appropriate and consistent with the Sarbanes-Oxley Act. We believe investors in small companies, however, just as investors in large companies, would want and benefit from the proposed revisions in the auditor independence rules and enhanced communications between the auditor and the audit committee.

The proposed rules are designed to enhance auditors' independence and the reliability and credibility of financial statements for all public companies. Currently, we do not believe that it is feasible to further clarify, consolidate, or simplify the proposed rules for small entities. We are particularly mindful of the implications of our proposed rules on the provision of bookkeeping and internal controls services, as well as auditor rotation and cooling-off period requirements for small firms. We invite comments on these and all other issues.

*H. Solicitation of Comments*

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. Specifically, we request comments regarding the number of small entities that may be affected by the proposed rules, and the existence or nature of the potential impact on those small entities. We also seek comments on how to quantify the number of small accounting firms that would be affected by the proposals, and how to quantify the impact of the proposed rules on those firms.

Commenters are requested to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules are adopted, and will be placed in the same public file as comments on the proposed rules.

## VIII. Codification Update

The Commission proposes to amend the ''Codification of Financial Reporting Policies'' announced in Financial Reporting Release No. 1 (April 15, 1982):

By amending section 602 to add a new discussion at the end of that section under the Financial Reporting Release Number (FR–64) assigned to the adopting release and including the text in the adopting release that discusses the final rules, which, if the proposals are adopted, would be substantially similar to section III of this release.

The Codification is a separate publication of the Commission. It will not be published in the Code of Federal Regulations.

## IX. Statutory Bases and Text of Amendments

We are proposing amendments to rules 2–01 and 2–07 of Regulation S–X, item 9 of schedule 14A, forms 10–K, 10–KSB, 20–F and 40–F, and proposed form N–CSR under the authority set forth in schedule A and sections 7, 8, 10, 19 and 28 of the Securities Act, sections 3, 10A, 12, 13, 14, 17, 23 and 36 of the Exchange Act, sections 5, 10, 14 and 20 of the Public Utility Holding Company Act of 1935, sections 8, 30, 31 and 38 of the Investment Company Act of 1940, and sections 203 and 211 of the Investment Advisers Act of 1940 and sections 3(a) and 208 of the Sarbanes-Oxley Act.

### List of Subjects

*17 CFR Part 210*

Accountants, Accounting.

*17 CFR Part 240*

Broker-dealers, Issuers, Securities.

*17 CFR Part 249*

Reporting and recordkeeping requirements, Securities.

*17 CFR Part 274*

Investment companies, Reporting and recordkeeping requirements, Securities.

### Text of Proposed Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

## PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940 AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for part 210 continues to read as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 78c, 78j–1, 78l, 78m, 78n, 78o(d), 78q, 78u–5, 78w(a), 78ll, 78mm, 79e(b), 79j(a), 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–37(a), 80b–3, 80b–11 unless otherwise noted.

2. Section 210.2–01 is amended by:
a. Revising paragraph (c)(2)(iii);
b. Revising paragraph (c)(4);
c. Adding paragraph (c)(6);
d. Adding paragraph (c)(7);
e. Adding paragraph (c)(8);
f. Revising paragraph (f)(1);
g. Revising paragraph (f)(3); and
h. Adding paragraph (f)(17).

The revisions and additions read as follows:

**§ 210.2–01 Qualifications of accountants.**

* * * * *

(c) * * *

(2) * * *

(iii) *Employment at audit client of former employee of accounting firm.*

(A) A former partner, principal, shareholder, or professional employee

is $25,000,000 or more. *See* 17 CFR 240.12b–2. Registered management investment companies would use proposed form N–CSR to file certified shareholder reports with the Commission under the Sarbanes-Oxley Act of 2002. *See* Investment Company Act Release No. 25723 (Aug. 30, 2002) (67 FR 57298 (Sept. 9, 2002)).

of an accounting firm is in an accounting role or financial reporting oversight role at an audit client, unless the individual:

(1) Does not influence the accounting firm's operations or financial policies;

(*2*) Has no capital balances in the accounting firm; and

(*3*) Has no financial arrangement with the accounting firm other than one providing for regular payment of a fixed dollar amount (which is not dependent on the revenues, profits, or earnings of the accounting firm):

(*i*) Pursuant to a fully funded retirement plan, rabbi trust, or, in jurisdictions in which a rabbi trust does not exist, a similar vehicle; or

(*ii*) In the case of a former professional employee who was not a partner, principal, or shareholder of the accounting firm and who has been disassociated from the accounting firm for more than five years, that is immaterial to the former professional employee.

(B) A former partner, principal, shareholder, or professional employee of an accounting firm is in a financial reporting oversight role at an audit client, unless the individual:

(*1*) Was not a member of the audit engagement team of the audit client during the one year period preceding the date that audit procedures commenced. Audit procedures are deemed to have commenced at the earlier of:

(*i*) The date that the accountant commenced the audit for the period covered by the financial statements that included the date of the initial employment of the audit engagement team member by the audit client; or

(*ii*) The date that the accountant commenced review procedures for the period covered by the financial statements that included the initial employment of the audit engagement team member by the audit client.

* * * * *

(4) *Non-audit services.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant provides the following non-audit services to an audit client:

(i) *Bookkeeping or other services related to the accounting records or financial statements of the audit client.* Any service, where it is reasonably likely that the results of these services will be subject to audit procedures during an audit of the audit client's financial statements, including:

(A) Maintaining or preparing the audit client's accounting records;

(B) Preparing the audit client's financial statements that are filed with the Commission or form the basis of financial statements filed with the Commission; or

(C) Preparing or originating source data underlying the audit client's financial statements.

(ii) *Financial information systems design and implementation.* (A) Directly or indirectly, operating, or supervising the operation of, the audit client's information system or managing the audit client's local area network.

(B) Designing or implementing a hardware or software system that aggregates source data underlying the financial statements or generates information that is significant to the audit client's financial statements or other financial information systems taken as a whole.

(iii) *Appraisal or valuation services, fairness opinions, or contribution-in-kind reports.* Any appraisal service, valuation service or any service involving a fairness opinion or contribution-in-kind report for an audit client, where it is reasonably likely that the results of these services will be subject to audit procedures during an audit of the audit client's financial statements.

(iv) *Actuarial services.* Any actuarially-oriented advisory service involving the determination of amounts recorded in the financial statements and related accounts for the audit client, where it is reasonably likely that the results of these services will be subject to audit procedures during an audit of the audit client's financial statements.

(v) *Internal audit outsourcing services.* Any internal audit services related to the internal accounting controls, financial systems, or financial statements, for an audit client.

(vi) *Management functions.* Acting, temporarily or permanently, as a director, officer, or employee of an audit client, or performing any decision-making, supervisory, or ongoing monitoring function for the audit client.

(vii) *Human resources.* (A) Searching for or seeking out prospective candidates for managerial, executive, or director positions;

(B) Engaging in psychological testing, or other formal testing or evaluation programs;

(C) Undertaking reference checks of prospective candidates for an executive or director position;

(D) Acting as a negotiator on the audit client's behalf, such as determining position, status or title, compensation, fringe benefits, or other conditions of employment; or

(E) Recommending, or advising the audit client to hire, a specific candidate for a specific job (except that an accounting firm may, upon request by the audit client, interview candidates and advise the audit client on the candidate's competence for financial accounting, administrative, or control positions).

(viii) *Broker-dealer, investment adviser, or investment banking services.* Acting as a broker-dealer (registered or unregistered), promoter, or underwriter, on behalf of an audit client, making investment decisions on behalf of the audit client or otherwise having discretionary authority over an audit client's investments, executing a transaction to buy or sell an audit client's investment, or having custody of assets of the audit client, such as taking temporary possession of securities purchased by the audit client.

(ix) *Legal services.* Providing any service to an audit client that, under circumstances in which the service is provided, could be provided only by someone licensed, admitted, or otherwise qualified to practice law in the jurisdiction in which the service is provided.

(x) *Expert services unrelated to the audit.* Providing expert opinions for an audit client in connection with legal, administrative, or regulatory proceedings or acting as an advocate for an audit client in such proceedings.

* * * * *

(6) *Partner rotation.* An accountant is not independent of an audit client that is:

(i) An issuer as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(f)) when an audit engagement team partner, principal or shareholder performs audit, review or attest services for that issuer or any significant subsidiaries as defined in 17 CFR 210.1–02(w), as a partner, principal or shareholder in each of the five previous fiscal years of the issuer or any significant subsidiaries and continues to serve as a partner, principal or shareholder on the audit engagement team. Following five consecutive years where audit, review or attest services have not been provided to that issuer or any significant subsidiaries by the aforementioned partners, principals or shareholders such partners, principals or shareholders again may perform audit, review or attest services for the audit client.

(ii) An entity that is part of an investment company complex as defined in 17 CFR 210.2–01(f)(14) when any audit engagement team partner, principal or shareholder performs audit, review or attest services for any entity in the investment company complex, as a partner, principal or shareholder in

each of the five previous fiscal years of the entity and continues to serve as a partner, principal or shareholder on the audit engagement team. Following five consecutive years where audit, review or attest services have not been provided to any entity in the investment company complex by the aforementioned partners, principals or shareholders such partners, principals or shareholders again may perform audit, review or attest services for the audit client.

(7) *Audit committee administration of the engagement.* An accountant is not independent of an issuer (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(f))), other than an issuer that is an Asset-Backed Issuer as defined in § 240.13a–14(g) and § 240.15d–14(g) of this chapter, or an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), other than a unit investment trust as defined by section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4(2)), unless:

(i) In connection with audit, review and attest reports required under the securities laws, the issuer's or registered investment company's audit committee pre-approves all such engagements;

(ii) For engagements other than those specified in paragraph (c)(7)(i) of this section, in accordance with section 10A(i) of the Securities Exchange Act of 1934, either:

(A) Before the accountant is engaged by the issuer or its subsidiaries, or the registered investment company or its subsidiaries, to render the service, the engagement is approved by the issuer's or registered investment company's audit committee; or

(B) The engagement to render the service is entered into pursuant to pre-approval policies and procedures established by the audit committee of the issuer or registered investment company, provided the audit committee is informed of each service.

(C) Notwithstanding paragraphs (c)(7)(ii)(A) and (B) of this section, the pre-approval requirement is waived with respect to the provision of services covered under paragraph (c)(7)(ii) of this section provided:

(*1*) The aggregate amount of all such services provided constitutes no more than five percent of the total amount of revenues paid by the audit client to its accountant during the fiscal year in which the services are provided;

(*2*) Such services were not recognized by the issuer or registered investment company at the time of the engagement to be non-audit services; and

(*3*) Such services are promptly brought to the attention of the audit committee of the issuer or registered investment company and approved prior to the completion of the audit by the audit committee or by one or more members of the audit committee who are members of the board of directors to whom authority to grant such approvals has been delegated by the audit committee;

(iii) In addition, a registered investment company's audit committee pre-approves its accountant's engagements under paragraph (c)(7)(ii) of this section with the registered investment company's investment adviser (not including a sub-adviser whose role is primarily portfolio management and is sub-contracted or overseen by another investment adviser) and any entity controlling, controlled by, or under common control with the investment adviser that provides services to the registered investment company in accordance with paragraphs (c)(7)(ii)(A) through (C) of this section, except that with respect to paragraph (c)(7)(ii)(C)(*1*) of this section, the aggregate amount of all services provided constitutes no more than five percent of the total amount of revenues paid to the registered investment company's accountant by the registered investment company, its investment adviser and any entity controlling, controlled by, or under common control with the investment adviser that provides services to the registered investment company during the fiscal year in which the services are provided.

(8) *Compensation.* An accountant is not independent of an audit client if, at any point during the audit and professional engagement period, any partner, principal or shareholder who is a member of the audit engagement team earns or receives compensation based on the performance of, or procuring of, engagements with that audit client to provide any products or services other than audit, review or attest services.

* * * * *

(f)(1) *Accountant,* as used in paragraphs (b) through (e) of this section, means a registered public accounting firm, certified public accountant or public accountant performing services in connection with an engagement for which independence is required. References to the accountant include any accounting firm with which the certified public accountant or public accountant is affiliated.

* * * * *

(3)(i) *Accounting role* means a role in which a person is in a position to or does exercise more than minimal influence over the contents of the accounting records or anyone who prepares them.

(ii) *Financial reporting oversight role* means a role in which a person is in a position to or does exercise influence over the contents of the financial statements or anyone who prepares them, such as when the person is a member of the board of directors or similar management or governing body, chief executive officer, president, chief financial officer, chief operating officer, general counsel, chief accounting officer, controller, director of internal audit, director of financial reporting, treasurer, or any equivalent position.

* * * * *

(17) *Audit committee* means a committee (or equivalent body) as defined in section 3(a)(58) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(58)).

3. By adding § 210.2–07 to read as follows:

**§ 210.2–07 Communication with audit committees.**

(a) Each registered public accounting firm that performs for an audit client that is an issuer (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1(f))), other than an issuer that is an Asset-Backed Issuer as defined in § 240.13a–14(g) and § 240.15d–14(g) of this chapter, or an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), other than a unit investment trust as defined by section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4(2)), any audit required under the securities laws shall report, prior to the filing of such audit report with the Commission, to the audit committee of the issuer or registered investment company:

(1) All critical accounting policies and practices to be used;

(2) All alternative treatments of financial information within Generally Accepted Accounting Principles that have been discussed with management of the issuer or registered investment company, including:

(i) Ramifications of the use of such alternative disclosures and treatments; and

(ii) The treatment preferred by the registered public accounting firm;

(3) Other material written communications between the registered public accounting firm and the management of the issuer or registered investment company, such as any management letter or schedule of unadjusted differences.

(b) [Reserved]

## PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for part 240 continues to read as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 79q, 79j, 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–37(a), 80b–4, 80b–11, unless otherwise noted.

* * * * *

5. Section 240.10A–2 is added to read as follows:

### § 240.10A–2 Auditor independence.

It shall be unlawful for an auditor not to be independent under § 210.2–01(c)(2)(iii)(B), 2–01(c)(4), 2–01(c)(6), 2–01(c)(7) and 2–07.

6. Section 240.14a–101 is amended by revising paragraph (e) of item 9 to read as follows:

### § 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 9. *Independent public accountants.*

* * *

* * * * *

(e)(1) Disclose, under the caption *Audit Fees,* the aggregate fees billed for each of the last two fiscal years for professional services rendered by the principal accountant for the audit of the registrant's annual financial statements and review of financial statements included in the registrant's form 10–Q (17 CFR 249.308a) or 10–QSB (17 CFR 249.308b) for those fiscal years.

(2) Disclose, under the caption *Audit-Related Fees,* the aggregate fees billed in each of the last two fiscal years for assurance and related services by the principal accountant that are reasonably related to the performance of the audit or review of the registrant's financial statements and are not reported under paragraph (e)(1) of this section. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(3) Disclose, under the caption *Tax Fees,* the aggregate fees billed in each of the last two fiscal years for professional services rendered by the principal accountant for tax compliance, tax consulting, and tax planning.

(4) Disclose, under the caption *All Other Fees,* the aggregate fees billed in each of the last two fiscal years for products and services provided by the principal accountant, other than the services reported in paragraphs (e)(1) through (e)(3) of this section. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(5)(i) Disclose the audit committee's pre-approval policies and procedures described in paragraph (c)(7)(ii) of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)).

(ii) Disclose the percentage of fees described in each of paragraphs (e)(2) through (e)(4) of this section that were approved by the audit committee pursuant to each of the paragraphs (c)(7)(ii)(A), (c)(7)(ii)(B) and, (c)(7)(ii)(C), of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)(A), (B) and (C)).

(6) If greater than 50 percent, disclose the percentage of hours expended on the principal accountant's engagement to audit the registrant's financial statements for the most recent fiscal year that were attributed to work performed by persons other than the principal accountant's full-time, permanent employees.

*Instruction to Item 9(e).*

For purposes of item 9(e)(2), (3), (4), and (5)(ii) registrants that are investment companies must disclose fees billed for services rendered to the registrant, the registrant's investment adviser (not including any sub-adviser whose role is primarily portfolio management and is subcontracted with or overseen by another investment adviser), and any entity controlling, controlled by, or under common control with the adviser that provides services to the registrant.

* * * * *

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for part 249 is amended by revising the citations, § 249.220f, § 249.240f, § 249.310 and § 249.310b and a citation for § 249.331 is added in numerical order to read as follows:

**Authority:** 15 U.S.C. 78a *et seq.*, unless otherwise noted.

* * * * *

Section 249.220f is also issued under secs. 3(a), 202, 302, 404 and 407, Pub. L. No. 107–204, 116 Stat. 745.

Section 249.240f is also issued under secs. 3(a), 202, 302, 404 and 407, Pub. L. No. 107–204, 116 Stat. 745.

* * * * *

Section 249.310 is also issued under 15 U.S.C. 78m, 78o(d) and 78w(a) and secs. 3(a), 202 and 302, Pub. L. No. 107–204, 116 Stat. 745.

Section 249.310b is also issued under secs. 3(a), 202 and 302, Pub. L. No. 107–204, 116 Stat. 745.

* * * * *

Section 249.331 is also issued under secs. 3(a), 202, and 302, Pub. L. No. 107–204, 116 Stat. 745.

8. Amend form 20–F (referenced in § 249.220f) by adding paragraph (d) to item 15 to read as follows:

**Note:** The text of form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form 20–F**

* * * * *

Item 15. *Certain Disclosures.*

* * * * *

(d) Principal Accountant Fees and Services.

(1) Disclose, under the caption *Audit Fees,* the aggregate fees billed for each of the last two fiscal years for professional services rendered by the principal accountant for the audit of the registrant's annual financial statements and review of financial statements included in the registrant's form 10–Q (17 CFR 249.308a) or 10–QSB (17 CFR 249.308b) for those fiscal years.

(2) Disclose, under the caption *Audit-Related Fees,* the aggregate fees billed in each of the last two fiscal years for assurance and related services by the principal accountant that are reasonably related to the performance of the audit or review of the registrant's financial statements and are not reported under paragraph (e)(1) of this section. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(3) Disclose, under the caption *Tax Fees*, the aggregate fees billed in each of the last two fiscal years for professional services rendered by the principal accountant for tax compliance, tax consulting, and tax planning.

(4) Disclose, under the caption *All Other Fees,* the aggregate fees billed in each of the last two fiscal years for products and services provided by the principal accountant, other than the services reported in paragraphs (e)(1) through (e)(3) of this section. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(5)(i) Disclose the audit committee's pre-approval policies and procedures described in paragraph (c)(7)(ii) of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)).

(ii) Disclose the percentage of fees described in each of paragraphs (e)(2) through (e)(4) of this section that were approved by the audit committee pursuant to each of the paragraphs (c)(7)(ii)(A), (c)(7)(ii)(B), and (c)(7)(ii)(C), of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)(A), (B) and (C)).

(6) If greater than 50 percent, disclose the percentage of hours expended on the principal accountant's engagement to audit the registrant's financial statements for the most recent fiscal year that were attributed to work performed by persons other than the principal accountant's full-time, permanent employees.

*Instructions to Item 15(d).*

1. You do not need to provide the information called for by this item 15(d) unless you are using this form as an annual report.

2. A registrant that is an Asset-Backed Issuer (as defined in § 240.13a–14(g) and § 240.15d–14(g) of this chapter) is not required to disclose the information required by this item.

* * * * *

9. Amend form 40–F (referenced in § 249.240f) by adding paragraph (10) to general instruction B to read as follows:

**Note:** The text of form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form 40–F**

* * * * *

*General Instructions*

* * * * *

B. Information To Be Filed on This Form.

* * * * *

(10) Principal Accountant Fees and Services.

(1) Disclose, under the caption *Audit Fees,* the aggregate fees billed for each of the last two fiscal years for professional services rendered by the principal accountant for the audit of the registrant's annual financial statements and review of financial statements included in the registrant's form 10–Q (17 CFR 249.308a) or 10–QSB (17 CFR 249.308b) for those fiscal years.

(2) Disclose, under the caption *Audit-Related Fees,* the aggregate fees billed in each of the last two fiscal years for assurance and related services by the principal accountant that are reasonably related to the performance of the audit or review of the registrant's financial statements and are not reported under paragraph (e)(1) of this section. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(3) Disclose, under the caption *Tax Fees*, the aggregate fees billed in each of the last two fiscal years for professional services rendered by the principal accountant for tax compliance, tax consulting, and tax planning.

(4) Disclose, under the caption *All Other Fees,* the aggregate fees billed in each of the last two fiscal years for products and services provided by the principal accountant, other than the services reported in paragraphs (e)(1) through (e)(3) of this section. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(5)(i) Disclose the audit committee's pre-approval policies and procedures described in paragraph (c)(7)(ii) of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)).

(ii) Disclose the percentage of fees described in each of paragraphs (e)(2) through (e)(4) of this section that were approved by the audit committee pursuant to each of the paragraphs (c)(7)(ii)(A), (c)(7)(ii)(B), and (c)(7)(ii)(C), of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)(A), (B) and (C)).

(6) If greater than 50 percent, disclose the percentage of hours expended on the principal accountant's engagement to audit the registrant's financial statements for the most recent fiscal year that were attributed to work performed by persons other than the principal accountant's full-time, permanent employees.

*Notes to Instruction B.(10).*

1. You do not need to provide the information called for by this instruction B.(10) unless you are using this form as an annual report.

2. A registrant that is an Asset-Backed Issuer (as defined in § 240.13a–14(g) and § 240.15d–14(g) of this chapter) is not required to disclose the information required by this instruction B.(10).

* * * * *

10. Amend form 10–K (referenced in § 249.310) by:

a. Redesignating item 16 of part IV as item 17 of part IV, and

b. Adding new item 16 to part III. The addition reads as follows:

**Note:** The text of form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form 10–K**

* * * * *

*General Instructions*

* * * * *

Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

* * * * *

*Part III*

* * * * *

*Item 16. Principal Accountant Fees and Services.*

Furnish the information required by item 9(e) of schedule 14A (§ 240.14a–101 of this chapter).

(1) Disclose, under the caption *Audit Fees,* the aggregate fees billed for each of the last two fiscal years for professional services rendered by the principal accountant for the audit of the registrant's annual financial statements and review of financial statements included in the registrant's form 10–Q (17 CFR 249.308a) or 10–QSB (17 CFR 249.308b) for those fiscal years.

(2) Disclose, under the caption *Audit-Related Fees,* the aggregate fees billed in each of the last two fiscal years for assurance and related services by the principal accountant that are reasonably related to the performance of the audit or review of the registrant's financial statements and are not reported under paragraph (e)(1) of this section. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(3) Disclose, under the caption *Tax Fees,* the aggregate fees billed in each of the last two fiscal years for professional services rendered by the principal accountant for tax compliance, tax consulting, and tax planning.

(4) Disclose, under the caption *All Other Fees,* the aggregate fees billed in each of the last two fiscal years for products and services provided by the principal accountant, other than the services reported in paragraphs (e)(1) through (e)(3) of this section. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(5)(i) Disclose the audit committee's pre-approval policies and procedures described in paragraph (c)(7)(ii) of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)).

(ii) Disclose the percentage of fees described in each of paragraphs (e)(2) through (e)(4) of this section that were approved by the audit committee pursuant to each of the paragraphs (c)(7)(ii)(A), (c)(7)(ii)(B), and (c)(7)(ii)(C), of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)(A), (B) and (C)).

(6) If greater than 50 percent, disclose the percentage of hours expended on the principal accountant's engagement to audit the registrant's financial statements for the most recent fiscal year that were attributed to work performed by persons other than the principal accountant's full-time, permanent employees.

*Instruction to Item 16.*

A registrant that is an Asset-Backed Issuer (as defined in § 240.13a–14(g) and § 240.15d–14(g) of this chapter) is not required to disclose the information required by this item.

* * * * *

11. Amend form 10–KSB (referenced in § 249.310b) by adding item 16 to part III to read as follows:

**Note:** The text of form 10–KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form 10–KSB**

* * * * *

*Part III*

* * * * *

*Item 16. Principal Accountant Fees and Services.*

Furnish the information required by item 9(e) of schedule 14A (§ 240.14a–101 of this chapter).

(1) Disclose, under the caption *Audit Fees,* the aggregate fees billed for each of the last two fiscal years for professional services rendered by the principal accountant for the audit of the registrant's annual financial statements and review of financial statements included in the registrant's form 10–Q (17 CFR 249.308a) or 10–QSB (17 CFR 249.308b) for those fiscal years.

(2) Disclose, under the caption *Audit-Related Fees,* the aggregate fees billed in each of the last two fiscal years for assurance and related services by the principal accountant that are reasonably related to the performance of the audit or review of the registrant's financial statements and are not reported under paragraph (e)(1) of this section. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(3) Disclose, under the caption *Tax Fees,* the aggregate fees billed in each of the last two fiscal years for professional services rendered by the principal accountant for tax compliance, tax consulting, and tax planning.

(4) Disclose, under the caption *All Other Fees,* the aggregate fees billed in each of the last two fiscal years for products and services provided by the principal accountant, other than the services reported in paragraphs (e)(1) through (e)(3) of this section. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(5)(i) Disclose the audit committee's pre-approval policies and procedures described in paragraph (c)(7)(ii) of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)).

(ii) Disclose the percentage of fees described in each of paragraphs (e)(2) through (e)(4) of this section that were approved by the audit committee pursuant to each of the paragraphs (c)(7)(ii)(A), (c)(7)(ii)(B), and (c)(7)(ii)(C), of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)(A), (B) and (C)).

(6) If greater than 50 percent, disclose the percentage of hours expended on the

principal accountant's engagement to audit the registrant's financial statements for the most recent fiscal year that were attributed to work performed by persons other than the principal accountant's full-time, permanent employees.

*Instruction to Item 16.*

A registrant that is an Asset-Backed Issuer (as defined in § 240.13a–14(g) and § 240.15d–14(g) of this chapter) is not required to disclose the information required by this item.

* * * * *

## PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

12. The authority citation for part 274 is revised to read as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

Section 274.128 is also issued under secs. 3(a), 202, and 302, Pub. L. 107–204, 116 Stat. 745.

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

## PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

13. By amending form N–CSR (referenced in §§ 249.331 and 274.128).

a. By revising general instruction D;

b. By redesignating items 5 and 6 as items 6 and 7; and

c. By adding a new item 5.

The revisions and additions read as follows:

**Note:** The text of form N–CSR does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form N–CSR**

* * * * *

*General Instructions*

* * * * *

D. Incorporation by Reference.

A registrant may incorporate by reference information required by items 5 and 7(b). No other items of the form shall be answered by incorporating any information by reference. The information required by item 5 may be incorporated by reference from the registrant's definitive proxy statement (filed or required to be filed pursuant to Regulation 14A (17 CFR 240.14a–1 *et seq.*)) or definitive information statement (filed or to be filed pursuant to Regulation 14C (17 CFR 240.14c–1 *et seq.*)) which involves the election of directors, if such definitive proxy statement or information statement is filed with the Commission not later than 120 days after the end of the fiscal year covered by an annual report on this form. All incorporation by reference must comply with the requirements of this form and the following rules on incorporation by reference: Rule 10(d) of Regulation S–K under the Securities Act of 1933 (17 CFR 229.10(d)) (general rules on incorporation by reference, which, among other things, prohibit, unless specifically required by this form, incorporating by reference a document that includes incorporation by reference to another document, and limits incorporation to documents filed within the last 5 years, with certain exceptions); rule 303 of Regulation S–T (17 CFR 232.303) (specific requirements for electronically filed documents); rules 12b–23 and 12b–32 under the Securities Exchange Act of 1934 (additional rules on incorporation by reference for reports filed pursuant to sections 13 and 15(d) of the Securities Exchange Act of 1934); and rules 0–4, 8b–23, and 8b–32 under the Investment Company Act of 1940 (17 CFR 270.0–4, 270.8b–23, and 270.8b–32) (additional rules on incorporation by reference for investment companies).

* * * * *

*Item 5. Principal Accountant Fees and Services.*

(a) Disclose, under the caption *Audit Fees,* the aggregate fees billed for each of the last two fiscal years for professional services rendered by the principal accountant for the audit of the registrant's annual financial statements for those fiscal years.

(b) Disclose, under the caption *Audit-Related Fees,* the aggregate fees billed in each of the last two fiscal years for assurance and related services by the principal accountant that are reasonably related to the performance of the audit of the registrant's financial statements and are not reported under paragraph (a) of this item. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(c) Disclose, under the caption *Tax Fees,* the aggregate fees billed in each of the last two fiscal years for professional services rendered by the principal accountant for tax compliance, tax consulting, and tax planning.

(d) Disclose, under the caption *All Other Fees,* the aggregate fees billed in each of the last two fiscal years for products and services provided by the principal accountant, other than the services reported in paragraphs (a) through (c) of this item. Registrants shall describe each subcategory of services comprising the fees disclosed under this category.

(e)(1) Disclose the audit committee's pre-approval policies and procedures described in paragraph (c)(7)(ii) of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)).

(2) Disclose the percentage of fees described in each of paragraphs (b) through (d) of this item that were approved by the audit committee pursuant to each of the paragraphs (c)(7)(ii)(A), (B), and (C) of rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(7)(ii)(A), (B), and (C)).

(f) If greater than 50 percent, disclose the percentage of hours expended on the principal accountant's engagement to audit the registrant's financial statements for the most recent fiscal year that were attributed to work performed by persons other than the principal accountant's full-time, permanent employees.

*Instructions*

1. The information required by this item 5 is only required in a report on this form N–CSR that is required by item 7(a) to include a copy of an annual report transmitted to stockholders.

2. For purposes of paragraphs (b), (c), (d) and (e)(2) of this item, registrants must disclose fees billed for services rendered to the registrant, the registrant's investment adviser (not including any sub-adviser whose role is primarily portfolio management and is subcontracted with or overseen by another investment adviser), and any entity controlling, controlled by, or under common control with the adviser that provides services to the registrant.

* * * * *

By the Commission.

Dated: December 2, 2002.

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 02–30884 Filed 12–12–02; 8:45 am]

BILLING CODE 8010–01–P

Federal Register

Friday,
December 13, 2002

# Part III

# General Services Administration

**41 CFR Parts 102–71, et al.**
**Real Property Policies Update; Final Rules**

## GENERAL SERVICES ADMINISTRATION

### 41 CFR Parts 102–71, 102–72, 102–73, 102–74, 102–75, 102–76, 102–78, 102–79, 102–80, 102–81 and 102–83

**[FMR Amendment C–1]**

**RIN 3090–AH45**

## Real Property Policies Update

**AGENCY:** Office of Governmentwide Policy, GSA.

**ACTION:** Final rule.

**SUMMARY:** The General Services Administration (GSA) is revising the Federal Management Regulation (FMR) to complete the transfer of coverage on real property policies from the Federal Property Management Regulations (FPMR) to the FMR. In addition to this regulatory action that amends the FMR, another final rule is being published today in the **Federal Register** that amends the FPMR by removing regulatory text and providing cross-references to the FMR. The FMR coverage is written in plain language to provide agencies with updated regulatory material that is easy to read and understand.

**DATES:** Effective December 13, 2002.

**FOR FURTHER INFORMATION CONTACT:** Stanley C. Langfeld, Director, Real Property Policy Division, Office of Governmentwide Policy, General Services Administration, by phone at (202) 501–1737 or by e-mail at *stanley.langfeld@gsa.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Background

As part of GSA's regulatory improvement initiative, GSA published a final rule that created FMR parts 102–71 through 102–82 (41 CFR parts 102–71 through 102–82), entitled ''Real Property Policies,'' in the **Federal Register** on January 18, 2001 (66 FR 5358). FMR parts 102–71 through 102–82 describe the current real property policies applicable to GSA and Federal agencies to whom GSA real property authority has been delegated. By amending this regulation, GSA will update the policies in the FMR and complete the transfer of policy from the FPMR to the FMR. In addition, this amendment creates a separate part, FMR part 102–83, to deal specifically with the updated location of space policy.

Public Law 107–217 was enacted on August 21, 2002, to revise and codify without substantive change certain laws related to public buildings, property, and works in Title 40 of the United States Code. GSA will update the legal citations in FMR parts 102–71 through 102–83 to reflect this new law in a separate regulatory action.

### B. Executive Order 12866

The General Services Administration (GSA) has determined that this final rule is not a significant regulatory action for the purposes of Executive Order 12866.

### C. Regulatory Flexibility Act

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

### D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this final rule does not impose reporting, recordkeeping or information collection requirements which require the approval of the Office of Management and Budget pursuant to 44 U.S.C. 3501 *et seq.*

### E. Small Business Regulatory Enforcement Fairness Act

This final rule is exempt from Congressional review under 5 U.S.C. 801 since it relates solely to agency management and personnel.

### List of Subjects in 41 CFR Parts 102–71, 102–72, 102–73, 102–74, 102–75, 102–76, 102–78, 102–79, 102–80 and 102–83

Administrative practice and procedure, Blind, Concessions, Federal buildings and facilities, Fire prevention, Government property management, Homeless, Individuals with disabilities, Location of space, Occupational safety and health, Parking, Real property acquisition, Security measures, Surplus Government property, Utilities.

For the reasons set forth in the preamble, GSA amends 41 CFR chapter 102 as follows:

## PART 102–71—GENERAL

1. The authority citation for part 102–71 continues to read as follows:

**Authority:** 40 U.S.C. 486(c).

### § 102–71.15 [Removed and reserved]

2. Section 102–71.15 is removed and reserved.

3. Section 102–71.20 is revised to read as follows:

### § 102–71.20 What definitions apply to GSA's real property policies?

The following definitions apply to GSA's real property policies:

*Act* means the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended.

*Airport* means any area of land or water that is used, or intended for use, for the landing and takeoff of aircraft, and any appurtenant areas that are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

*Alteration* means remodeling, improving, extending, or making other changes to a facility, exclusive of maintenance repairs which are preventive in nature. The term includes planning, engineering, architectural work, and other similar actions.

*Blanket work authorization* means an open-end agreement with an agency with an agreed upon maximum dollar ceiling where there is an on-going account for processing small requests for reimbursable services. The need for the service is clearly recognized, but exactly when the service must be rendered during the fiscal year is unclear.

*Carpool* means a group of two or more people regularly using a motor vehicle for transportation to and from work on a continuing basis.

*Commercial activities,* within the meaning of subpart D, part 102–74 of this chapter, are activities undertaken for the primary purpose of producing a profit for the benefit of an individual or organization organized for profit. (Activities where commercial aspects are incidental to the primary purpose of expression of ideas or advocacy of causes are not *commercial activities* for purposes of this part.)

*Crime prevention assessment* is a formal, on-site review which consists of a detailed survey, review, and analysis of an occupant agency's vulnerability to criminal activity. In addition to the normal process of a physical security survey, it involves an intensive review of an occupant's and/or building's operation and administrative procedures. It is designed to identify specific weaknesses and to recommend cost-effective, positive steps to Federal managers in dealing with criminal threats and occurrences.

*Cultural activities* include, but are not limited to, films, dramatics dances, and musical presentations, and fine art exhibits, whether or not these activities are intended to make a profit.

*Decontamination* means the complete removal or destruction by flashing of explosive powders; the neutralizing and cleaning-out of acid and corrosive materials; the removal, destruction, or neutralizing of toxic, hazardous or infectious substances; and the complete removal and destruction by burning or detonation of live ammunition from contaminated areas and buildings.

*Designated Official* is the highest ranking official of the primary occupant

agency of a Federal facility, or, alternatively, a designee selected by mutual agreement of occupant agency officials.

*Disposal agency* means the executive agency designated by the Administrator of General Services to dispose of surplus real or personal property.

*Educational activities* mean activities such as (but not limited to) the operation of schools, libraries, day care centers, laboratories, and lecture or demonstration facilities.

*Emergency* includes bombings and bomb threats, civil disturbances, fires, explosions, electrical failures, loss of water pressure, chemical and gas leaks, medical emergencies, hurricanes, tornadoes, floods, and earthquakes. The term does not apply to civil defense matters such as potential or actual enemy attacks, which are addressed by the Federal Emergency Management Agency.

*Executive* means a Government employee with management responsibilities who, in the judgment of the employing agency head or his/her designee, requires preferential assignment of parking privileges.

*Executive agency* means an executive department specified in section 101 of title 5; a military department specified in section 102 of such title; an independent establishment as defined in section 104(1) of such title; and a wholly owned Government corporation fully subject to the provisions of chapter 91 of title 31.

*Federal agency* means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his or her direction).

*Federal agency buildings manager* means the buildings manager employed by GSA or a Federal agency that has been delegated real property management and operation authority from GSA.

*Federal Government real property services provider* means any Federal Government entity operating under, or subject to, the authorities of the Administrator of General Services, that provides real property services to Federal agencies. This definition also includes private sector firms under contract with Federal agencies that deliver real property services to Federal agencies. This definition excludes any entity operating under, or subject to, authorities other than those of the Administrator of General Services.

*Flame-resistant* means meeting performance standards as described by the National Fire Protection Association (NFPA Standard No. 701). Fabrics labeled with the Underwriters Laboratories Inc., classification marking for flammability are deemed to be flame resistant for purposes of this part.

*Foot-candle* is the illumination on a surface one square foot in area on which there is a uniformly distributed flux of one lumen, or the illuminance produced on a surface all points of which are at a distance of one foot from a directionally uniform point source of one candela.

*GSA* means the General Services Administration, acting by or through the Administrator of General Services, or a designated official to whom functions under this part have been delegated by the Administrator of General Services.

*Handicapped employee* means an employee who has a severe, permanent impairment which for all practical purposes precludes the use of public transportation, or an employee who is unable to operate a car as a result of permanent impairment who is driven to work by another. Priority may require certification by an agency medical unit, including the Department of Veterans Affairs or the Public Health Service.

*Highest and best use* means the most likely use to which a property can be put, which will produce the highest monetary return from the property, promote its maximum value, or serve a public or institutional purpose. The highest and best use determination must be based on the property's economic potential, qualitative values (social and environmental) inherent in the property itself, and other utilization factors controlling or directly affecting land use (*e.g.* zoning, physical characteristics, private and public uses in the vicinity, neighboring improvements, utility services, access, roads, location, and environmental and historical considerations). Projected highest and best use should not be remote, speculative, or conjectural.

*Landholding agency* means the Federal agency that has accountability for the property involved. For the purposes of this definition, accountability means that the Federal agency reports the real property on its financial statements and inventory records.

*Indefinite quantity contract* (commonly referred to as *term contract*) provides for the furnishing of an indefinite quantity, within stated limits, of specific property or services during a specified contract period, with deliveries to be scheduled by the timely placement of orders with the contractor by activities designated either specifically or by class.

*Industrial property* means any real property and related personal property that has been used or which is suitable to be used for manufacturing, fabricating, or processing of products; mining operations; construction or repair of ships and other waterborne carriers; power transmission facilities; railroad facilities; and pipeline facilities for transporting petroleum or gas.

*Landing area* means any land or combination of water and land, together with improvements thereon and necessary operational equipment used in connection therewith, which is used for landing, takeoff, and parking of aircraft. The term includes, but is not limited to, runways, strips, taxiways, and parking aprons.

*Life cycle cost* is the total cost of owning, operating, and maintaining a building over its useful life, including its fuel and energy costs, determined on the basis of a systematic evaluation and comparison of alternative building systems; except that in the case of leased buildings, the life cycle cost shall be calculated over the effective remaining term of the lease.

*Limited combustible* means rigid materials or assemblies which have fire hazard ratings not exceeding 25 for flame spread and 150 for smoke development when tested in accordance with the American Society for Testing and Materials, Test E 84, Surface Burning Characteristics of Building Materials.

*Maintenance,* for the purposes of part 102–75, entitled ''Real Property Disposal,'' of this chapter, means the upkeep of property only to the extent necessary to offset serious deterioration; also such operation of utilities, including water supply and sewerage systems, heating, plumbing, and air-conditioning equipment, as may be necessary for fire protection, the needs of interim tenants, and personnel employed at the site, and the requirements for preserving certain types of equipment. For the purposes of part 102–74, entitled ''Facility Management,'' of this chapter, *maintenance* means preservation by inspection, adjustment, lubrication, cleaning, and the making of minor repairs. *Ordinary maintenance* means routine recurring work which is incidental to everyday operations; *preventive maintenance* means work programmed at scheduled intervals.

*Management* means the safeguarding of the Government's interest in property, in an efficient and economical manner consistent with the best business practices.

*Nationally recognized standards* encompasses any standard or modification thereof which:

(1) Has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby those interested and affected by it have reached substantial agreement on its adoption, or

(2) Was formulated through consultation by appropriate Federal agencies in a manner which afforded an opportunity for diverse views to be considered.

*No commercial value* means real property, including related personal property, which has no reasonable prospect of producing any disposal revenues.

*Nonprofit organization* means an organization identified in 26 U.S.C. 501(c).

*Normally furnished commercially* means consistent with the level of services provided by a commercial building operator for space of comparable quality and housing tenants with comparable requirements. Service levels are based on the effort required to service space for a five-day week, one eight-hour shift schedule.

*Occupant agency* means an organization that is assigned space in a facility under GSA's custody and control through the formal procedures outlined in part 101–17 of the Federal Property Management Regulations.

*Occupancy Emergency Organization* means the emergency response organization comprised of employees of Federal agencies designated to perform the requirements established by the Occupant Emergency Plan.

*Occupant Emergency Plan* means procedures developed to protect life and property in a specific federally-occupied space under stipulated emergency conditions.

*Occupant Emergency Program* means a short-term emergency response program. It establishes procedures for safeguarding lives and property during emergencies in particular facilities.

*Postal vehicle* means a Government-owned vehicle used for the transportation of mail, or a privately owned vehicle used under contract with the U.S. Postal Service for the transportation of mail.

*Protection* means the provisions of adequate measures for prevention and extinguishment of fires, special inspections to determine and eliminate fire and other hazards, and necessary guards to protect property against thievery, vandalism, and unauthorized entry.

*Public area* means any area of a building under the control and custody of GSA which is ordinarily open to members of the public, including lobbies, courtyards, auditoriums, meeting rooms, and other such areas not assigned to a lessee or occupant agency.

*Public body* means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, or any political subdivision, agency, or instrumentality of the foregoing.

*Public building* means:

(1) Any building which is suitable for office and/or storage space for the use of one or more Federal agencies or mixed ownership corporations, such as Federal office buildings, post offices, customhouses, courthouses, border inspection facilities, warehouses, and any such building designated by the President. It also includes buildings of this sort that are acquired by the Federal Government under the Administrator's installment-purchase, lease-purchase, and purchase-contract authorities.

(2) *Public building* does not include buildings:

(i) On the public domain.

(ii) In foreign countries.

(iii) On Indian and native Eskimo properties held in trust by the United States.

(iv) On lands used in connection with Federal programs for agricultural, recreational, and conservation purposes.

(v) On or used in connection with river, harbor, flood control, reclamation or power projects, or for chemical manufacturing or development projects, or for nuclear production, research, or development projects.

(vi) On or used in connection with housing and residential projects.

(vii) On military installations.

(viii) On Department of Veterans Affairs installations used for hospital or domiciliary purposes.

(ix) Excluded by the President.

*Real property* means:

(1) Any interest in land, together with the improvements, structures, and fixtures located thereon (including prefabricated movable structures, such as Butler-type storage warehouses and quonset huts, and housetrailers with or without undercarriages), and appurtenances thereto, under the control of any Federal agency, except:

(i) The public domain;

(ii) Lands reserved or dedicated for national forest or national park purposes;

(iii) Minerals in lands or portions of lands withdrawn or reserved from the public domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws;

(iv) Lands withdrawn or reserved from the public domain but not including lands or portions of lands so withdrawn or reserved which the Secretary of the Interior, with the concurrence of the Administrator of General Services, determines are not suitable for return to the public domain for disposition under the general public land laws because such lands are substantially changed in character by improvements or otherwise; and

(v) Crops when designated by such agency for disposition by severance and removal from the land.

(2) Improvements of any kind, structures, and fixtures under the control of any Federal agency when designated by such agency for disposition without the underlying land (including such as may be located on the public domain, on lands withdrawn or reserved from the public domain, on lands reserved or dedicated for national forest or national park purposes, or on lands that are not owned by the United States) excluding, however, prefabricated movable structures, such as Butler-type storage warehouses and quonset huts, and housetrailers (with or without undercarriages).

(3) Standing timber and embedded gravel, sand, or stone under the control of any Federal agency whether designated by such agency for disposition with the land or by severance and removal from the land, excluding timber felled, and gravel, sand, or stone excavated by or for the Government prior to disposition.

*Recognized labor organization* means a labor organization recognized under title VII of the Civil Service Reform Act of 1978 (Pub. L. 95–454) governing labor-management relations.

Recreational activities include, but are not limited to, the operations of gymnasiums and related facilities.

Regional Officer, within the meaning of part 102–74, subpart D of this chapter, means the Federal official designated to supervise the implementation of the Public Buildings Cooperative Use Act's occasional use provisions. The Federal official may be an employee of GSA or a Federal agency that has delegated authority from GSA to supervise the implementation of the Public Buildings Cooperative Use Act's occasional use provisions.

*Related personal property* means any personal property:

(1) Which is an integral part of real property or is related to, designed for, or specially adapted to the functional or productive capacity of the real property and the removal of which would significantly diminish the economic value of the real property. Normally,

common use items, including but not limited to general-purpose furniture, utensils, office machines, office supplies, or general-purpose vehicles, are not considered to be related personal property; or

(2) Which is determined by the Administrator of General Services to be related to the real property.

*Repairs* means those additions or changes that are necessary for the protection and maintenance of property to deter or prevent excessive or rapid deterioration or obsolescence, and to restore property damaged by storm, flood, fire, accident, or earthquake.

*Ridesharing* means the sharing of the commute to and from work by two or more people, on a continuing basis, in any mode of transportation.

*Special space alterations* are those alterations required by occupant agencies that are beyond those standard alterations provided by GSA under the RENT system and are reimbursable from the requesting agency.

*State* means the fifty States, political subdivisions thereof, the District of Columbia, the Commonwealths of Puerto Rico and Guam, and the territories and possessions of the United States.

*Unit price agreement* provides for the furnishing of an indefinite quantity, within stated limits, of specific property or services at a specified price, during a specified contract period, with deliveries to be scheduled by the timely placement of orders upon the lessor by activities designated either specifically or by class.

*Unusual hours* means work hours that are frequently required to be varied and do not coincide with any regular work schedule. This category includes time worked by individuals who regularly or frequently work significantly more than 8 hours per day. *Unusual hours* does not include time worked by shift workers, by those on alternate work schedules, and by those granted exceptions to the normal work schedule (*e.g.*, flex-time).

*Upon approval from GSA* means when an agency either has a delegation of authority document from the Administrator of General Services or written approval from the Administrator or his/her designee before proceeding with a specified action.

*Vanpool* means a group of at least 8 persons using a passenger van or a commuter bus designed to carry 10 or more passengers. Such a vehicle must be used for transportation to and from work in a single daily round trip.

*Zonal allocations* means the allocation of parking spaces on the basis of zones established by GSA in conjunction with occupant agencies. In metropolitan areas where this method is used, all agencies located in a designated zone will compete for available parking in accordance with instructions issued by GSA. In establishing this procedure, GSA will consult with all affected agencies.

## PART 102–72—DELEGATION OF AUTHORITY

4. The authority citation for part 102–72 continues to read as follows:

**Authority:** 40 U.S.C. 486(c), (d) and (e).

### § 102–72.30 [Amended]

5. In § 102–72.30(a), remove ''§ 101–18.104'' and add ''§ 102–73.135'' in its place.

### § 102–72.60 [Amended]

6. In § 102–72.60, remove ''under § 101–20.106 of this title'' and add ''as specified in the GSA Customer Guide to Real Property'' in its place.

### § 102–72.85 [Amended]

7. In § 102–72.85, remove the ''part 101–47, subpart 101–47.6, of this title'' and add ''part 102–75, subpart F of this chapter'' in its place.

8. Part 102–73 is revised to read as follows:

## CHAPTER 102—FEDERAL MANAGEMENT REGULATION

## SUBCHAPTER C—REAL PROPERTY

## PART 102–73—REAL ESTATE ACQUISITION

### Subpart A—General Provisions

Sec.
102–73.5 What is the scope of this part?
102–73.10 What is the basic real estate acquisition policy?
102–73.15 What real estate acquisition and related services must Federal agencies provide?

**United States Postal Service-Controlled Space**

102–73.20 Are Federal agencies required to give priority consideration to space in buildings under the custody and control of the United States Postal Service in fulfilling Federal agency space needs?

**Locating Federal Facilities**

102–73.25 What policies must executive agencies comply with in locating Federal facilities?

**Historic Preservation**

102–73.30 What historic preservation provisions must Federal agencies comply with prior to acquiring, constructing, or leasing space?

**Prospectus Requirements**

102–73.35 Is a prospectus required for all acquisition, construction, or alteration projects?
102–73.40 What happens if the project exceeds the prospectus threshold?

### Subpart B—Acquisition by Lease

102–73.45 When may Federal agencies consider leases of privately owned land and buildings to satisfy their space needs?
102–73.50 Are Federal agencies that possess independent statutory authority to acquire leased space subject to requirements of this part?
102–73.55 On what basis must Federal agencies acquire leases?
102–73.60 With whom may Federal agencies enter into lease agreements?
102–73.65 Are there any limitations on leasing certain types of space?
102–73.70 Are executive agencies required to acquire leased space by negotiation?
102–73.75 What functions must Federal agencies perform with regard to leasing building space?
102–73.80 Who is authorized to contact lessors, offerors, or potential offerors concerning space leased or to be leased?
102–73.85 Can agencies with independent statutory authority to lease space have GSA perform the leasing functions?
102–73.90 What contingent fee policy must Federal agencies apply to the acquisition of real property by lease?
102–73.95 How are Federal agencies required to assist GSA?

**Competition in Contracting Act of 1984**

102–73.100 Is the Competition in Contracting Act of 1984 (CICA) applicable to lease acquisition?

**Lease Construction**

102–73.105 What rules must executive agencies follow when acquiring leasehold interests in buildings constructed for Federal Government use?

**Price Preference for Historic Properties**

102–73.110 Must Federal agencies offer a price preference to space in historic properties when acquiring leased space?
102–73.115 How much of a price preference must Federal agencies give when acquiring leased space using the lowest price technically acceptable source selection process?
102–73.120 How much of a price preference must Federal agencies give when acquiring leased space using the best value tradeoff source selection process?

**Leases With Purchase Options**

102–73.125 When may Federal agencies consider acquiring leases with purchase options?

**Scoring Rules**

102–73.130 What scoring rules must Federal agencies follow when considering leases and leases with purchase options?

**Delegations of Leasing Authority**

102–73.135 When may agencies that do not possess independent leasing authority lease space?

**Categorical Space Delegations**

102–73.140 What is a categorical space delegation?
102–73.145 What is the policy for categorical space delegations?
102–73.150 What types of space can Federal agencies acquire with a categorical space delegation?

**Special Purpose Space Delegations**

102–73.155 What is an agency special purpose space delegation?
102–73.160 What is the policy for agency special purpose space delegations?
102–73.165 What types of special purpose space may the Department of Agriculture lease?
102–73.170 What types of special purpose space may the Department of Commerce lease?
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102–73.180 What types of special purpose space may the Department of Energy lease?
102–73.185 What types of special purpose space may the Federal Communications Commission lease?
102–73.190 What types of special purpose space may the Department of Health and Human Services lease?
102–73.195 What types of special purpose space may the Department of the Interior lease?
102–73.200 What types of special purpose space may the Department of Justice lease?
102–73.205 What types of special purpose space may the Office of Thrift Supervision lease?
102–73.210 What types of special purpose space may the Department of Transportation lease?
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**Limitations on the Use of Delegated Authority**

102–73.225 When must Federal agencies submit a prospectus to lease real property?
102–73.230 What is the maximum lease term that a Federal agency may agree to when it has been delegated lease acquisition authority from GSA?
102–73.235 What policy must Federal agencies follow to acquire official parking spaces?

**Subpart C—Acquisition by Purchase or Condemnation**

**Buildings**

102–73.240 When may Federal agencies consider purchase of buildings?
102–73.245 Are agencies required to adhere to the policies for locating Federal facilities when purchasing buildings?
102–73.250 What factors must executive agencies consider when purchasing sites?

**Land**

102–73.255 What land acquisition policy must Federal agencies follow?
102–73.260 What actions must Federal agencies take to facilitate land acquisition?

**Just Compensation**

102–73.265 Are Federal agencies required to provide the owner with a written statement of the amount established as just compensation?
102–73.270 What specific information must be included in the summary statement for the owner that explains the basis for just compensation?
102–73.275 Are Federal agencies required to compensate a property owner for the owner's buildings, structures, or other improvements that must be removed from the property being acquired?
102–73.280 What are Federal agencies' responsibilities to compensate a tenant for tenant-owned property when the tenant has the right or obligation to remove buildings, structures, or other improvements at the end of the term?
102–73.285 Are there any prohibitions when a Federal agency pays ''just compensation'' to a tenant?

**Expenses Incidental to Property Transfer**

102–73.290 What property transfer expenses must Federal agencies cover when acquiring real property?

**Litigation Expenses**

102–73.295 Are Federal agencies required to pay for litigation expenses incurred by a property owner because of a condemnation proceeding?

**Relocation Assistance Policy**

102–73.300 What relocation assistance policy must Federal agencies follow?

**Authority:** 40 U.S.C. 486(c); Sec. 3(c), Reorganization Plan No. 18 of 1950 (40 U.S.C. 490 note); Sec. 1'201(b), E.O. 12072, 43 FR 36869, 3 CFR, 1978 Comp., p. 213.

## Subpart A—General Provisions

### § 102–73.5 What is the scope of this part?

The real property policies contained in this part apply to Federal agencies, including the General Services Administration (GSA)/Public Buildings Service (PBS), operating under, or subject to, the authorities of the Administrator of General Services.

### § 102–73.10 What is the basic real estate acquisition policy?

When seeking to acquire space, Federal agencies should first seek space in Government-owned and Government-leased buildings. If suitable Government-controlled space is unavailable, Federal agencies must acquire real estate and related services in an efficient and cost effective manner.

### § 102–73.15 What real estate acquisition and related services must Federal agencies provide?

Federal agencies, upon approval from GSA, may provide real estate acquisition and related services, including leasing (with or without purchase options), building and/or site purchase, condemnation, and relocation assistance. For information on the design and construction of Federal facilities, see part 102–76 of this chapter.

### United States Postal Service-Controlled Space

### § 102–73.20 Are Federal agencies required to give priority consideration to space in buildings under the custody and control of the United States Postal Service in fulfilling Federal agency space needs?

Yes, after considering the availability of GSA-controlled space and determining that no such space is available to meet its needs, Federal agencies must extend priority consideration to available space in buildings under the custody and control of the United States Postal Service (USPS) in fulfilling Federal agency space needs, as specified in the ''Agreement Between General Services Administration and the United States Postal Service Covering Real and Personal Property Relationships and Associated Services,'' dated July 1985.

### Locating Federal Facilities

### § 102–73.25 What policies must executive agencies comply with in locating Federal facilities?

Executive agencies must comply with the location policies in this part and part 102–83 of this chapter.

### Historic Preservation

### § 102–73.30 What historic preservation provisions must Federal agencies comply with prior to acquiring, constructing, or leasing space?

Prior to acquiring, constructing, or leasing space, Federal agencies must comply with the provisions of section 110(a) of the National Historic Preservation Act of 1966, as amended, (16 U.S.C. 470h–2(a)), regarding the use of historic properties. Federal agencies can find guidance on protecting, enhancing and preserving historic and cultural property in part 102–78 of this chapter.

### Prospectus Requirements

### § 102–73.35 Is a prospectus required for all acquisition, construction, or alteration projects?

No, a prospectus is not required if the dollar value of a project does not exceed the prospectus threshold. The Public

Buildings Act of 1959, as amended, 40 U.S.C. 601–619, establishes a prospectus threshold, applicable to Federal agencies operating under, or subject to, the authorities of the Administrator of General Services, for the construction, alteration, purchase, and acquisition of any building to be used as a public building, and establishes a prospectus threshold to lease any space for use for public purposes. The current prospectus threshold value for each fiscal year can be found at *http://www.gsa.gov.*

**§ 102–73.40 What happens if the project exceeds the prospectus threshold?**

Such projects require approval by the Senate and the House of Representatives if the dollar value exceeds the prospectus threshold. In order to obtain this approval, prospectuses for such projects must be submitted to GSA and the Administrator of General Services will transmit the proposed prospectuses to Congress for consideration by the Senate and the House of Representatives.

## Subpart B—Acquisition by Lease

**§ 102–73.45 When may Federal agencies consider leases of privately owned land and buildings to satisfy their space needs?**

Federal agencies may consider leases of privately owned land and buildings only when needs cannot be met satisfactorily in Government-controlled space and one or more of the following conditions exist:

(a) Leasing is more advantageous to the Government than constructing a new building, or more advantageous than altering an existing Federal building;

(b) New construction or alteration is unwarranted because demand for space in the community is insufficient, or is indefinite in scope or duration; or

(c) Federal agencies cannot provide for the completion of a new building within a reasonable time.

**§ 102–73.50 Are Federal agencies that possess independent statutory authority to acquire leased space subject to requirements of this part?**

No, Federal agencies possessing independent statutory authority to acquire leased space are not subject to GSA authority and, therefore, are not subject to the requirements of this part.

**§ 102–73.55 On what basis must Federal agencies acquire leases?**

Federal agencies must acquire leases on the most favorable basis to the Federal Government, with due consideration to maintenance and operational efficiency, and at charges consistent with prevailing market rates for comparable facilities in the community.

**§ 102–73.60 With whom may Federal agencies enter into lease agreements?**

Federal agencies, upon approval from GSA, may enter into lease agreements with any person, partnership, corporation, or other public or private entity, provided that such lease agreements do not bind the Government for periods in excess of twenty years (40 U.S.C. 490(h)(1)). Federal agencies may not enter into lease agreements with persons who are barred from contracting with the Federal Government (*e.g.*, Members of Congress or debarred or suspended contractors).

**§ 102–73.65 Are there any limitations on leasing certain types of space?**

Yes, the limitations on leasing certain types of space are as follows:

(a) In general, Federal agencies may not lease any space to accommodate computer and telecommunications operations; secure or sensitive activities related to the national defense or security; or a permanent courtroom, judicial chamber, or administrative office for any United States court, if the average annual net rental cost of leasing such space would exceed the prospectus threshold (40 U.S.C. 606(e)).

(b) However, Federal agencies may lease such space if the Administrator of General Services first determines that leasing such space is necessary to meet requirements which cannot be met in public buildings and then submits such determination to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives in accordance with 40 U.S.C. 606(e).

**§ 102–73.70 Are executive agencies required to acquire leased space by negotiation?**

Yes, executive agencies must acquire leased space by negotiation, except where the sealed bid procedure is required by the Competition in Contracting Act of 1984 (CICA), as amended (41 U.S.C. 253(a)).

**§ 102–73.75 What functions must Federal agencies perform with regard to leasing building space?**

Federal agencies, upon approval from GSA, must perform all functions of leasing building space, and land incidental thereto, for their use except as provided in this subpart.

**§ 102–73.80 Who is authorized to contact lessors, offerors, or potential offerors concerning space leased or to be leased?**

No one, except the Contracting Officer or his or her designee, may contact lessors, offerors, or potential offerors concerning space leased or to be leased for the purpose of making oral or written representation or commitments or agreements with respect to the terms of occupancy of particular space, tenant improvements, alterations and repairs, or payment for overtime services.

**§ 102–73.85 Can agencies with independent statutory authority to lease space have GSA perform the leasing functions?**

Yes, upon request, GSA may perform, on a reimbursable basis, all functions of leasing building space, and land incidental thereto, for Federal agencies possessing independent statutory authority to lease space. However, GSA reserves the right to accept or reject reimbursable leasing service requests on a case-by-case basis.

**§ 102–73.90 What contingent fee policy must Federal agencies apply to the acquisition of real property by lease?**

Federal agencies must apply the contingent fee policies in 48 CFR 3.4 to all negotiated and sealed bid contracts for the acquisition of real property by lease. Federal agencies must appropriately adapt the representations and covenants required by that subpart for use in leases of real property for Government use.

**§ 102–73.95 How are Federal agencies required to assist GSA?**

The heads of Federal agencies must:

(a) Cooperate with and assist the Administrator of General Services in carrying out his responsibilities respecting office buildings and space;

(b) Take measures to give GSA early notice of new or changing space requirements;

(c) Seek to economize their requirements for space; and

(d) Continuously review their needs for space in and near the District of Columbia, taking into account the feasibility of decentralizing services or activities which can be carried on elsewhere without excessive costs or significant loss of efficiency.

## Competition in Contracting Act of 1984

**§ 102–73.100 Is the Competition in Contracting Act of 1984 (CICA) applicable to lease acquisition?**

Yes, executive agencies must obtain full and open competition among suitable locations meeting minimum Government requirements, except as otherwise provided by CICA (41 U.S.C. 253).

## Lease Construction

### § 102–73.105 What rules must executive agencies follow when acquiring leasehold interests in buildings constructed for Federal Government use?

When acquiring leasehold interests in buildings to be constructed for Federal Government use, executive agencies must:

(a) Establish detailed building specifications before agreeing to a contract that will result in the construction of a building;

(b) Use competitive procedures;

(c) Inspect every building during construction to ensure that the building complies with the Government's specifications;

(d) Evaluate every building after completion of construction to determine that the building complies with the Government's specifications; and

(e) Ensure that any contract that will result in the construction of a building contains provisions permitting the Government to reduce the rent during any period when the building does not comply with the Government's specifications.

## Price Preference for Historic Properties

### § 102–73.110 Must Federal agencies offer a price preference to space in historic properties when acquiring leased space?

Yes, Federal agencies must give a price preference to space in historic properties when acquiring leased space using either the lowest price technically acceptable or the best value tradeoff source selection processes.

### § 102–73.115 How much of a price preference must Federal agencies give when acquiring leased space using the lowest price technically acceptable source selection process?

Federal agencies must give a price evaluation preference to space in historic properties as follows:

(a) First to suitable historic properties within historic districts, a 10 percent price preference.

(b) If no suitable historic property within an historic district is offered, or the 10 percent preference does not result in such property being the lowest price technically acceptable offer, the Government will give a 2.5 percent price preference to suitable non-historic developed or undeveloped sites within historic districts.

(c) If no suitable non-historic developed or undeveloped site within an historic district is offered, or the 2.5 percent preference does not result in such property being the lowest price technically acceptable offer, the Government will give a 10 percent price preference to suitable historic properties outside of historic districts.

(d) Finally, if no suitable historic property outside of historic districts is offered, no historic price preference will be given to any property offered.

### § 102–73.120 How much of a price preference must Federal agencies give when acquiring leased space using the best value tradeoff source selection process?

When award will be based on the best value tradeoff source selection process, which permits tradeoffs among price and non-price factors, the Government will give a price evaluation preference to historic properties as follows:

(a) First to suitable historic properties within historic districts, a 10 percent price preference.

(b) If no suitable historic property within an historic district is offered or remains in the competition, the Government will give a 2.5 percent price preference to suitable non-historic developed or undeveloped sites within historic districts.

(c) If no suitable non-historic developed or undeveloped site within an historic district is offered or remains in the competition, the Government will give a 10 percent price preference to suitable historic properties outside of historic districts.

(d) Finally, if no suitable historic property outside of historic districts is offered, no historic price preference will be given to any property offered.

## Leases With Purchase Options

### § 102–73.125 When may Federal agencies consider acquiring leases with purchase options?

Agencies may consider leasing with a purchase option at or below fair market value, consistent with the lease-purchase scoring rules, when one or more of the following conditions exist:

(a) The purchase option offers economic and other advantages to the Government and is consistent with the Government's goals;

(b) The Government is the sole or major tenant of the building, and has a long-term need for the property; or

(c) Leasing with a purchase option is otherwise in the best interest of the Government.

## Scoring Rules

### § 102–73.130 What scoring rules must Federal agencies follow when considering leases and leases with purchase options?

All Federal agencies must follow the budget scorekeeping rules for leases, capital leases, and lease-purchases identified in appendices A and B of OMB Circular A–11. (For availability, *see* 5 CFR 1310.3.)

## Delegations of Leasing Authority

### § 102–73.135 When may agencies that do not possess independent leasing authority lease space?

Federal agencies may perform for themselves all functions necessary to acquire leased space in buildings and land incidental thereto when:

(a) The authority may be delegated (see § 102–72.30(b) on the different types of delegations related to real estate leasing);

(b) The space may be leased for no rental, or for a nominal consideration of $1 per annum, and is limited to terms not to exceed 1 year;

(c) Authority has been requested by an executive agency and a specific delegation has been granted by the Administrator of General Services;

(d) A categorical delegation has been granted by the Administrator of General Services for space to accommodate particular types of agency activities, such as military recruiting offices or space for certain county level agricultural activities. A listing of categorical delegations is found at § 102–73.150; or

(e) The required space is found by the Administrator of General Services to be wholly or predominantly utilized for the special purposes of the agency to occupy such space and is not generally suitable for use by other agencies. Federal agencies must obtain prior approval from the GSA regional office having jurisdiction for the proposed leasing action, before initiating a leasing action involving 2,500 or more square feet of such special purpose space. GSA's approval must be based upon a finding that there is no vacant Government-owned or leased space available that will meet the agency's requirements. Agency special purpose space delegations can be found in §§ 102–73.165 through 102–73.220.

## Categorical Space Delegations

### § 102–73.140 What is a categorical space delegation?

A categorical space delegation is a standing delegation of authority from the Administrator of General Services to a Federal agency to acquire a type of space identified in § 102–73.150 subject to limitations in this part.

### § 102–73.145 What is the policy for categorical space delegations?

Subject to the limitations cited in §§ 102–73.225 through 102–73.235, all Federal agencies are authorized to acquire the types of space listed in § 102–73.150 and, except where otherwise noted, may lease space for

terms, including all options, of up to 20 years.

**§ 102–73.150 What types of space can Federal agencies acquire with a categorical space delegation?**

Federal agencies can use categorical space delegations to acquire:

(a) Space to house antennas, repeaters, or transmission equipment;

(b) Depots, including, but not limited to, stockpiling depots and torpedo net depots;

(c) Docks, piers, and mooring facilities (including closed storage space required in combination with such facilities);

(d) Fumigation areas;

(e) Garage space (may be leased only on a fiscal year basis);

(f) Greenhouses;

(g) Hangars and other airport operating facilities including, but not limited to, flight preparation space, aircraft storage areas, and repair shops;

(h) Hospitals, including medical clinics;

(i) Housing (temporary), including hotels (does not include quarters obtained pursuant to temporary duty travel or employee relocation);

(j) Laundries;

(k) Quarantine facilities for plants, birds, and other animals;

(l) Ranger stations; *i.e.*, facilities which typically include small offices staffed by one or more uniformed employees, and may include sleeping/family quarters, parking areas, garages, and storage space. Office space within ranger stations is minimal and does not comprise a majority of the space. (May also be referred to as guard stations, information centers, or kiosks);

(m) Recruiting space for the armed forces (lease terms, including all options, limited to 5 years);

(n) Schools directly related to the special purpose function(s) of an agency;

(o) Specialized storage/depot facilities, such as cold storage; self-storage units; and lumber, oil, gasoline, shipbuilding materials, and pesticide materials/equipment storage (general purpose warehouse type storage facilities not included); and

(p) Space for short-term use (such as conferences and meetings, judicial proceedings, and emergency situations).

## Special Purpose Space Delegations

**§ 102–73.155 What is an agency special purpose space delegation?**

An agency special purpose space delegation is a standing delegation of authority from the Administrator of General Services to specific Federal agencies to lease their own special purpose space (identified in §§ 102–73.165 through 102–73.220), subject to limitations in this part.

**§ 102–73.160 What is the policy for agency special purpose space delegations?**

Subject to the limitations on annual rental amounts, lease terms, and leases on parking spaces cited in §§ 102–73.225 through 102–73.235, the agencies listed below are authorized to acquire special purpose space associated with that agency and, except where otherwise noted, may lease such space for terms, including all options, of up to 20 years. The agencies and types of space subject to special purpose space delegations are specified in §§ 102–73.165 through 102–73.220.

**§ 102–73.165 What types of special purpose space may the Department of Agriculture lease?**

The Department of Agriculture is delegated the authority to lease the following types of space:

(a) Cotton classing laboratories (lease terms, including all options, limited to 5 years);

(b) Land (if unimproved, may be leased only on a fiscal year basis);

(c) Miscellaneous storage by cubic foot or weight basis;

(d) Office space when required to be located in or adjacent to stockyards, produce markets, produce terminals, airports, and other ports (lease terms, including all options, limited to 5 years);

(e) Space for agricultural commodities stored in licensed warehouses and utilized under warehouse contracts; and

(f) Space utilized in cooperation with State and local governments or their instrumentalities (extension services) where the cooperating State or local government occupies a portion of the space and pays a portion of the rent.

**§ 102–73.170 What types of special purpose space may the Department of Commerce lease?**

The Department of Commerce is delegated authority to lease the following types of space:

(a) Space required by the Census Bureau in connection with conducting the decennial census (lease terms, including all options, limited to 5 years);

(b) Laboratories for testing materials, classified or ordnance devices, calibration of instruments, and atmospheric and oceanic research (lease terms, including all options, limited to 5 years);

(c) Maritime training stations;

(d) Radio stations;

(e) Land (if unimproved, may be leased only on a fiscal year basis); and

(f) National Weather Service meteorological facilities.

**§ 102–73.175 What types of special purpose space may the Department of Defense lease?**

The Department of Defense is delegated authority to lease the following types of space:

(a) Air Force—Civil Air Patrol Liaison Offices and land incidental thereto when required for use incidental to, in conjunction with, and in close proximity to airports, including aircraft and warning stations (if unimproved, land may be leased only on a fiscal year basis; for space, lease terms, including all options, limited to 5 years);

(b) Armories;

(c) Film library in the vicinity of Washington, DC;

(d) Mess halls;

(e) Ports of embarkation and debarkation;

(f) Post exchanges;

(g) Postal Concentration Center, Long Island City, NY;

(h) Recreation centers;

(i) Reserve training space;

(j) Service clubs; and

(k) Testing laboratories (lease terms, including all options, limited to 5 years).

**§ 102–73.180 What types of special purpose space may the Department of Energy lease?**

The Department of Energy is delegated authority to lease facilities housing the special purpose or special location activities of the old Atomic Energy Commission.

**§ 102–73.185 What types of special purpose space may the Federal Communications Commission lease?**

The Federal Communications Commission is delegated authority to lease monitoring station sites.

**§ 102–73.190 What types of special purpose space may the Department of Health and Human Services lease?**

The Department of Health and Human Services is delegated authority to lease laboratories (lease terms, including all options, limited to 5 years).

**§ 102–73.195 What types of special purpose space may the Department of the Interior lease?**

The Department of the Interior is delegated authority to lease the following types of space:

(a) Space in buildings and land incidental thereto used by field crews of the Bureau of Reclamation, Bureau of Land Management, and the Geological Survey in areas where no other Government agencies are quartered (unimproved land may be leased only on a fiscal year basis); and

(b) National Parks/Monuments Visitors Centers consisting primarily of

special purpose space (*e.g.*, visitor reception, information, and rest room facilities) and not general office or administrative space.

**§ 102–73.200 What types of special purpose space may the Department of Justice lease?**

The Department of the Justice is delegated authority to lease the following types of space:

(a) U.S. marshals office in any Alaska location (lease terms, including all options, limited to 5 years);

(b) Border Patrol Offices similar in character and utilization to police stations, involving the handling of prisoners, firearms, and motor vehicles, regardless of location (lease terms, including all options limited to 5 years);

(c) Space used for storage and maintenance of surveillance vehicles and seized property (lease terms, including all options, limited to 5 years);

(d) Space used for review and custody of records and other evidentiary materials (lease terms, including all options, limited to 5 years); and

(e) Space used for trial preparation where space is not available in Federal buildings, Federal courthouses, USPS facilities, or GSA-leased buildings (lease terms limited to not more than 1 year.)

**§ 102–73.205 What types of special purpose space may the Office of Thrift Supervision lease?**

The Office of Thrift Supervision is delegated authority to lease space for field offices of Examining Divisions required to be located within Office of Thrift Supervision buildings or immediately adjoining or adjacent to such buildings (lease terms, including all options, limited to 5 years).

**§ 102–73.210 What types of special purpose space may the Department of Transportation lease?**

The Department of Transportation is delegated authority to lease the following types of space (or real property):

(a) Land for the Federal Aviation Administration (FAA) at airports (unimproved land may be leased only on a fiscal year basis);

(b) General purpose office space not exceeding 10,000 square feet for the FAA at airports in buildings under the jurisdiction of public or private airport authorities (lease terms, including all options, limited to 5 years);

(c) Space for the U.S. Coast Guard oceanic unit, Woods Hole, MA; and

(d) Space for the U.S. Coast Guard port security activities.

**§ 102–73.215 What types of special purpose space may the Department of Treasury lease?**

The Department of Treasury is delegated authority to lease the following types of space:

(a) Space and land incidental thereto for the use of the Comptroller of the Currency, as well as the operation, maintenance and custody thereof (if unimproved, land may be leased only on a fiscal year basis; lease term for space, including all options, limited to 5 years); and

(b) Aerostat radar facilities necessary for U.S. Custom Service mission activities.

**§ 102–73.220 What types of special purpose space may the Department of Veterans Affairs lease?**

The Department of Veterans Affairs is delegated authority to lease the following types of space:

(a) Guidance and training centers located at schools and colleges; and

(b) Space used for veterans hospitals, including outpatient and medical-related clinics, such as drug, mental health, and alcohol.

### Limitations on the Use of Delegated Authority

**§ 102–73.225 When must Federal agencies submit a prospectus to lease real property?**

In accordance with section 7(a) of the Public Buildings Act of 1959, as amended (40 U.S.C. 606), Federal agencies must submit a prospectus to the Administrator of General Services for leases involving a net annual rental, excluding services and utilities, in excess of the prospectus threshold provided in 40 U.S.C. 606. Agencies must be aware that prospectus thresholds are indexed and change each year.

**§ 102–73.230 What is the maximum lease term that a Federal agency may agree to when it has been delegated lease acquisition authority from GSA?**

Pursuant to GSA's long-term authority contained in section 210(h)(1) of the Federal Property and Administrative Services Act of 1949, as amended, (40 U.S.C. 490(h)(1)), agencies delegated the authorities outlined herein may enter into leases for the term specified in the delegation. In those cases where agency special purposes space delegations include the authority to acquire unimproved land, the land may be leased only on a fiscal year basis.

**§ 102–73.235 What policy must Federal agencies follow to acquire official parking spaces?**

Federal agencies that need parking must utilize available Government-owned or leased facilities. Federal agencies must make inquiries regarding availability of such Government-controlled space to GSA regional offices and document such inquiries. If no suitable Government-controlled facilities are available, an agency may use its own procurement authority to acquire parking by service contract.

## Subpart C—Acquisition by Purchase or Condemnation

### Buildings

**§ 102–73.240 When may Federal agencies consider purchase of buildings?**

Agencies may consider purchase of buildings on a case-by-case basis when one or more of the following conditions exist:

(a) It is economically more beneficial to own and manage the property;

(b) There is a long-term need for the property;

(c) The property is an existing building, or a building nearing completion, that can be purchased and occupied within a reasonable time; or

(d) When otherwise in the best interests of the Government.

**§ 102–73.245 Are agencies required to adhere to the policies for locating Federal facilities when purchasing buildings?**

Yes, when purchasing buildings, agencies must comply with the location policies in this part and part 102–83 of this chapter.

**§ 102–73.250 What factors must executive agencies consider when purchasing sites?**

Agencies must locate proposed Federal buildings on sites that are most advantageous to the United States. Executive agencies must consider factors such as whether the site will contribute to economy and efficiency in the construction, maintenance, and operation of the individual building, and how the proposed site relates to the Government's total space needs in the community. Prior to acquiring, constructing, or leasing buildings (or sites for such buildings), Federal agencies must use, to the maximum extent feasible, historic properties available to the agency. In site selections, executive agencies must consider Executive Orders 12072 (3 CFR, 1978 Comp., p. 213) and 13006 (40 U.S.C. 601a note). In addition, executive agencies must consider all of the following:

(a) Maximum utilization of Government-owned land (including excess land) whenever it is adequate, economically adaptable to requirements and properly located, where such use is consistent with the provisions of part 102–75, subpart B, of this chapter.

(b) A site adjacent to or in the proximity of an existing Federal building which is well located and is to be retained for long-term occupancy.

(c) The environmental condition of proposed sites prior to purchase. The sites must be free from contamination, unless it is otherwise determined to be in the best interests of the Government to purchase a contaminated site (*e.g.*, reuse of a site under an established ''Brownfields'' program).

(d) Purchase options to secure the future availability of a site.

(e) All applicable location policies in this part and part 102–83 of this chapter.

## Land

### § 102–73.255 What land acquisition policy must Federal agencies follow?

Federal agencies must follow the land acquisition policy in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. 4651–4655, that:

(a) Encourages and expedites the acquisition of real property by agreements with owners;

(b) Avoids litigation, including condemnation actions, where possible and relieves congestion in the courts;

(c) Provides for consistent treatment of owners; and

(d) Promotes public confidence in Federal land acquisition practices.

### § 102–73.260 What actions must Federal agencies take to facilitate land acquisition?

To facilitate land acquisition, Federal agencies must:

(a) Obtain one appraisal on each parcel, tract, or other real property;

(b) Pay a property owner (or occupant) or deposit payment in the registry of the court before requiring the owner to surrender the property;

(c) Provide property owners (and occupants) at least 90-days notice of displacement before requiring anyone to move. If a Federal agency permits the owner to keep possession for a short time after acquiring the owner's property, Federal agencies must not charge rent in excess of the property's fair rental value to a short-term occupier;

(d) Try to negotiate with owners on the price;

(e) Appraise the real property before starting negotiations and give the owner (or the owner's representative) the opportunity to accompany the appraiser during the inspection; and

(f) Establish an amount estimated to be the just compensation before starting negotiations and promptly offer to acquire the property for this full amount.

## Just Compensation

### § 102–73.265 Are Federal agencies required to provide the owner with a written statement of the amount established as just compensation?

Yes, Federal agencies must provide the owner with a written statement of this amount and summarize the basis for it. When it's appropriate, Federal agencies must separately state the just compensation for the property to be acquired and damages to the remaining real property.

### § 102–73.270 What specific information must be included in the summary statement for the owner that explains the basis for just compensation?

The summary statement must:

(a) Identify the real property and the estate or interest the Federal agency is acquiring;

(b) Identify the buildings, structures, and other improvements the Federal agency considers part of the real property for which just compensation is being offered;

(c) State that the Federal agency based the estimate of just compensation on the Government's estimate of the property's fair market value. If only part of a property or less than a full interest is being acquired, Federal agencies must explain how they determined the just compensation for it; and

(d) State that the Government's estimate of just compensation is at least as much as the property's approved appraisal value.

### § 102–73.275 Are Federal agencies required to compensate a property owner for the owner's buildings, structures, or other improvements that must be removed from the property being acquired?

Yes, Federal agencies must acquire at least an equal interest in all buildings, structures, or other improvements on the real property they are acquiring, including those that the Government require to be removed or those that will interfere with the proposed use of the property.

### § 102–73.280 What are Federal agencies' responsibilities to compensate a tenant for tenant-owned property when the tenant has the right or obligation to remove buildings, structures, or other improvements at the end of the term?

If a tenant has the right or obligation to remove these buildings, structures, or other improvements at the end of his term, Federal agencies must determine the total just compensation for the property and pay the tenant the greater of two values:

(a) The fair market value of buildings, structures, or other improvements the tenant must remove.

(b) The contributive fair market value of the tenant's improvements to the entire property's fair market value. This value will be at least as much as the value of items the tenant must remove.

### § 102–73.285 Are there any prohibitions when a Federal agency pays ''just compensation'' to a tenant?

Yes, Federal agencies must not:

(a) Duplicate any payment to the tenant otherwise authorized by law; and

(b) Pay a tenant unless the landowner disclaims all interests in the tenant's improvements. In consideration for any such payment, the tenant must assign, transfer, and release to the Federal agency all of its right, title, and interest in the improvements. The tenant may reject such payment under this subpart and obtain payment for its property interests according to other sections of applicable law.

## Expenses Incidental to Property Transfer

### § 102–73.290 What property transfer expenses must Federal agencies cover when acquiring real property?

Federal agencies must:

(a) Reimburse property owners for all reasonable expenses actually incurred for recording fees, transfer taxes, documentary stamps, evidence of title, boundary surveys, legal descriptions of the real property, and similar expenses needed to convey the property to the Federal Government;

(b) Reimburse property owners for all reasonable expenses actually incurred for penalty costs and other charges to prepay any existing, recorded mortgage that a property owner entered into in good faith and that encumbers the real property;

(c) Reimburse property owners for all reasonable expenses actually incurred for the prorated part of any prepaid real property taxes that cover the period after the Federal Government gets title to the property or effective possession of it, whichever is earlier; and

(d) Whenever possible, directly pay the costs identified in this section, so property owners will not have to pay them and then seek reimbursement from the Government.

## Litigation Expenses

### § 102–73.295 Are Federal agencies required to pay for litigation expenses incurred by a property owner because of a condemnation proceeding?

Federal agencies must pay reasonable expenses for attorneys, appraisals, and engineering fees that a property owner incurs because of a condemnation proceeding, if any of the following are true:

(a) The court's final judgment is that the Federal agency cannot acquire the real property by condemnation.

(b) The Federal agency abandons the condemnation proceeding other than under an agreed-on settlement.

(c) The court renders a judgment in the property owner's favor in an inverse condemnation proceeding or the Federal agency agrees to settle such proceeding.

### Relocation Assistance Policy

#### § 102–73.300 What relocation assistance policy must Federal agencies follow?

Federal agencies, upon approval from GSA, must provide appropriate relocation assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. 4651–4655) to eligible owners and tenants of property purchased for use by Federal agencies in accordance with the implementing regulations found in 49 CFR part 24 . Appropriate relocation assistance means that the Federal agency must pay the displaced person for actual:

(a) Reasonable moving expenses (in moving himself, his family, and business);

(b) Direct losses of tangible personal property as a result of moving or discontinuing a business;

(c) Reasonable expenses in searching for a replacement business or farm; and

(d) Reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, but not to exceed $10,000.

9. Part 102–74 is revised to read as follows:

## PART 102–74—FACILITY MANAGEMENT

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102–74.10 What is the basic facility management policy?

### Subpart B—Facility Management

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102–74.25 What responsibilities do executive agencies have regarding occupancy services?
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Appendix to Part 102–74—Rules and Regulations Governing Conduct on Federal Property

**Authority:** 40 U.S.C. 486(c); E.O. 12191, 45 FR 7997, 3 CFR, 1980 Comp., p 138.

## Subpart A—General Provisions

### § 102–74.5 What is the scope of this part?

The real property policies contained in this part apply to Federal agencies, including the GSA/Public Buildings Service (PBS), operating under, or subject to, the authorities of the Administrator of General Services.

### § 102–74.10 What is the basic facility management policy?

Executive agencies must manage, operate and maintain Government-owned and leased buildings in a manner that provides for quality space and services consistent with their operational needs and accomplishes overall Government objectives. The management, operation and maintenance of buildings and building systems must:

(a) Be cost effective and energy efficient;

(b) Be adequate to meet the agencies' missions;

(c) Meet nationally recognized standards; and

(d) Be at an appropriate level to maintain and preserve the physical plant assets, consistent with available funding.

## Subpart B—Facility Management

### § 102–74.15 What are the facility management responsibilities of occupant agencies?

Occupants of facilities under the custody and control of Federal agencies must:

(a) Cooperate to the fullest extent with all pertinent facility procedures and regulations;

(b) Promptly report all crimes and suspicious circumstances occurring on federally controlled property first to the regional law enforcement organization and other designated law enforcement agencies, and then through internal agency channels;

(c) Provide training to employees regarding protection and responses to emergency situations; and

(d) Make recommendations for improving the effectiveness of protection in Federal facilities.

### Occupancy Services

### § 102–74.20 What are occupancy services?

Occupancy services are:

(a) Building services (see § 102–74.35);

(b) Concession services; and

(c) Conservation programs.

### § 102–74.25 What responsibilities do executive agencies have regarding occupancy services?

Executive agencies, upon approval from GSA, must manage, administer and enforce the requirements of agreements (such as Memoranda of Understanding) and contracts that provide for the delivery of occupancy services.

### § 102–74.30 What standard in providing occupancy services must executive agencies follow?

Executive agencies must provide occupancy services that substantially conform to nationally recognized standards. As needed, executive agencies may adopt other standards for buildings and services in federally-controlled facilities to conform to statutory requirements and to implement cost-reduction efforts.

### § 102–74.35 What building services must executive agencies provide?

Executive agencies, upon approval from GSA, must provide:

(a) Building services such as custodial, solid waste management (including recycling), heating and cooling, landscaping and grounds maintenance, tenant alterations, minor repairs, building maintenance, integrated pest management, signage, parking, and snow removal, at appropriate levels to support Federal agency missions; and

(b) Arrangements for raising and lowering the United States flags at appropriate times. In addition, agencies must display P.O.W. and M.I.A. flags at locations specified in 36 U.S.C. 902 on P.O.W./M.I.A. flag display days.

### Concession Services

### § 102–74.40 What are concession services?

Concession services are any food or snack services provided by a Randolph-Sheppard Act vendor, commercial contractor or nonprofit organization (see definition in § 102–71.20 of this chapter), in vending facilities such as:

(a) Vending machines;

(b) Sundry facilities;

(c) Prepackaged facilities;

(d) Snack bars; and

(e) Cafeterias.

### § 102–74.45 When must Federal agencies provide concession services?

Federal agencies, upon approval from GSA, must provide concession services where building population supports such services and when the availability of existing commercial services is insufficient to meet Federal agency needs. Prior to establishing concessions, Federal agencies must ensure that:

(a) The proposed concession will be established and operated in conformance with applicable policies, safety, health and sanitation codes, laws, regulations, *etc.,* and will not contravene the terms of any lease or other contractual arrangement;

(b) Sufficient funds are legally available to cover all costs for which the Government may be responsible; and

(c) All contracts will be financially self-supporting and not compete with nearby commercial enterprise.

### § 102–74.50 May Federal agencies sell tobacco products in vending machines in Government-owned and leased space?

No, Public Law 104–52, Section 636, prohibits the sale of tobacco products in vending machines in Government-owned and leased space. The Administrator of GSA or the head of an Agency may designate areas not subject to the prohibition, if minors are prohibited and reports are made to the appropriate committees of Congress.

### § 102–74.55 Are commercial vendors and nonprofit organizations required to operate vending facilities by permit or contractual arrangement?

Commercial vendors and nonprofit organizations must operate vending facilities, including cafeterias, under a contractual arrangement with Federal agencies.

### § 102–74.60 Are Federal agencies required to give blind vendors priority in operating vending facilities?

With certain exceptions, the Randolph-Sheppard Act (20 U.S.C. 107 *et seq.*) requires that blind persons licensed by a State licensing agency under the provisions of the Randolph-

Sheppard Act be authorized to operate vending facilities on any Federal property, including leased buildings. The Randolph-Sheppard Act imposes an obligation on Federal agencies to give priority to Randolph-Sheppard Act vendors for vending facilities in buildings that they operate.

**§ 102–74.65 Are Randolph-Sheppard Act vendors required to operate vending facilities by permit or contractual agreement?**

Except for cafeterias, Randolph-Sheppard Act vendors must obtain a permit from a Federal agency prior to operating vending facilities. Randolph-Sheppard Act vendors operating a cafeteria must have a contractual agreement with a Federal agency.

**§ 102–74.70 What information must be in a permit for a vending facility?**

In every permit for a vending facility, Federal agencies must describe the vending facility location and indicate:

(a) The name of the applicant State licensing agency;

(b) That the permit is issued for an indefinite period of time subject to suspension or termination on the basis of non-compliance with agreed upon terms;

(c) That the Government will not charge the State licensing agency for normal cleaning, maintenance and repair of the building structure in and immediately adjacent to the vending facility areas;

(d) That the State licensing agency is responsible for the costs associated with properly installing, cleaning, replacing, repairing, maintaining, and removing vending facilities and vending facility equipment;

(e) That blind licensees may sell newspapers, periodicals, publications, confections, tobacco products, foods, beverages, chances for any lottery authorized by State law and conducted by an agency of a State within such State, and other articles or services that the State licensing agency and the Government determine to be suitable for a particular location;

(f) That the blind licensee's articles and services may be dispensed automatically or manually and may be prepared on or off the premises;

(g) That the blind licensee is prohibited from selling tobacco products in vending machines in Government-owned and leased space, unless the Administer of General Services designates areas not subject to the prohibition;

(h) That vending facilities must be operated in compliance with applicable health, sanitation and building codes or ordinances;

(i) That the vendor must not install, modify, relocate, remove, or renovate vending facilities without the prior written approval and supervision of the Federal agency buildings manager and the State licensing agency;

(j) That the State licensing agency must pay for relocations that it initiates;

(k) That the Federal agency must pay for relocations that it initiates; and

(l) That the Federal agency must pay for all plumbing, electrical and mechanical costs related to the renovation of existing facilities.

**§ 102–74.75 What responsibilities do State licensing agencies have in implementing the vending facility program for blind persons?**

State licensing agencies must:

(a) Prescribe necessary procedures so that when they select vendors and employees for vending facilities no discrimination occurs because of sex, race, age, creed, color, national origin, physical or mental disability, or political affiliation;

(b) Take the necessary action to assure that vendors do not discriminate against any persons in furnishing, or refusing to furnish, to such person or persons the use of any vending facility, including any and all services, privileges, accommodations, and activities provided thereby; and

(c) Take the necessary action to assure that vendors comply with Title VI of the Civil Rights Act of 1964 and the GSA regulations issued pursuant thereto.

**§ 102–74.80 Who has the initial responsibility for resolving vendor performance issues?**

The State licensing agency must attempt to resolve day-to-day problems pertaining to the operation of the vending facility in an informal manner with the participation of the blind vendor and the Federal agency building's manager.

**§ 102–74.85 What action must Federal agencies take if the State licensing agency is unable to informally resolve vendor performance issues?**

Federal agencies must report in writing any unresolved vendor issues concerning the terms of the permit, the Randolph-Sheppard Act, or the regulations in this part to the State licensing agency supervisory personnel, so that the issues may be formally addressed and resolved.

**§ 102–74.90 What information must Federal agencies report to the Secretary of Education concerning the vending facility program for blind persons?**

Federal agencies, upon approval from GSA, must report to the Secretary of Education at the end of each fiscal year:

(a) The total number of applications for vending facility locations received from State licensing agencies;

(b) The number of applications approved;

(c) The number of applications denied;

(d) The number of applications still pending;

(e) The total amount of vending machine income collected; and

(f) The amount of such vending machine income disbursed to the State licensing agency in each State.

**§ 102–74.95 Are Randolph-Sheppard Act vendors operating cafeterias required to meet the same contract performance requirements as commercial or nonprofit cafeteria operators?**

Yes, Randolph-Sheppard Act vendors must meet the same contract performance requirements as commercial or nonprofit cafeteria operators.

## Conservation Programs

**§ 102–74.100 What are conservation programs?**

Conservation programs are programs that improve energy and water efficiency and promote the use of solar and other renewable energy. These programs must promote and maintain an effective source reduction activity (reducing consumption of resources such as energy, water, and paper), resource recovery activity (obtaining materials from the waste stream that can be recycled into new products), and reuse activity (reusing same product before disposition, such as reusing unneeded memos for scratch paper).

## Asset Services

**§ 102–74.105 What are asset services?**

Asset services include repairs (other than those minor repairs identified in § 102–74.35(a)), alterations and modernizations for real property assets. Typically, these are the type of repairs and alterations necessary to preserve or enhance the value of the real property asset.

**§ 102–74.110 What asset services must executive agencies provide?**

Executive agencies, upon approval from GSA, must provide asset services such as repairs (in addition to those minor repairs identified in § 102–74.35(a)), alterations, and modernizations for real property assets. For repairs and alterations projects for which the estimated cost exceeds the prospectus threshold, Federal agencies must follow the prospectus submission and approval policy identified in this part and part 102–73 of this chapter.

**§ 102–74.115 What standard in providing asset services must executive agencies follow?**

Executive agencies must provide asset services that maintain continuity of Government operations, continue efficient building operations, extend the useful life of buildings and related building systems, and provide a quality workplace environment that enhances employee productivity.

**§ 102–74.120 Is a prospectus required to be submitted before emergency alterations can be performed?**

No, a prospectus is not required to be submitted before emergency alterations can be performed. Federal agencies must immediately alter a building if the alteration protects people, buildings, or equipment; saves lives; and/or avoids further property damage. Federal agencies can take these actions in an emergency before GSA submits a prospectus on the alterations to the Committees for Public Works. GSA must submit a prospectus as soon as possible after the emergency.

**§ 102–74.125 Are prospectuses required for reimbursable alteration projects?**

A project which is to be financed in whole or in part from funds appropriated to the requesting agency may be performed without a prospectus if:

(a) Payment is made from agency appropriations that are not subject to Section 7 of the Public Buildings Act of 1959 (40 U.S.C. 606); and

(b) GSA's portion of the cost, if any, does not exceed the prospectus threshold.

**§ 102–74.130 When a prospectus is required, can GSA prepare a prospectus for a reimbursable alteration project?**

Yes, if requested by a Federal agency, GSA will prepare a prospectus for a reimbursable alteration project.

**§ 102–74.135 Who selects construction and alteration projects that are to be performed?**

The Administrator of General Services selects construction and alteration projects to be performed.

**§ 102–74.140 On what basis does the Administrator select construction and alteration projects?**

The Administrator selects projects based on a continuing investigation and survey of the public building needs of the Federal Government. These projects must be equitably distributed throughout the United States, with due consideration given to each project's comparative urgency.

**§ 102–74.145 What information must a Federal agency submit to GSA after the agency has identified a need for construction or alteration of a public building?**

Federal agencies identifying a need for construction or alteration of a public building must provide information, such as a description of the work, location, estimated maximum cost, and justification to the Administrator of General Services.

**§ 102–74.150 Who submits prospectuses for the construction or alteration of public buildings to the congressional committees?**

The Administrator of General Services must submit prospectuses for public building construction or alteration projects to the congressional committees for public buildings oversight for approval.

## Energy Conservation

**§ 102–74.155 What energy conservation policy must Federal agencies follow in the management of facilities?**

Federal agencies must:

(a) Comply with the energy conservation guidelines in 10 CFR part 436 (Federal Energy Management and Planning Programs); and

(b) Observe the energy conservation policies cited in this part.

**§ 102–74.160 What actions must Federal agencies take to promote energy conservation?**

Federal agencies must ensure that:

(a) Lights and equipment are turned off when not needed;

(b) Ventilation is not blocked or impeded; and

(c) Windows and other building accesses are closed during the heating and cooling seasons.

**§ 102–74.165 What energy standards must Federal agencies follow for existing facilities?**

Federal agencies must ensure that existing Federal facilities meet the energy standards prescribed by the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North American in ASHRAE/IES Standard 90A–1980, as amended by the Department of Energy. Federal agencies must apply these energy standards where they can be achieved through life cycle, cost effective actions.

**§ 102–74.170 May exceptions to the energy conservation policies in this subpart be granted?**

Yes, the Federal agency buildings manager may grant exceptions to the foregoing policies in this subpart to enable agencies to accomplish their missions more effectively and efficiently.

**§ 102–74.175 Are Government-leased buildings required to conform with the policies in this subpart?**

Yes, Federal agencies must ensure that all new lease contracts are in conformance with the policies prescribed in this subpart. Federal agencies must administer existing lease contracts in accordance with these policies to the maximum extent feasible.

**§ 102–74.180 What illumination levels must Federal agencies maintain on Federal facilities?**

Except where special circumstances exist, Federal agencies must maintain illumination levels at:

(a) 50 foot-candles at work station surfaces, measured at a height of 30 inches above floor level, during working hours (for visually difficult or critical tasks, additional lighting may be authorized by the Federal agency buildings manager);

(b) 30 foot-candles in work areas during working hours, measured at 30 inches above floor level;

(c) 10 foot-candles, but not less than 1 foot-candle, in non-work areas, to ensure safety during working hours (normally this will require levels of 5 foot-candles at elevator boarding areas, minimum of 1 foot-candle at the middle of corridors and stairwells as measured at the walking surface, 1 foot-candle at the middle of corridors and stairwells as measured at the walking surface, and 10 foot-candles in storage areas); and

(d) Levels essential for safety and security purposes, including exit signs and exterior lights.

**§ 102–74.185 What heating and cooling policy must Federal agencies follow in Federal facilities?**

Within the limitations of the building systems, Federal agencies must:

(a) Operate heating and cooling systems in the most overall energy efficient and economical manner;

(b) Maintain temperatures to maximize customer satisfaction by conforming to local commercial equivalent temperature levels and operating practices;

(c) Set heating temperatures no higher than 55 degrees Fahrenheit during non-working hours;

(d) Not provide air-conditioning during non-working hours, except as necessary to return space temperatures to a suitable level for the beginning of working hours;

(e) Not permit reheating, humidification and simultaneous heating and cooling; and

(f) Operate building systems as necessary during extreme weather conditions to protect the physical condition of the building.

**§ 102–74.190 Are portable heaters, fans and other such devices allowed in Government-controlled facilities?**

Federal agencies are prohibited from operating portable heaters, fans, and other such devices in Government-controlled facilities unless authorized by the Federal agency building's manager.

**§ 102–74.195 What ventilation policy must Federal agencies follow?**

During working hours in periods of heating and cooling, Federal agencies must provide ventilation in accordance with ASHRAE Standard 62, Ventilation for Acceptable Indoor Air Quality where physically practical. Where not physically practical, Federal agencies must provide the maximum allowable amount of ventilation during periods of heating and cooling and pursue opportunities to increase ventilation up to current standards. ASHRAE Standard 62 is available from ASHRAE Publications Sales, 1791 Tullie Circle NE, Atlanta, GA 30329–2305.

**§ 102–74.200 What information are Federal agencies required to report to the Department of Energy (DOE)?**

Federal agencies, upon approval of GSA, must report to the DOE the energy consumption in buildings, facilities, vehicles, and equipment within 45 calendar days after the end of each quarter as specified in the DOE Federal Energy Usage Report DOE F 6200.2 Instructions.

## Ridesharing

**§ 102–74.205 What Federal facility ridesharing policy must executive agencies follow?**

In accordance with Executive Order 12191, ''Federal Facility Ridesharing Program'' (3 CFR, 1980 Comp., p. 138), executive agencies must actively promote the use of ridesharing (carpools, vanpools, privately-leased buses, public transportation, and other multi-occupancy modes of travel) by personnel working at Federal facilities to conserve energy, reduce congestion, improve air quality, and provide an economical way for Federal employees to commute to work.

**§ 102–74.210 What steps must executive agencies take to promote ridesharing at Federal facilities?**

To promote ridesharing at Federal facilities, agencies must:

(a) Establish an annual ridesharing goal for each facility;

(b) Report to the Administrator of General Services by June 1 of each year the goals established, the means developed to achieve those goals and the progress achieved; and

(c) Cooperate with State and local ridesharing agencies where such agencies exist.

**§ 102–74.215 What specific ridesharing information must executive agencies report to the Administrator of General Services?**

The head of each agency must submit to GSA by June 1 of each year a report that includes:

(a) The name, address, title, and telephone number of the agencywide Employee Transportation Coordinator (ETC);

(b) A narrative on actions taken and barriers encountered in promoting ridesharing within the agency;

(c) Information on any noticeable facility achievements; and

(d) A copy of instructions issued to the agency's facility ETC's for implementing the Federal Facility Ridesharing Program.

**§ 102–74.220 Where should executive agencies send their Federal Facility Ridesharing Reports?**

Agencies must send their Federal Facility Ridesharing Reports to the Office of Real Property (MP), General Services Administration, 1800 F Street, NW., Washington, DC 20405.

**§ 102–74.225 Are there any exceptions to these ridesharing reporting requirements?**

Yes, facilities with less than 100 full-time employees or less than 100 full-time employees on the largest shift are not required to submit an annual report. Agencies must not subdivide buildings, groups of buildings or worksites for the purpose of meeting the exception standards.

## Occupant Emergency Program

**§ 102–74.230 Who is responsible for establishing an occupant emergency program?**

The Designated Official (as defined in § 102–71.20 of this chapter) is responsible for developing, implementing and maintaining an Occupant Emergency Plan (as defined in § 102–71.20 of this chapter). The Designated Official's responsibilities include establishing, staffing and training an Occupant Emergency Organization with agency employees. Federal agencies, upon approval from GSA, must assist in the establishment and maintenance of such plans and organizations.

**§ 102–74.235 Are occupant agencies required to cooperate with the Designated Official in the implementation of the emergency plans and the staffing of the emergency organization?**

Yes, all occupant agencies of a facility must fully cooperate with the Designated Official in the implementation of the emergency plans and the staffing of the emergency organization.

**§ 102–74.240 What are Federal agencies' occupant emergency responsibilities?**

Federal agencies, upon approval from GSA, must:

(a) Provide emergency program policy guidance;

(b) Review plans and organizations annually;

(c) Assist in training of personnel;

(d) Otherwise ensure proper administration of Occupant Emergency Programs (as defined in § 102–71.20 of this chapter);

(e) Solicit the assistance of the lessor in the establishment and implementation of plans in leased space; and

(f) Assist the Occupant Emergency Organization (as defined in § 102–71.20 of this chapter) by providing technical personnel qualified in the operation of utility systems and protective equipment.

**§ 102–74.245 Who makes the decision to activate the Occupant Emergency Organization?**

The decision to activate the Occupant Emergency Organization must be made by the Designated Official, or by the designated alternate official. After normal duty hours, the senior Federal official present must represent the Designated Official or his/her alternates and must initiate action to cope with emergencies in accordance with the plans.

**§ 102–74.250 What information must the Designated Official use to make a decision to activate the Occupant Emergency Organization?**

The Designated Official must make a decision to activate the Occupant Emergency Organization based upon the best available information, including:

(a) An understanding of local tensions;

(b) The sensitivity of target agency(ies);

(c) Previous experience with similar situations;

(d) Advice from the Federal agency building's manager;

(e) Advice from the appropriate Federal law enforcement official; and

(f) Advice from Federal, State, and local law enforcement agencies.

**§ 102–74.255 How must occupant evacuation or relocation be accomplished when there is immediate danger to persons or property, such as fire, explosion or the discovery of an explosive device (not including a bomb threat)?**

The Designated Official must initiate action to evacuate or relocate occupants in accordance with the plan by sounding the fire alarm system or by other appropriate means when there is immediate danger to persons or property, such as fire, explosion or the discovery of an explosive device (not including a bomb threat).

**§ 102–74.260 What action must the Designated Official initiate when there is advance notice of an emergency?**

The Designated Official must initiate appropriate action according to the plan when there is advance notice of an emergency.

## Parking Facilities

**§ 102–74.265 Who must provide for the regulation and policing of parking facilities?**

Federal agencies, upon approval from GSA, must provide for any necessary regulation and policing of parking facilities, which may include:

(a) The issuance of traffic rules and regulations;

(b) The installation of signs and markings for traffic control. (Signs and markings must conform with the Manual on Uniform Traffic Control Devices published by the Department of Transportation);

(c) The issuance of citations for parking violations; and

(d) The immobilization or removal of illegally parked vehicles.

**§ 102–74.270 Are vehicles required to display parking permits in parking facilities?**

When the use of parking space is controlled as in § 102–74.265, all privately-owned vehicles other than those authorized to use designated visitor or service areas must display a parking permit. This requirement may be waived in parking facilities where the number of available spaces regularly exceeds the demand for such spaces.

**§ 102–74.275 May Federal agencies authorize lessors or parking management contractors to manage, regulate and police parking facilities?**

Yes, Federal agencies, upon approval from GSA, may authorize lessors or parking management contractors to manage, regulate and police parking facilities.

**§ 102–74.280 Are privately-owned vehicles converted for propane carburetion permitted in underground parking facilities?**

Federal agencies must not permit privately-owned vehicles converted for propane carburetion to enter underground parking facilities unless the owner provides to the occupant agency and the Federal agency building's manager the installer's certification that the installation methods and equipment comply with National Fire Protection Association (NFPA) Standard No. 58.

**§ 102–74.285 How must Federal agencies assign priority to parking spaces in controlled areas?**

Federal agencies must reserve official parking spaces, in the following order of priority, for:

(a) Official postal vehicles at buildings containing the U.S. Postal Service's mailing operations.

(b) Federally-owned vehicles used to apprehend criminals, fight fires and handle other emergencies.

(c) Private vehicles owned by Members of Congress (but not their staffs).

(d) Private vehicles owned by Federal judges (appointed under Article III of the Constitution), which may be parked in those spaces assigned for the use of the Court, with priority for them set by the Administrative Office of the U.S. Courts.

(e) Other federally-owned and leased vehicles, including those in motor pools or assigned for general use.

(f) Service vehicles, vehicles used in child care center operations and vehicles of patrons and visitors. (Federal agencies must allocate parking for handicapped visitors whenever an agency's mission requires visitor parking.)

(g) Private vehicles owned by employees, using spaces not needed for official business.

**§ 102–74.290 May Federal agencies allow employees to use parking spaces not required for official needs?**

Yes, Federal agencies may allow employees to use parking spaces not required for official needs.

**§ 102–74.295 Who determines the number of employee parking spaces for each facility?**

The Federal agency buildings manager must determine the total number of spaces available for employee parking. Typically, Federal agencies must make a separate determination for each parking facility. However, in major metropolitan areas, Federal agencies may determine that allocations by zone would make parking more efficient or more equitably available.

**§ 102–74.300 How must space available for employee parking be allocated among occupant agencies?**

The Federal agency buildings manager must allocate space available for employee parking among occupant agencies on an equitable basis, such as by allocating such parking in proportion to each agency's share of building space, office space or total employee population, as appropriate. In certain cases, Federal agencies may allow a third party, such as a board composed of representatives of agencies sharing space, to determine proper parking allocations among the occupant agencies.

**§ 102–74.305 How must Federal agencies assign available parking spaces to their employees?**

Federal agencies must assign available parking spaces to their employees using the following order of priority:

(a) Severely handicapped employees (see definition in § 102–71.20 of this chapter).

(b) Executive personnel and persons who work unusual hours.

(c) Vanpool/carpool vehicles.

(d) Privately-owned vehicles of occupant agency employees that are regularly used for Government business at least 12 days per month and that qualify for reimbursement of mileage and travel expenses under Government travel regulations.

(e) Other privately-owned vehicles of employees, on a space-available basis. (In locations where parking allocations are made on a zonal basis, GSA and affected agencies may cooperate to issue additional rules, as appropriate.)

**§ 102–74.310 What measures must Federal agencies take to improve the utilization of parking facilities?**

Federal agencies must take all feasible measures to improve the utilization of parking facilities, including:

(a) The conducting of surveys and studies;

(b) The periodic review of parking space allocations;

(c) The dissemination of parking information to occupant agencies;

(d) The implementation of parking incentives that promote ridesharing;

(e) The use of stack parking practices, where appropriate; and

(f) The employment of parking management contractors and concessionaires, where appropriate.

## Smoking

### § 102–74.315 What is the smoking policy for Federal facilities?

Pursuant to Executive Order 13058, ''Protecting Federal Employees and the Public From Exposure to Tobacco Smoke in the Federal Workplace'' (3 CFR, 1997 Comp., p. 216), it is the policy of the executive branch to establish a smoke-free environment for Federal employees and members of the public visiting or using Federal facilities. The smoking of tobacco products is prohibited in all interior space owned, rented or leased by the executive branch of the Federal Government, and in any outdoor areas under executive branch control in front of air intake ducts.

### § 102–74.320 Are there any exceptions to this smoking policy for Federal facilities?

Yes, this smoking policy does not apply in:

(a) Designated smoking areas that are enclosed and exhausted directly to the outside and away from air intake ducts, and are maintained under negative pressure (with respect to surrounding spaces) sufficient to contain tobacco smoke within the designated area. Agency officials must not require workers to enter such areas during business hours while smoking is ongoing;

(b) Any residential accommodation for persons voluntarily or involuntarily residing, on a temporary or long-term basis, in a building owned, leased or rented by the Federal Government;

(c) Portions of federally-owned buildings leased, rented or otherwise provided in their entirety to nonfederal parties;

(d) Places of employment in the private sector or in other non-Federal governmental units that serve as the permanent or intermittent duty station of one or more Federal employees; and

(e) Instances where an agency head establishes limited and narrow exceptions that are necessary to accomplish agency missions. Such exceptions must be in writing, approved by the agency head, and to the fullest extent possible provide protection of nonsmokers from exposure to environmental tobacco smoke. Authority to establish such exceptions may not be delegated.

### § 102–74.325 Who has the responsibility to determine which areas are to be smoking and which areas are to be nonsmoking areas?

Agency heads have the responsibility to determine which areas are to be smoking and which areas are to be nonsmoking areas. In exercising this responsibility, agency heads will give appropriate consideration to the views of the employees affected and/or their representatives and are to take into consideration the health issues involved. Nothing in this section precludes an agency from establishing more stringent guidelines. Agencies in multi-tenant buildings are encouraged to work together to identify designated smoking areas.

### § 102–74.330 Who must evaluate the need to restrict smoking at doorways and in courtyards?

Agency heads must evaluate the need to restrict smoking at doorways and in courtyards under executive branch control to protect workers and visitors from environmental tobacco smoke, and may restrict smoking in these areas in light of this evaluation.

### § 102–74.335 Who is responsible for monitoring and controlling areas designated for smoking and for ensuring that these areas are identified by proper signs?

Agency heads are responsible for monitoring and controlling areas designated for smoking and for ensuring that these areas are identified by proper signs. Suitable uniform signs reading ''Designated Smoking Area'' must be furnished and installed by the occupant agency.

### § 102–74.340 Who is responsible for signs on or near building entrance doors?

Federal agency building's managers must furnish and install suitable, uniform signs reading ''No Smoking Except in Designated Areas'' on or near entrance doors of buildings subject to this section. It is not necessary to display a sign in every room of each building.

### § 102–74.345 Does the smoking policy in this part apply to the judicial branch?

This smoking policy applies to the judicial branch when it occupies space in buildings controlled by the executive branch. Furthermore, the Federal Chief Judge in a local jurisdiction may be deemed to be comparable to an agency head and may establish exceptions for Federal jurors and others as indicated in § 102–74.320(e).

### § 102–74.350 Are agencies required to meet their obligations under the Federal Service Labor-Management Relations Act where there is an exclusive representative for the employees prior to implementing this smoking policy?

Yes, where there is an exclusive representative for the employees, Federal agencies must meet their obligations under the Federal Service Labor-Management Relations Act (5 U.S.C. 7101 *et seq.*) prior to implementing this section. In all other cases, agencies may consult directly with employees.

## Accident and Fire Prevention

### § 102–74.355 With what accident and fire prevention standards must Federal facilities comply?

To the maximum extent feasible, Federal agencies must manage facilities in accordance with the accident and fire prevention requirements identified in § 102–80.80 of this chapter.

### § 102–74.360 What are the specific accident and fire prevention responsibilities of occupant agencies?

Each occupant agency must:

(a) Participate in at least one fire drill per year;

(b) Maintain a neat and orderly facility to minimize the risk of accidental injuries and fires;

(c) Keep all exits, accesses to exits and accesses to emergency equipment clear at all times;

(d) Not bring hazardous, explosive or combustible materials into buildings unless authorized by appropriate agency officials and by GSA and unless protective arrangements determined necessary by GSA have been provided;

(e) Ensure that all draperies, curtains or other hanging materials are of non-combustible or flame-resistant fabric;

(f) Ensure that freestanding partitions and space dividers are limited combustible, and their fabric coverings are flame resistant;

(g) Cooperate with GSA to develop and maintain fire prevention programs that ensure the maximum safety of the occupants;

(h) Train employees to use protective equipment and educate employees to take appropriate fire safety precautions in their work;

(i) Ensure that facilities are kept in the safest condition practicable, and conduct periodic inspections in accordance with Executive Order 12196 and 29 CFR part 1960;

(j) Immediately report accidents involving personal injury or property damage, which result from building system or maintenance deficiencies, to the Federal agency building's manager; and

(k) Appoint a safety, health and fire protection liaison to represent the occupant agency with GSA.

## Subpart C—Conduct on Federal Property

### Applicability

#### § 102–74.365 To whom does this subpart apply?

The rules in this subpart apply to all property under the authority of the General Services Administration and to all persons entering in or on such property. Each occupant agency shall be responsible for the observance of these rules and regulations. Federal agencies must post the notice in the Appendix to this part at each public entrance to each Federal facility.

### Inspection

#### § 102–74.370 What items are subject to inspection by Federal agencies?

Federal agencies may, at their discretion, inspect packages, briefcases and other containers in the immediate possession of visitors, employees or other persons arriving on, working at, visiting, or departing from Federal property. Federal agencies may conduct a full search of a person and the vehicle the person is driving or occupying upon his or her arrest.

### Admission to Property

#### § 102–74.375 What is the policy on admitting persons to Government property?

Federal agencies must:

(a) Close property to the public during other than normal working hours. In those instances where a Federal agency has approved the after-normal-working-hours use of buildings or portions thereof for activities authorized by subpart D of this part, Federal agencies must not close the property (or affected portions thereof) to the public.

(b) Close property to the public during working hours only when situations require this action to ensure the orderly conduct of Government business. The designated official under the Occupant Emergency Program may make such decision only after consultation with the buildings manager and the highest ranking representative of the law enforcement organization responsible for protection of the property or the area. The designated official is defined in § 102–71.20 of this chapter as the highest ranking official of the primary occupant agency, or the alternate highest ranking offical or designee selected by mutual agreement by other occupant agency officials.

(c) Ensure, when property or a portion thereof is closed to the public, that admission to the property, or the affected portion, is restricted to authorized persons who must register upon entry to the property and must, when requested, display Government or other identifying credentials to Federal police officers or other authorized individuals when entering, leaving or while on the property. Failure to comply with any of the applicable provisions is a violation of these regulations.

### Preservation of Property

#### § 102–74.380 What is the policy concerning the preservation of property?

All persons entering in or on Federal property are prohibited from:

(a) Improperly disposing of rubbish on property;

(b) Willfully destroying or damaging property;

(c) Stealing property;

(d) Creating any hazard on property to persons or things; or

(e) Throwing articles of any kind from or at a building or the climbing upon statues, fountains or any part of the building.

### Conformity With Signs and Directions

#### § 102–74.385 What is the policy concerning conformity with official signs and directions?

Persons in and on property must at all times comply with official signs of a prohibitory, regulatory or directory nature and with the lawful direction of Federal police officers and other authorized individuals.

### Disturbances

#### § 102–74.390 What is the policy concerning disturbances?

All persons entering in or on Federal property are prohibited from loitering, exhibiting disorderly conduct or exhibiting other conduct on property which:

(a) Creates loud or unusual noise or a nuisance;

(b) Unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots;

(c) Otherwise impedes or disrupts the performance of official duties by Government employees; or

(d) Prevents the general public from obtaining the administrative services provided on the property in a timely manner.

### Gambling

#### § 102–74.395 What is the policy concerning gambling?

Except for the vending or exchange of chances by licensed blind operators of vending facilities for any lottery set forth in a State law and authorized by section 2(a)(5) of the Randolph-Sheppard Act (20 U.S.C. 107 *et seq.*), all persons entering in or on Federal property are prohibited from:

(a) Participating in games for money or other personal property;

(b) Operating gambling devices;

(c) Conducting a lottery or pool; or

(d) Selling or purchasing of numbers tickets.

### Narcotics and Other Drugs

#### § 102–74.400 What is the policy concerning the possession and use of narcotics and other drugs?

Except in cases where the drug is being used as prescribed for a patient by a licensed physician, all persons entering in or on Federal property are prohibited from:

(a) Being under the influence, using or possessing any narcotic drugs, hallucinogens, marijuana, barbiturates, or amphetamines; or

(b) Operating a motor vehicle on the property while under the influence of alcoholic beverages, narcotic drugs, hallucinogens, marijuana, barbiturates, or amphetamines.

### Alcoholic Beverages

#### § 102–74.405 What is the policy concerning the use of alcoholic beverages?

Except where the head of the responsible agency or his or her designee has granted an exemption in writing for the appropriate official use of alcoholic beverages, all persons entering in or on Federal property are prohibited from being under the influence or using alcoholic beverages. The head of the responsible agency or his or her designee must provide a copy of all exemptions granted to the buildings manager and the highest ranking representative of the law enforcement organization, or other authorized officials, responsible for the security of the property.

### Soliciting, Vending and Debt Collection

#### § 102–74.410 What is the policy concerning soliciting, vending and debt collection?

All persons entering in or on Federal property are prohibited from soliciting commercial or political donations, vending merchandise of all kinds, displaying or distributing commercial advertising, or collecting private debts, except for:

(a) National or local drives for funds for welfare, health or other purposes as authorized by 5 CFR part 950, entitled ''Solicitation Of Federal Civilian And Uniformed Service Personnel For Contributions To Private Voluntary Organizations,'' and sponsored or approved by the occupant agencies;

(b) Concessions or personal notices posted by employees on authorized bulletin boards;

(c) Solicitation of labor organization membership or dues authorized by occupant agencies under the Civil Service Reform Act of 1978 (Pub. L. 95–454); and

(d) Lessee, or its agents and employees, with respect to space leased for commercial, cultural, educational, or recreational use under the Public Buildings Cooperative Use Act of 1976 (40 U.S.C. 490(a)(16)). Public areas of GSA-controlled property may be used for other activities in accordance with subpart D of this part.

## Posting and Distributing Materials

### § 102–74.415 What is the policy for posting and distributing materials?

All persons entering in or on Federal property are prohibited from:

(a) Distributing free samples of tobacco products in or around Federal buildings, under Public Law 104–52, Section 636.

(b) Posting or affixing materials, such as pamphlets, handbills, or flyers, on bulletin boards or elsewhere on GSA-controlled property, except as authorized in § 102–74.410, or when these displays are conducted as part of authorized Government activities.

(c) Distributing materials, such as pamphlets, handbills or flyers, unless conducted as part of authorized Government activities. This prohibition does not apply to public areas of the property as defined in § 102–71.20 of this chapter. However, any person or organization proposing to distribute materials in a public area under this section must first obtain a permit from the building's manager as specified in subpart D of this part. Any such person or organization must distribute materials only in accordance with the provisions of subpart D of this part. Failure to comply with those provisions is a violation of these regulations.

## Photographs for News, Advertising or Commercial Purposes

### § 102–74.420 What is the policy concerning photographs for news, advertising or commercial purposes?

Except where security regulations apply or a Federal court order or rule prohibits it, persons entering in or on Federal property may take photographs of:

(a) Space occupied by a tenant agency for non-commercial purposes only with the permission of the occupying agency concerned;

(b) Space occupied by a tenant agency for commercial purposes only with written permission of an authorized official of the occupying agency concerned; and

(c) Building entrances, lobbies, foyers, corridors, or auditoriums for news purposes.

## Dogs and Other Animals

### § 102–74.425 What is the policy concerning dogs and other animals on Federal property?

Except seeing eye dogs, other guide dogs and animals used to guide or assist handicapped persons, persons may not bring dogs or other animals on Federal property for other than official purposes.

## Vehicular and Pedestrian Traffic

### § 102–74.430 What is the policy concerning vehicular and pedestrian traffic on Federal property?

All vehicle drivers entering or while on Federal property:

(a) Must drive in a careful and safe manner at all times;

(b) Must comply with the signals and directions of Federal police officers or other authorized individuals;

(c) Must comply with all posted traffic signs;

(d) Must comply with any additional posted traffic directives approved by the GSA Regional Administrator, which will have the same force and effect as these regulations;

(e) Are prohibited from blocking entrances, driveways, walks, loading platforms, or fire hydrants; and

(f) Are prohibited from parking on Federal property without a permit. Parking without authority, parking in unauthorized locations or in locations reserved for other persons, or parking contrary to the direction of posted signs is prohibited. Vehicles parked in violation, where warning signs are posted, are subject to removal at the owner's risk and expense. Federal agencies may take as proof that a motor vehicle was parked in violation of these regulations or directives as prima facie evidence that the registered owner was responsible for the violation.

## Explosives

### § 102–74.435 What is the policy concerning explosives on Federal property?

No person entering or while on Federal property may carry or possess explosives, or items intended to be used to fabricate an explosive or incendiary device, either openly or concealed, except for official purposes.

## Weapons

### § 102–74.440 What is the policy concerning weapons on Federal property?

Federal law prohibits the possession of firearms or other dangerous weapons in Federal facilities and Federal court facilities by all persons not specifically authorized by Title 18, United States Code, Section 930. Violators will be subject to fine and/or imprisonment for periods up to five (5) years.

## Nondiscrimination

### § 102–74.445 What is the policy concerning discrimination on Federal property?

Federal agencies must not discriminate by segregation or otherwise against any person or persons because of race, creed, sex, color, or national origin in furnishing or by refusing to furnish to such person or persons the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided on the property.

## Penalties

### § 102–74.450 What are the penalties for violating any rule or regulation in this subpart?

A person found guilty of violating any rule or regulation in this subpart while on any property under the charge and control of the U.S. General Services Administration shall be fined under title 18 of the United States Code, imprisoned for not more than 30 days, or both.

## Impact on Other Laws or Regulations

### § 102–74.455 What impact do the rules and regulations in this subpart have on other laws or regulations?

No rule or regulation in this subpart may be construed to nullify any other Federal laws or regulations or any State and local laws and regulations applicable to any area in which the property is situated (section 205(c), 63 Stat. 390; 40 U.S.C. 486(c)).

# Subpart D—Occasional Use of Public Buildings

### § 102–74.460 What is the scope of this subpart?

This subpart establishes rules and regulations for the occasional use of public areas of public buildings for cultural, educational and recreational activities as provided by the Public Buildings Cooperative Use Act of 1976 (Pub. L. 94–541).

## Application for Permit

### § 102–74.465 Is a person or organization that wishes to use a public area required to apply for a permit from a Federal agency?

Yes, any person or organization wishing to use a public area must file an application for a permit from the Federal agency buildings manager.

### § 102–74.470 What information must persons or organizations submit so that Federal agencies may consider their application for a permit?

Applicants must submit the following information:

(a) Their full names, mailing addresses and telephone numbers;

(b) The organization sponsoring the proposed activity;

(c) The individual(s) responsible for supervising the activity;

(d) Documentation showing that the applicant has authority to represent the sponsoring organization; and

(e) A description of the proposed activity, including the dates and times during which it is to be conducted and the number of persons to be involved.

### § 102–74.475 If an applicant proposes to use a public area to solicit funds, is the applicant required to make a certification?

Yes, if an applicant proposes to use a public area to solicit funds, the applicant must certify, in writing, that:

(a) The applicant is a representative of and will be soliciting funds for the sole benefit of a religion or religious group; or

(b) The applicant's organization has received an official ruling of tax-exempt status from the Internal Revenue Service under 26 U.S.C. 501; or, alternatively, that an application for such a ruling is still pending.

## Permits

### § 102–74.480 How many days does a Federal agency have to issue a permit following receipt of a completed application?

Federal agencies must issue permits within 10 working days following the receipt of the completed applications, unless the permit is disapproved in accordance with § 102–74.500.

### § 102–74.485 Is there any limitation on the length of time of a permit?

Yes, a permit may not be issued for a period of time in excess of 30 calendar days, unless specifically approved by the regional officer (as defined in § 102–71.20 of this chapter). After the expiration of a permit, Federal agencies may issue a new permit upon submission of a new application. In such a case, applicants may incorporate by reference all required information filed with the prior application.

### § 102–74.490 What if more than one permit is requested for the same area and time?

Federal agencies will issue permits on a first-come, first-served, basis when more than one permit is requested for the same area and times.

### § 102–74.495 If a permit involves demonstrations or activities that may lead to civil disturbances, what action must a Federal agency take before approving such a permit application?

Before approving a permit application, Federal agencies must coordinate with their law enforcement organization if a permit involves demonstrations or activities that may lead to civil disturbances.

## Disapproval of Applications or Cancellation of Permits

### § 102–74.500 Can Federal agencies disapprove permit applications or cancel issued permits?

Yes, Federal agencies may disapprove any permit application or cancel an issued permit if:

(a) The applicant has failed to submit all information required under § 102–74.470 and § 102–74.475, or has falsified such information;

(b) The proposed use is a commercial activity as defined in § 102–71.20 of this chapter;

(c) The proposed use interferes with access to the public area, disrupts official Government business, interferes with approved uses of the property by tenants or by the public, or damages any property;

(d) The proposed use is intended to influence or impede any pending judicial proceeding;

(e) The proposed use is obscene within the meaning of obscenity as defined in 18 U.S.C. 1461–65; or

(f) The proposed use violates the prohibition against political solicitations in 18 U.S.C. 607.

### § 102–74.505 What action must Federal agencies take after disapproving an application or canceling an issued permit?

Upon disapproving an application or canceling a permit, Federal agencies must promptly:

(a) Notify the applicant or permittee of the reasons for the action; and

(b) Inform the applicant or permittee of his/her appeal rights under § 102–74.510.

## Appeals

### § 102–74.510 How may the disapproval of a permit application or cancellation of an issued permit be appealed?

A person or organization may appeal the disapproval of an application or cancellation of an issued permit by notifying the regional officer (as defined in § 102–71.20 of this chapter), in writing, of the intent to appeal within 5 calendar days of the notification of disapproval or cancellation.

### § 102–74.515 Will the affected person or organization and the Federal agency buildings manager have an opportunity to state their positions on the issues?

Yes, during the appeal process, the affected person or organization and the Federal agency buildings manager will have an opportunity to state their positions on the issues, both verbally and in writing.

### § 102–74.520 How much time does the regional officer have to affirm or reverse the Federal agency building manager's decision after receiving the notification of appeal from the affected person or organization?

The regional officer must affirm or reverse the GSA building manager's decision, based on the information submitted, within 10 calendar days of the date on which the regional officer received notification of the appeal. If the decision is not rendered within 10 days, the application will be considered to be approved or the permit validly issued. The regional officer will promptly notify the applicant or permittee and the building's manager of the decision and the reasons therefor.

## Schedule of Use

### § 102–74.525 May Federal agencies reserve time periods for the use of public areas for official Government business or for maintenance, repair and construction?

Yes, Federal agencies may reserve certain time periods for use of public areas:

(a) For official Government business; or

(b) For maintenance, repair, and construction.

## Hours of Use

### § 102–74.530 When may public areas be used?

Permittees may use public areas during or after regular working hours of Federal agencies, provided that such uses will not interfere with Government business. When public areas are used by permittees after normal working hours, Federal agencies must lock, barricade or identify by signs, as appropriate, all adjacent areas not approved for such use to restrict permittees' activities to approved areas.

## Services and Costs

### § 102–74.535 What items may Federal agencies provide to permittees free of charge?

Federal agencies may provide to permittees at no cost:

(a) Space; and

(b) Services normally provided at the building in question during normal hours of building operation, such as security, cleaning, heating, ventilation, and air-conditioning. The regional officer must approve an applicant's request to provide its own services, such as security and cleaning, prior to permit approval.

### § 102–74.540 What are the items for which permittees must reimburse Federal agencies?

Permittees must reimburse Federal agencies for services over and above those normally provided during normal business hours. Federal agencies may provide the services free of charge if the cost is insignificant and if it is in the public's interest.

### § 102–74.545 May permittees make alterations to the public areas?

Permittees must not make alterations to public areas, except with the prior written approval of the Federal agency building's manager. Federal agencies must not approve such alterations unless the Federal agency determines that the proposed alterations to a building should be made to encourage and aid in the proposed use. Permittees making alterations must ensure the safety of users and prevent damage to property.

### § 102–74.550 What items are permittees responsible for furnishing?

Permittees are responsible for furnishing items such as tickets, audio-visual equipment, and other items, which are necessary for the proposed use.

## Conduct

### § 102–74.555 What rules of conduct must all permittees observe while on Federal property?

Permittees are subject to all rules and regulations governing conduct on Federal property as set forth in subpart C of this part. In addition, a permittee must:

(a) Not misrepresent his or her identity to the public;

(b) Not conduct any activities in a misleading or fraudulent manner;

(c) Not discriminate on the basis of race, creed, color, disability, sex or national origin in conducting activities;

(d) Not distribute any item, nor post or otherwise affix any item, for which prior written approval under § 102–74.415 has not been obtained;

(e) Not leave leaflets or other materials unattended on the property;

(f) Not engage in activities that would interfere with the preferences afforded blind licensees under the Randolph-Sheppard Act (20 U.S.C. 107); and

(g) Display identification badges while on Federal property, if engaging in the solicitation of funds as authorized by § 102–74.475. Each badge must indicate the permittee's name, address, telephone number, and organization.

## Non-affiliation With the Government

### § 102–74.560 May Federal agencies advise the public of the presence of any permittees and their non-affiliation with the Federal Government?

Yes, Federal agencies reserve the right to advise the public through signs or announcements of the presence of any permittees and of their non-affiliation with the Federal Government.

## Subpart E—Installing, Repairing, and Replacing Sidewalks

### § 102–74.565 What is the scope of this subpart?

In accordance with 40 U.S.C. 490(i), Federal agencies must comply with the real property policies in this subpart governing the installation, repair and replacement of sidewalks around buildings, installations, properties, or grounds under the control of executive agencies and owned by the United States.

### § 102–74.570 Are State and local governments required to fund the cost of installing, repairing, and replacing sidewalks?

No, the Federal Government must fund the cost of installing, repairing, and replacing sidewalks. Funds appropriated to the agency for installation, repair, and maintenance, generally, must be available for expenditure to accomplish the purposes of this subpart.

### § 102–74.575 How do Federal agencies arrange for work on sidewalks?

Upon approval from GSA, Federal agencies may:

(a) Authorize the appropriate State or local government to install, repair and replace sidewalks, or arrange for this work, and reimburse them for this work; or

(b) Contract or otherwise arrange and pay directly for installing, repairing and/or replacing sidewalks.

### § 102–74.580 Who decides when to replace a sidewalk?

Federal agencies, giving due consideration to State and local standards and specifications for sidewalks, decide when to install, repair or replace a sidewalk. However, Federal agencies may prescribe other standards and specifications for sidewalks whenever necessary to achieve architectural harmony and maintain facility security.

## Appendix to Part 102–74—Rules and Regulations Governing Conduct on Federal Property

*Federal Management Regulations*

Title 41, Code of Federal Regulations, Part 102–74, Subpart C

Applicability (41 CFR 102–74.365). The rules in this subpart apply to all property under the authority of the General Services Adminstration and to all persons entering in or on such property. Each occupant agency shall be responsible for the observance of these rules and regulations. Federal agencies must post the notice in the Appendix to part 102–74 at each public entrance to each Federal facility.

Inspection (41 CFR 102–74.370). Federal agencies may, at their discretion, inspect packages, briefcases and other containers in the immediate possession of visitors, employees or other persons arriving on, working at, visiting, or departing from Federal property. Federal agencies may conduct a full search of a person and the vehicle the person is driving or occupying upon his or her arrest.

Admission to Property (41 CFR 102–74.375). Federal agencies must:

(a) Close property to the public during other than normal working hours. In those instances where a Federal agency has approved the after-normal-working-hours use of buildings or portions thereof for activities authorized by subpart D of this part, Federal agencies must not close the property (or affected portions thereof) to the public.

(b) Close property to the public during working hours only when situations require this action to ensure the orderly conduct of Government business. The designated official under the Occupant Emergency Program may make such decision only after consultation with the buildings manager and the highest ranking representative of the law enforcement organization responsible for protection of the property or the area. The designated official is defined in § 102–71.20 of this chapter as the highest ranking official of the primary occupant agency, or the alternate highest ranking offical or designee selected by mutual agreement by other occupant agency officials.

(c) Ensure, when property or a portion thereof is closed to the public, that admission to the property, or the affected portion, is restricted to authorized persons who must register upon entry to the property and must, when requested, display Government or other identifying credentials to Federal police officers or other authorized individuals when entering, leaving or while on the property. Failure to comply with any of the applicable provisions is a violation of these regulations.

Preservation of Property (41 CFR 102–74.380). All persons entering in or on Federal property are prohibited from:

(a) Improperly disposing of rubbish on property;

(b) Willfully destroying or damaging property;

(c) Stealing property;

(d) Creating any hazard on property to persons or things;

(e) Throwing articles of any kind from or at a building or the climbing upon statues, fountains or any part of the building.

Conformity with Signs and Directions (41 CFR 102–74.385). Persons in and on property must at all times comply with official signs of a prohibitory, regulatory or directory nature and with the lawful direction of Federal police officers and other authorized individuals.

Disturbances (41 CFR 102–74.390). All persons entering in or on Federal property are prohibited from loitering, exhibiting disorderly conduct or exhibiting other conduct on property which:

(a) Creates loud or unusual noise or a nuisance;

(b) Unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots;

(c) Otherwise impedes or disrupts the performance of official duties by Government employees; or

(d) Prevents the general public from obtaining the administrative services provided on the property in a timely manner.

Gambling (41 CFR 102–74.395). Except for the vending or exchange of chances by licensed blind operators of vending facilities for any lottery set forth in a State law and authorized by section 2(a)(5) of the Randolph-Sheppard Act (20 U.S.C. 107 *et seq.*), all persons entering in or on Federal property are prohibited from:

(a) Participating in games for money or other personal property;

(b) Operating gambling devices;

(c) Conducting a lottery or pool; or

(d) Selling or purchasing of numbers tickets.

Narcotics and Other Drugs (41 CFR 102–74.400). Except in cases where the drug is being used as prescribed for a patient by a licensed physician, all persons entering in or on Federal property are prohibited from:

(a) Being under the influence, using or possessing any narcotic drugs, hallucinogens, marijuana, barbiturates, or amphetamines; or

(b) Operating a motor vehicle on the property while under the influence of alcoholic beverages, narcotic drugs, hallucinogens, marijuana, barbiturates, or amphetamines.

Alcoholic Beverages (41 CFR 102–74.405). Except where the head of the responsible agency or his or her designee has granted an exemption in writing for the appropriate official use of alcoholic beverages, all persons entering in or on Federal property are prohibited from being under the influence or using alcoholic beverages. The head of the responsible agency or his or her designee must provide a copy of all exemptions granted to the buildings manager and the highest ranking representative of the law enforcement organization, or other authorized officials, responsible for the security of the property.

Soliciting, Vending and Debt Collection (41 CFR 102–74.410). All persons entering in or on Federal property are prohibited from soliciting commercial or political donations; vending merchandise of all kinds; displaying or distributing commercial advertising, or collecting private debts, except for:

(a) National or local drives for funds for welfare, health or other purposes as authorized by 5 CFR part 950, entitled ''Solicitation of Federal Civilian And Uniformed Service Personnel For Contributions To Private Voluntary Organizations,'' and sponsored or approved by the occupant agencies;

(b) Concessions or personal notices posted by employees on authorized bulletin boards;

(c) Solicitation of labor organization membership or dues authorized by occupant agencies under the Civil Service Reform Act of 1978 (Public Law 95–454); and

(d) Lessee, or its agents and employees, with respect to space leased for commercial, cultural, educational, or recreational use under the Public Buildings Cooperative Use Act of 1976 (40 U.S.C. 490(a)(16)). Public areas of GSA-controlled property may be used for other activities in accordance with subpart D of this part.

Posting and Distributing Materials (41 CFR 102–74.415). All persons entering in or on Federal property are prohibited from:

(a) Distributing free samples of tobacco products in or around Federal buildings, under Public Law 104–52, Section 636.

(b) Posting or affixing materials, such as pamphlets, handbills, or flyers, on bulletin boards or elsewhere on GSA-controlled property, except as authorized in § 102–74.410, or when these displays are conducted as part of authorized Government activities.

(c) Distributing materials, such as pamphlets, handbills, or flyers, unless conducted as part of authorized Government activities. This prohibition does not apply to public areas of the property as defined in § 102–71.20 of this chapter. However, any person or organization proposing to distribute materials in a public area under this section must first obtain a permit from the building manager as specified in subpart D of this part. Any such person or organization must distribute materials only in accordance with the provisions of subpart D of this part. Failure to comply with those provisions is a violation of these regulations.

Photographs for News, Advertising, or Commercial Purposes (41 CFR 102–74.420). Except where security regulations apply or a Federal court order or rule prohibits it, persons entering in or on Federal property may take photographs of:

(a) Space occupied by a tenant agency for non-commercial purposes only with the permission of the occupying agency concerned;

(b) Space occupied by a tenant agency for commercial purposes only with written permission of an authorized official of the occupying agency concerned; and

(c) Building entrances, lobbies, foyers, corridors, or auditoriums for news purposes.

Dogs and Other Animals (41 CFR 102–74.425). Except seeing eye dogs, other guide dogs and animals used to guide or assist handicapped persons, persons may not bring dogs or other animals on Federal property for other than official purposes.

Vehicular and Pedestrian Traffic (41 CFR 102–74.430). All vehicle drivers entering or while on Federal property:

(a) Must drive in a careful and safe manner at all times;

(b) Must comply with the signals and directions of Federal police officers or other authorized individuals;

(c) Must comply with all posted traffic signs;

(d) Must comply with any additional posted traffic directives approved by the GSA Regional Administrator, which will have the same force and effect as these regulations;

(e) Are prohibited from blocking entrances, driveways, walks, loading platforms, or fire hydrants; and

(f) Are prohibited from parking on Federal property without a permit. Parking without authority, parking in unauthorized locations or in locations reserved for other persons, or parking contrary to the direction of posted signs is prohibited. Vehicles parked in violation, where warning signs are posted, are subject to removal at the owner's risk and expense. Federal agencies may take as proof that a motor vehicle was parked in violation of these regulations or directives as prima facie evidence that the registered owner was responsible for the violation.

Explosives (41 CFR 102–74.435). No person entering or while on property may carry or possess explosives, or items intended to be used to fabricate an explosive or incendiary device, either openly or concealed, except for official purposes.

Weapons (41 CFR 102–74.440) Federal law prohibits the possession of firearms or other dangerous weapons in Federal facilities and Federal court facilities by all persons not specifically authorized by Title 18, United States Code, Section 930. Violators will be subject to fine and/or imprisonment for periods up to five (5) years.

Nondiscrimination (41 CFR 102–74.445). Federal agencies must not discriminate by segregation or otherwise against any person or persons because of race, creed, sex, color, or national origin in furnishing or by refusing to furnish to such person or persons the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided on the property.

Penalties (41 CFR 102–74.450). A person found guilty of violating any rule or regulation in subpart C of this part while on any property under the charge and control of the U.S. General Services Administration shall be fined under title 18 of the United States Code, imprisoned for not more than 30 days, or both.

Impact on Other Laws or Regulations (41 CFR 102–74.455). No rule or regulation in this subpart may be construed to nullify any other Federal laws or regulations or any State and local laws and regulations applicable to any area in which the property is situated (section 205(c), 63 U.S. Statutes, 390; 40 U.S.C. 486(c)).

**Warning—Weapons Prohibited**

Federal law prohibits the possession of firearms or other dangerous weapons in

Federal facilities and Federal court faiclities by all persons not specifically authorized by Title 18, United States Code, Section 930. Violators will be subject to fine and/or imprisonment for periods up to five (5) years.

10. Part 102–75 is revised to read as follows:

## PART 102–75—REAL PROPERTY DISPOSAL

### Subpart A—General Provisions

Sec.

102–75.5 What is the scope of this part?
102–75.10 What basic real property disposal policy governs disposal agencies?

#### Real Property Disposal Services

102–75.15 What real property disposal services must disposal agencies provide?
102–75.20 How can Federal agencies with independent disposal authority obtain related disposal services?

### Subpart B—Utilization of Excess Real Property

102–75.25 What are landholding agencies' responsibilities concerning the utilization of excess property?
102–75.30 What are disposal agencies' responsibilities concerning the utilization of excess property?
102–75.35 What are GSA's responsibilities concerning the identification of unneeded Federal Real Property?

#### Standards

102–75.40 What are the standards that each executive agency must use to identify unneeded Federal real property?
102–75.45 What does the term ''Not utilized'' mean?
102–75.50 What does the term ''Underutilized'' mean?
102–75.55 What does the term ''Not being put to optimum use'' mean?

#### Guidelines

102–75.60 What are landholding agencies' responsibilities concerning real property surveys?
102–75.65 Why is it important for executive agencies to notify the disposal agency of its real property needs?
102–75.70 Are their any exceptions to this notification policy?
102–75.75 What is the most important consideration in evaluating a proposed transfer of excess real property?
102–75.80 What are an executive agency's responsibilities before requesting a transfer of excess real property?
102–75.85 Can disposal agencies transfer excess real property to agencies for programs which appear to be scheduled for substantial curtailment or termination?
102–75.90 How is excess real property needed for office, storage, and related purposes normally transferred to the requesting agency?
102–75.95 Can Federal agencies which normally do not require real property (other than for office, storage, and related purposes) or which may not have statutory authority to acquire such property, obtain the use of excess real property?

#### Land Withdrawn or Reserved From the Public Domain

102–75.100 When an agency holds land withdrawn or reserved from the public domain and determines that it no longer needs this land, what must it do?
102–75.105 What responsibility does the Department of the Interior have if it determines that minerals in the land are unsuitable for disposition under the public land mining and mineral leasing laws?

#### Transfers Under Other Laws

102–75.110 Can transfers of real property be made under authority of laws other than the Federal Property and Administrative Services Act of 1949?

#### Reporting of Excess Real Property

102–75.115 Must reports of excess real property and related personal property be prepared on specific forms?
102–75.120 Is there any other information that needs to accompany (or be submitted with) the Report of Excess Real Property (Standard Form 118)?

#### Title Report

102–75.125 What information must agencies include in the title report?
102–75.130 If hazardous substance activity took place on the property, what specific information must an agency include on the title report?
102–75.135 If no hazardous substance activity took place on the property, What specific information must an agency include on the title report?

#### Other Necessary Information

102–75.140 In addition to the title report, what information must an executive agency transmit with the Report of Excess Real Property (Standard Form 118)?

#### Examination for Acceptability

102–75.145 Is GSA required to review each report of excess?
102–75.150 What happens when GSA determines that the report of excess is adequate?
102–75.155 What happens if GSA determines that the report of excess is insufficient?

#### Designation as Personal Property

102–75.160 Should prefabricated movable structures be designated real or personal property for disposition purposes?
102–75.165 Should related personal property be designated real or personal property for disposition purposes?
102–75.170 What happens to the related personal property in a structure scheduled for demolition?

#### Transfers

102–75.175 What are GSA's responsibilities regarding transfer requests?
102–75.180 May landholding agencies transfer excess real property without notifying GSA?
102–75.185 In those instances where landholding agencies may transfer excess real property without notifying GSA, which policies must they follow?
102–75.190 What amount must the transferee agency pay for the transfer of excess real property?
102–75.195 If the transferor agency is a wholly owned Government corporation, what amount must the transferee agency pay?
102–75.200 hat amount must the transferee agency pay if property is being transferred for the purpose of upgrading the transferee agency's facilities?
102–75.205 Are transfers ever made without reimbursement by the transferee agency?
102–75.210 What must a transferee agency include in its request for an exception from the 100 percent reimbursement requirement?
102–75.215 Who must endorse requests for exception to the 100 percent reimbursement requirement?
102–75.220 Where should an agency send a request for exception to the 100 percent reimbursement requirement?
102–75.225 Who must review and approve a request for exception from the 100 percent reimbursement requirement?
102–75.230 Who is responsible for property protection and maintenance costs while the request for exception is being reviewed?
102–75.235 May disposal agencies transfer excess property to the Senate, the House of Representatives, and the Architect of the Capitol?

#### Temporary Utilization

102–75.240 May excess real property be temporarily assigned/reassigned?

#### Nonfederal Interim Use of Excess Property

102–75.245 When can landholding agencies grant rights for nonfederal interim use of excess property reported to GSA?

### Subpart C—Surplus Real Property Disposal

102–75.250 What general policy must disposal agencies follow concerning the disposal of surplus property?
102–75.255 What are disposal agencies' specific responsibilities concerning the disposal of surplus property?
102–75.260 When may disposal agencies dispose of surplus real property by exchange for privately owned property?
102–75.265 Are conveyance documents required to identify all agreements and representations concerning property restrictions and conditions?

## Applicability of Antitrust Laws

102–75.270 Must antitrust laws be considered when disposing of property?
102–75.275 Who determines whether the proposed disposal would create or maintain a situation inconsistent with antitrust laws?
102–75.280 What information concerning a proposed disposal must a disposal agency provide to the Attorney General to determine the applicability of anti-trust laws?
102–75.285 Can a disposal agency dispose of real property to a private interest specified in § 102–75.270 before advice is received from the Attorney General?

## Disposals Under Other Laws

102–75.290 Can disposals of real property be made under authority of laws other than the Federal Property and Administrative Services Act of 1949?

## Credit Disposals

102–75.295 What is the policy on extending credit in connection with the disposal of surplus property?

## Appraisal

102–75.300 Are appraisals required for all real property disposal transactions?
102–75.305 What type of appraisal value must be obtained for real property disposal transactions?
102–75.310 Who must agencies use to appraise the real property?
102–75.315 Are appraisers authorized to consider the effect of historic covenants on the fair market value?
102–75.320 Does appraisal information need to be kept confidential?

## Inspection

102–75.325 What responsibility does the landholding agency have to provide persons the opportunity to inspect available surplus property?

## Submission of Offers To Purchase or Lease

102–75.330 What form must all offers to purchase or lease be in?

## Provisions Relating to Asbestos

102–75.335 Where asbestos is identified, what information must the disposal agency incorporate into the offer to purchase and in the conveyance document?

## Provisions Relating to Hazardous Substance Activity

102–75.340 Where hazardous substance activity has been identified on property proposed for disposal, what information must the disposal agency incorporate into the offer to purchase and conveyance document?
102–75.345 What is different about the statements in the offer to purchase and conveyance document if the sale is to a potentially responsible party with respect to the hazardous substance activity?

## Public Benefit Conveyances

102–75.350 What are disposal agencies' responsibilities concerning public benefit conveyances?
102–75.355 What clause must be in the offer to purchase and conveyance documents for public benefit conveyances?
102–75.360 What wording must be in the non-discrimination clause which is required in the offer to purchase and in the conveyance document?

## Power Transmission Lines

102–75.365 Do disposal agencies have to notify State entities and Government agencies that a surplus power transmission line and right-of-way is available?
102–75.370 May a State, or any political subdivision thereof, certify to a disposal agency that it needs a surplus power transmission line and the right-of-way acquired for its construction to meet the requirements of a public or cooperative power project?
102–75.375 What happens once a State, or political subdivision, certifies that it needs a surplus power transmission line and the right-of-way acquired for its construction to meet the requirements of a public or cooperative power project?
102–75.380 May power transmission lines and rights-of-way be disposed of in other ways?

## Property for Public Airports

102–75.385 Do disposal agencies have the responsibility to notify eligible public agencies that airport property has been determined to be surplus?
102–75.390 May surplus airport property be conveyed or disposed of to a State, political subdivision, municipality, or tax-supported institution for a public airport?
102–75.395 What does the term ''surplus airport property'' mean?
102–75.400 Is industrial property located on an airport also considered to be ''airport property''?
102–75.405 What responsibilities does the FAA have after receiving a copy of the notice (and a copy of the Report of Excess Real Property (Standard Form 118)) given to eligible public agencies that there is surplus airport property?
102–75.410 What action must the disposal agency take after an eligible public agency has submitted a plan of use and application to acquire property for a public airport?
102–75.415 What happens after the disposal agency receives the FAA's recommendation for disposal of the property for a public airport?
102–75.420 What happens if the FAA informs the disposal agency that it does not recommend disposal of the property for a public airport?
102–75.425 Who has sole responsibility for enforcing compliance with the terms and conditions of disposal for property disposed of for use as a public airport?
102–75.430 What happens if property conveyed for use as a public airport is revested in the United States?
102–75.435 Is the Airport and Airway Development Act of 1970 (Airport Act of 1970) applicable to the transfer of airports to State and local agencies?

## Property for Use as Historic Monuments

102–75.440 Who must disposal agencies notify that surplus property is available for historic monument use?
102–75.445 Who can convey surplus real and related personal property for historic monument use?
102–75.450 What type of property is suitable or desirable for use as a historic monument?
102–75.455 May historic monuments be used for revenue-producing activities?
102–75.460 What information must disposal agencies furnish eligible public agencies?
102–75.465 What information must eligible public agencies interested in acquiring real property for use as a historic monument submit to the appropriate regional or field offices of the National Park Service (NPS) of the Department of the Interior?
102–75.470 What action must the National Park Service (NPS) of the Department of the Interior take after an eligible public agency has submitted an application for conveyance of surplus property for use as a historic monument?
102–75.475 What happens after the disposal agency receives the Secretary of the Interior's determination for disposal of the surplus property for a historic monument and compatible revenue-producing activities?
102–75.480 Who has the responsibility for enforcing compliance with the terms and conditions of disposal for surplus property conveyed for use as a historic monument?
102–75.485 What happens if property that was conveyed for use as a historic monument is revested in the United States?

## Property for Educational and Public Health Purposes

102–75.490 Who must notify eligible public agencies that surplus real property for educational and public health purposes is available?
102–75.495 May the Department of Education or the Department of Health and Human Services notify nonprofit organizations that surplus real property and related personal property is available for educational and public health purposes?
102–75.500 Which Federal agencies may the head of the disposal agency (or his or her designee) assign for disposal surplus real property to be used for educational and public health purposes?
102–75.505 Is the request for educational or public health use of a property by an eligible nonprofit institution contingent upon the disposal agency's approval?

102–75.510 When must the Department of Education and the Department of Health and Human Services notify the disposal agency that an eligible applicant is interested in acquiring the property?
102–75.515 What action must the disposal agency take after an eligible public agency has submitted a plan of use for property for an educational or public health requirement?
102–75.520 What must the Department of Education or the Department of Health and Human Services address in the assignment recommendation that is submitted to the disposal agency?
102–75.525 What responsibilities do landholding agencies have concerning properties to be used for educational and public health purposes?
102–75.530 What happens if the Department of Education or the Department of Health and Human Services does not approve any applications for conveyance of the property for educational or public health purposes?
102–75.535 What responsibilities does the Department of Education or the Department of Health and Human Services have after receiving the disposal agency's assignment letter?
102–75.540 Who is responsible for enforcing compliance with the terms and conditions of the transfer for educational or public health purposes?
102–75.545 What happens if property that was transferred to meet an educational or public health requirement is revested in the United States for noncompliance with the terms of sale, or other cause?

## Property for Providing Self-Help Housing or Housing Assistance

102–75.550 What does ''self-help housing or housing assistance mean?''
102–75.555 Which Federal agency receives the property assigned for self-help housing or housing assistance for low-income individuals or families?
102–75.560 Who notifies eligible public agencies that real property to be used for self-help housing or housing assistance purposes is available?
102–75.565 Is the requirement for self-help housing or housing assistance use of the property by an eligible public agency or nonprofit organization contingent upon the disposal agency's approval of an assignment recommendation from the Department of Housing and Urban Development (HUD)?
102–75.570 What happens if the disposal agency does not approve the assignment recommendation?
102–75.575 Who notifies nonprofit organizations that surplus real property and related personal property to be used for self-help housing or housing assistance purposes is available?
102–75.580 When must HUD notify the disposal agency that an eligible applicant is interested in acquiring the property?
102–75.585 What action must the disposal agency take after an eligible public agency has submitted a plan of use for property for a self-help housing or housing assistance requirement?
102–75.590 What does the assignment recommendation contain?
102–75.595 What responsibilities do landholding agencies have concerning properties to be used for self-help housing or housing assistance use?
102–75.600 What happens if HUD does not approve any applications for self-help housing or housing assistance use?
102–75.605 What responsibilities does HUD have after receiving the disposal agency's assignment letter?
102–75.610 Who is responsible for enforcing compliance with the terms and conditions of the transfer of the property for self-help housing or housing assistance use?
102–75.615 Who is responsible for enforcing compliance with the terms and conditions of property transferred under section 414(a) of the 1969 HUD Act?
102–75.620 What happens if property that was transferred to meet a self-help housing or housing assistance use requirement is found to be in noncompliance with the terms of sale?

## Property for Use as Public Park or Recreation Areas

102–75.625 Which Federal agency is assigned surplus real property for public park or recreation purposes?
102–75.630 Who must disposal agencies notify that real property for public park or recreation purposes is available?
102–75.635 What information must the Department of the Interior (DOI) furnish eligible public agencies?
102–75.640 When must DOI notify the disposal agency that an eligible applicant is interested in acquiring the property?
102–75.645 What responsibilities do landholding agencies have concerning properties to be used for public park or recreation purposes?
102–75.650 When must DOI request assignment of the property?
102–75.655 What does the assignment recommendation contain?
102–75.660 What happens if DOI does not approve any applications or does not submit an assignment recommendation?
102–75.665 What happens after the disposal agency receives the assignment recommendation from DOI?
102–75.670 What responsibilities does DOI have after receiving the disposal agency's assignment letter?
102–75.675 What responsibilities does the grantee or recipient of the property have in accomplishing or completing the transfer?
102–75.680 What information must be included in the deed of conveyance of any surplus property transferred for public park or recreation purposes?
102–75.685 Who is responsible for enforcing compliance with the terms and conditions of the transfer of property used for public park or recreation purposes?
102–75.690 What happens if property that was transferred for use as a public park or recreation area is revested in the United States by reason of noncompliance with the terms or conditions of disposal, or for other cause?

## Property for Displaced Persons

102–75.695 Who can receive surplus real property for the purpose of providing replacement housing for persons who are to be displaced by Federal or federally assisted projects?
102–75.700 Which Federal agencies may solicit applications from eligible State agencies interested in acquiring the property to provide replacement housing for persons being displaced by Federal or federally assisted projects?
102–75.705 When must the Federal agency notify the disposal agency that an eligible State agency is interested in acquiring the property under section 218?
102–75.710 What responsibilities do landholding and disposal agencies have concerning properties used for providing replacement housing for persons who will be displaced by Federal or federally assisted projects?
102–75.715 When can a Federal agency request transfer of the property to the selected State agency?
102–75.720 Is there a specific or preferred format for the transfer request and who should receive it?
102–75.725 What does the transfer request contain?
102–75.730 What happens if a Federal agency does not submit a transfer request to the disposal agency for property to be used for replacement housing for persons who will be displaced by Federal or federally assisted projects?
102–75.735 What happens after the disposal agency receives the transfer request from the Federal agency?
102–75.740 Does the State agency have any responsibilities in helping to accomplish the transfer of the property?
102–75.745 What happens if the property transfer request is not approved by the disposal agency?

## Property for Correctional Facility, Law Enforcement, or Emergency Management Response Purposes

102–75.750 Who is eligible to receive surplus real and related personal property for correctional facility, law enforcement, or emergency management response purposes?
102–75.755 Which Federal agencies must the disposal agency notify concerning the availability of surplus properties for correctional facility, law enforcement, or emergency management response purposes?
102–75.760 Who must the Office of Justice Programs (OJP) and the Federal Emergency Management Agency (FEMA) notify that surplus real property is available for correctional facility, law enforcement, or emergency management response purposes?
102–75.765 What does the term ''law enforcement'' mean?
102–75.770 Is the disposal agency required to approve a determination by the Department of Justice that identifies

surplus property for correctional facility use or for law enforcement use?
102–75.775 Is the disposal agency required to approve a determination by FEMA that identifies surplus property for emergency management response use?
102–75.780 When must DOJ or FEMA notify the disposal agency that an eligible applicant is interested in acquiring the property?
102–75.785 What specifically must DOJ or FEMA address in the assignment request or recommendation that is submitted to the disposal agency?
102–75.790 What responsibilities do landholding agencies and disposal agencies have concerning properties to be used for correctional facility, law enforcement, or emergency management response purposes?
102–75.795 What happens after the disposal agency receives the assignment request by DOJ or FEMA?
102–75.800 What information must be included in the deed of conveyance?
102–75.805 Who is responsible for enforcing compliance with the terms and conditions of the transfer of the property used for correctional facility, law enforcement, or emergency management response purposes?
102–75.810 What responsibilities do OJP or FEMA have if they discover any information indicating a change in use of a transferred property?
102–75.815 What happens if property conveyed for correctional facility, law enforcement, or emergency management response purposes is found to be in noncompliance with the terms of the conveyance documents?

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102–75.835 When must DOT notify the disposal agency that an eligible applicant is interested in acquiring the property?
102–75.840 What action must the disposal agency take after an eligible public agency has submitted a plan of use for and an application to acquire a port facility property?
102–75.845 What must DOT address in the assignment recommendation submitted to the disposal agency?
102–75.850 What responsibilities do landholding agencies have concerning properties to be used in the development or operation of a port facility?
102–75.855 What happens if DOT does not submit an assignment recommendation?
102–75.860 What happens after the disposal agency receives the assignment recommendation from DOT?
102–75.865 What responsibilities does DOT have after receiving the disposal agency's assignment letter?
102–75.870 Who is responsible for enforcing compliance with the terms and conditions of the port facility conveyance?
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**Negotiated Sales**

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102–75.915 Do disposal agencies need to retain a copy of the explanatory statement?
102–75.920 Where is the explanatory statement sent?
102–75.925 Is GSA required to furnish the disposal agency with the explanatory statement's transmittal letter sent to Congress?
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**Public Sales**

102–75.935 What are disposal agencies' responsibilities concerning public sales?

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102–75.940 Can landholding agencies outlease surplus real property for nonfederal interim use?

**Subpart D—Management of Excess and Surplus Real Property**

102–75.945 What is GSA's policy concerning the physical care, handling, protection, and maintenance of excess and surplus real property and related personal property?

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102–75.955 Who is responsible for decontaminating excess and surplus real property?

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102–75.965 Who must perform the protection and maintenance of excess and surplus real property pending transfer to another Federal agency or disposal?
102–75.970 How long is the landholding agency responsible for the expense of protection and maintenance of excess and surplus real property pending its transfer or disposal?
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**Dangerous Property**

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102–75.1015 Are there any restrictions on Federal agencies concerning property donations to public bodies?

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**Abandonment and Destruction**

102–75.1025 When can a Federal agency abandon or destroy improvements on

land or related personal property in lieu of donating it to a public body?
102–75.1030 May Federal agencies abandon or destroy property in any manner they decide?
102–75.1035 Are there any restrictions on Federal agencies concerning the abandonment or destruction of improvements on land or related personal property?
102–75.1040 May Federal agencies abandon or destroy improvements on land or related personal property before public notice is given of such proposed abandonment or destruction?
102–75.1045 Are there exceptions to the policy that requires public notice be given before Federal agencies abandon or destroy improvements on land or related personal property?
102–75.1050 Is there any property for which this subpart does not apply?

## Subpart F—Delegations

### Delegation to Department of Defense (DOD)

102–75.1055 What is the policy governing delegations of real property disposal authority to the Secretary of Defense?
102–75.1060 What must the Secretary of Defense do before determining that DOD-controlled excess real property and related personal property is not required for the needs of any Federal agency and prior to disposal?
102–75.1065 When using a delegation of real property disposal authority under this subpart, is the DOD required to report excess property to GSA?
102–75.1070 Can this delegation of authority to the Secretary of Defense be redelegated?

### Delegation to Department of Agriculture (USDA)

102–75.1075 What is the policy governing delegations of real property disposal authority to the Secretary of Agriculture?
102–75.1080 What must the Secretary of Agriculture do before determining that USDA-controlled excess real property and related personal property is not required for the needs of any Federal agency and prior to disposal?
102–75.1085 When using a delegation of real property disposal authority under this subpart, is the USDA required to report excess property to GSA?
102–75.1090 Can this delegation of authority to the Secretary of Agriculture be redelegated?

### Delegation to the Department of the Interior

102–75.1095 What is the policy governing delegations of authority to the Secretary of the Interior?
102–75.1100 Can this delegation of authority to the Secretary of the Interior be redelegated?
102–75.1105 What other responsibilities does the Secretary of the Interior have under this delegation of authority?

### Native American-Related Delegations

102–75.1110 What is the policy governing delegations of authority to the Secretary of the Interior, the Secretary of Health and Human Services, and the Secretary of Education for property used in the administration of any Native American-related functions?
102–75.1115 Are there any limitations or restrictions on this delegation of authority?
102–75.1120 Does the property have to be federally screened?
102–75.1125 Can the transfer/retransfer under this delegation be at no cost or without consideration?
102–75.1130 What action must the Secretary requesting the transfer take where funds were not programmed and appropriated for acquisition of the property?
102–75.1135 May this delegation of authority to the Secretary of the Interior, the Secretary of Health and Human Services, and the Secretary of Education be redelegated?

## Subpart G—Conditional Gifts of Real Property To Further the Defense Effort

102–75.1140 What is the policy governing the acceptance or rejection of a conditional gift of real property for a particular defense purpose?
102–75.1145 What action must the Federal agency receiving an offer of a conditional gift take?
102–75.1150 What happens to the gift if GSA determines it to be acceptable?
102–75.1155 May an acceptable gift of property be converted to money?

## Subpart H—Use of Federal Real Property To Assist the Homeless

### Definitions

102–75.1160 What definitions apply to this subpart?

### Applicability

102–75.1165 What is the applicability of this subpart?

### Collecting the Information

102–75.1170 How will information be collected?

### Suitability Determination

102–75.1175 Who issues the suitability determination?

### Real Property Reported Excess to GSA

102–75.1180 For the purposes of this subpart, what is the policy concerning real property reported excess to GSA?

### Suitability Criteria

102–75.1185 What are suitability criteria?

### Determination of Availability

102–75.1190 What is the policy concerning determination of availability statements?

### Public Notice of Determination

102–75.1195 What is the policy concerning making public the notice of determination?

### Application Process

102–75.1200 How may representatives of the homeless apply for the use of properties to assist the homeless?

### Action on Approved Applications

102–75.1205 What action must be taken on approved applications?

### Unsuitable Properties

102–75.1210 What action must be taken on properties determined unsuitable for homeless assistance?

### No Applications Approved

102–75.1215 What action must be taken if there is no expression of interest?

**Authority:** 40 U.S.C. 486(c), 483(a), and 484; E.O. 12512, 50 FR 18453, 3 CFR, 1985 Comp., p. 340.

## Subpart A—General Provisions

### § 102–75.5 What is the scope of this part?

The real property policies contained in this part apply to Federal agencies, including the General Services Administration (GSA)/Public Buildings Service (PBS), operating under, or subject to, the authorities of the Administrator of General Services. Federal agencies with authority to dispose of real property under the Federal Property and Administrative Services Act of 1949, as amended, will be referred to as ''disposal agencies'' in this part. Except in rare instances where GSA delegates disposal authority to a Federal agency, the ''disposal agency'' as used in this part refers to GSA.

### § 102–75.10 What basic real property disposal policy governs disposal agencies?

Disposal agencies must provide, in a timely, efficient, and cost effective manner, the full range of real estate services necessary to support their real property utilization and disposal needs. Landholding agencies must survey the real property under their custody or control to identify property that is not utilized, underutilized, or not being put to optimum use. Disposal agencies must have adequate procedures in place to promote the effective utilization and disposal of such real property.

### Real Property Disposal Services

### § 102–75.15 What real property disposal services must disposal agencies provide?

Disposal agencies must provide real property disposal services for real property assets under their custody and control, such as the utilization of excess property, surveys, and the disposal of

surplus property, which includes public benefit conveyances, negotiated sales, public sales, related disposal services, and appraisals.

**§ 102–75.20 How can Federal agencies with independent disposal authority obtain related disposal services?**

Federal agencies with independent disposal authority are encouraged to obtain utilization, disposal, and related services from those agencies with expertise in real property disposal, such as GSA, as allowed by 31 U.S.C. 1535 (the Economy Act), so that they can remain focused on their core mission.

## Subpart B—Utilization of Excess Real Property

**§ 102–75.25 What are landholding agencies' responsibilities concerning the utilization of excess property?**

Landholding agencies' responsibilities concerning the utilization of excess property are to:

(a) Achieve maximum use of their real property, in terms of economy and efficiency, to minimize expenditures for the purchase of real property;

(b) Increase the identification and reporting of their excess real property; and

(c) Fulfill its needs for real property, so far as practicable, by utilization of real property determined excess by other agencies, pursuant to the provision of this part, before it purchases nonfederal real property.

**§ 102–75.30 What are disposal agencies' responsibilities concerning the utilization of excess property?**

Disposal agencies' responsibilities concerning the utilization of excess property are to:

(a) Provide for the transfer of excess real property among Federal agencies, to mixed-ownership Government corporations, and to the municipal government of the District of Columbia; and

(b) Resolve conflicting requests for transferring real property that the involved agencies cannot resolve.

**§ 102–75.35 What are GSA's responsibilities concerning the identification of unneeded Federal real property?**

In accordance with Executive Order 12512, the Administrator of General Services is responsible for providing Governmentwide policy, oversight, and guidance for Federal real property management. The Administrator of General Services must issue standards, procedures, and guidelines for surveying the real property holdings of executive agencies on a continuing basis to identify properties which are not utilized, are underutilized, or are not being put to optimum use. In addition, the Administrator must develop survey reports describing any property or portion thereof which, in his or her judgment, is not utilized, is underutilized, or is not being put to optimum use, and which should be reported as excess property. These provisions are presently limited to fee-owned properties and supporting leaseholds and lesser interests located within the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

### Standards

**§ 102–75.40 What are the standards that each executive agency must use to identify unneeded Federal real property?**

Each executive agency must identify unneeded Federal property using the following standards:

(a) Not utilized.

(b) Underutilized.

(c) Not being put to optimum use.

**§ 102–75.45 What does the term ''Not utilized'' mean?**

*Not utilized* means an entire property or portion thereof, with or without improvements, not occupied for current program purposes of the accountable executive agency, or occupied in caretaker status only.

**§ 102–75.50 What does the term ''Underutilized'' mean?**

*Underutilized* means an entire property or portion thereof, with or without improvements, which is used:

(1) Irregularly or intermittently by the accountable executive agency for current program purposes of that agency; or

(2) For current program purposes that can be satisfied with only a portion of the property.

**§ 102–75.55 What does the term ''Not being put to optimum use'' mean?**

*Not being put to optimum use* means an entire property or portion thereof, with or without improvements, which:

(1) Even though used for current program purposes, the nature, value, or location of the property is such that it could be utilized for a different and significantly higher and better purpose; or

(2) The costs of occupying are substantially higher than other suitable properties that could be made available through transfer, purchase, or lease with total net savings to the Government, after considering property values, costs of moving, occupancy, operational efficiency, environmental effects, regional planning, and employee morale.

### Guidelines

**§ 102–75.60 What are landholding agencies' responsibilities concerning real property surveys?**

A landholding agency's responsibilities concerning real property utilization surveys are to:

(a) Survey real property under its control (*i.e.*, property reported on its financial statements) at least annually to identify property that is not utilized, underutilized, or not being put to optimum use. When other needs for the property are identified or recognized, the agency must determine whether continuation of the current use or another use would better serve the public interest, considering both the Federal agency's needs and the property's location. In conducting annual reviews of their property holdings, the GSA Customer Guide to Real Property Disposal can provide guidelines for executive agencies to consider in identifying unneeded Federal real property;

(b) Maintain its inventory of real property at the absolute minimum consistent with economical and efficient conduct of the affairs of the agency; and

(c) Promptly report to GSA real property that it has determined to be excess.

**§ 102–75.65 Why is it important for executive agencies to notify the disposal agency of its real property needs?**

It is important that each executive agency notify the disposal agency of its real property needs in order to determine whether the excess or surplus property of another agency is available which would meet its need and prevent the unnecessary purchase or lease of real property.

**§ 102–75.70 Are there any exceptions to this notification policy?**

Yes, executive agencies are not required to notify the disposal agency when an agency's proposed acquisition of real property is dictated by such factors as exact geographical location, topography, engineering, or similar characteristics which limit the possible use of other available property. For example, executive agencies are not required to notify disposal agencies concerning the acquisition of real property for a dam site, reservoir area, or the construction of a generating plant or a substation, since specific lands are needed, which limit the possible use of other available property. Therefore, no

useful purpose would be served by notifying the disposal agency.

**§ 102–75.75 What is the most important consideration in evaluating a proposed transfer of excess real property?**

In every case of a proposed transfer of excess real property, the most important consideration is the validity and appropriateness of the requirement upon which the proposal is based. Also, a proposed transfer must not establish a new program which has never been reflected in any previous budget submission or congressional action. Additionally, a proposed transfer must not substantially increase the level of an agency's existing programs beyond that which has been contemplated in the President's budget or by the Congress.

**§ 102–75.80 What are an executive agency's responsibilities before requesting a transfer of excess real property?**

Before requesting a transfer of excess real property, an executive agency must:

(a) Screen its own property holdings to determine whether the new requirement can be met through improved utilization of existing real property; however, the utilization must be for purposes that are consistent with the highest and best use of the property under consideration;

(b) Review all real property under its accountability which it has been permitted or outleased and terminate the permit or lease for any property, or portion thereof, suitable for the proposed need if termination is not prohibited by the terms of the permit or lease.

(c) Utilize property that is or can be made available under § 102–75.80(a) or (b) for the proposed need in lieu of requesting a transfer of excess real property and reassign the property, when appropriate;

(d) Ensure that the appraised fair market value of the excess real property proposed for transfer will not substantially exceed the probable purchase price of other real property which would be suitable for the intended purpose;

(e) Limit the size and quantity of excess real property to be transferred to the actual requirements and separate, if possible, other portions of the excess installation for possible disposal to other agencies or to the public; and

(f) Consider the design, layout, geographic location, age, state of repair, and expected maintenance costs of excess real property proposed for transfer; agencies must be able to demonstrate that the transfer will be more economical over a sustained period of time than the acquisition of a new facility specifically planned for the purpose.

**§ 102–75.85 Can disposal agencies transfer excess real property to agencies for programs which appear to be scheduled for substantial curtailment or termination?**

Yes, but only on a temporary basis with the condition that the property will be released for further Federal utilization or disposal as surplus property at an agreed upon time when the transfer is arranged.

**§ 102–75.90 How is excess real property needed for office, storage, and related purposes normally transferred to the requesting agency?**

GSA may temporarily assign or direct the use of such excess real property to the requesting agency. See § 102–75.240.

**§ 102–75.95 Can Federal agencies which normally do not require real property (other than for office, storage, and related purposes) or which may not have statutory authority to acquire such property, obtain the use of excess real property?**

Yes, GSA can authorize the use of excess real property for an approved program. See § 102–75.240.

## Land Withdrawn or Reserved From the Public Domain

**§ 102–75.100 When an agency holds land withdrawn or reserved from the public domain and determines that it no longer needs this land, what must it do?**

An agency holding unneeded land withdrawn or reserved from the public domain must submit to the appropriate GSA regional office a Report of Excess Real Property (Standard Form 118), with appropriate Schedules A, B, and C, only when:

(a) It has filed a notice of intention to relinquish with the Department of the Interior (43 CFR part 2372, *et seq.*) and sent a copy of the notice to the appropriate GSA regional office;

(b) The Department of the Interior has notified the agency that the Secretary of the Interior has determined that the lands are not suitable for return to the public domain for disposition under the general public land laws because the lands are substantially changed in character by improvements or otherwise; and

(c) The Department of the Interior provides a report identifying whether or not any other agency claims primary, joint, or secondary jurisdiction over the lands and whether its records show that the lands are encumbered by rights or privileges under the public land laws.

**§ 102–75.105 What responsibility does the Department of the Interior have if it determines that minerals in the land are unsuitable for disposition under the public land mining and mineral leasing laws?**

In such cases, the Department of the Interior must:

(a) Notify the appropriate GSA regional office of such a determination; and

(b) Authorize the landholding agency to identify in the Standard Form 118 any minerals in the land that the Department of the Interior determines to be unsuitable for disposition under the public land mining and mineral leasing laws.

## Transfers Under Other Laws

**§ 102–75.110 Can transfers of real property be made under authority of laws other than the Federal Property and Administrative Services Act of 1949?**

Transfers of real property must be made only under the authority of the Federal Property and Administrative Services Act of 1949, unless the Administrator of General Services determines in each case that the transfer provisions of any such other law are consistent with the authority conferred by this Act. The provisions of this section shall not apply to transfers of real property authorized to be made by section 602(d) of the Act or by any special statute which directs or requires an executive agency to transfer or convey specifically described real property in accordance with the provisions of that statute.

## Reporting of Excess Real Property

**§ 102–75.115 Must reports of excess real property and related personal property be prepared on specific forms?**

Yes, landholding agencies must prepare reports of excess real property and related personal property on:

(a) Standard Form (SF) 118, Report of Excess Real Property, and accompanying Standard Form 118a, Buildings Structures, Utilities, and Miscellaneous Facilities, Schedule A;

(b) Standard Form 118b, Land, Schedule B; and

(c) Standard Form 118c, Related Personal Property, Schedule C.

**§ 102–75.120 Is there any other information that needs to accompany (or be submitted with) the Report of Excess Real Property (Standard Form 118)?**

Yes, in all cases where Government-owned land is reported excess, executive agencies must include a title report, prepared by a qualified employee of the landholding agency, documenting the Government's title to the property.

## Title Report

### § 102–75.125 What information must agencies include in the title report?

When completing the title report, agencies must include:

(a) The description of the property;

(b) The date title vested in the United States;

(c) All exceptions, reservations, conditions, and restrictions, relating to the title;

(d) Detailed information concerning any action, thing, or circumstance that occurred from the date the United States acquired the property to the date of the report which in any way affected or may have affected the United States' right, title, and interest in and to the real property (including copies of legal comments or opinions discussing the manner in which and the extent to which such right, title, or interest may have been affected). In the absence of any such action, thing, or circumstance, a statement to that effect must be made a part of the report;

(e) The status of civil and criminal jurisdiction over the land that is peculiar to the property by reason of it being Government-owned land. In the absence of any special circumstances, a statement to that effect must be made a part of the report;

(f) Detailed information regarding any known flood hazards or flooding of the property, and, if the property is located in a flood-plain or on wetlands, a listing of restricted uses (along with the citations) identified in Federal, State, or local regulations as required by Executive Orders 11988 and 11990 of May 24, 1977;

(g) The specific identification and description of fixtures and related personal property that have possible historic or artistic value;

(h) The historical significance of the property and whether the property is listed, is eligible for, or has been nominated for listing in the National Register of Historic Places or is in proximity to a property on the National Register. If the landholding agency is aware of any effort by the public to have the property listed on the National Register, it must also include this information;

(i) A description of the type, location, and condition of asbestos incorporated in the construction, repair, or alteration of any building or improvement on the property (*e.g.*, fire-proofing, pipe insulation, *etc.*) and a description of any asbestos control measures taken for the property. Agencies must also provide to GSA any available indication of costs and/or time necessary to remove all or any portion of the asbestos-containing materials. Agencies are not required to conduct any specific studies and/or tests to obtain this information. (The provisions of this subpart do not apply to asbestos on Federal property which is subject to section 120(h) of the Superfund Amendments and Reauthorization Act of 1986, Public Law 99–499); and

(j) A statement indicating whether or not, during the time the property was owned by the United States, any hazardous substance activity, as defined by regulations issued by the Environmental Protection Agency at 40 CFR part 373, took place on the property. Hazardous substance activity includes situations where any hazardous substance was stored for one year or more, known to have been released, or disposed of on the property. Agencies reporting such property shall review the regulations issued by the Environmental Protection Agency at 40 CFR part 373 for details on the information required.

### § 102–75.130 If hazardous substance activity took place on the property, what specific information must an agency include on the title report?

If hazardous substance activity took place on the property, the reporting agency must include information on the type and quantity of such hazardous substance and the time at which such storage, release, or disposal took place. The reporting agency must also advise the disposal agency if all remedial action necessary to protect human health and the environment with respect to any such hazardous substance activity was taken before the date the property was reported excess. If such action was not taken, the reporting agency must advise the disposal agency when such action will be completed or how the agency expects to comply with CERCLA in the disposal. See §§ 102–75.340 and 102–75.345.

### § 102–75.135 If no hazardous substance activity took place on the property, what specific information must an agency include on the title report?

If no hazardous substance activity took place, the reporting agency must include the following statement:

> The (reporting agency) has determined, in accordance with regulations issued by the Environmental Protection Agency at 40 CFR part 373, that there is no evidence indicating that hazardous substance activity took place on the property during the time the property was owned by the United States.

## Other Necessary Information

### § 102–75.140 In addition to the title report, what information must an executive agency transmit with the Report of Excess Real Property (Standard Form 118)?

Executive agencies must provide:

(a) A legible, reproducible copy of all instruments in possession of the agency which affect the United State's right, title, or interest in the property reported or the use and operation of such property (including agreements covering and licenses to use, any patents, processes, techniques, or inventions). If it is impracticable to transmit the abstracts of title and related title evidence, agencies must provide the name and address of the custodian of such documents in the title report referred to in § 102–75.120;

(b) Any appraisal reports indicating or providing the fair market value or the fair annual rental of the property if requested by the disposal agency; and

(c) A certification by a responsible person that the property does or does not contain polychlorinated biphenyl (PCB) transformers or other equipment regulated by the Environmental Protection Agency (EPA) under 40 CFR part 761 if requested by the disposal agency. If the property does contain any equipment subject to EPA regulation under 40 CFR part 761, the certification must include the landholding agency's assurance that each piece of equipment is now and will continue to be in compliance with the EPA regulations until disposal of the property.

## Examination for Acceptability

### § 102–75.145 Is GSA required to review each report of excess?

Yes, GSA must review each report of excess to ascertain whether the report was prepared according to the provisions of this part. GSA must notify the landholding agency, in writing, whether the report is acceptable or other information is needed within 15 calendar days after receipt of the report.

### § 102–75.150 What happens when GSA determines that the report of excess is adequate?

When GSA determines that a report is adequate, GSA will accept the report and inform the landholding agency of the acceptance date. However, the landholding agency must, upon request, promptly furnish any additional information or documents relating to the property required by GSA to accomplish a transfer or a disposal.

**§ 102–75.155 What happens if GSA determines that the report of excess is insufficient?**

Where GSA determines that a report is insufficient, GSA will return the report and inform the landholding agency of the facts and circumstances that make the report insufficient. The landholding agency must promptly take appropriate action to submit an acceptable report to GSA. If the landholding agency is unable to submit an acceptable report, the property will be removed from under the provisions of §§ 102–75.940 and 102–75.965. However, GSA may accept the report of excess on a conditional basis and identify what deficiencies in the report must be corrected in order for the report to gain full acceptance.

## Designation as Personal Property

**§ 102–75.160 Should prefabricated movable structures be designated real or personal property for disposition purposes?**

Prefabricated movable structures such as Butler-type storage warehouses, quonset huts, and housetrailers (with or without undercarriages) reported to GSA along with the land on which they are located may, at GSA's discretion, be designated for disposition as personal property for off-site use or as real property for disposal with the land.

**§ 102–75.165 Should related personal property be designated real or personal property for disposition purposes?**

Related personal property may, at the disposal agency's discretion, be designated as personal property for disposal purposes. In making this designation for items having possible historic or artistic value, the disposal agency must ensure that Federal agencies, including the Smithsonian Institution (see § 102–36.60 of this chapter), are afforded the opportunity of obtaining them through personal property channels for off-site use for preservation and display off-site. Fixtures such as murals and fixed sculpture that have exceptional historical or artistic value may be designated for disposition by severance for off-site use. In making such designations, consideration must be given to such factors as whether the fixtures can be removed without seriously affecting the value of the realty and whether a ready disposition can be made of the severed fixtures.

**§ 102–75.170 What happens to the related personal property in a structure scheduled for demolition?**

When a structure is to be demolished, any fixtures or related personal property therein may, at the disposal agency's discretion, be designated for disposition as personal property where a ready disposition can be made of these items. As indicated in § 102–75.165, particular consideration should be given to designating items having possible historical or artistic value as personal property.

## Transfers

**§ 102–75.175 What are GSA's responsibilities regarding transfer requests?**

Before property can be transferred among Federal agencies, to mixed-ownership Government corporations, and to the municipal government of the District of Columbia, GSA must determine that:

(a) The transfer is in the best interest of the Government;

(b) The requesting agency is the appropriate agency to hold the property; and

(c) The proposed land use will maximize use of the real property, in terms of economy and efficiency, to minimize expenditures for the purchase of real property.

**§ 102–75.180 May landholding agencies transfer excess real property without notifying GSA?**

Landholding agencies may, without notifying GSA, transfer excess real property that they use, occupy, or control under a lease, permit, license, easement, or similar instrument when—

(a) The lease or other instrument is subject to termination by the grantor or owner of the premises within nine months;

(b) The remaining term of the lease or other instrument, including renewal rights, will provide for less than nine months of use and occupancy; or

(c) The lease or other instrument provides for use and occupancy of space for office, storage, and related facilities, which does not exceed a total of 2,500 square feet.

**§ 102–75.185 In those instances where landholding agencies may transfer excess real property without notifying GSA, which policies must they follow?**

In those instances, landholding agencies must transfer property following the policies in this subpart.

**§ 102–75.190 What amount must the transferee agency pay for the transfer of excess real property?**

The transferee agency must pay an amount equal to the property's fair market value (determined by the Administrator);

(a) Where the transferor agency has requested the net proceeds of the transfer pursuant to section 204(c) of the Act; or

(b) Where either the transferor or transferee agency (or organizational unit affected) is subject to the Government Corporation Control Act (31 U.S.C. 841) or is a mixed-ownership Government corporation, or the municipal government of the District of Columbia.

**§ 102–75.195 If the transferor agency is a wholly owned Government corporation, what amount must the transferee agency pay?**

As may be agreed upon by GSA and the corporation, the transferee agency must pay an amount equal to—

(a) The estimated fair market value of the property; or

(b) The corporation's book value of the property.

**§ 102–75.200 What amount must the transferee agency pay if property is being transferred for the purpose of upgrading the transferee agency's facilities?**

Where the transfer is for the purpose of upgrading facilities (*i.e.*, for the purpose of replacing other property of the transferee agency which because of the location, nature, or condition thereof, is less efficient for use), the transferee must pay an amount equal to the difference between the fair market value of the property to be replaced and the fair market value of the property requested, as determined by the Administrator.

**§ 102–75.205 Are transfers ever made without reimbursement by the transferee agency?**

Transfers may be made without reimbursement by the transferee agency only if—

(a) Congress has specifically authorized the transfer without reimbursement, or

(b) The Administrator, with the approval of the Director of the Office of Management and Budget (OMB), has approved a request for an exception from the 100 percent reimbursement requirement.

**§ 102–75.210 What must a transferee agency include in its request for an exception from the 100 percent reimbursement requirement?**

The request must include an explanation of how granting the exception would further essential agency program objectives and at the same time be consistent with Executive Order 12512, Federal Real Property Management, dated April 29, 1985. The transferee agency must attach the explanation to the Request for Transfer of Excess Real and Related Personal Property (GSA Form 1334) prior to submitting the form to GSA. The

unavailability of funds alone is not sufficient to justify an exception.

**§ 102–75.215 Who must endorse requests for exception to the 100 percent reimbursement requirement?**

Agency heads must endorse requests for exceptions to the 100 percent reimbursement requirement.

**§ 102–75.220 Where should an agency send a request for exception to the 100 percent reimbursement requirement?**

Agencies must submit all requests for exception from the 100 percent reimbursement requirement to the appropriate GSA regional property disposal office.

**§ 102–75.225 Who must review and approve a request for exception from the 100 percent reimbursement requirement?**

The Administrator must review all requests for exception from the 100 percent reimbursement requirement. If the Administrator approves the request, it is then submitted to OMB for final concurrence. If OMB approves the request, then GSA may complete the transfer.

**§ 102–75.230 Who is responsible for property protection and maintenance costs while the request for exception is being reviewed?**

The agency requesting the property will assume responsibility for protection and maintenance costs where the disposal of the property is deferred for more than 30 days from the date OMB receives the request for an exception to the 100 percent reimbursement requirement. If the request is denied, the requesting agency may pay the fair market value for the property or withdraw its request. If the request is withdrawn, responsibility for protection and maintenance cost will return to the landholding agency at that time.

**§ 102–75.235 May disposal agencies transfer excess property to the Senate, the House of Representatives, and the Architect of the Capitol?**

Yes, disposal agencies may transfer excess property to the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his or her direction, pursuant to the provisions of section 602(e) of the Federal Property and Administrative Services Act of 1949. The amount of reimbursement for such transfer must be the same as would be required for a transfer of excess property to an executive agency under similar circumstances.

### Temporary Utilization

**§ 102–75.240 May excess real property be temporarily assigned/reassigned?**

Yes, whenever GSA determines that it is more advantageous to assign property temporarily rather than permanently, it may do so. If the space is for office, storage, or related facilities, GSA will determine the length of the assignment/reassignment. Agencies are required to reimburse the landholding agency (or GSA, if GSA has become responsible for seeking an appropriation for protection and maintenance expenses) (see § 102–75.970) for protection and maintenance expenses. GSA may also temporarily assign/reassign excess real property for uses other than storage, office or related facilities. In such cases, the agency receiving the temporary assignment may be required to pay a rental or users charge based upon the fair market value of the property, as determined by GSA. If the property will be required by the agency for a period of more than 1 year, it may be transferred on a conditional basis, with an understanding that the property will be reported excess at an agreed upon time (*see* § 102–75.85). The requesting agency is responsible for protection and maintenance expenses.

### Nonfederal Interim Use of Excess Property

**§ 102–75.245 When can landholding agencies grant rights for nonfederal interim use of excess property reported to GSA?**

Landholding agencies, upon approval from GSA, may grant rights for nonfederal interim use of excess property reported to GSA, when it is determined that such excess property is not required for the needs of any Federal agency and when the interim use will not impair the ability to dispose of the property.

## Subpart C—Surplus Real Property Disposal

**§ 102–75.250 What general policy must disposal agencies follow concerning the disposal of surplus property?**

Disposal agencies must dispose of surplus real property:

(a) In the most economical manner consistent with the best interests of the Government; and

(b) Ordinarily for cash, consistent with the best interests of the Government.

**§ 102–75.255 What are disposal agencies' specific responsibilities concerning the disposal of surplus property?**

Disposal agencies must obtain from GSA a determination that there is no further Federal need or requirement for their excess real property and this property is surplus to the needs of the Federal Government. After receiving this determination, disposal agencies, upon approval from GSA, must expeditiously make the surplus property available for acquisition by State and local governmental units and nonprofit institutions (see § 102–75.350) or for sale by public advertising, negotiation, or other disposal action. Disposal agencies must consider the availability of real property for public purposes on a case-by-case basis, based on highest and best use and estimated fair market value. Where hazardous substance activity is identified, *see* §§ 102–75.340 and 102–75.345 for required information that the disposal agency must incorporate into the offer to purchase and conveyance document.

**§ 102–75.260 When may disposal agencies dispose of surplus real property by exchange for privately owned property?**

Disposal agencies may dispose of surplus real property by exchange for privately owned property for property management considerations such as boundary realignment or for providing access. Disposal agencies may also dispose of surplus real property by exchange for privately owned property where authorized by law, when the requesting Federal agency receives approval from the Office of Management and Budget and the appropriate oversight committees and where the transaction offers substantial economic or unique program advantages not otherwise obtainable by any other acquisition method.

**§ 102–75.265 Are conveyance documents required to identify all agreements and representations concerning property restrictions and conditions?**

Yes, conveyance documents must identify all agreements and representations concerning restrictions and conditions affecting the property's future use, maintenance, or transfer.

### Applicability of Antitrust Laws

**§ 102–75.270 Must antitrust laws be considered when disposing of property?**

Yes, antitrust laws must be considered in any case in which there is contemplated a disposal to any private interest of:

(a) Real and related personal property which has an estimated fair market value of $3 million or more; or

(b) Patents, processes, techniques, or inventions, irrespective of cost.

**§ 102–75.275 Who determines whether the proposed disposal would create or maintain a situation inconsistent with antitrust laws?**

The Attorney General determines whether the proposed disposal would

create or maintain a situation inconsistent with antitrust laws.

**§ 102–75.280 What information concerning a proposed disposal must a disposal agency provide to the Attorney General to determine the applicability of anti-trust laws?**

The disposal agency must promptly provide the Attorney General with notice of any such proposed disposal and the probable terms or conditions, as required by section 207 of the Federal Property and Administrative Services Act of 1949. If notice is given by any disposal agency other than GSA, a copy of the notice must also be provided simultaneously to the GSA regional office in which the property is located. Upon request, a disposal agency must furnish information that the Attorney General believes to be necessary in determining whether the proposed disposition or any other disposition of surplus real property violates or would violate any of the antitrust laws.

**§ 102–75.285 Can a disposal agency dispose of real property to a private interest specified in § 102–75.270 before advice is received from the Attorney General?**

No, advice from the Attorney General must be received before disposing of real property.

## Disposals Under Other Laws

**§ 102–75.290 Can disposals of real property be made under authority of laws other than the Federal Property and Administrative Services Act of 1949?**

Except for disposals specifically authorized by special legislation, disposals of real property must be made only under the authority of the Federal Property and Administrative Services Act of 1949. However, the Administrator of General Services can evaluate, on a case-by-case basis, the disposal provisions of any other law to determine consistency with the authority conferred by the Act. The provisions of this section do not apply to disposals of real property authorized to be made by section 602(d) of the Act or by any special statute which directs or requires an executive agency named in the law to transfer or convey specifically described real property in accordance with the provisions of that statute.

## Credit Disposals

**§ 102–75.295 What is the policy on extending credit in connection with the disposal of surplus property?**

The disposal agency:

(a) May extend credit in connection with any disposal of surplus property when it determines that credit terms are necessary to avoid reducing the salability of the property and potential obtainable price;

(b) Must administer and manage the credit disposal and any related security;

(c) May enforce, adjust, or settle any right of the Government with respect to extending credit in a manner and with terms that are in the best interests of the Government; and

(d) Must include provisions in the conveyance documents that obligate the purchaser, where a sale is made upon credit, to obtain the disposal agency's prior written approval before reselling or leasing the property. The disposal agency must ensure that the purchaser's credit obligations to the United States are fulfilled before approving the resale of the property.

## Appraisal

**§ 102–75.300 Are appraisals required for all real property disposal transactions?**

Generally, yes, appraisals are required for all real property disposal transactions, except when:

(a) An appraisal will serve no useful purpose ( *e.g.*, legislation authorizes conveyance without monetary consideration or at a fixed price). This exception does not apply to negotiated sales to public agencies intending to use the property for a public purpose not covered by any of the special disposal provisions in subpart C of this part; or

(b) The estimated fair market value of property to be offered on a competitive sale basis does not exceed $300,000.

**§ 102–75.305 What type of appraisal value must be obtained for real property disposal transactions?**

For all real property transactions requiring appraisals, agencies must obtain, as appropriate, an appraisal of either the fair market value or the fair annual rental value of the property available for disposal.

**§ 102–75.310 Who must agencies use to appraise the real property?**

Agencies must use only experienced and qualified real estate appraisers familiar with the types of property to be appraised when conducting the appraisal. When an appraisal is required for negotiation purposes, the same standard applies. However, agencies may authorize other methods of obtaining an estimate of the fair market value or the fair annual rental when the cost of obtaining that data from a contract appraiser would be out of proportion to the expected recoverable value of the property.

**§ 102–75.315 Are appraisers authorized to consider the effect of historic covenants on the fair market value?**

Yes, appraisers are authorized to consider the effect of historic covenants on the fair market value, if the property is on or eligible for the National Register of Historic Places.

**§ 102–75.320 Does appraisal information need to be kept confidential?**

Yes, appraisals, appraisal reports, appraisal analyses, and other pre-decisional appraisal documents are confidential and can only be used by authorized Government personnel who can substantiate the need to know this information. Appraisal information must not be divulged prior to the delivery and acceptance of the deed. Any persons engaged to collect or evaluate appraisal information must certify that:

(a) They have no direct or indirect interest in the property; and

(b) The report was prepared and submitted without bias or influence.

## Inspection

**§ 102–75.325 What responsibility does the landholding agency have to provide persons the opportunity to inspect available surplus property?**

Landholding agencies should provide all persons interested in the acquiring available surplus property with the opportunity to make a complete inspection of the property, including any available inventory records, plans, specifications, and engineering reports that relate to the property. These inspections are subject to any necessary national security restrictions and are subject to the disposal agency's rules. (See §§ 102–75.335 and 102–75.985.)

## Submission of Offers To Purchase or Lease

**§ 102–75.330 What form must all offers to purchase or lease be in?**

All offers to purchase or lease must be in writing, accompanied by any required earnest money deposit, using the form prescribed by the disposal agency. In addition to the financial terms upon which the offer is predicated, the offer must set forth the willingness of the offeror to abide by the terms, conditions, reservations, and restrictions upon which the property is offered, and must contain such other information as the disposal agency may request.

## Provisions Relating to Asbestos

### § 102–75.335 Where asbestos is identified, what information must the disposal agency incorporate into the offer to purchase and in the conveyance document?

Where the existence of asbestos on the property has been brought to the attention of the disposal agency by the Report of Excess Real Property (Standard Form 118) information provided (see § 102–75.125), the disposal agency must incorporate this information (less any cost or time estimates to remove the asbestos-containing materials) into any offer to purchase and conveyance document and include the following wording:

Notice of the Presence of Asbestos—Warning!

(a) The Purchaser is warned that the property offered for sale contains asbestos-containing materials. Unprotected or unregulated exposures to asbestos in product manufacturing, shipyard, and building construction workplaces have been associated with asbestos-related diseases. Both the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) regulate asbestos because of the potential hazards associated with exposure to airborne asbestos fibers. Both OSHA and EPA have determined that such exposure increases the risk of asbestos-related diseases, which include certain cancers and which can result in disability or death.

(b) Bidders (Offerors) are invited, urged and cautioned to inspect the property to be sold prior to submitting a bid (offer). More particularly, bidders (offerors) are invited, urged and cautioned to inspect the property as to its asbestos content and condition and any hazardous or environmental conditions relating thereto. The disposal agency will assist bidders (offerors) in obtaining any authorization(s) which may be required in order to carry out any such inspection(s). Bidders (Offerors) shall be deemed to have relied solely on their own judgment in assessing the overall condition of all or any portion of the property including, without limitation, any asbestos hazards or concerns.

(c) No warranties either express or implied are given with regard to the condition of the property including, without limitation, whether the property does or does not contain asbestos or is or is not safe for a particular purpose. The failure of any bidder (offeror) to inspect, or to be fully informed as to the condition of all or any portion of the property offered, will not constitute grounds for any claim or demand for adjustment or withdrawal of a bid or offer after its opening or tender.

(d) The description of the property set forth in the Invitation for Bids (Offer to Purchase) and any other information provided therein with respect to said property is based on the best information available to the disposal agency and is believed to be correct, but an error or omission, including but not limited to the omission of any information available to the agency having custody over the property and/or any other Federal agency, shall not constitute grounds or reason for nonperformance of the contract of sale, or any claim by the Purchaser against the Government including, without limitation, any claim for allowance, refund, or deduction from the purchase price.

(e) The Government assumes no liability for damages for personal injury, illness, disability or death, to the Purchaser, or to the Purchaser's successors, assigns, employees, invitees, or any other person subject to Purchaser's control or direction, or to any other person, including members of the general public, arising from or incident to the purchase, transportation, removal, handling, use, disposition, or other activity causing or leading to contact of any kind whatsoever with asbestos on the property which is the subject of this sale, whether the Purchaser, its successors or assigns has or have properly warned or failed properly to warn the individual(s) injured.

(f) The Purchaser further agrees that in its use and occupancy of the property it will comply with all Federal, State, and local laws relating to asbestos.

## Provisions Relating to Hazardous Substance Activity

### § 102–75.340 Where hazardous substance activity has been identified on property proposed for disposal, what information must the disposal agency incorporate into the offer to purchase and conveyance document?

Where the existence of hazardous substance activity has been brought to the attention of the disposal agency by the Report of Excess Real Property (Standard Form 118) information provided (*see* §§ 102–75.125 and 102–75.130), the disposal agency must incorporate this information into any offer to purchase and conveyance document. In any offer to purchase and conveyance document, disposal agencies, generally, must also address the following (specific recommended language that addresses the following issues can be found in the GSA Customer Guide to Real Property Disposal):

(a) Notice of all hazardous substance activity identified as a result of a complete search of agency records by the landholding agency;

(b) A statement, certified by a responsible landholding agency official in the report of excess, that all remedial actions necessary to protect human health and the environment with regard to such hazardous substance activity have been taken (this is not required in the offer to purchase or conveyance document in the case of a transfer of property under the authority of section 120(h)(3)(C) of CERCLA, or the Early Transfer Authority);

(c) A commitment, on behalf of the United States, to return to correct any hazardous condition discovered after the conveyance that results from hazardous substance activity prior to the date of conveyance; and

(d) A reservation by the United States of a right of access in order to accomplish any further remedial actions required in the future.

### § 102–75.345 What is different about the statements in the offer to purchase and conveyance document if the sale is to a potentially responsible party with respect to the hazardous substance activity?

In the case where the purchaser or grantee is a potentially responsible party (PRP) with respect to hazardous substance activity on the property under consideration, the United States is no longer under a general obligation to certify that the property has been successfully remediated, or to commit to return to the property to address contamination that is discovered in the future. Therefore, the statements of responsibility and commitments on behalf of the United States referenced in § 102–75.340 should not be used. Instead, language should be included in the offer to purchase and conveyance document that is consistent with any agreement that has been reached between the landholding agency and the PRP with regard to prior hazardous substance activity.

## Public Benefit Conveyances

### § 102–75.350 What are disposal agencies' responsibilities concerning public benefit conveyances?

Based on a highest and best use analysis, disposal agencies may make surplus real property available to State and local governments and certain nonprofit institutions at up to 100 percent public benefit discount for public benefit purposes. Some examples of such purposes are education, health, park and recreation, the homeless, historic monuments, public airports, highways, correctional facilities, ports, and wildlife conservation. The implementing regulations for these conveyances are found in this subpart.

### § 102–75.355 What clause must be in the offer to purchase and conveyance documents for public benefit conveyances?

Executive agencies must include in the offer to purchase and conveyance documents the non-discrimination clause in § 102–75.360 for public benefit conveyances.

### § 102–75.360 What wording must be in the non-discrimination clause which is required in the offer to purchase and in the conveyance document?

The wording of the non-discrimination clause must be as follows:

The Grantee covenants for itself, its heirs, successors, and assigns and every successor in interest to the property hereby conveyed, or any part thereof, that the said Grantee and such heirs, successors, and assigns shall not discriminate upon the basis of race, color, religion, or national origin in the use, occupancy, sale, or lease of the property, or in their employment practices conducted thereon. This covenant shall not apply, however, to the lease or rental of a room or rooms within a family dwelling unit; nor shall it apply with respect to religion to premises used primarily for religious purposes. The United States of America shall be deemed a beneficiary of this covenant without regard to whether it remains the owner of any land or interest therein in the locality of the property hereby conveyed and shall have the sole right to enforce this covenant in any court of competent jurisdiction.

## Power Transmission Lines

### § 102–75.365 Do disposal agencies have to notify State entities and Government agencies that a surplus power transmission line and right-of-way is available?

Yes, disposal agencies must notify State entities and Government agencies of the availability of a surplus power transmission line and right-of-way.

### § 102–75.370 May a State, or any political subdivision thereof, certify to a disposal agency that it needs a surplus power transmission line and the right-of-way acquired for its construction to meet the requirements of a public or cooperative power project?

Yes, section 13(d) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(d)), and section 602(a) of the Federal Property and Administrative Services Act of 1949, allows any State or political subdivision, or any State or Government agency or instrumentality to certify to the disposal agency that a surplus power transmission line and the right-of-way acquired for its construction is needed to meet the requirements of a public or cooperative power project.

### § 102–75.375 What happens once a State, or political subdivision, certifies that it needs a surplus power transmission line and the right-of-way acquired for its construction to meet the requirements of a public or cooperative power project?

Generally, once a State or political subdivision certifies that it needs a surplus power transmission line and the right-of-way, the disposal agency may sell the property to the state, or political subdivision thereof, at the fair market value. However, if a sale of a surplus transmission line cannot be accomplished because of the price to be charged, or other reasons, and the certification by the State or political subdivision is not withdrawn, the disposal agency must report the facts involved to the Administrator of General Services, to determine what further action will or should be taken to dispose of the property.

### § 102–75.380 May power transmission lines and rights-of-way be disposed of in other ways?

Yes, power transmission lines and rights-of-way not disposed of by sale for fair market value may be disposed of following other applicable provisions of this part, including, if appropriate, reclassification by the disposal agency.

## Property for Public Airports

### § 102–75.385 Do disposal agencies have the responsibility to notify eligible public agencies that airport property has been determined to be surplus?

Yes, the disposal agency must notify eligible public agencies that property currently used as or suitable for use as a public airport under the Surplus Property Act of 1944, as amended, has been determined to be surplus. A copy of the landholding agency's Report of Excess Real Property (Standard Form 118, with accompanying schedules) must be transmitted with the copy of the surplus property notice sent to the appropriate regional office of the FAA. The FAA must furnish an application form and instructions for the preparation of an application to eligible public agencies upon request.

### § 102–75.390 May surplus airport property be conveyed or disposed of to a State, political subdivision, municipality, or tax-supported institution for a public airport?

Yes, section 13(g) of the Surplus Property Act of 1944 (49 U.S.C. 47151) authorizes the disposal agency to convey or dispose of surplus airport property to a State, political subdivision, municipality, or tax-supported institution for use as a public airport.

### § 102–75.395 What does the term "surplus airport property" mean?

For the purposes of this part, surplus airport property is any surplus real property including improvements and personal property included as a part of the operating unit that the Administrator of the Federal Aviation Administration (FAA) deems is:

(a) Essential, suitable, or desirable for the development, improvement, operation, or maintenance of a public airport, as defined in the Federal Airport Act, as amended (49 U.S.C. 1101); or

(b) Reasonably necessary to fulfill the immediate and foreseeable future requirements of the grantee for the development, improvement, operation, or maintenance of a public airport, including property needed to develop sources of revenue from non-aviation businesses at a public airport. Approval for non-aviation revenue-producing areas shall be given only for such areas as are anticipated to generate net proceeds which do not exceed expected deficits for operation of the aviation area applied for at the airport.

### § 102–75.400 Is industrial property located on an airport also considered to be "airport property"?

No, if the Administrator of General Services determines that a property's highest and best use is industrial, then the property must be classified as such for disposal without regard to the public benefit conveyance provisions of this subpart.

### § 102–75.405 What responsibilities does the FAA have after receiving a copy of the notice (and a copy of the Report of Excess Real Property (Standard Form 118)) given to eligible public agencies that there is surplus airport property?

As soon as possible after receiving the copy of the surplus notice, the Federal Aviation Administration must inform the disposal agency of its determination. Then, the FAA must provide assistance to any eligible public agency known to have a need for the property for a public airport so that the public agency may develop a comprehensive and coordinated plan of use and procurement for the property.

### § 102–75.410 What action must the disposal agency take after an eligible public agency has submitted a plan of use and application to acquire property for a public airport?

After an eligible public agency submits a plan of use and application, the disposal agency must transmit two copies of the plan and two copies of the application to the appropriate FAA regional office. The FAA must promptly submit a recommendation to the disposal agency for disposal of the property for a public airport or must inform the disposal agency that no such recommendation will be submitted.

### § 102–75.415 What happens after the disposal agency receives the FAA's recommendation for disposal of the property for a public airport?

The head of the disposal agency, or his or her designee, may convey property approved by the FAA for use as a public airport to the eligible public agency, subject to the provisions of the Surplus Property Act of 1944, as amended.

**§ 102–75.420 What happens if the FAA informs the disposal agency that it does not recommend disposal of the property for a public airport?**

Any airport property that the FAA does not recommend for disposal as a public airport must be disposed of in accordance with other applicable provisions of this part. However, the disposal agency must first notify the landholding agency of its inability to dispose of the property for use as a public airport. In addition, the disposal agency must allow the landholding agency 30 days to withdraw the property from surplus or to waive any future interest in the property for public airport use.

**§ 102–75.425 Who has sole responsibility for enforcing compliance with the terms and conditions of disposal for property disposed of for use as a public airport?**

The FAA Administrator has the sole responsibility for enforcing compliance with the terms and conditions of disposals. The FAA is also responsible for the reforming, correcting, or amending of any disposal instrument; granting releases; and any action necessary for recapturing the property, using the provisions of the Act of October 1, 1949, 63 Stat. 700, and section 1402(c) of the Federal Aviation Act of 1958, 72 Stat. 807 (50 U.S.C. App. 1622a–1622c).

**§ 102–75.430 What happens if property conveyed for use as a public airport is revested in the United States?**

If property that was conveyed for use as a public airport is revested in the United States for noncompliance with the terms of the disposal, or other cause, the Administrator of the FAA must be accountable for the property and must report the property to GSA as excess property following the provisions of this part.

**§ 102–75.435 Is the Airport and Airway Development Act of 1970 (Airport Act of 1970) applicable to the transfer of airports to State and local agencies?**

No, the Airport and Airway Development Act of 1970 (49 U.S.C. sec. 47151 through sec. 47153) (Airport Act of 1970) does not apply to the transfer of airports to State and local agencies. The transfer of airports to State and local agencies may be made only under section 13(g) of the Surplus Property Act of 1944 which is continued (in effect) by the Act. Only property which the landholding agency determines cannot be reported excess to GSA for disposal under the Act, but nevertheless may be made available for use by a State or local public body as a public airport without being inconsistent with the Federal program of the landholding agency, may be conveyed under the Airport Act of 1970. In the latter instance, this act may be used to transfer non-excess land for airport development purposes providing it does not constitute an entire airport. An entire, existing and established airport can only be disposed of to a State or eligible local government under section 13(g) of the Surplus Property Act of 1944.

## Property for Use as Historic Monuments

**§ 102–75.440 Who must disposal agencies notify that surplus property is available for historic monument use?**

Disposal agencies must notify State and areawide clearinghouses and eligible public agencies that property which may be conveyed for use as a historic monument has been determined to be surplus. A copy of the landholding agency's Report of Excess Real Property (Standard Form 118) with accompanying schedules must be transmitted with the copy of each notice that is sent to the appropriate regional or field offices of the National Park Service (NPS) of the Department of the Interior.

**§ 102–75.445 Who can convey surplus real and related personal property for historic monument use?**

A disposal agency may convey surplus real and related personal property for use as a historic monument, without monetary consideration, to any State, political subdivision, instrumentality thereof, or municipality, for the benefit of the public provided the Secretary of the Interior has determined that the property is suitable and desirable for such use.

**§ 102–75.450 What type of property is suitable or desirable for use as a historic monument?**

Only property conforming with the recommendation of the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments shall be determined to be suitable or desirable for use as a historic monument.

**§ 102–75.455 May historic monuments be used for revenue-producing activities?**

The disposal agency may authorize the use of historic monuments conveyed under section 203(k)(3) of the Act or the Surplus Property Act of 1944, as amended, for revenue-producing activities if the Secretary of the Interior:

(a) Determines that the activities, described in the applicant's proposed program of use, are compatible with the use of the property for historic monument purposes;

(b) Approves the grantee's plan for repair, rehabilitation, restoration, and maintenance of the property;

(c) Approves the grantee's plan for financing the repair, rehabilitation, restoration, and maintenance of the property. The Department of the Interior must not approve the plan unless it provides that all income in excess of costs of repair, rehabilitation, restoration, maintenance and a specified reasonable profit or payment that may accrue to a lessor, sublessor, or developer in connection with the management, operation, or development of the property for revenue producing activities, is used by the grantee, lessor, sublessor, or developer, only for public historic preservation, park, or recreational purposes; and

(d) Examines and approves the grantee's accounting and financial procedures for recording and reporting on revenue-producing activities.

**§ 102–75.460 What information must disposal agencies furnish eligible public agencies?**

Upon request, the disposal agency must furnish eligible public agencies with adequate preliminary property information and, with the landholding agency's cooperation, provide assistance to enable public agencies to obtain adequate property information.

**§ 102–75.465 What information must eligible public agencies interested in acquiring real property for use as a historic monument submit to the appropriate regional or field offices of the National Park Service (NPS) of the Department of the Interior (DOI)?**

Eligible public agencies must submit the original and two copies of the completed application to acquire real property for use as a historic monument to the appropriate regional or field offices of the National Park Service (NPS) of the Department of the Interior (DOI), which will forward one copy of the application to the appropriate regional office of the disposal agency.

**§ 102–75.470 What action must the National Park Service (NPS) of the Department of the Interior take after an eligible public agency has submitted an application for conveyance of surplus property for use as a historic monument?**

The National Park Service must promptly:

(a) Submit the Secretary of the Interior's determination to the disposal agency; or

(b) Inform the disposal agency that no such recommendation will be submitted.

**§ 102–75.475 What happens after the disposal agency receives the Secretary of the Interior's determination for disposal of the surplus property for a historic monument and compatible revenue-producing activities?**

The head of the disposal agency or his or her designee may convey to an eligible public agency surplus property determined by the Secretary of the Interior to be suitable and desirable for use as a historic monument for the benefit of the public and for compatible revenue-producing activities subject to the provisions of section 203(k)(3) of the Act.

**§ 102–75.480 Who has the responsibility for enforcing compliance with the terms and conditions of disposal for surplus property conveyed for use as a historic monument?**

The Secretary of the Interior has the responsibility for enforcing compliance with the terms and conditions of such a disposal. DOI is also responsible for reforming, correcting, or amending any disposal instrument; granting releases; and any action necessary for recapturing the property using the provisions of section 203(k)(4) of the Act. The actions are subject to the approval of the head of the disposal agency.

**§ 102–75.485 What happens if property that was conveyed for use as a historic monument is revested in the United States?**

In such a case, the DOI must notify the appropriate GSA Public Buildings Service regional office immediately by letter when title to the historic property is to be revested in the United States for noncompliance with the terms and conditions of disposal or for other cause. The notification must cite the legal and administrative actions that the DOI must take to obtain full title and possession of the property. In addition, it must include an adequate description of the property, including any improvements constructed since the original conveyance to the grantee. After receiving a statement from the DOI that title to the property is proposed for revesting, GSA will review the statement and determine if title should be revested. If GSA, in consultation with the Department of Interior, determines that the property should be revested, DOI must submit a Report of Excess Real Property (SF 118) to GSA. GSA will review and act upon the SF 118, if acceptable. However, the grantee must provide protection and maintenance of the property until the title reverts to the Federal Government, including the period of the notice of intent to revert. Such protection and maintenance must, at a minimum, conform to the standards prescribed in the GSA Customer Guide to Real Property Disposal.

## Property for Educational and Public Health Purposes

**§ 102–75.490 Who must notify eligible public agencies that surplus real property for educational and public health purposes is available?**

The disposal agency must notify eligible public agencies that surplus property is available for educational and/or public health purposes. The notice must require that any plans for an educational or public health use, resulting from the development of the comprehensive and coordinated plan of use and procurement for the property, must be coordinated with ED or HHS, as appropriate. The notice must also let eligible public agencies know where to obtain the applications, instructions for preparing them, and where to submit the application. The requirement for educational or public health use of the property by an eligible public agency is contingent upon the disposal agency's approval, under § 102–75.515, of a recommendation for assignment of Federal surplus real property received from ED or HHS. Further, any subsequent transfer is subject to the approval of the head of the disposal agency as stipulated under section 203(k)(1) (A) or (B) of the Act and referenced in § 102–75.535.

**§ 102–75.495 May the Department of Education or the Department of Health and Human Services notify nonprofit organizations that surplus real property and related personal property is available for educational and public health purposes?**

Yes, ED or HHS may notify eligible nonprofit institutions that such property has been determined to be surplus. Notices to eligible nonprofit institutions must require eligible nonprofit institutions to coordinate any request for educational or public health use of the property with the appropriate public agency responsible for developing and submitting a comprehensive and coordinated plan of use and procurement for the property.

**§ 102–75.500 Which Federal agencies may the head of the disposal agency (or his or her designee) assign for disposal surplus real property to be used for educational and public health purposes?**

The head of the disposal agency or his designee may:

(a) Assign to the Secretary of the Department of Education (ED) for disposal under section 203(k)(1) of the Act surplus real property, including buildings, fixtures, and equipment, as recommended by the Secretary as being needed for school, classroom, or other educational use; or

(b) Assign to the Secretary of Health and Human Services (HHS) for disposal under section 203(k)(1) of the Act such surplus real property, including buildings, fixtures, and equipment situated thereon, as recommended by the Secretary as being needed for use in the protection of public health, including research.

**§ 102–75.505 Is the request for educational or public health use of a property by an eligible nonprofit institution contingent upon the disposal agency's approval?**

Yes, eligible nonprofit organizations will only receive surplus real property for an educational or public health use if the disposal agency approves or grants the assignment request from either ED or HHS. The disposal agency will also consider other uses for available surplus real property, taking into account the highest and best use determination. Any subsequent transfer is subject to the approval of the head of the disposal agency as stipulated under section 203(k)(1)(A) or (B) of the Act and referenced in this part.

**§ 102–75.510 When must the Department of Education and the Department of Health and Human Services notify the disposal agency that an eligible applicant is interested in acquiring the property?**

The ED and HHS must notify the disposal agency if it has an eligible applicant interested in acquiring the property within 30 calendar days after the date of the surplus notice. Then, after the 30-day period expires, ED or HHS has 30 calendar days to review and approve an application and request assignment of the property, or inform the disposal agency that no assignment request will be forthcoming.

**§ 102–75.515 What action must the disposal agency take after an eligible public agency has submitted a plan of use for property for an educational or public health requirement?**

When an eligible public agency submits a plan of use for property for an educational or public health requirement, the disposal agency must transmit two copies of the plan to the regional office of ED or HHS, as appropriate. The ED or HHS must submit to the disposal agency, within 30 calendar days after the date the plan is transmitted, a recommendation for assignment of the property to the Secretary of ED or HHS, or must inform the disposal agency, within the 30-calendar day period, that a recommendation will not be made for assignment of the property to ED or HHS, as appropriate. If, after

considering other uses for the property, the disposal agency approves the assignment recommendation from ED or HHS, it must assign the property by letter or other document to the Secretary of ED or HHS as appropriate. The disposal agency must furnish to the landholding agency a copy of the assignment, unless the landholding agency is also the disposal agency. If the recommendation is disapproved, the disposal agency must likewise notify the appropriate Department.

**§ 102–75.520 What must the Department of Education or the Department of Health and Human Services address in the assignment recommendation that is submitted to the disposal agency?**

Any assignment recommendation that the Department of Education or the Department of Health and Human Services submits to the disposal agency must provide complete information concerning the educational or public health use, including:

(a) Identification of the property;

(b) The name of the applicant and the size and nature of its program;

(c) The specific use planned;

(d) The intended public benefit allowance;

(e) The estimate of the value upon which such proposed allowance is based; and

(f) An explanation if the acreage or value of the property exceeds the standards established by the Secretary.

**§ 102–75.525 What responsibilities do landholding agencies have concerning properties to be used for educational and public health purposes?**

Landholding agencies must cooperate to the fullest extent possible with representatives of ED or HHS in their inspection of such property and in furnishing information relating to the property.

**§ 102–75.530 What happens if the Department of Education or the Department of Health and Human Services does not approve any applications for conveyance of the property for educational or public health purposes?**

In the absence of an approved application from ED or HHS to convey the property for educational or public health purposes, which must be received within the 30 calendar day time limit, the disposal agency will proceed with other disposal actions.

**§ 102–75.535 What responsibilities does the Department of Education or the Department of Health and Human Services have after receiving the disposal agency's assignment letter?**

After receiving the disposal agency's assignment letter, ED or HHS must furnish the disposal agency with a Notice of Proposed Transfer within 30 calendar days. If the disposal agency approves the proposed transfer within 30 days of receiving the Notice of Proposed Transfer, ED or HHS may prepare the transfer documents and proceed with the transfer. The Department of Education or the Department of Health and Human Services must take all necessary actions to accomplish the transfer within 15-calendar days beginning when the disposal agency approves the transfer. The ED or HHS must furnish the disposal agency two conformed copies of deeds, leases or other instruments conveying the property under section 203(k)(1) (A) or (B) of the Act and all related documents containing restrictions or conditions regulating the future use, maintenance or transfer of the property.

**§ 102–75.540 Who is responsible for enforcing compliance with the terms and conditions of the transfer for educational or public health purposes?**

The ED or HHS, as appropriate, is responsible for enforcing compliance with the terms and conditions of transfer. The ED or HHS is also responsible for reforming, correcting, or amending any transfer instruments; granting releases; and for taking any necessary actions for recapturing the property using or following the provisions of section 203(k)(4) of the Act. These actions are subject to the approval of the head of the disposal agency. The ED or HHS must notify the disposal agency of its intent to take any actions to recapture the property. The notice must identify the property affected, describe in detail the proposed action, and state the reasons for the proposed action.

**§ 102–75.545 What happens if property that was transferred to meet an educational or public health requirement is revested in the United States for noncompliance with the terms of sale, or other cause?**

In each case of repossession under a terminated lease or reversion of title for noncompliance with the terms or conditions of sale or other cause, ED or HHS must, prior to repossession or reversion of title, provide the appropriate GSA regional property disposal office with an accurate description of the real and related personal property involved using SF 118, Report of Excess Real Property, and the appropriate schedules. After receiving a statement from ED or HHS that the property is proposed for revesting, GSA will review the statement and determine if title should be revested. If GSA, in conjunction with the ED or HHS, determines that the property should be revested, ED or HHS must submit a SF 118 to GSA. The GSA will review and act upon the SF 118, if acceptable. However, the grantee must provide protection and maintenance for the property until the title reverts to the Federal Government, including the period of any notice of intent to revert. Such protection and maintenance must, at a minimum, conform to the standards prescribed in the GSA Customer Guide to Real Property Disposal.

## Property for Providing Self-Help Housing or Housing Assistance

**§ 102–75.550 What does ''self-help housing or housing assistance mean?'**

Property for self-help housing or housing assistance (which is separate from the program under Title V of the McKinney-Vento Homeless Assistance Act covered in subpart H of this part) is property for low-income housing opportunities through the construction, rehabilitation, or refurbishment of housing, under terms that require that:

(a) Any individual or family receiving housing or housing assistance must contribute a significant amount of labor toward the construction, rehabilitation, or refurbishment; and

(b) Dwellings constructed, rehabilitated, or refurbished must be quality dwellings that comply with local building and safety codes and standards and must be available at prices below prevailing market prices.

**§ 102–75.555 Which Federal agency receives the property assigned for self-help housing or housing assistance for low-income individuals or families?**

The head of the disposal agency, or designee, may assign, at his/her discretion, surplus real property, including buildings, fixtures, and equipment to the Secretary of the Department of Housing and Urban Development (HUD).

**§ 102–75.560 Who notifies eligible public agencies that real property to be used for self-help housing or housing assistance purposes is available?**

The disposal agency must notify eligible public agencies that surplus property is available. The notice must require that any plans for self-help housing or housing assistance use resulting from the development of the comprehensive and coordinated plan of use and procurement for the property must be coordinated with HUD. Eligible public agencies may obtain an application form and instructions for preparing and submitting the application from HUD.

**§ 102–75.565 Is the requirement for self-help housing or housing assistance use of the property by an eligible public agency or nonprofit organization contingent upon the disposal agency's approval of an assignment recommendation from the Department of Housing and Urban Development (HUD)?**

Yes, the requirement for self-help housing or housing assistance use of the property by an eligible public agency or nonprofit organization is contingent upon the disposal agency's approval under § 102–75.585 of HUD's assignment recommendation/request. Any subsequent transfer is subject to the approval of the head of the disposal agency as stipulated under section 203(k)(6)(B) of the Act and referenced in § 102–75.605.

**§ 102–75.570 What happens if the disposal agency does not approve the assignment recommendation?**

If the recommendation is not approved, the disposal agency must also notify the Secretary of HUD and then may proceed with other disposal action.

**§ 102–75.575 Who notifies nonprofit organizations that surplus real property and related personal property to be used for self-help housing or housing assistance purposes is available?**

The HUD notifies eligible nonprofit organizations, following guidance in the GSA Customer Guide to Real Property Disposal. Such notices must require eligible nonprofit organizations to:

(a) Coordinate any requirement for self-help housing or housing assistance use of the property with the appropriate public agency; and

(b) Declare to the disposal agency an intent to develop and submit a comprehensive and coordinated plan of use and procurement for the property.

**§ 102–75.580 When must HUD notify the disposal agency that an eligible applicant is interested in acquiring the property?**

The HUD must notify the disposal agency within 30 calendar days after the date of the surplus notice. Then, after the 30-day period expires, HUD has 30 calendar days to review and approve an application and request assignment or inform the disposal agency that no assignment request is forthcoming.

**§ 102–75.585 What action must the disposal agency take after an eligible public agency has submitted a plan of use for property for a self-help housing or housing assistance requirement?**

When an eligible public agency submits a plan of use for property for a self-help housing or housing assistance requirement, the disposal agency must transmit two copies of the plan to the appropriate HUD regional office. The HUD must submit to the disposal agency, within 30 calendar days after the date the plan is transmitted, a recommendation for assignment of the property to the Secretary of HUD, or must inform the disposal agency, within the 30-calendar day period, that a recommendation will not be made for assignment of the property to HUD. If, after considering other uses for the property, the disposal agency approves the assignment recommendation from HUD, it must assign the property by letter or other document to the Secretary of HUD. The disposal agency must furnish to the landholding agency a copy of the assignment, unless the landholding agency is also the disposal agency. If the disposal agency disapproves the recommendation, the disposal agency must likewise notify the Secretary of HUD.

**§ 102–75.590 What does the assignment recommendation contain?**

Any assignment recommendation that HUD submits to the disposal agency must set forth complete information concerning the self-help housing or housing assistance use, including:

(a) Identification of the property;

(b) Name of the applicant and the size and nature of its program;

(c) Specific use planned;

(d) Intended public benefit allowance;

(e) Estimate of the value upon which such proposed allowance is based; and

(f) An explanation, if the acreage or value of the property exceeds the standards established by the Secretary.

**§ 102–75.595 What responsibilities do landholding agencies have concerning properties to be used for self-help housing or housing assistance use?**

Landholding agencies must cooperate to the fullest extent possible with HUD representatives in their inspection of such property and in furnishing information relating to such property.

**§ 102–75.600 What happens if HUD does not approve any applications for self-help housing or housing assistance use?**

In the absence of an approved application from HUD for self-help housing or housing assistance use, which must be received within the 30-calendar day time limit specified therein, the disposal agency must proceed with other disposal action.

**§ 102–75.605 What responsibilities does HUD have after receiving the disposal agency's assignment letter?**

After receiving the disposal agency's assignment letter, HUD must furnish the disposal agency with a Notice of Proposed Transfer within 30 calendar days. If the disposal agency approves the proposed transfer within 30 calendar days of receiving the Notice of Proposed Transfer, HUD may prepare the transfer documents and proceed with the transfer. The Department of Housing and Urban Development must take all necessary actions to accomplish the transfer within 15 calendar days beginning when the disposal agency approves the transfer. The HUD must furnish the disposal agency two conformed copies of deeds, leases or other instruments conveying the property under section 203(k)(6) of the Act and all related documents containing restrictions or conditions regulating the future use, maintenance or transfer of the property.

**§ 102–75.610 Who is responsible for enforcing compliance with the terms and conditions of the transfer of the property for self-help housing or housing assistance use?**

The HUD is responsible for enforcing compliance with the terms and conditions of transfer. The HUD is also responsible for reforming, correcting, or amending any transfer instrument; granting releases; and for taking any necessary actions for recapturing the property using the provisions of section 203(k)(4) of the Act. These actions are subject to the approval of the head of the disposal agency. The HUD must notify the head of the disposal agency of its intent to take action to recapture the property. The notice must identify the property affected, describe in detail the proposed action, and state the reasons for the proposed action.

**§ 102–75.615 Who is responsible for enforcing compliance with the terms and conditions of property transferred under section 414(a) of the 1969 HUD Act?**

The HUD maintains responsibility for properties previously conveyed under section 414(a) of the 1969 HUD Act. Property transferred to an entity other than a public body and used for any purpose other than that for which it was sold or leased within a 30-year period must revert to the United States. If the property was leased, then the lease terminates. The appropriate Secretary (HUD or Department of Agriculture) and the Administrator (GSA) can approve the new use of the property after the first 20 years of the original 30-year period has expired.

**§ 102–75.620 What happens if property that was transferred to meet a self-help housing or housing assistance use requirement is found to be in noncompliance with the terms of sale?**

In each case of repossession under a terminated lease or reversion of title for noncompliance with the terms or

conditions of sale or other cause, HUD (or USDA for property conveyed through the former Farmers Home Administration program under section 414(a) of the 1969 HUD Act) must, prior to repossession or reversion of title, provide the appropriate GSA regional office with an accurate description of the real and related personal property involved using the Report of Excess Real Property (SF 118), and the appropriate schedules. After receiving a statement from HUD (or USDA) that title to the property is proposed for revesting, GSA will review the statement and determine if title should be revested. If GSA, in conjunction with HUD (or USDA), determines that the property should be revested, HUD (or USDA) must submit a SF 118 to GSA. The GSA will review and act upon the SF 118, if acceptable. However, the grantee must provide protection and maintenance for the property until the title reverts to the Federal Government, including the period of any notice of intent to revert. Such protection and maintenance must, at a minimum, conform to the standards prescribed in the GSA Customer Guide to Real Property Disposal.

## Property for Use as Public Park or Recreation Areas

### § 102–75.625 Which Federal agency is assigned surplus real property for public park or recreation purposes?

The head of the disposal agency or his or her designee is authorized to assign to the Secretary of the Interior for disposal under section 203(k)(2) of the Act, surplus real property, including buildings, fixtures, and equipment as recommended by the Secretary as being needed for use as a public park or recreation area for conveyance to a State, political subdivision, instrumentalities, or municipality.

### § 102–75.630 Who must disposal agencies notify that real property for public park or recreation purposes is available?

The disposal agency must notify established State, regional, or metropolitan clearinghouses and eligible public agencies that surplus property is available for use as a public park or recreation area. The disposal agency must transmit the landholding agency's Report of Excess Real Property (SF 118, with accompanying schedules) with the copy of each notice sent to a regional or field office of the National Park Service (NPS) of the Department of the Interior.

### § 102–75.635 What information must the Department of the Interior (DOI) furnish eligible public agencies?

Upon request, DOI must furnish eligible public agencies with an application form to acquire property for permanent use as a public park or recreation area and preparation instructions for the application.

### § 102–75.640 When must DOI notify the disposal agency that an eligible applicant is interested in acquiring the property?

The DOI must notify the disposal agency if it has an eligible applicant interested in acquiring the property within 30 calendar days from the date of the surplus notice.

### § 102–75.645 What responsibilities do landholding agencies have concerning properties to be used for public park or recreation purposes?

Landholding agencies must cooperate to the fullest extent possible with DOI representatives in their inspection of the property and in furnishing information relating to the property.

### § 102–75.650 When must DOI request assignment of the property?

Within 30 calendar days after the expiration of the 30-calendar day period specified in § 102–75.640, DOI must submit to the disposal agency an assignment recommendation along with a copy of the application or inform the disposal agency that a recommendation will not be made for assignment of the property.

### § 102–75.655 What does the assignment recommendation contain?

Any recommendation submitted by DOI must provide complete information concerning the plans for use of the property as a public park or recreation area, including:

(a) Identification of the property;

(b) The name of the applicant;

(c) The specific use planned; and

(d) The intended public benefit allowance.

### § 102–75.660 What happens if DOI does not approve any applications or does not submit an assignment recommendation?

If DOI does not approve any applications or does not submit an assignment recommendation to convey the property for public park or recreation purposes, the disposal agency must proceed with other disposal action.

### § 102–75.665 What happens after the disposal agency receives the assignment recommendation from DOI?

If, after considering other uses for the property, the disposal agency approves the assignment recommendation from DOI, it must assign the property by letter or other document to the Secretary of the Interior. The disposal agency must furnish to the landholding agency a copy of the assignment, unless the landholding agency is also the disposal agency. If the recommendation is disapproved, the disposal agency must likewise notify the Secretary.

### § 102–75.670 What responsibilities does DOI have after receiving the disposal agency's assignment letter?

After receiving the disposal agency's assignment letter, the Secretary of the Interior must provide the disposal agency with a Notice of Proposed Transfer within 30 calendar days. If the disposal agency approves the proposed transfer within 30 calendar days, the Secretary may proceed with the transfer. The DOI must take all necessary actions to accomplish the transfer within 15 calendar days after the expiration of the 30-calendar day period provided for the disposal agency to consider the notice. The DOI may place the applicant in possession of the property as soon as practicable in order to minimize the Government's expense of protection and maintenance of the property. As of the date the applicant takes possession of the property, or the date it is conveyed, whichever occurs first, the applicant must assume responsibility for care and handling and all risks of loss or damage to the property, and has all obligations and liabilities of ownership. The DOI must furnish the disposal agency two conformed copies of deeds, leases, or other instruments conveying property under section 203(k)(2) of the Act and related documents containing reservations, restrictions, or conditions regulating the future use, maintenance or transfer of the property.

### § 102–75.675 What responsibilities does the grantee or recipient of the property have in accomplishing or completing the transfer?

Where appropriate, the disposal agency may make the assignment subject to DOI requiring the grantee or recipient to bear the cost of any out-of-pocket expenses necessary to accomplish the transfer, such as for surveys, fencing, security of the remaining property or otherwise.

### § 102–75.680 What information must be included in the deed of conveyance of any surplus property transferred for public park or recreation purposes?

The deed of conveyance of any surplus real property transferred for public park and recreation purposes under the Act must require that the property be used and maintained for the purpose for which it was conveyed in

perpetuity. In the event that the property ceases to be used or maintained for that purpose, all or any portion of such property will in its existing condition, at the option of the United States, revert to the United States. The deed of conveyance may contain additional terms, reservations, restrictions, and conditions determined by the Secretary of the Interior to be necessary to safeguard the interest of the United States.

**§ 102–75.685 Who is responsible for enforcing compliance with the terms and conditions of the transfer of property used for public park or recreation purposes?**

The Secretary of the Interior is responsible for enforcing compliance with the terms and conditions of transfer. The Secretary is also responsible for reforming, correcting, or amending any transfer instrument; granting releases; and for recapturing any property following the provisions of section 202(k)(4) of the Act. These actions are subject to the approval of the head of the disposal agency. The DOI must notify the head of the disposal agency of its intent to take or recapture the property. The notice must identify the property affected, describe in detail the proposed action, including the reasons for the proposed action.

**§ 102–75.690 What happens if property that was transferred for use as a public park or recreation area is revested in the United States by reason of noncompliance with the terms or conditions of disposal, or for other cause?**

The DOI must notify the appropriate GSA regional office immediately by letter when title to property transferred for use as a public park or recreation area is to be revested in the United States for noncompliance with the terms or conditions of disposal or for other cause. The notification must cite the legal and administrative actions that the Department must take to obtain full title and possession of the property. In addition, it must include an adequate description of the property, using the SF 118 and the appropriate schedules. After receiving notice from DOI that title to the property is proposed for revesting, GSA will review the statement and determine if title should be revested. If GSA, in consultation with DOI, determines that the property should be revested, DOI must submit a SF 118 to GSA. The GSA will review and act upon the SF 118, if acceptable. However, the grantee must provide protection and maintenance for the property until the title reverts to the Federal Government, including the period of any notice of intent to revert. Such protection and maintenance must, at a minimum, conform to the standards prescribed in the GSA Customer Guide to Real Property Disposal.

## Property for Displaced Persons

**§ 102–75.695 Who can receive surplus real property for the purpose of providing replacement housing for persons who are to be displaced by Federal or federally assisted projects?**

Section 218 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, authorizes the disposal agency to transfer surplus real property to a State agency to provide replacement housing under title II of the Act for persons who are or will be displaced by Federal or federally assisted projects.

**§ 102–75.700 Which Federal agencies may solicit applications from eligible State agencies interested in acquiring the property to provide replacement housing for persons being displaced by Federal or federally assisted projects?**

After receiving the surplus notice, any Federal agency needing property for replacement housing for displaced persons may solicit applications from eligible State agencies.

**§ 102–75.705 When must the Federal agency notify the disposal agency that an eligible State agency is interested in acquiring the property under section 218?**

Federal agencies must notify the disposal agency within 30 calendar days after the date of the surplus notice if an eligible State agency is interested in acquiring the property under section 218 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

**§ 102–75.710 What responsibilities do landholding and disposal agencies have concerning properties used for providing replacement housing for persons who will be displaced by Federal or federally assisted projects?**

Both landholding and disposal agencies must cooperate, to the fullest extent possible, with Federal and State agency representatives in their inspection of the property and in furnishing information relating to the property.

**§ 102–75.715 When can a Federal agency request transfer of the property to the selected State agency?**

Federal agencies must advise the disposal agency and request transfer of the property to the selected State agency within 30 calendar days after the expiration of the 30-calendar-day period specified in § 102–75.705.

**§ 102–75.720 Is there a specific or preferred format for the transfer request and who should receive it?**

Any request submitted by a Federal agency must be in the form of a letter addressed to the appropriate GSA Public Buildings Service regional property disposal office.

**§ 102–75.725 What does the transfer request contain?**

Any transfer request must include:

(a) Identification of the property by name, location, and control number;

(b) The name and address of the specific State agency and a copy of the State agency's application or proposal;

(c) A certification by the appropriate Federal agency official that the property is required to house displaced persons authorized by section 218; that all other options authorized under title II of the Act have been explored and replacement housing cannot be found or made available through those channels; and that the Federal or federally assisted project cannot be accomplished unless the property is made available for replacement housing;

(d) Any special terms and conditions that the Federal agency deems necessary to include in conveyance instruments to ensure that the property is used for the intended purpose;

(e) The name and proposed location of the Federal or federally assisted project which is creating the requirement;

(f) Purpose of the project;

(g) Citation of enabling legislation or authorization for the project, when appropriate;

(h) A detailed outline of steps taken to obtain replacement housing for displaced persons as authorized under title II of the Act; and

(i) Details of the arrangements that have been made to construct replacement housing on the surplus property and to ensure that displaced persons will be provided housing in the development.

**§ 102–75.730 What happens if a Federal agency does not submit a transfer request to the disposal agency for property to be used for replacement housing for persons who will be displaced by Federal or federally assisted projects?**

If the disposal agency does not receive a request for assignment or transfer of the property under § 102–75.715, then the disposal agency must proceed with other appropriate disposal actions.

**§ 102–75.735 What happens after the disposal agency receives the transfer request from the Federal agency?**

If, after considering other uses for the property, the disposal agency

determines that the property should be made available for replacement housing under section 218, it must transfer the property to the designated State agency on such terms and conditions as will protect the United State's interest, including the payment or the agreement to pay to the United States all amounts received by the State agency from any sale, lease, or other disposition of the property for such housing. The sale, lease, or other disposition of the property by the State agency must be at the fair market value as approved by the disposal agency, unless a compelling justification is offered for disposal of the property at less than fair market value. Disposal of the property at less than fair market value must also be approved by the disposal agency.

**§ 102–75.740 Does the State agency have any responsibilities in helping to accomplish the transfer of the property?**

Yes, the State agency is required to bear the costs of any out-of-pocket expenses necessary to accomplish the transfer, such as costs of surveys, fencing, or security of the remaining property.

**§ 102–75.745 What happens if the property transfer request is not approved by the disposal agency?**

If the request is not approved, the disposal agency must notify the Federal agency requesting the transfer. The disposal agency must furnish a copy of the notice of disapproval to the landholding agency.

## Property for Correctional Facility, Law Enforcement, or Emergency Management Response Purposes

**§ 102–75.750 Who is eligible to receive surplus real and related personal property for correctional facility, law enforcement, or emergency management response purposes?**

Under section 203(p)(1) of the Act, the head of the disposal agency or designee may, in his or her discretion, convey, without monetary consideration, to any State, or to those governmental bodies named in the Act, or to any political subdivision or instrumentality, surplus real and related personal property for:

(a) Correctional facility purposes, if the Attorney General has determined that the property is required for such purposes and has approved an appropriate program or project for the care or rehabilitation of criminal offenders;

(b) Law enforcement purposes, if the Attorney General has determined that the property is required for such purposes; and

(c) Emergency management response purposes, including fire and rescue services, if the Director of the Federal Emergency Management Agency has determined that the property is required for such purposes.

**§ 102–75.755 Which Federal agencies must the disposal agency notify concerning the availability of surplus properties for correctional facility, law enforcement, or emergency management response purposes?**

The disposal agency must provide prompt notification to the Office of Justice Programs (OJP), Department of Justice (DOJ), and the Federal Emergency Management Agency (FEMA) that surplus property is available. The disposal agency's notice or notification must include a copy of the landholding agency's Report of Excess Real Property (SF 118), with accompanying schedules.

**§ 102–75.760 Who must the Office of Justice Programs (OJP) and the Federal Emergency Management Agency (FEMA) notify that surplus real property is available for correctional facility, law enforcement, or emergency management response purposes?**

The OJP or FEMA must send notices of availability to the appropriate State and local public agencies. The notices must state that OJP or FEMA, as appropriate, must coordinate and approve any planning involved in developing a comprehensive and coordinated plan of use and procurement for the property for correctional facility, law enforcement, or emergency management response use. The notice must also state that public agencies may obtain application forms and preparation instructions from OJP or FEMA.

**§ 102–75.765 What does the term ''law enforcement'' mean?**

The OJP defines ''law enforcement'' as ''any activity involving the control or reduction of crime and juvenile delinquency, or enforcement of the criminal law, including investigative activities such as laboratory functions as well as training.''

**§ 102–75.770 Is the disposal agency required to approve a determination by the Department of Justice that identifies surplus property for correctional facility use or for law enforcement use?**

Yes, the disposal agency must approve a determination, under § 102–75.795, by DOJ that identifies surplus property required for correctional facility use or for law enforcement use before an eligible public agency can obtain such property for correctional facility or law enforcement use.

**§ 102–75.775 Is the disposal agency required to approve a determination by FEMA that identifies surplus property for emergency management response use?**

Yes, the disposal agency must approve a determination, under § 102–75.795, by FEMA that identifies surplus property required for emergency management response use before an eligible public agency can obtain such property for emergency management response use.

**§ 102–75.780 When must DOJ or FEMA notify the disposal agency that an eligible applicant is interested in acquiring the property?**

The OJP or FEMA must notify the disposal agency within 30 calendar days after the date of the surplus notice if there is an eligible applicant interested in acquiring the property. After that 30-calendar day period expires, OJP or FEMA then has another 30 days to review and approve an appropriate program and notify the disposal agency of the need for the property. If no application is approved, then OJP or FEMA must notify the disposal agency that there is no requirement for the property within the 30-calendar day period allotted for review and approval.

**§ 102–75.785 What specifically must DOJ or FEMA address in the assignment request or recommendation that is submitted to the disposal agency?**

Any determination that DOJ or FEMA submits to the disposal agency must provide complete information concerning the correctional facility, law enforcement, or emergency management response use, including:

(a) Identification of the property;

(b) Certification that the property is required for correctional facility, law enforcement, or emergency management response use;

(c) A copy of the approved application which defines the proposed plan of use; and

(d) The environmental impact of the proposed correctional facility, law enforcement, or emergency management response use.

**§ 102–75.790 What responsibilities do landholding agencies and disposal agencies have concerning properties to be used for correctional facility, law enforcement, or emergency management response purposes?**

Both landholding and disposal agencies must cooperate to the fullest extent possible with Federal and State agency representatives in their inspection of such property and in furnishing information relating to the property.

**§ 102–75.795 What happens after the disposal agency receives the assignment request by DOJ or FEMA?**

If, after considering other uses for the property, the disposal agency approves the assignment request by DOJ or FEMA, the disposal agency must convey the property to the appropriate grantee. The disposal agency must proceed with other disposal action if it does not approve the assignment request, if DOJ or FEMA does not submit an assignment request, or if the disposal agency does not receive the determination within the 30 calendar days specified in § 102–75.780. The disposal agency must notify OJP or FEMA 15 days prior to any announcement of a determination to either approve or disapprove an application for correctional, law enforcement, or emergency management response purposes and must furnish to OJP or FEMA a copy of the conveyance documents.

**§ 102–75.800 What information must be included in the deed of conveyance?**

The deed of conveyance of any surplus real property transferred under the provisions of section 203(p)(1) of the Act must provide that all property be used and maintained for the purpose for which it was conveyed in perpetuity. If the property ceases to be used or maintained for that purpose, all or any portion of the property must, at the option of the United States, revert to the United States in its existing condition. The deed of conveyance may contain additional terms, reservations, restrictions, and conditions the Administrator of General Services determines to be necessary to safeguard the United States' interests.

**§ 102–75.805 Who is responsible for enforcing compliance with the terms and conditions of the transfer of the property used for correctional facility, law enforcement, or emergency management response purposes?**

The Administrator of General Services is responsible for enforcing compliance with the terms and conditions of disposals. The GSA is also responsible for reforming, correcting, or amending any disposal instrument; granting releases; and any action necessary for recapturing the property following the provisions of section 203(p)(3) of the Act.

**§ 102–75.810 What responsibilities do OJP or FEMA have if they discover any information indicating a change in use of a transferred property?**

Upon discovery of any information indicating a change in use, OJP or FEMA must:

(a) Notify GSA; and

(b) Upon request, make a redetermination of continued appropriateness of the use of a transferred property.

**§ 102–75.815 What happens if property conveyed for correctional facility, law enforcement, or emergency management response purposes is found to be in noncompliance with the terms of the conveyance documents?**

The OJP or FEMA must, prior to the repossession, provide the appropriate GSA regional property disposal office with an accurate description of the real and related personal property involved. The OJP or FEMA must use the SF 118, Report of Excess Real Property, and the appropriate schedules for this purpose. After receiving a statement from OJP or FEMA that the title to the property is proposed for revesting, GSA will review the statement and determine if title should be revested. If GSA, in consultation with OJP or FEMA, determines that the property should be revested, OJP or FEMA must submit a SF 118 to GSA. The GSA will review and act upon the SF 118, if applicable. However, the grantee must provide protection and maintenance for the property until the title reverts to the Federal Government, including the period following any notice of intent to revert. Such protection and maintenance must, at a minimum, conform to the standards prescribed in the GSA Customer Guide to Real Property Disposal.

## Property for Port Facility Use

**§ 102–75.820 Which Federal agency is eligible to receive surplus real and related personal property for the development or operation of a port facility?**

Under section 203(q)(1) of the Act, the Administrator of General Services, the Secretary of the Department of Defense (in the case of property located at a military installation closed or realigned pursuant to a base closure law), or their designee, may assign to the Secretary of the Department of Transportation (DOT) for conveyance, without monetary consideration, to any State, or to governmental bodies, any political subdivision, municipality, or instrumentality, surplus real and related personal property, including buildings, fixtures, and equipment situated on the property, that DOT recommends as being needed for the development or operation of a port facility.

**§ 102–75.825 Who must the disposal agency notify when surplus real and related personal property is available for port facility use?**

The disposal agency must notify established State, regional or metropolitan clearinghouses and eligible public agencies that surplus real property is available for the development or operation of a port facility. The disposal agency must transmit a copy of the notice to DOT and a copy of the landholding agency's Report of Excess Real Property (SF 118 and supporting schedules).

**§ 102–75.830 What does the surplus notice contain?**

Surplus notices to eligible public agencies must state:

(a) That public agencies must coordinate any planning involved in the development of the comprehensive and coordinated plan of use and procurement of property, with DOT, the Secretary of Labor, and the Secretary of Commerce;

(b) That any party interested in acquiring the property for use as a port facility must contact the Department of Transportation, Maritime Administration, for the application and instructions;

(c) That the disposal agency must approve a recommendation from DOT before it can assign the property to DOT (see § 102–75.905); and

(d) That any subsequent conveyance is subject to the approval of the head of the disposal agency as stipulated under section 203(q)(2) of the Act and referenced in § 102–75.865.

**§ 102–75.835 When must DOT notify the disposal agency that an eligible applicant is interested in acquiring the property?**

The DOT must notify the disposal agency within 30 calendar days after the date of the surplus notice if there is an eligible applicant interested in acquiring the property. After that 30-calendar day period expires, DOT then has another 30 calendar days to review and approve applications and notify the disposal agency of the need for the property. If no application is approved, then DOT must notify the disposal agency that there is no requirement for the property within the same 30-calendar day period allotted for review and approval.

**§ 102–75.840 What action must the disposal agency take after an eligible public agency has submitted a plan of use for and an application to acquire a port facility property?**

Whenever an eligible public agency has submitted a plan of use for a port facility requirement, the disposal agency must transmit two copies of the plan to DOT. The DOT must either submit to the disposal agency, within 30 calendar days after the date the plan is transmitted, a recommendation for assignment of the property to DOT, or inform the disposal agency, within the

30-calendar day period, that a recommendation will not be made for assignment of the property to DOT.

**§ 102–75.845 What must DOT address in the assignment recommendation submitted to the disposal agency?**

Any assignment recommendation that DOT submits to the disposal agency must provide complete information concerning the contemplated port facility use, including:

(a) An identification of the property;

(b) An identification of the applicant;

(c) A copy of the approved application, which defines the proposed plan of use of the property;

(d) A statement that DOT's determination (that the property is located in an area of serious economic disruption) was made in consultation with the Secretary of Labor;

(e) A statement that DOT approved the economic development plan, associated with the plan of use of the property, in consultation with the Secretary of Commerce; and

(f) A copy of the explanatory statement, required under section 203(q)(3)(c) of the Act.

**§ 102–75.850 What responsibilities do landholding agencies have concerning properties to be used in the development or operation of a port facility?**

Landholding agencies must cooperate to the fullest extent possible with DOT representatives and the Secretary of Commerce in their inspection of such property, and with the Secretary of Labor in affirming that the property is in an area of serious economic disruption, and in furnishing any information relating to such property.

**§ 102–75.855 What happens if DOT does not submit an assignment recommendation?**

If DOT does not submit an assignment recommendation or if it is not received within 30 calendar days, the disposal agency must proceed with other disposal action.

**§ 102–75.860 What happens after the disposal agency receives the assignment recommendation from DOT?**

If, after considering other uses for the property, the disposal agency approves the assignment recommendation from DOT, the disposal agency must assign the property by letter or other document to DOT. If the disposal agency disapproves the recommendation, the disposal agency must likewise notify DOT. The disposal agency must furnish to the landholding agency a copy of the assignment, unless the landholding agency is also the disposal agency.

**§ 102–75.865 What responsibilities does DOT have after receiving the disposal agency's assignment letter?**

After receiving the assignment letter from the disposal agency, DOT must provide the disposal agency with a Notice of Proposed Transfer within 30 calendar days after the date of the assignment letter. If the disposal agency approves the proposed transfer within 30 calendar days of the receipt of the Notice of Proposed Transfer, DOT may prepare the conveyance documents and proceed with the conveyance. The DOT must take all necessary actions to accomplish the conveyance within 15 calendar days after the expiration of the 30-calendar day period provided for the disposal agency to consider the notice. DOT must furnish the disposal agency two conformed copies of the instruments conveying property and all related documents containing restrictions or conditions regulating the future use, maintenance, or transfer of the property.

**§ 102–75.870 Who is responsible for enforcing compliance with the terms and conditions of the port facility conveyance?**

The DOT is responsible for enforcing compliance with the terms and conditions of conveyance, including reforming, correcting, or amending any instrument of conveyance; granting releases; and taking any necessary actions to recapture the property following the provisions of section 203(q)(4) of the Act. Any of these actions are subject to the approval of the head of the disposal agency. The DOT must notify the head of the disposal agency of its intent to take any proposed action, identify the property affected, and describe in detail the proposed action, including the reasons for the proposed action.

**§ 102–75.875 What happens in the case of repossession by the United States under a reversion of title for noncompliance with the terms or conditions of conveyance?**

In each case of a repossession by the United States, DOT must, at or prior to reversion of title, provide the appropriate GSA regional property disposal office, with a SF 118 and accompanying schedules. After receiving a statement from DOT that title to the property is proposed for revesting, GSA will review the statement and determine if title should be revested. If GSA, in consultation with DOT, determines that the property should be revested, DOT must submit a SF 118 to GSA. The GSA will review and act upon the SF 118, if acceptable. However, the grantee must provide protection and maintenance for the property until the title reverts to the Federal Government, including the period following the notice of intent to revert. Such protection and maintenance must, at a minimum, conform to the standards prescribed in the GSA Customer Guide to Real Property Disposal.

## Negotiated Sales

**§ 102–75.880 When may executive agencies conduct negotiated sales?**

Executive agencies may conduct negotiated sales only when:

(a) The estimated fair market value of the property does not exceed $50,000;

(b) Bid prices after advertising are unreasonable (for all or part of the property) or were not independently arrived at in open competition;

(c) The character or condition of the property or unusual circumstances make it impractical to advertise for competitive bids and the fair market value of the property and other satisfactory terms of disposal are obtainable by negotiation;

(d) The disposals will be to States, Commonwealth of Puerto Rico, possessions, political subdivisions, or tax-supported agencies therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtainable by negotiations. Negotiated sales to public bodies can only be conducted if a public benefit, which would not be realized from a competitive sale, will result from the negotiated sale; or

(e) Negotiation is otherwise authorized by the Federal Property and Administrative Services Act of 1949 or other law, such as disposals of power transmission lines for public or cooperative power projects.

**§ 102–75.885 What are executive agencies' responsibilities concerning negotiated sales?**

Executive agencies must:

(a) Obtain such competition as is feasible in all negotiations of disposals and contracts for disposal of surplus property; and

(b) Prepare and transmit an explanatory statement if the fair market value of the property exceeds $700,000, identifying the circumstances of each disposal by negotiation for any real property specified in 40 U.S.C. 484(e)(6)(A), to the appropriate committees of the Congress in advance of such disposal.

**§ 102–75.890 What clause must be in the offer to purchase and conveyance documents for negotiated sales to public agencies?**

Executive agencies must include in the offer to purchase and conveyance

documents an excess profits clause, which usually runs for 3 years, to eliminate the potential for windfall profits to public agencies. This clause states that, if the purchaser should sell or enter into agreements to sell the property within 3 years from the date of title transfer by the Federal Government, all proceeds in excess of the purchaser's costs will be remitted to the Federal Government.

**§ 102–75.895 What wording must be in the excess profits clause which is required in the offer to purchase and in the conveyance document?**

The wording of the excess profits clause should be as follows:

Excess Profits Covenant for Negotiated Sales to Public Bodies

(a) This covenant shall run with the land for a period of 3 years from the date of conveyance. With respect to the property described in this deed, if at any time within a 3-year period from the date of transfer of title by the Grantor, the Grantee, or its successors or assigns, shall sell or enter into agreements to sell the property, either in a single transaction or in a series of transactions, it is covenanted and agreed that all proceeds received or to be received in excess of the Grantee's or a subsequent seller's actual allowable costs will be remitted to the Grantor. In the event of a sale of less than the entire property, actual allowable costs will be apportioned to the property based on a fair and reasonable determination by the Grantor.

(b) For purposes of this covenant, the Grantee's or a subsequent seller's allowable costs shall include the following:

(1) The purchase price of the real property;

(2) The direct costs actually incurred and paid for improvements which serve only the property, including road construction, storm and sanitary sewer construction, other public facilities or utility construction, building rehabilitation and demolition, landscaping, grading, and other site or public improvements;

(3) The direct costs actually incurred and paid for design and engineering services with respect to the improvements described in (b)(2) of this section; and

(4) The finance charges actually incurred and paid in conjunction with loans obtained to meet any of the allowable costs enumerated above.

(c) None of the allowable costs described in paragraph (b) of this section will be deductible if defrayed by Federal grants or if used as matching funds to secure Federal grants.

(d) In order to verify compliance with the terms and conditions of this covenant, the Grantee, or its successors or assigns, shall submit an annual report for each of the subsequent 3 years to the Grantor on the anniversary date of this deed. Each report will identify the property involved in this transaction and will contain such of the following items of information as are applicable at the time of submission:

(1) A statement indicating whether or not a resale has been made;

(2) A description of each portion of the property that has been resold;

(3) The sale price of each such resold portion;

(4) The identity of each purchaser;

(5) The proposed land use; and

(6) An enumeration of any allowable costs incurred and paid that would offset any realized profit.

(e) The Grantor may monitor the property and inspect records related thereto to ensure compliance with the terms and conditions of this covenant and may take any actions which it deems reasonable and prudent to recover any excess profits realized through the resale of the property.

**§ 102–75.900 What is a negotiated sale for economic development purposes?**

A negotiated sale for economic development purposes means that the public body purchasing the property will develop or make substantial improvements to the property with the intention of reselling or leasing the property in parcels to users to advance the community's economic benefit. This type of negotiated sale is acceptable where the expected public benefits to the community are greater than the anticipated proceeds derived from a competitive public sale.

## Explanatory Statements for Negotiated Sales

**§ 102–75.905 When must the disposal agency prepare an explanatory statement?**

The disposal agency must prepare an explanatory statement of the circumstances of each of the following proposed disposals by negotiation:

(a) Any real property that has an estimated fair market value in excess of $700,000, except that any real property disposed of by lease or exchange is subject only to paragraphs (b) through (d) of this section;

(b) Any real property disposed of by lease for a term of 5 years or less, if the estimated fair annual rent is in excess of $100,000 for any of such years;

(c) Any real property disposed of by lease for a term of more than 5 years, if the total estimated rent over the term of the lease is in excess of $700,000; or

(d) Any real property or real and related personal property disposed of by exchange, regardless of value, or any property disposed in which any part of the consideration is real property.

**§ 102–75.910 Are there any exceptions to this policy of preparing explanatory statements?**

Yes, the disposal agency is not required to prepare an explanatory statement for property authorized to be disposed of without advertising by any provision of law other than section 203(e) of the Act.

**§ 102–75.915 Do disposal agencies need to retain a copy of the explanatory statement?**

Yes, disposal agencies must retain a copy of the explanatory statement in their files.

**§ 102–75.920 Where is the explanatory statement sent?**

Disposal agencies must submit each explanatory statement to the Administrator of General Services for review and transmittal by letter from the Administrator of General Services to the Committees on Government Operations and any other appropriate committees of the Senate and House of Representatives. Disposal agencies must include in the submission to the Administrator of General Services any supporting data that may be relevant and necessary for evaluating the proposed action.

**§ 102–75.925 Is GSA required to furnish the disposal agency with the explanatory statement's transmittal letter sent to Congress?**

Yes, GSA must furnish copies of its transmittal letters to the committees of the Congress (see § 102–75.920) to the disposal agency.

**§ 102–75.930 What happens if there is no objection by an appropriate committee or subcommittee of Congress concerning the proposed negotiated sale?**

If there is no objection, the disposal agency may consummate the sale on or after 35 days from the date the Administrator of General Services transmitted the explanatory statement to the committees. If there is an objection, the disposal agency must resolve objections with the appropriate congressional committee or subcommittee before consummating the sale.

## Public Sales

**§ 102–75.935 What are disposal agencies' responsibilities concerning public sales?**

Disposal agencies must make available by competitive public sale any surplus property that is not disposed of by public benefit discount conveyance or by negotiated sale. Awards must be made to the responsible bidder whose bid will be most advantageous to the Government, price and other factors considered.

## Nonfederal Interim Use of Surplus Property

**§ 102–75.940 Can landholding agencies outlease surplus real property for nonfederal interim use?**

Yes, landholding agencies may allow organizations to use surplus real

property awaiting disposal using either a lease or permit, only when:

(a) The lease or permit does not exceed one year and is revocable with not more than a 30-day notice by the disposal agency;

(b) The use and occupancy will not interfere with, delay, or impede the disposal of the property; and

(c) The agency executing the agreement is responsible for the servicing of such property.

## Subpart D—Management of Excess and Surplus Real Property

### § 102–75.945 What is GSA's policy concerning the physical care, handling, protection, and maintenance of excess and surplus real property and related personal property?

GSA's policy is to:

(a) Manage excess and surplus real property, including related personal property, by providing only those minimum services necessary to preserve the Government's interest and realizable value of the property considered;

(b) Place excess and surplus real property in productive use through interim utilization, provided, that such temporary use and occupancy do not interfere with, delay, or retard its transfer to a Federal agency or disposal; and

(c) Render safe or destroy aspects of excess and surplus real property which are dangerous to the public health or safety.

### Taxes and Other Obligations

### § 102–75.950 Who has the responsibility for paying taxes and other obligations pending transfer or disposal of the property?

The landholding agency is responsible for paying taxes or payments in lieu of taxes (in the event of subsequent enactment of legislation by Congress authorizing such payments on Government-owned property not legally assessable), rents, and insurance premiums and other obligations pending transfer or disposal.

### Decontamination

### § 102–75.955 Who is responsible for decontaminating excess and surplus real property?

The landholding agency is responsible for all expense to the Government and for the supervision of the decontamination of excess and surplus real property that has been contaminated with hazardous materials of any sort. Extreme care must be exercised in the decontamination, management, and disposal of contaminated property in order to prevent such properties from becoming a hazard to the general public. The landholding agency must inform the disposal agency of any and all hazards involved relative to such property in order to protect the general public from hazards and to preclude the Government from any and all liability resulting from indiscriminate disposal or mishandling of contaminated property.

### Improvements or Alterations

### § 102–75.960 May landholding agencies make improvements or alterations to excess or surplus property in those cases where disposal is otherwise not feasible?

Yes, landholding agencies may make improvements or alterations which involve rehabilitation, reconditioning, conversion, completion, additions, and replacements in structures, utilities, installations, and land improvements, in those cases where disposal cannot be accomplished without such improvements or alterations. However, agencies must not enter into commitments concerning improvements or alterations without GSA's prior approval.

### Protection and Maintenance

### § 102–75.965 Who must perform the protection and maintenance of excess and surplus real property pending transfer to another Federal agency or disposal?

The landholding agency remains responsible and accountable for excess and surplus real property, including related personal property, and must perform the protection and maintenance of such property pending transfer to another Federal agency or disposal. Guidelines for protection and maintenance of excess and surplus real property are in the GSA Customer Guide to Real Property Disposal. The landholding agency is responsible for complying with the requirements of the National Oil and Hazardous Substances Pollution Contingency Plan and initiating or cooperating with others in the actions prescribed for the prevention, containment, or remedy of hazardous conditions.

### § 102–75.970 How long is the landholding agency responsible for the expense of protection and maintenance of excess and surplus real property pending its transfer or disposal?

Generally, the landholding agency is responsible for the cost of protection and maintenance of the property pending transfer or disposal for at least 12 months, but not more than 15 months. However, the landholding agency is responsible for providing and funding protection and maintenance during the period of delay if the landholding agency:

(a) Requests deferral of the disposal;

(b) Continues to occupy the property beyond the excess date to the detriment of orderly disposal; or

(c) Otherwise takes actions which result in a delay in the disposition.

### § 102–75.975 What happens if the property is not conveyed or disposed of during this time frame?

If the property is not transferred to a Federal agency or disposed of during the period mentioned in § 102–75.970, the disposal agency must pay or reimburse the landholding agency for protection and maintenance expense of such property from and after the expiration date of said period, only if:

(a) There is a written agreement between the landholding agency and the disposal agency specifying the maximum amount of protection and maintenance expense that the disposal agency is responsible for; and

(b) Appropriations have been made by Congress to the disposal agency in an amount sufficient to make such payment or reimbursement.

### § 102–75.980 Who is responsible for protection and maintenance expenses if there is no written agreement or no Congressional appropriation to the disposal agency?

If there is no written agreement (between the landholding agency and the disposal agency) or no Congressional appropriation to the disposal agency, the landholding agency is responsible for all protection and maintenance expenses, without any right of contribution or reimbursement from the disposal agency.

### Assistance in Disposition

### § 102–75.985 Is the landholding agency required to assist the disposal agency in the disposition process?

Yes, the landholding agency must cooperate with the disposal agency in showing the property to prospective transferees or purchasers. Unless extraordinary expenses are incurred in showing the property, the landholding agency must absorb the entire cost of such actions.

## Subpart E—Abandonment, Destruction, or Donation to Public Bodies

### § 102–75.990 May Federal agencies abandon, destroy, or donate to public bodies real property?

Yes, subject to the restrictions in this subpart, any Federal agency having control of real property which has no commercial value or for which the

estimated cost of continued care and handling exceeds the estimated proceeds from its sale, may:

(a) Abandon or destroy Government-owned improvements and related personal property located on privately owned land;

(b) Destroy Government-owned improvements and related personal property located on Government-owned land; abandonment of such property is not authorized; or

(c) Donate to public bodies any Government-owned real property (land and/or improvements and related personal property), or interests therein.

### Dangerous Property

#### § 102–75.995 May Federal agencies dispose of dangerous property?

No, property which is dangerous to public health or safety must be made harmless or have adequate safeguards in place before it can be abandoned, destroyed, or donated to public bodies.

### Determinations

#### § 102–75.1000 How is the decision made to abandon, destroy, or donate property?

No property shall be abandoned, destroyed, or donated by a Federal agency under § 102–75.920, unless a duly authorized official of that agency determines, in writing, that:

(a) The property has no commercial value; or

(b) The estimated cost of its continued care and handling exceeds the estimated proceeds from its sale.

#### § 102–75.1005 Who can make the determination within the Federal agency on whether a property can be abandoned, destroyed, or donated?

Only a duly authorized official of that agency not directly accountable for the subject property can make the determination.

#### § 102–75.1010 When is a reviewing authority required to approve the determination concerning a property that is to be abandoned, destroyed, or donated?

A reviewing authority must approve determinations made under § 102–75.1000 before any such disposal, whenever all the property proposed to be disposed of by a Federal agency has a current estimated fair market value of more than $50,000.

### Restrictions

#### § 102–75.1015 Are there any restrictions on Federal agencies concerning property donations to public bodies?

Yes, Federal agencies must obtain prior concurrence of GSA before donating to public bodies:

(a) Improvements on land or related personal property having a current estimated fair market value in excess of $250,000; and

(b) Land, regardless of cost.

### Disposal Costs

#### § 102–75.1020 Are public bodies ever required to pay the disposal costs associated with donated property?

Yes, any public body receiving donated improvements on land or related personal property must pay the disposal costs associated with the donation, such as dismantling, removal, and the cleaning up of the premises.

### Abandonment and Destruction

#### § 102–75.1025 When can a Federal agency abandon or destroy improvements on land or related personal property in lieu of donating it to a public body?

A Federal agency may not abandon or destroy improvements on land or related personal property unless a duly authorized official of that agency finds, in writing, that donating the property is not feasible. This written finding is in addition to the determination prescribed in §§ 102–75.1000, 102–75.1005, and 102–75.1010. If donating the property becomes feasible at any time prior to actually abandoning or destroying the property, the Federal agency must donate it.

#### § 102–75.1030 May Federal agencies abandon or destroy property in any manner they decide?

No, Federal agencies may not abandon or destroy property in a manner which is detrimental or dangerous to public health or safety or which will infringe on the rights of other persons.

#### § 102–75.1035 Are there any restrictions on Federal agencies concerning the abandonment or destruction of improvements on land or related personal property?

Yes, GSA must concur on an agency's abandonment or destruction of improvements on land or related personal property prior to abandoning or destroying such improvements on land or related personal property—

(a) Which are of permanent type construction; or

(b) The retention of which would enhance the value of the underlying land, if it were to be made available for sale or lease.

#### § 102–75.1040 May Federal agencies abandon or destroy improvements on land or related personal property before public notice is given of such proposed abandonment or destruction?

Except as provided in § 102–75.1045, a Federal agency must not abandon or destroy improvements on land or related personal property until after it has given public notice of the proposed abandonment or destruction. This notice must be given in the area in which the property is located, must contain a general description of the property to be abandoned or destroyed, and must include an offering of the property for sale. A copy of the notice must be given to the GSA regional property disposal office for the region in which the property is located.

#### § 102–75.1045 Are there exceptions to the policy that requires public notice be given before Federal agencies abandon or destroy improvements on land or related personal property?

Yes, property can be abandoned or destroyed without public notice if—

(a) Its value is so low or the cost of its care and handling so great that retaining the property in order to post public notice is clearly not economical;

(b) Health, safety, or security considerations require its immediate abandonment or destruction; or

(c) The assigned mission of the agency might be jeopardized by the delay, and a duly authorized Federal agency official finds in writing, with respect to paragraph (a), (b), or (c) of this section, and a reviewing authority approves this finding. The finding must be in addition to the determinations prescribed in §§ 102–75.1000, 102–75.1005, 102–75.1010 and 102–75.1025.

#### § 102–75.1050 Is there any property for which this subpart does not apply?

Yes, this subpart does not apply to surplus property assigned for disposal to educational or public health institutions pursuant to section 203(k) of the Act.

## Subpart F—Delegations

### Delegation to Department of Defense (DOD)

#### § 102–75.1055 What is the policy governing delegations of real property disposal authority to the Secretary of Defense?

GSA delegates to the Secretary of Defense the authority to determine that Federal agencies do not need Department of Defense controlled excess real property and related personal property having a total estimated fair market value, including all the component units of the property, of less than $50,000; and to dispose of the property by means deemed most advantageous to the United States.

**§ 102–75.1060 What must the Secretary of Defense do before determining that DOD-controlled excess real property and related personal property is not required for the needs of any Federal agency and prior to disposal?**

The Secretary must conduct a Federal screening to determine that there is no further Federal need or requirement for the property.

**§ 102–75.1065 When using a delegation of real property disposal authority under this subpart, is the DOD required to report excess property to GSA?**

No, although the authority in this delegation must be used following the Federal Property and Administrative Services Act of 1949 and its implementing regulations.

**§ 102–75.1070 Can this delegation of authority to the Secretary of Defense be redelegated?**

Yes, the Secretary of Defense may redelegate the authority delegated in § 102–75.1055 to any officer or employee of the Department of Defense.

## Delegation to Department of Agriculture (USDA)

**§ 102–75.1075 What is the policy governing delegations of real property disposal authority to the Secretary of Agriculture?**

GSA delegates authority to the Secretary of Agriculture to determine that Federal agencies do not need USDA-controlled excess real property and related personal property having a total estimated fair market value, including all the component units of the property, of less than $50,000; and to dispose of the property by means deemed most advantageous to the United States.

**§ 102–75.1080 What must the Secretary of Agriculture do before determining that USDA-controlled excess real property and related personal property is not required for the needs of any Federal agency and prior to disposal?**

The Secretary must conduct a Federal screening to determine that there is no further Federal need or requirement for the property.

**§ 102–75.1085 When using a delegation of real property disposal authority under this subpart, is the USDA required to report excess property to GSA?**

No, although the authority in this delegation must be used following the Federal Property and Administrative Services Act of 1949 and its implementing regulations.

**§ 102–75.1090 Can this delegation of authority to the Secretary of Agriculture be redelegated?**

Yes, the Secretary of Agriculture may redelegate authority delegated in § 102–75.1075 to any officer or employee of the Department of Agriculture.

## Delegation to the Department of the Interior

**§ 102–75.1095 What is the policy governing delegations of authority to the Secretary of the Interior?**

GSA delegates authority to the Secretary of the Interior to:

(a) Maintain custody, control, and accountability for mineral resources in, on, or under Federal real property which the Administrator or his designee occasionally designates as currently utilized, excess, or surplus to the Government's needs;

(b) Dispose of mineral resources by lease and to administer those leases which are made; and

(c) Determine that Federal agencies do not need Department of the Interior controlled excess real property and related personal property with an estimated fair market value, including all components of the property, of less than $50,000; and to dispose of the property by means most advantageous to the United States.

**§ 102–75.1100 Can this delegation of authority to the Secretary of the Interior be redelegated?**

Yes, the Secretary of the Interior may redelegate this authority to any officer, official, or employee of the Department of the Interior.

**§ 102–75.1105 What other responsibilities does the Secretary of the Interior have under this delegation of authority?**

Under this authority, the Secretary of the Interior is responsible for:

(a) Maintaining proper inventory records, as head of the landholding agency;

(b) Monitoring the minerals as necessary, as head of the landholding agency, to ensure that no unauthorized mining or removal of the minerals occurs;

(c) Securing any appraisals deemed necessary by the Secretary;

(d) Coordinating with all surface landowners, Federal or otherwise, to ensure no unnecessary interference with the surface use;

(e) Ensuring that the damaged or disturbed lands are restored after removal of the mineral deposits;

(f) Notifying the Administrator of General Services when the disposal of all marketable mineral deposits is complete;

(g) Complying with the applicable environmental laws and regulations, including the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321, *et seq.*); and the implementing regulations issued by the Council on Environmental Quality (40 CFR part 1500); section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470f); and the Coastal Zone Management Act of 1972 (16 U.S.C. 1451, *et seq.*) and the Department of Commerce implementing regulations (15 CFR parts 923 and 930);

(h) Forwarding promptly to the Administrator of General Services copies of any agreements executed under this authority; and

(i) Providing the Administrator of General Services with an annual accounting of the proceeds received from leases executed under this authority.

## Native American-Related Delegations

**§ 102–75.1110 What is the policy governing delegations of authority to the Secretary of the Interior, the Secretary of Health and Human Services, and the Secretary of Education for property used in the administration of any Native American-related functions?**

The GSA delegates authority to the Secretary of the Interior, the Secretary of Health and Human Services, and the Secretary of Education to transfer and to retransfer to each other, upon request, any of the property of either agency which is being used and will continue to be used in the administration of any functions relating to the Native Americans. The term *property*, as used in this delegation, includes real property and such personal property as the Secretary making the transfer or re-transfer determines to be related personal property. The Departments must exercise the authority conferred in this section following applicable GSA regulations issued pursuant to the Act.

**§ 102–75.1115 Are there any limitations or restrictions on this delegation of authority?**

This authority must be used only in connection with property which the appropriate Secretary determines:

(a) Comprises a functional unit;

(b) Is located within the United States; and

(c) Has an acquisition cost of $100,000 or less, provided that the transfer or retransfer does not include property situated in any area which is recognized as an urban area or place as identified by the most recent decennial census.

**§ 102–75.1120 Does the property have to be federally screened?**

No, screening is not required because it would accomplish no useful purpose,

since the property subject to transfer or retransfer will continue to be used in the administration of any functions relating to Native Americans.

**§ 102–75.1125 Can the transfer/retransfer under this delegation be at no cost or without consideration?**

Yes, transfers/retransfers under this delegation can be at no cost or without consideration, except:

(a) Where funds programmed and appropriated for acquisition of the property are available to the Secretary requesting the transfer or retransfer; or

(b) Whenever reimbursement at fair market value is required by subpart B of this part (entitled ''Utilization of Excess Real Property''.)

**§ 102–75.1130 What action must the Secretary requesting the transfer take where funds were not programmed and appropriated for acquisition of the property?**

The Secretary requesting the transfer or retransfer must certify in writing that no funds are available to acquire the property. The Secretary transferring or retransferring the property may make any determination necessary that would otherwise be made by GSA to carry out the authority contained in this delegation.

**§ 102–75.1135 May this delegation of authority to the Secretary of the Interior, the Secretary of Health and Human Services, and the Secretary of Education be redelegated?**

Yes, the Secretary of the Interior, the Secretary of Health and Human Services, and the Secretary of Education may redelegate any of the authority contained in this delegation to any officers or employees of their respective departments.

## Subpart G—Conditional Gifts of Real Property To Further the Defense Effort

**§ 102–75.1140 What is the policy governing the acceptance or rejection of a conditional gift of real property for a particular defense purpose?**

Any Federal agency receiving an offer of a conditional gift of real property for a particular defense purpose within the purview of the Act of July 27, 1954, must notify the appropriate GSA regional office and must submit to GSA a recommendation indicating whether the Government should accept or reject the gift. Nothing in this subpart shall be construed as applicable to the acceptance of gifts under the provisions of other laws. The GSA must:

(a) Consult with the interested agencies before it may accept or reject such conditional gifts of real property on behalf of the United States or before it transfers such conditional gifts of real property to an agency; and

(b) Advise the donor and the agencies concerned of the action taken with respect to acceptance or rejection of the conditional gift and of its final disposition.

**§ 102–75.1145 What action must the Federal agency receiving an offer of a conditional gift take?**

Prior to notifying the appropriate GSA regional property disposal office, the receiving Federal agency must acknowledge receipt of the offer in writing and advise the donor that the offer will be referred to the appropriate GSA regional property disposal office. The receiving agency must not indicate acceptance or rejection of the gift on behalf of the United States at this time. The receiving agency must provide a copy of the acknowledgment with the notification and recommendation to the GSA regional property disposal office.

**§ 102–75.1150 What happens to the gift if GSA determines it to be acceptable?**

When GSA determines that the gift is acceptable and can be accepted and used in the form in which it was offered, GSA must designate an agency and transfer the gift without reimbursement to this agency to use as the donor intended.

**§ 102–75.1155 May an acceptable gift of property be converted to money?**

The GSA can determine whether or not a gift of property can and should be converted to money. After conversion, GSA must deposit the funds with the Treasury Department for transfer to an appropriate account which will best effectuate the intent of the donor, in accordance with Treasury Department procedures.

## Subpart H—Use of Federal Real Property To Assist the Homeless Definitions

**§ 102–75.1160 What definitions apply to this subpart?**

*Applicant* means any representative of the homeless that has submitted an application to the Department of Health and Human Services to obtain use of a particular suitable property to assist the homeless.

*Checklist or property checklist* means the form developed by HUD for use by landholding agencies to report the information to be used by HUD in making determinations of suitability.

*Classification* means a property's designation as unutilized, underutilized, excess, or surplus.

*Day* means one calendar day including weekends and holidays.

*Eligible organization* means a State, unit of local government, or a private, nonprofit organization which provides assistance to the homeless, and which is authorized by its charter or by State law to enter into an agreement with the Federal Government for use of real property for the purposes of this subpart. Representatives of the homeless interested in receiving a deed for a particular piece of surplus Federal property must be section 501(c)(3) tax exempt.

*Excess property* means any property under the control of any Federal executive agency that is not required for the agency's needs or the discharge of its responsibilities, as determined by the head of the agency pursuant to 40 U.S.C. 483.

*GSA* means the General Services Administration.

*HHS* means the Department of Health and Human Services.

*Homeless* means:

(1) An individual or family that lacks a fixed, regular, and adequate nighttime residence; and

(2) An individual or family that has a primary nighttime residence that is:

(i) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(ii) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(iii) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. This term does not include any individual imprisoned or otherwise detained under an Act of the Congress or a State law.

*HUD* means the Department of Housing and Urban Development.

*ICH* means the Interagency Council on the Homeless.

*Landholding agency* means a Federal department or agency with statutory authority to control real property.

*Lease* means an agreement between either the Department of Health and Human Services for surplus property, or landholding agencies in the case of non-excess properties or properties subject to the Base Closure and Realignment Act (Pub. L. 100–526; 10 U.S.C. 2687), and the applicant, giving rise to the relationship of lessor and lessee for the use of Federal real property for a term of at least one year under the conditions set forth in the lease document.

*Nonprofit organization* means an organization, no part of the net earnings of which inures to the benefit of any member, founder, contributor, or

individual; that has a voluntary board; that has an accounting system or has designated an entity that will maintain a functioning accounting system for the organization in accordance with generally accepted accounting procedures; and that practices nondiscrimination in the provision of assistance.

*Permit* means a license granted by a landholding agency to use unutilized or underutilized property for a specific amount of time under terms and conditions determined by the landholding agency.

*Property* means real property consisting of vacant land or buildings, or a portion thereof, that is excess, surplus, or designated as unutilized or underutilized in surveys by the heads of landholding agencies conducted pursuant to section 202(b)(2) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483(b)(2)).

*Regional Homeless Coordinator* means a regional coordinator of the Interagency Council on the Homeless.

*Representative of the Homeless* means a State or local government agency, or private nonprofit organization that provides, or proposes to provide, services to the homeless.

*Screen* means the process by which GSA surveys Federal agencies, or State, local and nonprofit entities, to determine if any such entity has an interest in using excess Federal property to carry out a particular agency mission or a specific public use.

*State Homeless Coordinator* means a State contact person designated by a State to receive and disseminate information and communications received from the Interagency Council on the Homeless in accordance with section 210(a) of the Stewart B. McKinney Act of 1987, as amended.

*Suitable property* means that HUD has determined that a particular property satisfies the criteria listed in § 102–75.1185.

*Surplus property* means any excess real property not required by any Federal landholding agency for its needs or the discharge of its responsibilities, as determined by the Administrator of GSA.

*Underutilized* means an entire property or portion thereof, with or without improvements, which is used only at irregular periods or intermittently by the accountable landholding agency for current program purposes of that agency, or which is used for current program purposes that can be satisfied with only a portion of the property.

*Unsuitable property* means that HUD has determined that a particular property does not satisfy the criteria in § 102–75.1185.

*Unutilized property* means an entire property or portion thereof, with or without improvements, not occupied for current program purposes for the accountable executive agency or occupied in caretaker status only.

## Applicability

### § 102–75.1165 What is the applicability of this subpart?

(a) This part applies to Federal real property which has been designated by Federal landholding agencies as unutilized, underutilized, excess or surplus, and is, therefore, subject to the provisions of title V of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11411).

(b) The following categories of properties are not subject to this subpart (regardless of whether they may be unutilized or underutilized):

(1) Machinery and equipment.

(2) Government-owned, contractor-operated machinery, equipment, land, and other facilities reported excess for sale only to the using contractor and subject to a continuing military requirement.

(3) Properties subject to special legislation directing a particular action.

(4) Properties subject to a court order.

(5) Property not subject to survey requirements of Executive Order 12512 (April 29, 1985).

(6) Mineral rights interests.

(7) Air Space interests.

(8) Indian Reservation land subject to section 202(a)(2) of the Federal Property and Administrative Service Act of 1949, as amended.

(9) Property interests subject to reversion.

(10) Easements.

(11) Property purchased in whole or in part with Federal funds if title to the property is not held by a Federal landholding agency as defined in this part.

## Collecting the Information

### § 102–75.1170 How will information be collected?

(a) *Canvass of landholding agencies.* On a quarterly basis, HUD will canvass landholding agencies to collect information about property described as unutilized, underutilized, excess, or surplus in surveys conducted by the agencies under section 202 of the Federal Property and Administrative Services Act (40 U.S.C. 483), Executive Order 12512, and subpart H of this part. Each canvass will collect information on properties not previously reported and about property reported previously the status or classification of which has changed or for which any of the information reported on the property checklist has changed.

(1) HUD will request descriptive information on properties sufficient to make a reasonable determination, under the criteria described below, of the suitability of a property for use as a facility to assist the homeless.

(2) HUD will direct landholding agencies to respond to requests for information within 25 days of receipt of such requests.

(b) *Agency annual report.* By December 31 of each year, each landholding agency must notify HUD regarding the current availability status and classification of each property controlled by the agency that—

(1) Was included in a list of suitable properties published that year by HUD; and

(2) Remains available for application for use to assist the homeless, or has become available for application during that year.

(c) *GSA inventory.* HUD will collect information, in the same manner as described in paragraph (a) of this section, from GSA regarding property that is in GSA's current inventory of excess or surplus property.

(d) *Change in status.* If the information provided on the property checklist changes subsequent to HUD's determination of suitability, and the property remains unutilized, underutilized, excess or surplus, the landholding agency shall submit a revised property checklist in response to the next quarterly canvass. HUD will make a new determination of suitability and, if it differs from the previous determination, republish the property information in the **Federal Register**. For example, property determined unsuitable for national security concerns may no longer be subject to security restrictions, or property determined suitable may subsequently be found to be contaminated.

## Suitability Determination

### § 102–75.1175 Who issues the suitability determination?

(a) *Suitability determination.* Within 30 days after the receipt of information from landholding agencies regarding properties which were reported pursuant to the canvass described in § 102–75.1170(a), HUD will determine, under criteria set forth in § 102–75.1185, which properties are suitable for use as facilities to assist the homeless and report its determination to the

landholding agency. Properties that are under lease, contract, license, or agreement by which a Federal agency retains a real property interest or which are scheduled to become unutilized or underutilized will be reviewed for suitability no earlier than six months prior to the expected date when the property will become unutilized or underutilized, except that properties subject to the Base Closure and Realignment Act may be reviewed up to eighteen months prior to the expected date when the property will become unutilized or underutilized.

(b) *Scope of suitability.* HUD will determine the suitability of a property for use as a facility to assist the homeless without regard to any particular use.

(c) *Environmental information.* HUD will evaluate the environmental information contained in property checklists forwarded to HUD by the landholding agencies solely for the purpose of determining suitability of properties under the criteria in § 102–75.1185.

(d) *Written record of suitability determination.* HUD will assign an identification number to each property reviewed for suitability. HUD will maintain a written public record of the following:

(1) The suitability determination for a particular piece of property, and the reasons for that determination; and

(2) The landholding agency's response to the determination pursuant to the requirements of § 102–75.1190(a).

(e) *Property determined unsuitable.* Property that is reviewed by HUD under this section and that is determined unsuitable for use to assist the homeless may not be made available for any other purpose for 20 days after publication in the **Federal Register** of a notice of unsuitability to allow for review of the determination at the request of a representative of the homeless.

(f) *Procedures for appealing unsuitability determinations.* (1) To request review of a determination of unsuitability, a representative of the homeless must contact HUD within 20 days of publication of notice in the **Federal Register** that a property is unsuitable. Requests may be submitted to HUD in writing or by calling 1–800–927–7588 (Toll Free). Written requests must be received no later than 20 days after notice of unsuitability is published in the **Federal Register**.

(2) Requests for review of a determination of unsuitability may be made only by representatives of the homeless, as defined in § 102–75.1160.

(3) The request for review must specify the grounds on which it is based, *i.e.*, that HUD has improperly applied the criteria or that HUD has relied on incorrect or incomplete information in making the determination (*e.g.*, that property is in a floodplain but not in a floodway).

(4) Upon receipt of a request to review a determination of unsuitability, HUD will notify the landholding agency that such a request has been made, request that the agency respond with any information pertinent to the review, and advise the agency that it should refrain from initiating disposal procedures until HUD has completed its reconsideration regarding unsuitability.

(i) HUD will act on all requests for review within 30 days of receipt of the landholding agency's response and will notify the representative of the homeless and the landholding agency in writing of its decision.

(ii) If a property is determined suitable as a result of the review, HUD will request the landholding agency's determination of availability pursuant to § 102–75.1190(a), upon receipt of which HUD will promptly publish the determination in the **Federal Register**. If the determination of unsuitability stands, HUD will inform the representative of the homeless of its decision.

## Real Property Reported Excess to GSA

### § 102–75.1180 For the purposes of this subpart, what is the policy concerning real property reported excess to GSA?

(a) Each landholding agency must submit a report to GSA of properties it determines excess. Each landholding agency must also provide a copy of HUD's suitability determination, if any, including HUD's identification number for the property.

(b) If a landholding agency reports a property to GSA which has been reviewed by HUD for homeless assistance suitability and HUD determined the property suitable, GSA will screen the property pursuant to § 102–75.1180(g) and will advise HUD of the availability of the property for use by the homeless as provided in § 102–75.1180(e). In lieu of the above, GSA may submit a new checklist to HUD and follow the procedures in § 102–75.1180(c) through § 102–75.1180(g).

(c) If a landholding agency reports a property to GSA which has not been reviewed by HUD for homeless assistance suitability, GSA will complete a property checklist, based on information provided by the landholding agency, and will forward this checklist to HUD for a suitability determination. This checklist will reflect any change in classification, *i.e.,* from unutilized or underutilized to excess.

(d) Within 30 days after GSA's submission, HUD will advise GSA of the suitability determination.

(e) When GSA receives a letter from HUD listing suitable excess properties in GSA's inventory, GSA will transmit to HUD within 45 days a response which includes the following for each identified property:

(1) A statement that there is no other compelling Federal need for the property and, therefore, the property will be determined surplus; or

(2) A statement that there is further and compelling Federal need for the property (including a full explanation of such need) and that, therefore, the property is not presently available for use to assist the homeless.

(f) When an excess property is determined suitable and available and notice is published in the **Federal Register**, GSA will concurrently notify HHS, HUD, State and local government units, known homeless assistance providers that have expressed interest in the particular property, and other organizations, as appropriate, concerning suitable properties.

(g) Upon submission of a Report of Excess to GSA, GSA may screen the property for Federal use. In addition, GSA may screen State and local governmental units and eligible nonprofit organizations to determine interest in the property in accordance with current regulations. (*See* GSA Customer Guide to Real Property Disposal.)

(h) The landholding agency will retain custody and accountability and will protect and maintain any property which is reported excess to GSA as provided in § 102–75.965.

## Suitability Criteria

### § 102–75.1185 What are suitability criteria?

(a) All properties, buildings, and land will be determined suitable unless a property's characteristics include one or more of the following conditions:

(1) *National security concerns.* A property located in an area to which the general public is denied access in the interest of national security (*e.g.*, where a special pass or security clearance is a condition of entry to the property) will be determined unsuitable. Where alternative access can be provided for the public without compromising national security, the property will not be determined unsuitable on this basis.

(2) *Property containing flammable or explosive materials.* A property located within 2,000 feet of an industrial, commercial or Federal facility handling

flammable or explosive material (excluding underground storage) will be determined unsuitable. Above ground containers with a capacity of 100 gallons or less, or larger containers which provide the heating or power source for the property, and which meet local safety, operation, and permitting standards, will not affect whether a particular property is determined suitable or unsuitable. Underground storage, gasoline stations, and tank trucks are not included in this category, and their presence will not be the basis of an unsuitability determination unless there is evidence of a threat to personal safety as provided in paragraph (a)(5) of this section.

(3) *Runway clear zone and military airfield clear zone.* A property located within an airport runway clear zone or military airfield clear zone will be determined unsuitable.

(4) *Floodway.* A property located in the floodway of a 100-year floodplain will be determined unsuitable. If the floodway has been contained or corrected, or if only an incidental portion of the property not affecting the use of the remainder of the property is in the floodway, the property will not be determined unsuitable.

(5) *Documented deficiencies.* A property with a documented and extensive condition(s) that represents a clear threat to personal physical safety will be determined unsuitable. Such conditions may include, but are not limited to, contamination, structural damage, or extensive deterioration, friable asbestos, PCB's, or natural hazardous substances such as radon, periodic flooding, sinkholes or earth slides.

(6) *Inaccessible.* A property that is inaccessible will be determined unsuitable. An inaccessible property is one that is not accessible by road (including property on small off-shore islands) or is land locked (*e.g.*, can be reached only by crossing private property and there is no established right or means of entry).

## Determination of Availability

### § 102–75.1190 What is the policy concerning determination of availability statements?

(a) Within 45 days after receipt of a letter from HUD pursuant to § 102–75.1170(a), each landholding agency must transmit to HUD a statement of one of the following:

(1) In the case of unutilized or underutilized property:

(i) An intention to declare the property excess;

(ii) An intention to make the property available for use to assist the homeless; or

(iii) The reasons why the property cannot be declared excess or made available for use to assist the homeless. The reasons given must be different than those listed as suitability criteria in § 102–75.1185.

(2) In the case of excess property that had previously been reported to GSA:

(i) A statement that there is no compelling Federal need for the property and that, therefore, the property will be determined surplus; or

(ii) A statement that there is a further and compelling Federal need for the property (including a full explanation of such need) and that, therefore, the property is not presently available for use to assist the homeless.

## Public Notice of Determination

### § 102–75.1195 What is the policy concerning making public the notice of determination?

(a) No later than 15 days after the last-45 day period has elapsed for receiving responses from the landholding agencies regarding availability, HUD will publish in the **Federal Register** a list of all properties reviewed, including a description of the property, its address, and classification. The following designations will be made:

(1) Properties that are suitable and available.

(2) Properties that are suitable and unavailable.

(3) Properties that are suitable and to be declared excess.

(4) Properties that are unsuitable.

(b) Information about specific properties can be obtained by contacting HUD at the following toll free number: 1–800–927–7588.

(c) HUD will transmit to the ICH a copy of the list of all properties published in the **Federal Register**. The ICH will immediately distribute to all state and regional homeless coordinators area-relevant portions of the list. The ICH will encourage the state and regional homeless coordinators to disseminate this information widely.

(d) No later than February 15 of each year, HUD shall publish in the **Federal Register** a list of all properties reported pursuant to § 102–75.1170(b).

(e) HUD shall publish an annual list of properties determined suitable, but that agencies reported unavailable, including the reasons such properties are not available.

(f) Copies of the lists published in the **Federal Register** will be available for review by the public in the HUD headquarters building library (room 8141); area-relevant portions of the lists will be available in the HUD regional offices and in major field offices.

## Application Process

### § 102–75.1200 How may representatives of the homeless apply for the use of properties to assist the homeless?

(a) *Holding period.* (1) Properties published as available for application for use to assist the homeless shall not be available for any other purpose for a period of 60 days beginning on the date of publication. Any representative of the homeless interested in any underutilized, unutilized, excess or surplus Federal property for use as a facility to assist the homeless must send to HHS a written expression of interest in that property within 60 days after the property has been published in the **Federal Register**.

(2) If a written expression of interest to apply for suitable property for use to assist the homeless is received by HHS within the 60-day holding period, such property may not be made available for any other purpose until the date HHS or the appropriate landholding agency has completed action on the application submitted pursuant to that expression of interest.

(3) The expression of interest should identify the specific property, briefly describe the proposed use, include the name of the organization, and indicate whether it is a public body or a private, nonprofit organization. The expression of interest must be sent to the Division of Health Facilities Planning (DHFP) of the Department of Health and Human Services at the following address: Director, Division of Health Facilities Planning, Public Health Service, room 17A–10, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. The HHS will notify the landholding agency (for unutilized and underutilized properties) or GSA (for excess and surplus properties) when an expression of interest has been received for a particular property.

(4) An expression of interest may be sent to HHS any time after the 60-day holding period has expired. In such a case, an application submitted pursuant to this expression of interest may be approved for use by the homeless if:

(i) No application or written expression of interest has been made under any law for use of the property for any purpose; and

(ii) In the case of excess or surplus property, GSA has not received a bona fide offer to purchase that property or advertised for the sale of the property by public auction.

(b) *Application requirements.* Upon receipt of an expression of interest,

DHFP will send an application packet to the interested entity. The application packet requires the applicant to provide certain information, including the following:

(1) *Description of the applicant organization.* The applicant must document that it satisfies the definition of a ''representative of the homeless,'' as specified in § 102–75.1160. The applicant must document its authority to hold real property. Private, nonprofit organizations applying for deeds must document that they are section 501(c)(3) tax-exempt.

(2) *Description of the property desired.* The applicant must describe the property desired and indicate that any modifications made to the property will conform to local use restrictions, except for, in the case of leasing the property, local zoning regulations.

(3) *Description of the proposed program.* The applicant must fully describe the proposed program and demonstrate how the program will address the needs of the homeless population to be assisted. The applicant must fully describe what modifications will be made to the property before the program becomes operational.

(4) *Ability to finance and operate the proposed program.* The applicant must specifically describe all anticipated costs and sources of funding for the proposed program. The applicant must indicate that it can assume care, custody, and maintenance of the property and that it has the necessary funds or the ability to obtain such funds to carry out the approved program of use for the property.

(5) *Compliance with non-discrimination requirements.* Each applicant and lessee under this part must certify in writing that it will comply with the requirements of the Fair Housing Act (42 U.S.C. 3601–3619) and implementing regulations; and as applicable, Executive Order 11063 (Equal Opportunity in Housing) and implementing regulations; title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d to d–4) (Nondiscrimination in Federally Assisted Programs) and implementing regulations; the prohibitions against discrimination on the basis of age under the Age Discrimination Act of 1975 (42 U.S.C. 6101–6107) and implementing regulations; and the prohibitions against otherwise qualified individuals with handicaps under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations. The applicant must state that it will not discriminate on the basis of race, color, national origin, religion, sex, age, familial status, or handicap in the use of the property, and will maintain the required records to demonstrate compliance with Federal laws.

(6) *Insurance.* The applicant must certify that it will insure the property against loss, damage, or destruction in accordance with the requirements of 45 CFR 12.9.

(7) *Historic preservation.* Where applicable, the applicant must provide information that will enable HHS to comply with Federal historic preservation requirements.

(8) *Environmental information.* The applicant must provide sufficient information to allow HHS to analyze the potential impact of the applicant's proposal on the environment, in accordance with the instructions provided with the application packet. The HHS will assist applicants in obtaining any pertinent environmental information in the possession of HUD, GSA, or the landholding agency.

(9) *Local government notification.* The applicant must indicate that it has informed the applicable unit of general local government responsible for providing sewer, water, police, and fire services, in writing of its proposed program.

(10) *Zoning and local use restrictions.* The applicant must indicate that it will comply with all local use restrictions, including local building code requirements. Any applicant which applies for a lease or permit for a particular property is not required to comply with local zoning requirements. Any applicant applying for a deed of a particular property, pursuant to § 102–75.1200(b)(3), must comply with local zoning requirements, as specified in 45 CFR part 12.

(c) *Scope of evaluations.* Due to the short time frame imposed for evaluating applications, HHS' evaluation will, generally, be limited to the information contained in the application.

(d) *Deadline.* Completed applications must be received by DHFP, at the above address, within 90 days after an expression of interest is received from a particular applicant for that property. Upon written request from the applicant, HHS may grant extensions, provided that the appropriate landholding agency concurs with the extension. Because each applicant will have a different deadline based on the date the applicant submitted an expression of interest, applicants should contact the individual landholding agency to confirm that a particular property remains available prior to submitting an application.

(e) *Evaluations.* (1) Upon receipt of an application, HHS will review it for completeness and, if incomplete, may return it or ask the applicant to furnish any missing or additional required information prior to final evaluation of the application.

(2) HHS will evaluate each completed application within 25 days of receipt and will promptly advise the applicant of its decision. Applications are evaluated on a first-come, first-serve basis. HHS will notify all organizations that have submitted expressions of interest for a particular property regarding whether the first application received for that property has been approved or disapproved. All applications will be reviewed on the basis of the following elements, which are listed in descending order of priority, except that paragraphs (e)(2)(iv) and (e)(2)(v) of this section are of equal importance:

(i) *Services offered.* The extent and range of proposed services, such as meals, shelter, job training, and counseling.

(ii) *Need.* The demand for the program and the degree to which the available property will be fully utilized.

(iii) *Implementation time.* The amount of time necessary for the proposed program to become operational.

(iv) *Experience.* Demonstrated prior success in operating similar programs and recommendations attesting to that fact by Federal, State, and local authorities.

(v) *Financial ability.* The adequacy of funding that will likely be available to run the program fully and properly and to operate the facility.

(3) Additional evaluation factors may be added as deemed necessary by HHS. If additional factors are added, the application packet will be revised to include a description of these additional factors.

(4) If HHS receives one or more competing applications for a property within 5 days of the first application, HHS will evaluate all completed applications simultaneously. The HHS will rank approved applications based on the elements listed in § 102–75.1200(e)(2) and notify the landholding agency, or GSA, as appropriate, of the relative ranks.

## Action on Approved Applications

### § 102–75.1205 What action must be taken on approved applications?

(a) *Unutilized and underutilized properties.* (1) When HHS approves an application, it will so notify the applicant and forward a copy of the application to the landholding agency. The landholding agency will execute the lease, or permit document, as

appropriate, in consultation with the applicant.

(2) The landholding agency maintains the discretion to decide the following:

(i) The length of time the property will be available. (Leases and permits will be for a period of at least one year, unless the applicant requests a shorter term.)

(ii) Whether to grant use of the property via a lease or permit.

(iii) The terms and conditions of the lease or permit document.

(b) *Excess and surplus properties.* (1) When HHS approves an application, it will so notify the applicant and request that GSA assign the property to HHS for leasing. Upon receipt of the assignment, HHS will execute a lease in accordance with the procedures and requirements set out in 45 CFR part 12. In accordance with § 102–75.965, custody and accountability of the property will remain throughout the lease term with the agency that initially reported the property as excess.

(2) Prior to assignment to HHS, GSA may consider other Federal uses and other important national needs; however, in deciding the disposition of surplus real property, GSA will generally give priority of consideration to uses to assist the homeless. The GSA may consider any competing request for the property made under section 203(k) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 484(k)) (education, health, public park or recreation, and historic monument uses) that is so meritorious and compelling that it outweighs the needs of the homeless, and HHS may likewise consider any competing request made under subsection 203(k)(1) (education and health uses) of that law.

(3) Whenever GSA or HHS decides in favor of a competing request over a request for property for homeless assistance use as provided in paragraph (b)(2) of this section, the agency making the decision will transmit to the appropriate committees of the Congress an explanatory statement which details the need satisfied by conveyance of the surplus property, and the reasons for determining that such need was so meritorious and compelling as to outweigh the needs of the homeless.

(4) *Deeds.* Surplus property may be conveyed to representatives of the homeless pursuant to section 203(k) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 484(k)(1), and section 501(f) of the McKinney-Vento Act, as amended, 42 U.S.C. 11411. Representatives of the homeless must complete the application packet pursuant to the requirements of § 102–75.1200 and in accordance with the requirements of 45 CFR part 12.

(c) *Completion of lease term and reversion of title.* Lessees and grantees will be responsible for the protection and maintenance of the property during the time that they possess the property. Upon termination of the lease term or reversion of title to the Federal Government, the lessee or grantee will be responsible for removing any improvements made to the property and will be responsible for restoration of the property. If such improvements are not removed, they will become the property of the Federal Government. The GSA or the landholding agency, as appropriate, will assume responsibility for protection and maintenance of a property when the lease terminates or title reverts.

### Unsuitable Properties

#### § 102–75.1210 What action must be taken on properties determined unsuitable for homeless assistance?

The landholding agency will defer, for 20 days after the date that notice of a property is published in the **Federal Register**, action to dispose of properties determined unsuitable for homeless assistance. The HUD will inform landholding agencies or GSA if appeal of an unsuitability determination is filed by a representative of the homeless pursuant to § 102–75.1175(f)(4). The HUD will advise the agency that it should refrain from initiating disposal procedures until HUD has completed its reconsideration process regarding unsuitability. Thereafter, or if no appeal has been filed after 20 days, GSA or the appropriate landholding agency may proceed with disposal action in accordance with applicable law.

### No Applications Approved

#### § 102–75.1215 What action must be taken if there is no expression of interest?

(a) At the end of the 60-day holding period described in § 102–75.1200(a), HHS will notify GSA, or the landholding agency, as appropriate, if an expression of interest has been received for a particular property. Where there is no expression of interest, GSA or the landholding agency, as appropriate, will proceed with disposal in accordance with applicable law.

(b) Upon advice from HHS that all applications have been disapproved, or if no completed applications or requests for extensions have been received by HHS within 90 days from the date of the last expression of interest, disposal may proceed in accordance with applicable law.

## PART 102–76—DESIGN AND CONSTRUCTION

11. The authority citation for part 102–76 continues to read as follows:

**Authority:** 40 U.S.C. 486(c) (in furtherance of the Administrator's authorities under 40 U.S.C. 601–619 and elsewhere as included under 40 U.S.C. 490(a) and (c)); E.O. 12411, 48 FR 13391, 3 CFR, 1983 Comp., p. 155; E.O. 12512, 50 FR 18453, 3 CFR, 1985 Comp., p. 340.

#### § 102–76.25 [Amended]

12. Section 102–76.25(b) is amended by removing ''part 101–19, subpart 101–19.6, of this title'' and adding ''36 CFR parts 1190 and 1191'' in its place.

## PART 102–78—HISTORIC PRESERVATION

13. The authority citation for part 102–78 continues to read as follows:

**Authority:** 16 U.S.C. 470 h–2; 40 U.S.C. 486(c) and 490(a).

14. Section 102–78.60 is revised to read as follows:

#### § 102–78.60 When leasing space, are Federal agencies able to give preference to space in historic properties or districts?

Yes, Executive Order 13006 requires executive agencies that have a mission requirement to locate in an urban area to give first consideration to space in historic buildings and districts inside central business areas. Agencies may give a price preference of up to 10 percent to space in historic buildings and districts, in accordance with §§ 102–73.115 and 102–73.120 of this chapter.

15. Part 102–79 is revised to read as follows:

## PART 102–79—ASSIGNMENT AND UTILIZATION OF SPACE

Sec.

102–79.5 What is the scope of this part?
102–79.10 What basic assignment and utilization of space policy governs an executive agency?
102–79.15 What objectives must an executive agency strive to meet in providing assignment and utilization of space services?
102–79.20 What standard must executive agencies promote when assigning space?
102–79.25 May Federal agencies allot space in Federal buildings for the provision of child care services?
102–79.30 May Federal agencies allot space in Federal buildings for establishing fitness centers?
102–79.35 What elements must Federal agencies address in their planning effort for establishing fitness programs?
102–79.40 Can Federal agencies allot space in Federal buildings to Federal credit unions?

102–79.45 What type of services may Federal agencies provide without charge to Federal credit unions?
102–79.50 What standard must executive agencies promote in their utilization of space?
102–79.55 Is there a general hierarchy of consideration that agencies must follow in their utilization of space?
102–79.60 Are agencies required to use historic properties available to the agency?
102–79.65 What guidelines must an agency follow if it elects to establish a public access defibrillation program in a Federal facility?

**Authority:** 40 U.S.C. 486(c); E.O. 12411, 48 FR 13391, 3 CFR, 1983 Comp., p. 155; and E.O. 12512, 50 FR 18453, 3 CFR, 1985 Comp., p. 340.

### § 102–79.5 What is the scope of this part?

The real property policies contained in this part apply to Federal agencies, including the GSA/Public Buildings Service (PBS), operating under, or subject to, the authorities of the Administrator of General Services.

### § 102–79.10 What basic assignment and utilization of space policy governs an executive agency?

Executive agencies must provide a quality workplace environment that supports program operations, preserves the value of real property assets, meets the needs of the occupant agencies, and provides child care and physical fitness facilities in the workplace when adequately justified. An executive agency must promote maximum utilization of Federal workspace, consistent with mission requirements, to maximize its value to the Government.

### § 102–79.15 What objectives must an executive agency strive to meet in providing assignment and utilization of space services?

Executive agencies must provide assignment and utilization services that will maximize the value of Federal real property resources and improve the productivity of the workers housed therein.

### § 102–79.20 What standard must executive agencies promote when assigning space?

Executive agencies must promote the optimum use of space for each assignment at an economical cost to the Government, provide quality workspace that is delivered and occupied in a timely manner, and assign space based on mission requirements.

### § 102–79.25 May Federal agencies allot space in Federal buildings for the provision of child care services?

Yes, in accordance with 40 U.S.C. 490b, Federal agencies can allot space in Federal buildings to individuals or entities who will provide child care services to Federal employees if such:

(a) Space is available;

(b) Agency determines that such space will be used to provide child care services to children of whom at least 50 percent have one parent or guardian who is a Federal Government employee; and

(c) Agency determines that such individual or entity will give priority for available child care services in such space to Federal employees.

### § 102–79.30 May Federal agencies allot space in Federal buildings for establishing fitness centers?

Yes, in accordance with 5 U.S.C. 7901, Federal agencies can allot space in Federal buildings for establishing fitness programs.

### § 102–79.35 What elements must Federal agencies address in their planning effort for establishing fitness programs?

Federal agencies must address the following elements in their planning effort for establishing fitness programs:

(a) A survey indicating employee interest in the program;

(b) A three-to five-year implementation plan demonstrating long-term commitment to physical fitness/health for employees;

(c) A health related orientation, including screening procedures, individualized exercise programs, identification of high-risk individuals, and appropriate follow-up activities;

(d) Identification of a person skilled in prescribing exercise to direct the fitness program;

(e) An approach that will consider key health behavior related to degenerative disease, including smoking and nutrition;

(f) A modest facility that includes only the essentials necessary to conduct a program involving cardiovascular and muscular endurance, strength activities, and flexibility;

(g) Provision for equal opportunities for men and women, and all employees, regardless of grade level.

### § 102–79.40 Can Federal agencies allot space in Federal buildings to Federal credit unions?

Yes, in accordance with 12 U.S.C. 1770, Federal agencies may allot space in Federal buildings to Federal credit unions without charge for rent or services if:

(a) At least 95 percent of the membership of the credit union to be served by the allotment of space is composed of persons who either are presently Federal employees or were Federal employees at the time of admission into the credit union, and members of their families; and

(b) Space is available.

### § 102–79.45 What type of services may Federal agencies provide without charge to Federal credit unions?

Federal agencies may provide without charge to Federal credit union services such as:

(a) Lighting;

(b) Heating and cooling;

(c) Electricity;

(d) Office furniture;

(e) Office machines and equipment;

(f) Telephone service (including installation of lines and equipment and other expenses associated with telephone service); and

(g) Security systems (including installation and other expenses associated with security systems).

### § 102–79.50 What standard must executive agencies promote in their utilization of space?

Executive agencies, when acquiring or utilizing federally owned and leased space under the Federal Property and Administrative Services Act of 1949, as amended, must promote efficient utilization of space. Where there is no Federal agency space need, executive agencies must make every effort to maximize the productive use of vacant space through the issuance of permits, licenses or leases to nonfederal entities to the extent authorized by law.

### § 102–79.55 Is there a general hierarchy of consideration that agencies must follow in their utilization of space?

Yes, Federal agencies must:

(a) First utilize space in Government-owned and Government-leased buildings.

(b) If there is no suitable space in Government-owned and Government-leased buildings, utilize space in buildings under the custody and control of the U.S. Postal Service.

(c) If there is no suitable space in buildings under the custody and control of the U.S. Postal Service, agencies may acquire real estate by lease, purchase, or construction, as specified in part 102–73 of this chapter.

### § 102–79.60 Are agencies required to use historic properties available to the agency?

Yes, Federal agencies must assume responsibility for the preservation of the historic properties they own or control. Prior to acquiring, constructing or leasing buildings, agencies must use, to the maximum extent feasible, historic properties already owned or leased by the agency (16 U.S.C. 470h–2).

**§ 102–79.65 What guidelines must an agency follow if it elects to establish a public access defibrillation program in a Federal facility?**

Federal agencies electing to establish a public access defibrillation program in a Federal facility must follow the guidelines, entitled ''Guidelines for Public Access Defibrillation Programs in Federal Facilities,'' which can be obtained from the Office of Real Property (MP), General Services Administration, 1800 F Street, NW., Washington, DC 20405.

16. Part 102–80 is revised to read as follows:

## PART 102–80—SAFETY AND ENVIRONMENTAL MANAGEMENT

### Subpart A—General Provisions

Sec.

102–80.5 What is the scope of this part?
102–80.10 What are the basic safety and environmental management policies for real property?

### Subpart B—Safety and Environmental Management

**Asbestos**

102–80.15 What are Federal agencies' responsibilities concerning the assessment and management of asbestos?

**Radon**

102–80.20 What are Federal agencies' responsibilities concerning the abatement of radon?

**Indoor Air Quality**

102–80.25 What are Federal agencies' responsibilities concerning the management of indoor air quality?

**Lead**

102–80.30 What are Federal agencies' responsibilities concerning lead?

**Hazardous Materials and Wastes**

102–80.35 What are Federal agencies' responsibilities concerning the monitoring of hazardous materials and wastes?

**Underground Storage Tanks**

102–80.40 What are Federal agencies' responsibilities concerning the management of underground storage tanks?

**Seismic Safety**

102–80.45 What are Federal agencies' responsibilities concerning seismic safety in Federal facilities?

**Risks and Risk Reduction Strategies**

102–80.50 Are Federal agencies responsible for identifying/estimating risks and for appropriate risk reduction strategies?
102–80.55 Are Federal agencies responsible for managing the execution of risk reduction projects?

**Facility Assessments**

102–80.60 Are Federal agencies responsible for performing facility assessments?

**Incident Investigation**

102–80.65 What are Federal agencies' responsibilities concerning the investigation of incidents, such as fires, accidents, injuries, and environmental incidents?

**Responsibility for Informing Tenants**

102–80.70 Are Federal agencies responsible for informing their tenants of the condition and management of their facility safety and environment?

**Assessment of Environmental Issues**

102–80.75 Who assesses environmental issues in Federal construction and lease construction projects?

### Subpart C—Accident and Fire Prevention

102–80.80 What general accident and fire prevention policy must Federal agencies comply with?

**State and Local Codes**

102–80.85 Are federally owned and leased buildings exempt from State and local code requirements in fire protection?

**Fire Administration Authorization Act of 1992**

102–80.90 Is the Fire Administration Authorization Act of 1992 (Public Law 102–522) relevant to fire protection engineering?
102–80.95 Is the Fire Administration Authorization Act of 1992 applicable to all Federal agencies?

**Automatic Sprinkler Systems**

102–80.100 What performance objective should an automatic sprinkler system be capable of meeting?

**Equivalent Level of Safety Analysis**

102–80.105 What information must be included in an equivalent level of safety analysis?
102–80.110 What must an equivalent level of safety analysis indicate?
102–80.115 Is there more than one option for establishing that an equivalent level of safety exists?
102–80.120 What analytical and empirical tools should be used to support the life safety equivalency evaluation?
102–80.125 Who has the responsibility for determining the acceptability of each equivalent level of safety analysis?
102–80.130 Who must perform the equivalent level of safety analysis?
102–80.135 What is a qualified fire protection engineer?

**Room of Origin**

102–80.140 What is meant by ''room of origin''?

**Flashover**

102–80.145 What is meant by ''flashover''?

**Reasonable Worst Case Fire Scenario**

102–80.150 What is meant by ''reasonable worst case fire scenario''?

**Authority:** 40 U.S.C. 486(c) and 490.

### Subpart A—General Provisions

**§ 102–80.5 What is the scope of this part?**

The real property policies contained in this part apply to Federal agencies, including the General Services Administration (GSA)/Public Buildings Service (PBS), operating under, or subject to, the authorities of the Administrator of General Services. The responsibilities for safety and environmental management under this part are intended to apply to GSA or those Federal agencies operating in GSA space pursuant to a GSA delegation of authority.

**§ 102–80.10 What are the basic safety and environmental management policies for real property?**

The basic safety and environmental management policies for real property are that Federal agencies must:

(a) Provide for a safe and healthful work environment for Federal employees and the visiting public;

(b) Protect Federal real and personal property;

(c) Promote mission continuity;

(d) Provide reasonable safeguards for emergency forces if an incident occurs;

(e) Assess risk;

(f) Make decisionmakers aware of risks; and

(g) Act promptly and appropriately in response to risk.

### Subpart B—Safety and Environmental Management

#### Asbestos

**§ 102–80.15 What are Federal agencies' responsibilities concerning the assessment and management of asbestos?**

Federal agencies have the following responsibilities concerning the assessment and management of asbestos:

(a) Inspect and assess buildings for the presence and condition of asbestos-containing materials. Space to be leased must be free of all asbestos containing materials, except undamaged asbestos flooring in the space or undamaged boiler or pipe insulation outside the space, in which case an asbestos management program conforming to Environmental Protection Agency (EPA) guidance must be implemented;

(b) Manage in-place asbestos that is in good condition and not likely to be disturbed;

(c) Abate damaged asbestos, and asbestos likely to be disturbed. Federal agencies must perform a pre-alteration asbestos assessment for activities that may disturb asbestos;

(d) Not use asbestos in new construction, renovation/modernization or repair of their owned or leased space. Unless approved by GSA, Federal agencies must not obtain space with asbestos through purchase, exchange, transfer, or lease, except as identified in paragraph (a) of this section; and

(e) Communicate all written and oral asbestos information about the leased space to tenants.

## Radon

### § 102–80.20 What are Federal agencies' responsibilities concerning the abatement of radon?

Federal agencies have the following responsibilities concerning the abatement of radon in space when radon levels exceed current EPA standards:

(a) Retest abated areas and make lessors retest, as required, abated areas to adhere to EPA standards; and

(b) Test non-public water sources (in remote areas for projects such as border stations) for radon according to EPA guidance. Radon levels that exceed current applicable EPA standards must be mitigated. Federal agencies must retest, as required, to adhere to EPA standards.

## Indoor Air Quality

### § 102–80.25 What are Federal agencies' responsibilities concerning the management of indoor air quality?

Federal agencies must assess indoor air quality of buildings as part of their safety and environmental facility assessments. Federal agencies must respond to tenant complaints on air quality and take appropriate corrective action where air quality does not meet applicable standards.

## Lead

### § 102–80.30 What are Federal agencies' responsibilities concerning lead?

Federal agencies have the following responsibilities concerning lead in buildings:

(a) Test space for lead-based paint in renovation projects that require sanding, welding or scraping painted surfaces.

(b) Not remove lead based paint from surfaces in good condition.

(c) Test all painted surfaces for lead in proposed or existing child care centers.

(d) Abate lead-based paint found in accordance with Department of Housing and Urban Development (HUD) Lead-Based Paint Guidelines, available by writing to HUD USER, PO Box 6091, Rockville, MD, 20850.

(e) Test potable water for lead in all drinking water outlets.

(f) Take corrective action when lead levels exceed the HUD Guidelines.

## Hazardous Materials and Wastes

### § 102–80.35 What are Federal agencies' responsibilities concerning the monitoring of hazardous materials and wastes?

Federal agencies' responsibilities concerning the monitoring of hazardous materials and wastes are:

(a) Monitor the transport, use, and disposition of hazardous materials and waste in buildings to provide for compliance with GSA, Occupational Safety and Health Administration (OSHA), Department of Transportation, EPA, and applicable State and local requirements. In addition to those operating in GSA space pursuant to a delegation of authority, tenants in GSA space must comply with these requirements.

(b) In leased space, include in all agreements with the lessor requirements that hazardous materials kept in leased space are kept and maintained according to applicable Federal, State, and local environmental regulations.

## Underground Storage Tanks

### § 102–80.40 What are Federal agencies' responsibilities concerning the management of underground storage tanks?

Federal agencies have the following responsibilities concerning the management of underground storage tanks in real property:

(a) Register, manage and close underground storage tanks, including heating oil and fuel oil tanks, in accordance with GSA, EPA, and applicable State and local requirements.

(b) Require the party responsible for tanks they use but don't own to follow these requirements and to be responsible for the cost of compliance.

## Seismic Safety

### § 102–80.45 What are Federal agencies' responsibilities concerning seismic safety in Federal facilities?

Federal agencies must follow the standards issued by the Interagency Committee on Seismic Safety in Construction (ICSSC) as the minimum level acceptable for use by Federal agencies in assessing the seismic safety of their owned and leased buildings and in mitigating unacceptable seismic risks in those buildings.

## Risks and Risk Reduction Strategies

### § 102–80.50 Are Federal agencies responsible for identifying/estimating risks and for appropriate risk reduction strategies?

Yes, Federal agencies must identify and estimate safety and environmental management risks and appropriate risk reduction strategies for buildings. Federal agencies occupying as well as operating buildings must identify any safety and environmental management risks and report or correct the situation, as appropriate. Federal agencies must use the applicable national codes and standards as a guide for their building operations.

### § 102–80.55 Are Federal agencies responsible for managing the execution of risk reduction projects?

Yes, Federal agencies must manage the execution of risk reduction projects in buildings they operate. Federal agencies must identify and take appropriate action to eliminate hazards and regulatory noncompliance.

## Facility Assessments

### § 102–80.60 Are Federal agencies responsible for performing facility assessments?

Yes, Federal agencies must evaluate facilities to comply with GSA's safety and environmental program and applicable Federal, State and local environmental laws and regulations. Federal agencies should conduct these evaluations in accordance with schedules that are compatible with repair and alteration and leasing operations.

## Incident Investigation

### § 102–80.65 What are Federal agencies' responsibilities concerning the investigation of incidents, such as fires, accidents, injuries, and environmental incidents?

Federal agencies have the following responsibilities concerning the investigation of incidents, such as fires, accidents, injuries, and environmental incidents in buildings they operate:

(a) Investigate all incidents regardless of severity.

(b) Form Boards of Investigation for incidents resulting in serious injury, death, or significant property losses.

## Responsibility for Informing Tenants

### § 102–80.70 Are Federal agencies responsible for informing their tenants of the condition and management of their facility safety and environment?

Yes, Federal agencies must inform their tenants of the condition and management of their facility safety and environment. Agencies operating GSA buildings must report any significant facility safety or environmental concerns to GSA.

### Assessment of Environmental Issues

#### § 102–80.75 Who assesses environmental issues in Federal construction and lease construction projects?

Federal agencies must assess required environmental issues throughout planning and project development so that the environmental impacts of a project are considered during the decision making process.

## Subpart C—Accident and Fire Prevention

#### § 102–80.80 What general accident and fire prevention policy must Federal agencies comply with?

Federal agencies must:

(a) Comply with the occupational safety and health standards established in the Occupational Safety and Health Act (OSHA) of 1970 (Pub. L. 91–596); Executive Order 12196; 29 CFR part 1960, and applicable safety and environmental management criteria identified in this part;

(b) Not expose occupants and visitors to unnecessary risks;

(c) Provide safeguards that minimize personal harm, property damage, and impairment of Governmental operations, and that allow emergency forces to accomplish their missions effectively.

(d) Follow accepted fire prevention practices in operating and managing buildings;

(e) To the maximum extent feasible, comply with one of the nationally recognized model building codes and with other nationally recognized codes in their construction or alteration of each building in accordance with 40 U.S.C. 619.

(f) Use the applicable national codes and standards as a guide for their building operations.

### State and Local Codes

#### § 102–80.85 Are federally owned and leased buildings exempt from State and local code requirements in fire protection?

Federally owned buildings are generally exempt from State and local code requirements in fire protection; however, in accordance with 40 U.S.C. 619, each building constructed or altered by a Federal agency must be constructed or altered, to the maximum extent feasible, in compliance with one of the nationally recognized model building codes and with other nationally recognized codes. Leased buildings are subject to local code requirements and inspection.

### Fire Administration Authorization Act of 1992

#### § 102–80.90 Is the Fire Administration Authorization Act of 1992 (Public Law 102–522) relevant to fire protection engineering?

Yes, the Fire Administration Authorization Act of 1992 (Pub. L. 102–522) requires sprinklers or an equivalent level of safety in certain types of Federal employee office buildings, Federal employee housing units, and federally assisted housing units.

#### § 102–80.95 Is the Fire Administration Authorization Act of 1992 applicable to all Federal agencies?

Yes, the Act applies to all Federal agencies and all federally owned and leased buildings in the United States.

### Automatic Sprinkler Systems

#### § 102–80.100 What performance objective should an automatic sprinkler system be capable of meeting?

The performance objective of the automatic sprinkler system is that it must be capable of protecting human lives. Sprinklers should be capable of controlling the spread of fire and its effects beyond the room of origin. A functioning sprinkler system should activate prior to the onset of flashover.

### Equivalent Level of Safety Analysis

#### § 102–80.105 What information must be included in an equivalent level of safety analysis?

The equivalent level of life safety evaluation is to be performed by a qualified fire protection engineer. The analysis should include a narrative discussion of the features of the building structure, function, operational support systems and occupant activities that impact fire protection and life safety. Each analysis should describe potential reasonable worst case fire scenarios and their impact on the building occupants and structure. Specific issues that must be addressed include rate of fire growth, type and location of fuel items, space layout, building construction, openings and ventilation, suppression capability, detection time, occupant notification, occupant reaction time, occupant mobility, and means of egress.

#### § 102–80.110 What must an equivalent level of safety analysis indicate?

To be acceptable, the analysis must indicate that the existing and/or proposed safety systems in the building provide a period of time equal to or greater than the amount of time available for escape in a similar building complying with the Act. In conducting these analyses, the capability, adequacy, and reliability of all building systems impacting fire growth, occupant knowledge of the fire, and time required to reach a safety area will have to be examined. In particular, the impact of sprinklers on the development of hazardous conditions in the area of interest will have to be assessed.

#### § 102–80.115 Is there more than one option for establishing that an equivalent level of safety exists?

Yes, the following are three options for establishing that an equivalent level of safety exists:

(a) In the first option, the margin of safety provided by various alternatives is compared to that obtained for a code complying building with complete sprinkler protection. The margin of safety is the difference between the available safe egress time and the required safe egress time. Available safe egress time is the time available for evacuation of occupants to an area of safety prior to the onset of untenable conditions in occupied areas or the egress pathways. The required safe egress time is the time required by occupants to move from their positions at the start of the fire to areas of safety. Available safe egress times would be developed based on analysis of a number of assumed reasonable worst case fire scenarios including assessment of a code complying fully sprinklered building. Additional analysis would be used to determine the expected required safe egress times for the various scenarios. If the margin of safety plus an appropriate safety factor is greater for an alternative than for the fully sprinklered building, then the alternative should provide an equivalent level of safety.

(b) A second alternative is applicable for typical office and residential scenarios. In these situations, complete sprinkler protection can be expected to prevent flashover in the room of fire origin, limit fire size to no more than 1 megawatt (950 Btu/sec), and prevent flames from leaving the room of origin. The times required for each of these conditions to occur in the area of interest must be determined. The shortest of these three times would become the time available for escape. The difference between the minimum time available for escape and the time required for evacuation of building occupants would be the target margin of safety. Various alternative protection strategies would have to be evaluated to determine their impact on the times at which hazardous conditions developed in the spaces of interest and the times required for egress. If a combination of fire protection systems provides a margin of safety equal to or greater than the target margin of safety, then the

combination could be judged to provide an equivalent level of safety.

(c) As a third option, other technical analysis procedures, as approved by the responsible agency head, can be used to show equivalency.

**§ 102–80.120 What analytical and empirical tools should be used to support the life safety equivalency evaluation?**

Analytical and empirical tools, including fire models and grading schedules such as the Fire Safety Evaluation System (Alternative Approaches to Life Safety, NEPA 101A) should be used to support the life safety equivalency evaluation. If fire modeling is used as part of an analysis, an assessment of the predictive capabilities of the fire models must be included. This assessment should be conducted in accordance with the American Society for Testing and Materials Standard Guide for Evaluating the Predictive Capability of Fire Models (ASTM E 1355).

**§ 102–80.125 Who has the responsibility for determining the acceptability of each equivalent level of safety analysis?**

The head of the agency responsible for physical improvements in the facility or providing Federal assistance or a designated representative will determine the acceptability of each equivalent level of safety analysis. The determination of acceptability must include a review of the fire protection engineer's qualifications, the appropriateness of the fire scenarios for the facility, and the reasonableness of the assumed maximum probable loss. Agencies should maintain a record of each accepted equivalent level of safety analysis and provide copies to fire departments or other local authorities for use in developing prefire plans.

**§ 102–80.130 Who must perform the equivalent level of safety analysis?**

A qualified fire protection engineer must perform the equivalent level of safety analysis.

**§ 102–80.135 What is a qualified fire protection engineer?**

A *Qualified fire protection engineer* is defined as an individual, with a thorough knowledge and understanding of the principles of physics and chemistry governing fire growth, spread, and suppression, meeting one of the following criteria:

(a) An engineer having an undergraduate or graduate degree from a college or university offering a course of study in fire protection or firesafety engineering, plus a minimum of 4 years work experience in fire protection engineering;

(b) A professional engineer (P.E. or similar designation) registered in Fire Protection Engineering; or

(c) A professional engineer (P.E. or similar designation) registered in a related engineering discipline and holding Member grade status in the International Society of Fire Protection Engineers.

### Room of Origin

**§ 102–80.140 What is meant by ''room of origin''?**

*Room of origin* means an area of a building where a fire can be expected to start. Typically, the size of the area will be determined by the walls, floor, and ceiling surrounding the space. However, this could lead to unacceptably large areas in the case of open plan office space or similar arrangements. Therefore, the maximum allowable fire area should be limited to 200 $m^2$ (2000 $ft^2$) including intervening spaces. In the case of residential units, an entire apartment occupied by one tenant could be considered as the *room of origin* to the extent it did not exceed the 200 $m^2$ (2000 $ft^2$) limitation.

### Flashover

**§ 102–80.145 What is meant by ''flashover''?**

*Flashover* means fire conditions in a confined area where the upper gas layer temperature reaches 600 °C (1100 °F) and the heat flux at floor level exceeds 20 $kW/m^2$ (1.8 $Btu/ft^2/sec$).

### Reasonable Worst Case Fire Scenario

**§ 102–80.150 What is meant by ''reasonable worst case fire scenario''?**

*Reasonable worst case fire scenario* means a combination of an ignition source, fuel items, and a building location likely to produce a fire which would have a significant adverse impact on the building and its occupants. The development of *reasonable worst case scenarios* must include consideration of types and forms of fuels present (*e.g.*, furniture, trash, paper, chemicals), potential fire ignition locations (*e.g.*, bedroom, office, closet, corridor), occupant capabilities (*e.g.*, awake, intoxicated, mentally or physically impaired), numbers of occupants, detection and suppression system adequacy and reliability, and fire department capabilities. A quantitative analysis of the probability of occurrence of each scenario and combination of events will be necessary.

## PART 102–81—SECURITY

17. The authority citation for part 102–81 continues to read as follows:

**Authority:** 40 U.S.C. 318a, 486(c) and 490.

18. Section 102–81.15 is revised to read as follows:

**§ 102–81.15 Who is responsible for upgrading and maintaining security standards in each existing federally-owned and leased facility?**

In a June 28, 1995, Presidential Policy Memorandum for Executive Departments and Agencies, entitled, ''Upgrading Security at Federal Facilities'' (see the Weekly Compilation of Presidential Documents, vol. 31, p. 1148), the President directed that executive agencies must, where feasible, upgrade and maintain security in facilities they own or lease under their own authority to the minimum standards specified in the Department of Justice's June 28, 1995 study entitled ''Vulnerability Assessment of Federal Facilities.'' The study may be obtained by writing to the Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA, 15250–7954.

19. Section 102–81.20 is added to read as follows:

**§ 102–81.20 Are the security standards for new federally owned and leased facilities the same as the standards for existing federally owned and leased facilities?**

No, the minimum standards specified in the Department of Justice's June 28, 1995 study entitled ''Vulnerability Assessment of Federal Facilities'' identifies the minimum-security standards that agencies must adhere to for all existing owned and leased Federal facilities. As specified in § 102–81.25, new federally owned and leased facilities must be designed to meet the standards identified in the document entitled ''Interagency Security Committee Security Design Criteria for New Federal Office Buildings and Major Modernization Projects,'' dated May 28, 2001. The security design criteria for new facilities takes into consideration technology developments, new cost consideration, the experience of practitioners applying the criteria, and the need to balance security requirements with public building environments that remain lively, open, and accessible.

20. Section 102–81.25 is added to read as follows:

**§ 102–81.25 Do the Interagency Security Committee Security Design Criteria apply to all new federally owned and leased facilities?**

No, the Interagency Security Committee Security Design Criteria:

(a) Apply to new construction of general purpose office buildings and new or lease-construction of

courthouses occupied by Federal employees in the United States and not under the jurisdiction and/or control of the Department of Defense. The criteria also apply to lease-constructed projects being submitted to Congress for appropriations or authorization. Where prudent and appropriate, the criteria apply to major modernization projects.

(b) Do not apply to airports, prisons, hospitals, clinics, and ports of entry, or to unique facilities such as those classified by the Department of Justice Vulnerability Assessment Study as Level V. Nor will the criteria overrule existing Federal laws and statutes, and other agency standards that have been developed for special facilities, such as border stations and child care centers.

21. Section 102–81.30 is added to read as follows:

**§ 102–81.30 What information must job applicants at child care centers reveal?**

Anyone who applies for employment (including volunteer positions) at a child care facility, located on federally controlled property (including federally leased property), must reveal any arrests and convictions on the job application. *Employment at a child care facility* means any position that involves work with minor children, such as a teacher, day care worker, or school administrator.

22. Part 102–83 is added to read as follows:

## PART 102–83—LOCATION OF SPACE

### Subpart A—General Provisions

Sec.
102–83.5 What is the scope of this part?
102–83.10 What basic location of space policy governs an executive agency?
102–83.15 Is there a general hierarchy of consideration that agencies must follow in their utilization of space?

### Subpart B—Location of Space

**Delineated Area**

102–83.20 What is a delineated area?
102–83.25 Who is responsible for identifying the delineated area within which a Federal agency wishes to locate specific activities?
102–83.30 In addition to its mission and program requirements, are there any other issues that Federal agencies must consider in identifying the delineated area?
102–83.35 Are executive agencies required to consider whether the central business area will provide for adequate competition when acquiring leased space?
102–83.40 Who must approve the final delineated area?
102–83.45 Where may executive agencies find guidance on appealing GSA's decisions and recommendations concerning delineated areas?

**Rural Areas**

102–83.50 What is the Rural Development Act?
102–83.55 What is a rural area?
102–83.60 What is an urbanized area?
102–83.65 Are executive agencies required to give first priority to the location of new offices and other facilities in rural areas?

**Urban Areas**

102–83.70 What is Executive Order 12072?
102–83.75 What is Executive Order 13006?
102–83.80 What is an urban area?
102–83.85 What is a central business area?
102–83.90 Do Executive Orders 12072 and 13006 apply to rural areas?
102–83.95 After an agency has identified that its geographic service area and delineated area are in an urban area, what is the next step for an agency?
102–83.100 Why must agencies consider available space in properties under the custody and control of the U.S. Postal Service?
102–83.105 What happens if there is no available space in non-historic buildings under the custody and control of the U.S. Postal Service?
102–83.110 When an agency's mission and program requirements call for the location in an urban area, are executive agencies required to give first consideration to central business areas?
102–83.115 What is a central city?
102–83.120 What happens if an agency has a need to be in a specific urban area that is not a central city in a metropolitan area?

**Preference to Historic Properties**

102–83.125 Are executive agencies required to give preference to historic properties when acquiring leased space?

**Authority:** 40 U.S.C. 486(c); E.O. 12072; and E.O. 13006

### Subpart A—General Provisions

**§ 102–83.5 What is the scope of this part?**

The real property policies contained in this part apply to Federal agencies, including the GSA/Public Buildings Service (PBS), operating under, or subject to, the authorities of the Administrator of General Services.

**§ 102–83.10 What basic location of space policy governs an executive agency?**

Each executive agency is responsible for identifying its geographic service area and the delineated area within which it wishes to locate specific activities, consistent with its mission and program requirements, and in accordance with all applicable statutes, regulations and policies.

**§ 102–83.15 Is there a general hierarchy of consideration that agencies must follow in their utilization of space?**

Yes, Federal agencies must follow the hierarchy of consideration identified in § 102–79.55 of this chapter.

### Subpart B—Location of Space

**Delineated Area**

**§ 102–83.20 What is a delineated area?**

Delineated area means the specific boundaries within which space will be obtained to satisfy an agency space requirement.

**§ 102–83.25 Who is responsible for identifying the delineated area within which a Federal agency wishes to locate specific activities?**

Each Federal agency is responsible for identifying the delineated area within which it wishes to locate specific activities, consistent with its mission and program requirements, and in accordance with all applicable laws, regulations, and Executive Orders.

**§ 102–83.30 In addition to its mission and program requirements, are there any other issues that Federal agencies must consider in identifying the delineated area?**

Yes, Federal agencies must also consider real estate, labor, and other operational costs and applicable local incentives when identifying the delineated area.

**§ 102–83.35 Are executive agencies required to consider whether the central business area will provide for adequate competition when acquiring leased space?**

In accordance with the Competition in Contracting Act of 1984 (CICA), as amended (41 U.S.C. 253(a)), executive agencies must consider whether restricting the delineated area for obtaining leased space to the central business area will provide for adequate competition when acquiring leased space. Where an executive agency determines that the delineated area must be expanded beyond the CBA in order to provide adequate competition, the agency may expand the delineated area in consultation with local officials. Executive agencies must continue to include the CBA in such expanded areas.

**§ 102–83.40 Who must approve the final delineated area?**

Federal agencies conducting the procurement must approve the final delineated area for site acquisitions and lease actions and must confirm that the final delineated area complies with the requirements of all applicable laws, regulations, and Executive Orders.

**§ 102–83.45 Where may executive agencies find guidance on appealing GSA's decisions and recommendations concerning delineated areas?**

The GSA Public Buildings Service provides guidance in their Customer Guide to Real Property on the process for appealing GSA's decisions and recommendations concerning delineated areas.

## Rural Areas

**§ 102–83.50 What is the Rural Development Act?**

In the Rural Development Act, as amended, Congress directs Federal agencies to develop policies and procedures to give first priority to the location of new offices and other Federal facilities in rural areas. The intent of the Act is to revitalize and develop rural areas and help foster a balance between rural and urban America.

**§ 102–83.55 What is a rural area?**

Rural area means a city, town, or unincorporated area that has a population of 50,000 inhabitants or less, other than an urbanized area immediately adjacent to a city, town, or unincorporated area that has a population in excess of 50,000 inhabitants, as specified in the Rural Development Act, as amended.

**§ 102–83.60 What is an urbanized area?**

An urbanized area is a statistical geographic area defined by the Census Bureau, consisting of a central place(s) and adjacent densely settled territory that together contain at least 50,000 people, generally with an overall population density of at least 1,000 people per square mile.

**§ 102–83.65 Are executive agencies required to give first priority to the location of new offices and other facilities in rural areas?**

Yes, executive agencies must give first priority to the location of new offices and other facilities in rural areas in accordance with the Rural Development Act (7 U.S.C. 2204b–1), unless their mission or program requirements call for locations in an urban area. First priority to the location of new offices and other facilities in rural areas must be given in accordance with the hierarchy specified in § 102–79.55 of this chapter.

## Urban Areas

**§ 102–83.70 What is Executive Order 12072?**

Executive Order 12072, entitled ''Federal Space Management,'' requires all executive agencies that have a mission requirement to locate in an urban area to give first consideration to locating Federal facilities in central business areas, and/or adjacent areas of similar character, to use them to make downtowns attractive places to work, conserve existing resources, and encourage redevelopment. It also directs executive agencies to consider opportunities for locating cultural, educational, recreational, or commercial activities within the proposed facility.

**§ 102–83.75 What is Executive Order 13006?**

Executive Order 13006, entitled ''Locating Federal Facilities on Historic Properties in Our Nation's Central Cities,'' requires all executive agencies that have a mission requirement to locate in an urban area to give first consideration to locating Federal facilities in historic buildings and districts within central business areas. It also directs executive agencies to remove regulatory barriers, review their policies, and build new partnerships with the goal of enhancing participation in the National Historic Preservation program.

**§ 102–83.80 What is an urban area?**

*Urban area* means any metropolitan area (MA) as defined by the Office of Management and Budget (OMB) in OMB Bulletin No. 99–04, or succeeding OMB Bulletin, that doesn't meet the definition of rural area in § 102–83.55.

**§ 102–83.85 What is a central business area?**

*Central business area* means the centralized community business area and adjacent areas of similar character, including other specific areas that may be recommended by local officials in accordance with Executive Order 12072. The central business areas are designated by local government and not by Federal agencies.

**§ 102–83.90 Do Executive Orders 12072 and 13006 apply to rural areas?**

No, Executive Orders 12072 and 13006 only apply to agencies looking for space in urban areas.

**§ 102–83.95 After an agency has identified that its geographic service area and delineated area are in an urban area, what is the next step for an agency?**

After an agency identifies its geographic service area and delineated area within which it wishes to locate specific activities are in an urban area (*i.e.*, determined that the agency's mission requirements dictate a need to locate its facility in an urban area), Federal agencies must seek space in historic properties already under agency control, in accordance with section 110 of the National Historic Preservation Act. The Act provides that prior to purchasing, constructing or leasing new space, Federal agencies must:

(a) Consider agency-controlled historic properties within historic districts inside central business areas when locating Federal operations, in accordance with Executive Order 13006 (which, by reference, also incorporates the requirements in Executive Order 12072 and the Rural Development Act of 1972);

(b) Then consider agency-controlled developed or undeveloped sites within historic districts, if no suitable agency-controlled historic property specified in paragraph (a) of this section is available;

(c) Then consider agency-controlled historic properties outside of historic districts, if no suitable agency-controlled site exists within a historic district as specified in paragraph (b) of this section;

(d) Then consider non-historic agency-controlled properties, if no suitable agency-controlled historic properties outside of historic districts exist as specified in paragraph (c) of this section;

(e) Then consider historic properties under the custody and control of the U.S. Postal Service, if there is no available space in non-historic agency-controlled properties specified in paragraph (d) of this section.

(f) Then consider non-historic properties under the custody and control of the U.S. Postal Service, if there is no available space in historic properties under the custody and control of the U.S. Postal Service specified in paragraph (e) of this section.

**§ 102–83.100 Why must agencies consider available space in properties under the custody and control of the U.S. Postal Service?**

*See* § 102–73.20 of this chapter.

**§ 102–83.105 What happens if there is no available space in non-historic buildings under the custody and control of the U.S. Postal Service?**

If no suitable space in non-historic buildings under the custody and control of the U.S. Postal Service is available, agencies may then acquire real estate by purchase, lease, or construction, in accordance with FMR part 102–73.

**§ 102–83.110 When an agency's mission and program requirements call for the location in an urban area, are executive agencies required to give first consideration to central business areas?**

Yes, if an agency has a specific location need to be in an urban area,

then Executive Orders 12072 and 13006 require that agencies should give first consideration to locating in a historic building in a historic district in the CBA of a central city of the appropriate metropolitan area. If no such space is available, agencies must give consideration to locating in a non-historic building in a historic district in the CBA of a central city of the appropriate metropolitan area. If no such space is available, agencies must give consideration to locating in a historic building outside of a historic district in the CBA of a central city of the appropriate metropolitan area. If no such space is available, agencies should give consideration to locating in a non-historic building outside of a historic district in the CBA of a central city of the appropriate metropolitan area.

**§ 102–83.115 What is a central city?**

Central cities are those central cities defined by OMB in OMB Bulletin No. 99–04 or succeeding OMB Bulletin.

**§ 102–83.120 What happens if an agency has a need to be in a specific urban area that is not a central city in a metropolitan area?**

If an agency has a need to be in a specific urban area that is not a central city in a metropolitan area, then the agency must give first consideration to locating in a historic building in a historic district in the CBA of the appropriate metropolitan area. If no such space is available, agencies must give consideration to locating in a non-historic building in a historic district in the CBA of the appropriate metropolitan area. If no such space is available, agencies must give consideration to locating in a historic building outside of a historic district in the CBA of the appropriate metropolitan area. If no such space is available, agencies should give consideration to locating in a non-historic building outside of a historic district in the CBA of the appropriate metropolitan area.

### Preference to Historic Properties

**§ 102–83.125 Are executive agencies required to give preference to historic properties when acquiring leased space?**

Yes, Federal agencies must give a price preference when acquiring space via either the lowest price technically acceptable or the best value tradeoff source selection process. See part 102–73 of this chapter for additional guidance.

Dated: October 31, 2002.

**Stephen A. Perry,**

*Administrator of General Services.*

[FR Doc. 02–30050 Filed 12–12–02; 8:45 am]

BILLING CODE 6820–23–P

## GENERAL SERVICES ADMINISTRATION

## 41 CFR Parts 101–6, 101–18, 101–19, 101–20, 101–33, 101–47

**[FPMR Amendment D–99]**

**RIN 3090–AH60**

## Real Property Policies

**AGENCY:** Office of Governmentwide Policy, GSA.

**ACTION:** Final rule.

**SUMMARY:** The General Services Administration (GSA) is transferring coverage on real property policies to the Federal Management Regulation (FMR). A final rule published in the **Federal Register** at 66 FR 5358 (January 18, 2001) moved many of the real property policies to the FMR. An amendment to those regulations appears elsewhere in today's **Federal Register**. This final rule completes the transfer by removing all FPMR coverage on real property policies and providing cross references to direct readers to the coverage in the FMR.

**EFFECTIVE DATE:** December 13, 2002.

**FOR FURTHER INFORMATION CONTACT:** Stanley C. Langfeld, Director, Real Property Policy Division, at (202) 501–1737.

**SUPPLEMENTARY INFORMATION:**

### A. Background

To promote efficient management of Government assets, which is the Federal Property and Administrative Services Act's original intent, GSA is improving its regulatory system by establishing the Federal Management Regulation (FMR) as the successor regulation to the Federal Property Management Regulations (FPMR). The FMR will contain a refined set of policies and regulatory requirements on managing property and administrative services. Non-regulatory guidance, procedures, information, and standards now in the FPMR is being removed from the regulation and will be available in separate documents, such as customer service guides, handbooks, brochures, Internet Web sites, and FMR bulletins.

### B. Executive Order 12866

The General Services Administration (GSA) has determined that this final rule is not a significant regulatory action for the purposes of Executive Order 12866.

### C. Regulatory Flexibility Act

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

### D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this final rule does not impose reporting, recordkeeping or information collection requirements which require the approval of the Office of Management and Budget pursuant to 44 U.S.C. 3501, *et seq.*

### E. Small Business Regulatory Enforcement Fairness Act

This final rule is also exempt from Congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

### List of Subjects in 41 CFR Parts 101–6, 101–18, 101–19, 101–20, 101–33, 101–47, 102–73, 102–74, 102–75, 102–76, 102–80, 102–82, and 102–83

Acquisition of real property, Administrative practices and procedures, Concessions, Crime, Federal buildings and facilities, Fire prevention, Government real property management, Location of space, Public utilities, Safety and environmental management, Security measures, Vending facility program for blind persons.

For the reasons set forth in the preamble, GSA amends 41 CFR chapter 101 as follows:

**CHAPTER 101—[AMENDED]**

## PART 101–6—MISCELLANEOUS REGULATIONS

1. Subpart 101–6.3 is revised to read as follows:

## Subpart 101–6.3—Ridesharing

**Authority:** 40 U.S.C. 486(c); Executive Order 12191 dated February 1, 1980; Sec. 205(c), 63 Stat. 390.

**§ 101–6.300 Cross-reference to the Federal Management Regulation (FMR) 41 CFR chapter 102 parts 1 through 220.**

For information on Federal facility ridesharing, *see* FMR part 102–74 (41 CFR part 102–74).

2. Subpart 101–6.6 is revised to read as follows:

## Subpart 101–6.6—Fire Protection (Firesafety) Engineering

**Authority:** 40 U.S.C. 486(c).

**§ 101–6.600 Cross-reference to the Federal Management Regulation (FMR) 41 CFR chapter 102 parts 1 through 220.**

For information on fire protection (firesafety) engineering, *see* FMR part 102–74 (41 CFR part 102–74) and FMR part 102–80 (41 CFR part 102–80).

3. Part 101–18 is revised to read as follows:

## PART 101–18—ACQUISITION OF REAL PROPERTY

**Authority:** E.O. 12072, Sec. 1–201(b), 43 FR 36869.

### § 101–18.0 Cross-reference to the Federal Management Regulation (FMR) 41 CFR chapter 102 parts 1 through 220).

For information on acquisition of real property, *see* FMR part 102–73 (41 CFR part 102–73).

4. Part 101–19 is revised to read as follows:

## PART 101–19—CONSTRUCTION AND ALTERATION OF PUBLIC BUILDINGS

**Authority:** 40 U.S.C. 486(c); 40 U.S.C. 490 (The Federal Property and Administrative Services Act of 1949, as amended, Sec. 205(c) and 210, 63 Stat. 377); and 40 U.S.C. 601–619 (The Public Buildings Act of 1959, as amended); Pub. L. 92–313.

### § 101–19.0 Cross-reference to the Federal Management Regulation (FMR) 41 CFR chapter 102 parts 1 through 220).

For information on construction and alteration of public buildings, *see* FMR parts 102–74 (41 CFR part 102–74) and 102–76 (41 CFR part 102–76).

5. Part 101–20 is revised to read as follows:

## PART 101–20—MANAGEMENT OF BUILDINGS AND GROUNDS

**Authority:** 40 U.S.C. 486(c); The Federal Property and Administrative Services Act of 1949, as amended, Sec. 205(c), 63 Stat. 390.

### § 101–20.0 Cross-reference to the Federal Management Regulation (FMR) 41 CFR chapter 102 parts 1 through 220).

For information on management of buildings and grounds, *see* FMR part 102–74 (41 CFR part 102–74).

6. Part 101–33 is revised to read as follows:

## PART 101–33—PUBLIC UTILITIES

**Authority:** 40 U.S.C. 486(c); The Federal Property and Administrative Services Act of 1949, as amended, Sec. 205(c), 63 Stat. 390.

### § 101–33.0 Cross-reference to the Federal Management Regulation (FMR) 41 CFR chapter 102 parts 1 through 220).

For information on public utilities, *see* FMR part 102–82 (41 CFR part 102–82).

7. Part 101–47 is revised to read as follows:

## PART 101–47—UTILIZATION AND DISPOSAL OF REAL PROPERTY

**Authority:** 40 U.S.C. 486(c); The Federal Property and Administrative Services Act of 1949, as amended, Sec. 205(c), 63 Stat. 390.

### § 101–47.0 Cross-reference to the Federal Management Regulation (FMR) 41 CFR chapter 102 parts 1 through 220).

For information on utilization and disposal of real property, *see* FMR part 102–75 (41 CFR part 102–75).

8. The Appendix to Subchapter D is revised to read as follows:

## Appendix to Subchapter D—Temporary Regulations Federal Property Management Regulations; Interim Rule D–1

## PART 101–17—ASSIGNMENT AND UTILIZATION OF SPACE

### § 101–17.0 Cross-reference to the Federal Management Regulation (FMR) 41 CFR chapter 102 parts 1 through 220).

For information on location of space, *see* FMR part 102–83 (41 CFR part 102–83).

Dated: July 30, 2002.

**Stephen A. Perry,**

*Administrator of General Services.*

[FR Doc. 02–30051 Filed 12–12–02; 8:45 am]

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Federal Register

Friday,
December 13, 2002

# Part IV

# Department of Health and Human Services

## 42 Part 73

## Office of the Inspector General

## 42 CFR Part 1003

## Possession, Use, and Transfer of Select Agents and Toxins; Interim Final Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**42 CFR Part 73**

**Office of Inspector General**

**42 CFR Part 1003**

**RIN 0920–AA08**

## Possession, Use, and Transfer of Select Agents and Toxins

**AGENCY:** Centers for Disease Control and Prevention, Office of Inspector General, HHS.

**ACTION:** Interim final rule.

**SUMMARY:** This document establishes requirements regarding possession and use in the United States, receipt from outside the United States, and transfer within the United States, of select agents and toxins. This includes requirements concerning registration, security risk assessments, safety plans, security plans, emergency response plans, training, transfers, record keeping, inspections, and notifications. This document also contains delegations of authority to the Office of Inspector General concerning civil money penalties. The interim final rule implements provisions of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 and is designed to provide protection against misuse of select agents and toxins whether inadvertent or the result of terrorist acts against the United States homeland (such as the recent terrorist acts involving anthrax) or other criminal acts. In addition and in accordance with the Agricultural Bioterrorism Protection Act of 2002, the Department of Agriculture is establishing, by separate regulation, standards and procedures governing the possession, use, and transfer of biological agents and toxins that have been determined to have the potential to pose a severe threat to both human and animal health, to animal health, to plant health, or to animal and plant products. This action is necessary to protect animal and plant health, and animal and plant products.

**DATES:** The interim final rule is effective as of February 7, 2003. However, for dates of specific applicability see § 73.0. Written comments must be submitted on or before February 11, 2003. The final rule will be published after consideration of the comments.

**ADDRESSES:** Select Agent Program, Centers for Disease Control and Prevention, 1600 Clifton Rd., E–79, Atlanta, GA 30333. Comments may be e-mailed to: *SAPcomments@CDC.GOV.*

**FOR FURTHER INFORMATION CONTACT:** Minh Thomas, Select Agent Program, Centers For Disease Control and Prevention, 1600 Clifton Rd., MS E–79, Atlanta Ga. 30333. (404) 498–2259.

**SUPPLEMENTARY INFORMATION:** This document establishes requirements regarding possession and use in the United States, receipt from outside the United States, and transfer within the United States, of certain biological agents and toxins (referred to below as select agents and toxins). This includes requirements concerning registration, security risk assessments, safety plans, security plans, emergency response plans, training, transfers, record keeping, inspections, and notifications. The Act requires an interim final rule and mandates its effective date and transition provisions. The new regulations are set forth in a new 42 CFR part 73 (referred to below as the part 73 regulations).

The part 73 regulations implement provisions of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107–188 (referred to below as the Act).

In general, the entities regulated under the part 73 regulations are academic institutions and biomedical centers; commercial manufacturing facilities (the pharmaceutical industry); federal, state, and local laboratories, including clinical and diagnostic laboratories; and research facilities.

Based on provisions of the Act (42 U.S.C. 262a, note), the part 73 regulations supersede the regulations at 42 CFR 72.6 (referred to below as the § 72.6 regulations). The § 72.6 regulations, which became effective April 15, 1997, established certain shipping and handling requirements on laboratory facilities that send or receive ''select agents.'' In addition to regulating transfers, the part 73 regulations, among other things, cover the ''possession and use'' of select agents and toxins and include requirements for security risk assessments conducted by Department of Justice. The Act bolstered the authority to protect against misuse of select agents and toxins whether inadvertent or the result of terrorist acts against the United States homeland (such as the recent terrorist acts involving anthrax) or other criminal acts.

The Act gives the Department of Agriculture (referred to below as USDA) the authority and responsibility for regulating activities regarding select agents and toxins to protect animal and plant health and animal and plant products. The Act gives the Department of Health and Human Services (referred to below as HHS) the authority and responsibility for regulating activities regarding select agents and toxins to protect the public health and safety. Some of the select agents and toxins regulated under this part are also regulated by USDA under 9 CFR part 121. The select agents and toxins subject to regulation by both agencies are identified as ''overlap'' select agents and toxins and those regulated solely by HHS are identified as HHS select agents and toxins. The Act provides for interagency coordination between the two departments regarding overlap select agents and toxins.

### Purpose and Scope—§ 73.2

In addition to explaining information discussed above, § 73.2 explains that the part 73 regulations do not apply in two types of situations. Paragraph (b) states that the part 73 regulations do not set requirements for the exportation of select agents or toxins. The Department of Commerce has primary responsibility for regulating the exportation of microorganisms and toxins at 15 CFR. Paragraph (c) states that the part 73 regulations do not set requirements for the transportation in commerce of select agents or toxins. The Department of Transportation has primary responsibility for regulating the transportation of such select agents and toxins as hazardous materials under 49 CFR parts 171 through 180. Other agencies may also have authority over microorganisms that are exported or transported. For example, FDA regulates unapproved products used in clinical trials and such products would be subject to FDA's provisions as well as the provisions of the Department of Commerce or the Department of Transportation. The regulation only lists the agencies with primary authority over transportation and exports.

### General Prohibition—§ 73.3

The provisions of § 73.3, consistent with the intent of the Act, provide that entities and individuals are allowed to conduct activities regulated by the part 73 regulations only if they are conducted for a lawful purpose and in accordance with the part 73 regulations.

### List of Select Agents and Toxins—§§ 73.4 and 73.5

The HHS select agents and toxins are listed in § 73.4 and the overlap select agents and toxins are listed in § 73.5.

In a notice of intent to issue regulations published in the **Federal Register** on August 23, 2002, we specified those agents and toxins that we were considering for inclusion in the HHS and overlap lists and requested

comments regarding whether changes should be made. The comment period closed September 17, 2002. We received 22 comments. The select agents and toxins specified in §§ 73.4 and 73.5 are the same as those listed in the notice of intent to issue regulations, except for changes made based on comments, including changes to reflect current taxonomic classification and nomenclature. A number of commenters simply agreed with entries on the list. Those comments requesting substantive changes to the list are discussed below.

We prepared the list for the notice of intent to issue regulations after receiving extensive input from a group of scientists from 21 Federal government entities. We made all of the determinations discussed below in response to the comments based on recommendations from the same group of scientists.

The Act (42 U.S.C. 262a (a)(1)(B)) provides the following criteria that the HHS Secretary must consider for establishing the list:

- The effect on human health of exposure to the agent or toxin;
- The degree of contagiousness of the agent or toxin and the methods by which the agent or toxin is transferred to humans;
- The availability and effectiveness of pharmacotherapies and immunizations to treat and prevent any illness resulting from infection by the agent or toxin; and
- Any other criteria, including the needs of children and other vulnerable populations that the HHS Secretary considers appropriate.

The interim final rule does not make distinctions concerning children or other specific populations because we are unaware of any basis for making such distinctions.

The notice did not include ''viruses causing hantavirus pulmonary syndrome'' and ''yellow fever virus'' on the list of select viruses. One commenter, without providing reasons, asserted that they should be included on the list. We have not included them on the list in the interim final rule. ''Viruses causing hantavirus pulmonary syndrome'' are difficult to propagate and there is a lack of data establishing laboratory acquired infections. Also, there is an available and effective vaccine for ''Yellow fever virus.''

The notice included ''Monkeypox virus'' on the list of select viruses. One commenter indicated that it is not easily transmissible to humans, there is no indication that this agent has ever been chosen as a potential bioweapon, and this agent has not been demonstrated to result in high levels of mortality. We have included ''Monkeypox virus'' on the list of non-overlap viruses. Monkeypox has similarities with smallpox virus in that monkeypox has a similar clinical presentation, causes similar mortality rates as observed in recent outbreaks, is highly infectious when aerosolized, and is reported to have chains of transmission for several generations.

The notice included ''Herpes B virus'' on the list of select viruses. Six commenters indicated that it should be deleted based on assertions that there is no indication that this agent has ever been chosen as a potential bioweapon, the agent has not been shown to be easily transmissible to humans, the agent has not been demonstrated to result in high levels of mortality, and there is little evidence in the literature of true aerosol transmission of the naturally occurring virus. With changes to reflect current taxonomic classification and nomenclature, we have included it on the list of HHS agents and toxins as ''Cercopithecine herpesvirus 1 (Herpes B virus)'' based on the scientific data that it is lethal to humans, can be replicated in large concentrations, and can cause infection via the aerosol route.

The notice did not include ''Camelpox'' on the list of select viruses. One commenter asserted that ''Camelpox'' should be included on the list based on the assertion that recent publications have raised concerns about its potential use as a biological weapon. We have not included ''Camelpox'' on the list because it has not been associated with human illness or disease.

The notice included ''Variola major (smallpox)'' on the list of select viruses. One commenter requested that we change ''Variola major (smallpox)'' to ''Variola major and variola minor associated viruses including alastrim.'' We have made this change by including ''Variola major virus (Smallpox virus) and Variola minor (Alastrim)'' on the list of HHS select agents and toxins. ''Variola minor virus,'' also known as ''Variola Alastrim,'' is another virus that causes smallpox and like ''Variola major virus'' is highly infectious and lethal and can be spread by inhalation.

The notice included ''*Coccidioides immitis*'' and ''*Coccidioides posadasii*'' on the list of select fungi. One commenter indicated that both should be deleted based on the assertion that neither species of ''*Coccidioides*'' presented a risk for use as biological weapons. Another commenter asserted that ''*Coccidioides immitis*'' should be deleted based on the assertion that most infections with ''*Coccidioides immitis*'' do not cause severe illness. We have included ''*Coccidioides immitis*'' on the overlap list and ''*Coccidioides posadasii*'' on the HHS list because they are highly infectious when aerosolized and sporulate easily in culture.

The notice did not include ''*Histoplasma capsulatum*'' or ''*Blastomyces species*'' in the list of select fungi. One commenter asserted that these organisms should be included on the list since they easily can be spread by aerosol. We have not included them on the list because they are difficult to cultivate and do not sporulate readily.

The notice did not include ''aflatoxins'' on the list of select toxins. One commenter asserted, without reasons, that these organisms should be included on the list. We have not included them on the list because the acute toxicity is too low to pose a significant mass casualty threat.

The notice included ''Shigatoxin and Shiga-like toxins'' on the list of select toxins. One commenter asserted that a change is needed in the reference to ''Shiga-like toxins'' to clarify that it does not include analogous proteins that are not toxic, and another commenter similarly asserted that the same term should identify or at least quantify the specific ''Shiga-like toxins'' to be included. We agree with the commenters and clarified the list of select toxins to include ''Shigatoxin and Shiga-like ribosome inactivating proteins.''

In the notice, certain toxins were on the list of select toxins only if the aggregate amount were more than a specified amount. Three commenters argued in favor of the principle that a toxin should be listed without distinctions regarding amounts. One commenter asserted that the aggregate amounts for toxins are too low and do not take into account the vastly different toxicities of these listed materials. We made no changes based on these comments. The Act (42 U.S.C. 262a (a)(1)(A)) states that the list is to include those toxins that have the potential to pose a severe threat to public health and safety. We believe that the specified toxins at levels below the threshold levels do not meet the Act's criteria for inclusion. Further, as evidenced by the different amounts for certain toxins, we did take into account the different toxicities of toxins.

One commenter recommended that the list of toxins include only those with an $LD_{50}$ for vertebrates of less than 100 nanograms per kilogram body weight and two other commenters recommended that the list of toxins include only those that would theoretically contain one million $LD_{50}$'s

for vertebrates for each listed toxin. No changes were made based on these comments. These comments do not take into account the potential threat of large quantities of the toxins.

One commenter asserted that the ''Botulinum neurotoxins'' should be included only if quantities are greater than 13 milligrams and the listing for ''*Clostridium perfringens* epsilon toxin'' should be included only if quantities are greater than 68 milligrams. No changes are made based on this comment. The comment does not take into account that even the specified amounts could cause significant numbers of mortalities.

With respect to the listing in the notice of ''full-length'' nucleic acids, commenters raised concern that the deletion of one nucleic acid would not constitute ''full-length'' even though capable of causing harm similar to a ''full-length.'' We agree with the commenters and changed the listings to exclude only those forms that are not capable of yielding infectious and/or replication-competent forms of any of the viruses listed (accordingly, forms such as microarrays are not on the list).

Regarding the proposed regulation of ''Nucleic acids (synthetic or naturally derived) of Variola major virus (smallpox virus) and Variola minor virus (Alastrim) that are 100 nucleotides or more in length,'' one commenter noted that Variola virus shares many conserved nucleic acid sequences with other Orthopoxviruses (*e.g.*, vaccinia virus). Thus, the proposed requirement could result in the unintentional regulation of nucleic acids from other viruses. Because nucleic acids from Variola major virus and Variola minor virus that are capable of infection or replication are already listed as select agents in § 73.4 (d)(1), this requirement is being deleted.

The provisions of §§ 73.4 and 73.5 include procedures for excluding attenuated strains of select agents and toxins upon a determination that they do not meet the Act's criteria for inclusion, *i.e.*, they do not pose a severe threat to the public health and safety. The procedures also include provisions for providing notice for determinations. A written decision to an applicant granting the request for an exclusion will apply to all others.

**Exemption Regarding Diagnosis, Verification, or Proficiency Testing—§ 73.6(a)**

Paragraph (a) of § 73.6 states that an entity is exempt from the provisions of this part, other than § 73.14 (transfer), if all of the following apply:

- The only activities conducted by the entity that are subject to the part 73 regulations concern select agents or toxins that are contained in specimens or in isolates from the specimens presented for diagnosis, verification, or proficiency testing;
- Upon identification as the result of diagnosis or verification, the entity immediately reports to HHS any of the following: Variola major virus (Smallpox virus) and Variola minor (Alastrim), *Bacillus anthracis, Yersinia pestis,* Botulinum neurotoxins, *Francisella tularensis,* Ebola viruses, Marburg virus, Lassa fever virus, and South American Haemorrhagic Fever viruses (Junin, Machupo, Sabia, Flexal, Guanarito);
- The entity reports as required under Federal, State, or local law, to appropriate authorities;
- After diagnosis, verification, or proficiency testing, the entity either transfers the specimens or isolates from the specimens to a facility eligible for receiving them, or destroys them on-site by autoclaving, incineration, or by means of a sterilization or neutralization process sufficient to cause inactivation;
- The entity transfers or destroys those select agents or toxins used for diagnosis or verification within seven calendar days after identification, unless directed otherwise by the Federal Bureau of Investigation or other law enforcement entity after consultation with the HHS Secretary;
- The entity transfers or destroys those select agents or toxins used for proficiency testing within 90 calendar days after receipt; and
- The entity prepares a record of the identification and transfer or destruction on CDC Form 0.1318, submits the completed form to the HHS Secretary within seven calendar days after the transfer or destruction, and maintains a copy of the record for a period of three years.

The provisions of this exemption meet the requirements of the Act (42 U.S.C. 262a (g)(1)). The Act mandates such an exemption for diagnosis, verification, or proficiency testing regarding select agents and toxins. It also requires reporting to HHS and when required under Federal, State, or local law, to other appropriate authorities, and further requires the agents or toxins to be transferred or destroyed after use.

This requirement that the entity immediately reports to HHS upon identification of any of biological agents listed in § 73.6 (a)(2) is warranted because HHS has determined that these pose the greatest risk to public health and safety and national security.

Allowing seven calendar days for transfer or destruction for select agents or toxins identified through diagnosis or verification and 90 calendar days for transfer or destruction of select agents or toxins used for proficiency testing will provide sufficient time to accomplish the intended purpose.

The requirements that the entity must notify HHS within seven calendar days after identification and maintain the record of notification, provide a means for documenting that the transfer or destruction actually occurred. We request comment on the sufficiency of the 7-day and 90-day requirements for the transfer or destruction of the select agent or toxin after identification.

**Exemption Regarding Products Cleared, Approved, Licensed, or Registered Under Certain Laws—§ 73.6(b)**

Paragraph (b) of § 73.6 states that unless the HHS Secretary issues an order to an entity making specific provision of this part applicable to protect the public health and safety, products that are, bear, or contain listed select agents or toxins that are cleared, approved, licensed, or registered under any of the following laws are exempt from the provisions of the part 73 regulations insofar as their use is only for the approved purposes and meets the requirements of such laws:

(1) The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*);

(2) Section 351 of the Public Health Service Act pertaining to biological products (42 U.S.C. 262);

(3) The Act commonly known as the Virus-Serum-Toxin Act (21 U.S.C. 151–159); or

(4) The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*).

This exemption is mandated by the Act (42 U.S.C. 262a (g)(2)).

**Exemption Regarding Investigational Products—§ 73.6(c)**

Paragraph (c) of § 73.6 states that the HHS Secretary may exempt on a case-by-case basis an investigational product that is, bears, or contains a listed select agent or toxin from the requirements of the regulations when such product is being used in an investigation authorized under a Federal Act referred to above in the discussion concerning § 73.6 (b) and additional regulation under this part is not necessary to protect public health and safety. Paragraph (c) also sets forth application provisions and requires the HHS Secretary to make a determination within 14 calendar days after receipt of the application if the application meets certain requirements.

The Act specifically provides for this exemption, including the time frame for

making a decision (42 U.S.C. 262a (g)(2)). We limited the exemption to investigational products authorized under those Acts specified in § 73.6 (b) because we are unaware of any other acts that could be used to meet the specified criteria. There is a requirement that applicant notify the HHS Secretary when authorization is no longer in effect (*e.g.*, IND is put on clinical hold). An exemption granted under this paragraph continues in effect only so long as the investigation continues in accordance with the authorization under a Federal Act referred to in paragraph (b) of this section.

**Exemption Regarding Domestic or Foreign Public Health Emergency § 73.6(d)**

Paragraph (d) of § 73.6 states that the HHS Secretary may temporarily exempt an entity from the requirements of the regulations, in whole or in part, based on a determination that the exemption is necessary to provide for the timely participation of the entity in response to a domestic or foreign public health emergency. Paragraph (d) further provides that the exemption may not exceed 30 calendar days, except that the HHS Secretary may grant one extension of an additional 30 calendar days. In addition, it sets forth application provisions.

The Act specifically provides for this exemption, including the time limits (42 U.S.C. 262a (g)(3)).

**Exemption Based on Agricultural Emergency § 73.6(e)**

Paragraph (e) of § 73.6 states that upon request of the USDA Secretary, after the granting by the USDA Secretary of an exemption under section 212(g)(1)(D) of the Agricultural Bioterrorism Protection Act of 2002 based on a finding that there is an agricultural emergency, the HHS Secretary may temporarily exempt an entity from the applicability of the requirements of this part, in whole or in part, to provide for the timely participation of the entity in response to the agricultural emergency. Paragraph (e) further provides that the exemption may not exceed 30 calendar days, except that upon the request of the USDA Secretary, the HHS Secretary may grant one extension of an additional 30 calendar days.

The Act specifically provides for this exemption, including the time limits (42 U.S.C. 262a (g)(4)).

**Registration—§ 73.7**

Paragraph (a) of § 73.7 states that an entity may not possess or use in the United States, receive from outside the United States, or transfer within the United States, any select agent or toxin unless the entity has been granted a certificate of registration by HHS or USDA. This reflects requirements in the Act (42 U.S.C. 262a (d)).

Paragraph (b) contains information concerning the submission of an application for a certificate of registration to HHS or USDA and sets forth the information required to be included in the application. The requested information is needed to determine whether an applicant is eligible for a certificate of registration by meeting the requirements of the part 73 regulations. The requested information is necessary to make a preliminary determination if the entity meets the requirements of this part. We are requesting comments on the information required in the application for registration.

Paragraph (c) explains that an application that covers any HHS select agent or toxin (regardless of whether it also covers overlap select agents or toxins) must be submitted to HHS and an application that covers only overlap select agents or toxins may be submitted either to HHS or USDA. This reflects the intent of the Act to provide joint jurisdiction over activities and avoid unnecessary burden regarding overlap select agents and toxins (7 U.S.C. 8411). Regardless of which agency receives the application regarding an overlap select agent or toxin, both agencies will provide input before a determination is made to grant or deny a certificate of registration.

Paragraph (d) provides that a certificate of registration will be valid only for the specific select agents and toxins and the specified activities and locations consistent with the information upon which the certificate of registration or amendment was granted. This requirement reflects the conclusion that each situation for conducting activities involving select agents and toxins is unique, and HHS or USDA can only issue a certificate of registration based on the information submitted.

Paragraph (d) also provides that the Responsible Official of an agency must get prior approval by promptly notifying the HHS Secretary in writing in accordance with § 73.21, if any change occurs in any information submitted in the application for the certificate of registration or amendments. This includes modifications to the list of individuals approved under § 73.8, changes in area of work, or changes in protocols or objectives of studies. This requirement is necessary to enable HHS to ensure that the entity continues to meet the requirements of the part 73 regulations.

Paragraph (d) contains provisions for obtaining amendments to a certificate of registration to add select agents or toxins or to change specified activities or locations.

Paragraph (e) contains provisions for granting a certificate of registration if the requirements of the part 73 regulations are met. Paragraph (e) also notes, consistent with the discussion above, that HHS will issue a certificate of registration or amendment for an HHS overlap select agent or toxin only if the USDA Secretary concurs that the requirements for obtaining a certificate of registration or amendment under 9 CFR part 121 have been met.

Paragraph (f) provides that a certificate of registration will cover activities at only one general physical location (a building or a complex of buildings at a single mailing address). This is designed to ensure that the Responsible Official is not over-extended and will be able to perform the activities required under § 73.9.

Paragraph (g) provides that a certificate of registration will be valid for up to three years. This will allow for varied expiration dates and thereby lessen the subsequent administrative burden regarding the processing of renewals. We are seeking comments on this time period for renewal of a registration.

Paragraph (h) provides that an entity must provide notice in writing to the HHS Secretary in accordance with § 73.21 at least five business days before destroying a select agent or toxin, if the destruction is for the purpose of discontinuing activities with an agent or toxin covered by a certificate of registration. This will allow the HHS Secretary to observe the destruction or take other action as appropriate.

**Security Risk Assessments—§ 73.8**

Paragraph (a) of § 73.8 states that an entity may not possess or use in the United States, receive from outside the United States, or transfer within the United States, any select agent or toxin unless the entity and any individual who owns or controls the entity are approved by the HHS Secretary or the USDA Secretary based on security risk assessments by the Attorney General. Paragraph (b) of § 73.8 states that an individual may not have access to a select agent or toxin unless approved by the HHS Secretary or the USDA Secretary based on a security risk assessment by the Attorney General. These security risk assessments are required by the Act (42 U.S.C. 262a (e)).

Based on specific authority in the Act, paragraph (a) provides that the security risk assessment requirements do not apply to Federal, State, or local governmental agencies (42 U.S.C. 262a (e)), but the security risk assessments do apply to the Responsible Official and other individuals working for such agencies.

Paragraph (c) sets forth procedures for obtaining the security risk assessments.

Paragraph (d) restates the criteria in the Act for disapproving entities and individuals (42 U.S.C. 262a (e)). The Act states that ''restricted persons,'' as defined in 18 U.S.C. 175b, may not be granted access to select agents and toxins (42 U.S.C. 262a (e)). A restricted person is a person who:

- Is under indictment for a crime punishable by imprisonment for a term exceeding 1 year;
- Has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year;
- Is a fugitive from justice;
- Is an unlawful user of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- Is an alien illegally or unlawfully in the United States;
- Has been adjudicated as a mental defective or has been committed to any mental institution;
- Is an alien (other than an alien lawfully admitted for permanent residence) who is a national of a country as to which the Secretary of State has made a determination (that remains in effect) that such country has repeatedly provided support for acts of international terrorism; or
- Has been discharged from the Armed Services of the United States under dishonorable conditions.

In addition, the HHS Secretary may deny or limit access if the individual is reasonably suspected by any Federal law enforcement or intelligence agency of: Committing a crime set forth in section 2332b(g)(5) of title 18 U.S.C.; knowing involvement with an organization that engages in domestic or international terrorism (as defined in section 2331of such title18) or with any other organization that engages in intentional crimes of violence; or being an agent of a foreign power (as defined in section 1801 of title 50 U.S.C.

Consistent with specific provisions in the Act, paragraph (e) also allows for limited approvals (42 U.S.C. 262a (e)).

Paragraph (f) provides that unless a shorter period is granted under paragraph (e), an approval for an entity or individual will be valid for three years unless terminated sooner at the request of the entity or individual, or terminated for cause.

Paragraph (g) implements specific provisions of the Act for requesting the Attorney General to expedite the security risk assessment process and for expediting the HHS Secretary's review process (42 U.S.C. 262a (e)). The Act allows expedited processing only for individuals (not entities). Expedited processing will be given to those cases showing good cause (*e.g.*, public health or agricultural emergencies, national security, impending expiration of a research grant, a short-term visit by a prominent researcher).

**Responsible Official—§ 73.9**

Under § 73.9, an entity conducting regulated activities must identify and authorize an individual as the Responsible Official. The Responsible Official must:

- Be approved for access to biological agents and toxins under § 73.8;
- Be familiar with the requirements of the part 73 regulations, and
- Have authority and responsibility to ensure that the requirements of the part 73 are met, on behalf of the entity.

These requirements regarding a Responsible Official are necessary to ensure management oversight of the implementation of the part 73 regulations and to establish a point of contact.

This section also provides for the designation of Alternate Responsible Officials to conduct the duties of the Responsible Official. The Responsible Official may identify one or more individuals, any of whom may serve as the Alternate Responsible Official when the Responsible Official is unavailable. The Responsible Official and all individuals identified to serve as the Alternate Responsible Official must meet all of the qualifications for a Responsible Official.

We recommend that the Responsible Official and Alternate Responsible Officials be either biosafety officers or senior management officials of the entity, or both. Although we understand that some entities have limited staff, to help foster objectivity we strongly recommend where feasible that the Responsible Official should not be an individual actually using, working with, or transferring or receiving the select agents and toxins.

**Safety—§ 73.10**

Paragraph (a) of § 73.10 states that an entity subject to the provisions of the part 73 regulations must develop and implement a safety plan that:

- Considers the biosafety standards and requirements appropriate for BSL2, 3, or 4 operations,

as those standards and requirements pertain to the respective select agents. Guidance for biosafety standards for BSL2, 3, or 4 operations is contained in the CDC/NIH publication, ''Biosafety in Microbiological and Biomedical Laboratories,'' including all appendices except Appendix F.

- Meets the specific requirements for handling toxins found in 29 CFR 1910.1450, Occupational Exposure to Hazardous Chemicals in Laboratories' and/or 29 CFR 1910.1200, ''Hazard Communication,'' whichever applies.
- Considers the requirements for handling toxins found in Appendix I in the CDC/NIH publication, ''Biosafety in Microbiological and Biomedical Laboratories.''
- Considers the requirements for handling genetic elements, recombinant nucleic acids, and

recombinant organisms found in ''NIH Guidelines for Research Involving Recombinant DNA Molecules.'' This includes, among other things, provisions regarding security assessments, physical containment, biological containment, and local review.

These provisions are designed to implement the mandate in the Act to establish safety provisions commensurate with the risk the biological agent or toxin poses to the public health and safety (42 U.S.C. 262a (b)). Both BMBL and the NIH Guidelines provide for graded requirements based on the level of hazard posed by the specific agents and toxins. The work with these agents and toxins are classified into biosafety levels (BSL 1 through 4) based on their hazards and the quantities being handled. As the level of risk increases, the guidelines impose more stringent requirements for safety practices. These guidelines are accepted standards in the biomedical sector. In addition, grants that are awarded for funding improvements to public health agencies mandate compliance with the NIH Guidelines. Similarly, new grants from NIH to fund research on select agents and toxins mandate compliance with the NIH guidelines. Consequently, we expect that entities subject to this rule either are complying with these guidelines or are making provisions to comply. Further, these are essentially the same requirements imposed on entities under the § 72.6 regulations. We are seeking comments on the incorporation of these guidelines as requirements.

Paragraph (b) of § 73.10 states that:

• The Responsible Official must conduct regular inspections of the laboratory where select agents and toxins are stored or used to ensure compliance with all of the procedures and protocols of the safety plan,

• The results of these inspections must be documented, and

• Any problems identified during inspections must be addressed.

These provisions are added to help ensure that the safety provisions are met.

The concerns that prompted this rule and its authorizing statute are not limited to the Select Agents listed herein. Laboratory manipulation of microbes can alter their characteristics, either intentionally or inadvertently, so as to increase their virulence, pathogenicity, or host range or alter their mode of transmission or route of exposure in ways that increase risks to human, animal, or plant health. In particular, the resulting modified organisms could present risks equal to or even greater than the current select agents and toxins.

In recognition of this prospect, and to protect public health and safety and ensure security, paragraph (c) states that an entity may not conduct the following experiments unless approved by the HHS Secretary, after consultation with experts:

• Experiments utilizing recombinant DNA that involve the deliberate transfer of a drug resistance trait to select agents that are not known to acquire the trait naturally, if such acquisition could compromise the use of the drug to control disease agents in humans, veterinary medicine, or agriculture.

• Experiments involving the deliberate formation of recombinant DNA containing genes for the biosynthesis of select toxins lethal for vertebrates at an $LD_{50} < 100$ ng/kg body weight.

This is to ensure that these categories of experiments with select agents and toxins involving recombinant DNA (as defined in the NIH Guidelines) are conducted only if safe to do so.

Also, we have reserved paragraph (d) for possible future specification of additional types of experiments that might warrant stringent scrutiny in the interest of safety; and we hereby request comments concerning what additional experiments, regardless if regulated under the part 73 regulations, might warrant such attention. In particular, we request comments addressing issues concerning experiments with biological agents that could possibly increase their virulence or pathogenicity; change their natural mode of transmission, route of exposure, or host range in ways adverse to human, animal, or plant health; result in the deliberate transfer of a drug resistant trait or a toxin-producing capability to a microorganism by means that do not involve recombinant DNA techniques; or involve research with Variola major virus and Variola minor virus (*e.g.*, experiments involving the transfer of Variola nucleic acid sequences into any other orthopoxvirus). In light of the deletion from the select agent list of Variola nucleic acids that are 100 nucleotides or more in length, we request comments on whether a less restrictive, but scientifically sound threshold is needed. We also request comments regarding the form such special oversight should take; for example, the rule could require that, whenever laboratory manipulation of a microorganism increases its risk profile significantly, whether intentionally or inadvertently, the Responsible Official report such to the HHS Secretary and discontinue work with the modified organism until the HHS Secretary has made recommendations regarding appropriate safety practices.

**Security—§ 73.11**

The provisions of § 73.11 require entities subject to the provisions of the part 73 regulations to develop and implement a security plan establishing policy and procedures that ensure the security of areas containing select agents and toxins. The provisions of § 73.11 are designed to meet these objectives and the Act's mandate to establish security requirements for the purpose of protecting the public health and safety (42 U.S.C.262a (e)). We invite comments on these provisions, and are particularly interested in views on whether the provisions are sufficient to meet the purposes stated above.

**Emergency Response—§ 73.12**

The provisions of § 73.12 state that entities required to register under the part 73 regulations must develop and implement an emergency response plan. The requirements for the plan are designed to ensure that entities plan ahead to be ready to take appropriate action to deal with any hazard that could arise.

We also note that if the entity has prepared and implemented an emergency response plan or is part of a larger institution's plan developed under other Federal, State, or local emergency response planning laws (*e.g.*, OSHA's hazardous waste operations and emergency response standard), that plan, with any necessary amendments, may be used to meet the requirements of § 73.12.

**Training—§ 73.13**

The provisions of § 73.13 state that an entity required to register under this part must provide information and training on safety and security for working with select agents or toxins on a timely basis to each individual approved for access under § 73.8 and each unapproved individual working in, or visiting, areas where select agents and toxins are handled or stored. The criteria in § 73.13 are designed, consistent with the Act's mandate concerning training (42 U.S.C. 262a (b), to ensure that individuals understand the hazards and how to deal with them.

We also note that if the entity has an existing training program under OSHA or other government or entity programs, that training program, with any necessary amendments, may be used to meet the requirements of § 73.13.

**Transfers—§ 73.14**

The transfer provisions in § 73.14, consistent with specific provisions of the Act (42 U.S.C. 262a (b)), state that a select agent or toxin may not be transferred from one entity to another entity within the United States (regardless of whether the transfer is interstate or intrastate), or received by an entity in the United States from an entity outside the United States, unless the transfer meets specified requirements. The transfer provisions are designed to ensure that select agents and toxins are shipped only to recipients that have authority to use or possess them. Also, the transfer provisions are designed to ensure that HHS and the participants monitor the shipments and that any problems are quickly reported to HHS so that any required action could be taken.

**Records—§ 73.15**

The provisions of § 73.15 set forth record keeping requirements concerning the list of approved individuals, inventories, access to agents and toxins, and areas where agents are used. These requirements are designed to allow determinations concerning compliance with the requirements of the part 73 regulations and to help assign what action should be taken if an emergency were to arise. Some of the requirements concerning quantities apply only to toxins since quantity data concerning replicating organisms may not be meaningful. We invite comments on these requirements.

**Inspections—§ 73.16**

The part 73 regulations at § 73.16 set forth inspection provisions that apply during the time an application is pending and any time when a certificate

of registration is in effect. This allows the HHS Secretary, without prior notification and with or without cause, to inspect any site at which activities regulated by part 73 are conducted and to inspect and copy any records relating to the activities covered by this part. This section implements the provisions of the Act that authorize inspections as necessary to ensure compliance with the part 73 regulations (42 U.S.C. 262a (f)).

**Notification for Theft, Loss, or Release—§ 73.17**

Consistent with the mandate in the Act, § 73.17 sets forth requirements for reporting thefts, losses, or releases of select agents or toxins (42 U.S.C. 262a (g)(8) and (j)). This is intended to determine responsibility for reporting and to help ensure that the appropriate information is reported so that effective and timely responses can be made.

**Administrative Review—§ 73.18**

To implement requirements of the Act (42 U.S.C. 262a (e)(7)), § 73.18 provides that an entity may obtain review of a decision denying or revoking a certificate of registration under 73.7 and the affected entity or individual may obtain review of a decision denying or revoking approval under 73.8. To help ensure timely resolution of disputes, the request for such review must be submitted in writing within 30 calendar days after the adverse decision. Under this section, the request for review must state the factual basis for the review, which will be carried out in accordance with 42 U.S.C. 262a(e)(7). Where the adverse decision is in whole or in part based upon notification by the Attorney General under 42 U.S.C. 262a(e)(3), the request for review will be forwarded to the Attorney General for the Attorney General's review and final notification to the HHS Secretary.

**Civil Money Penalties—§ 73.19**

A discussion regarding the authority for, and the implementation of, civil money penalties by the Office of Inspector General is set forth below under the heading ''Civil money penalties.''

**Criminal Penalties—§ 73.20**

The provisions of § 73.20 are informational. They note that the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107–188) provides specific criminal penalties for violation of provisions of the part 73 regulations. They also note that other criminal penalties may apply for violation of the part 73 regulations.

**Submissions and Forms—§ 73.21**

Paragraphs (a), (b), and (c) of § 73.21 explain how to obtain forms and how to submit applications, requests, notifications, and other information under the part 73 regulations.

To help ensure the timely resolution of matters, paragraph (d) of § 73.21 sets forth a mechanism for considering applications or requests to be abandoned if the applicant or requester fails to respond within 30 calendar days (or within such time period agreed upon by the applicant or requester and the HHS Secretary) to an HHS request for additional information.

**Applicability and Related Requirements—§ 73.0**

The provisions of § 73.0 include a phase-in period for certain requirements to allow entities to comply without causing disruption or termination of research or educational projects.

The phase-in for entities that on February 7, 2003, already were conducting activities under a certificate of registration issued under § 72.6 of this chapter or already were lawfully possessing select agents and toxins are as follows:

1. On and after February 7, 2003, the following provisions of part 73 are applicable: § 73.1 Definitions; § 73.2 Purpose and scope; § 73.3 General prohibition; § 73.4 HHS select agents and toxins; § 73.5 Overlap select agents and toxins; § 73.6 Exemptions from requirements under this part; § 73.9 Responsible Official; § 73.10 Safety; § 73.12 Emergency response; § 73.13 Training, but only those training provisions relating to safety and emergency response; § 73.15 Records; § 73.16 Inspections; § 73.17 Notification for theft, loss, or release; § 73.18 Administrative review; § 73.19 Civil money penalties; § 73.20 Criminal penalties; and § 73.21 Submissions and forms.

2. Before conducting activities subject to the interim final during the period from March 12, 2003, through November 11, 2003, such an entity must have submitted to HHS or USDA an application package under § 73.7 certifying compliance with the provisions referred to in (1) above.

3. Before conducting activities subject to the interim final during the period from March 12, 2003, through April 11, 2003, such an entity must have submitted applications for security risk approvals under § 73.8 to the Attorney General for the entity, the Responsible Official, and any individual who owns or controls the entity.

4. On and after March 12, 2003, such an entity must comply with the transfer requirements in § 73.14.

5. On and after April 12, 2003, such an entity must comply with the requirement to obtain security risk approvals under § 73.8 for the entity, the Responsible Official, and any individual who owns or controls the entity.

6. Before conducting activities subject to the interim final during the period from April 12, 2003, through June 11, 2003, such an entity must have submitted applications for security risk approvals under § 73.8 for all individuals with access to select agents and toxins.

7. On and after June 12, 2003, such an entity must comply with the requirement to obtain security risk approvals under § 73.8 for all individuals with access to select agents and toxins.

8. Before conducting activities subject to the interim final during the period from June 12, 2003, through September 11, 2003, such an entity must comply with the requirement in § 73.11 to develop a security plan.

9. On and after September 12, 2003, such an entity must fully comply with the provisions of § 73.11, including the provisions regarding the implementation of a security plan, and must fully comply with the provisions of § 73.13, including the training provisions relating to security.

10. On and after November 12, 2003, such an entity must comply with the requirement in § 73.7 to obtain a certificate of registration.

11. Such an entity also remains:

- Subject to the registration provisions of the § 72.6 regulations until November 12, 2003, when superseded by § 73.7;
- Subject to the security provisions regarding development of a security plan until June 12, 2003, when superseded by the requirement to develop a security plan under § 73.11;
- Subject to the security provisions of the § 72.6 regulations regarding implementation of a security plan until September 12, 2003, when superseded by the requirement to fully comply with § 73.11;
- Subject to the training provisions of the § 72.6 regulations related to security until September 12, 2003, when superseded by the requirement to fully comply with § 73.13; and
- Subject to the transfer provisions of the § 72.6 regulations until March 12, 2003, when superseded by § 73.14.

The following is a timeline of the registration phase-in period that is described in the previous paragraph:

| 2/7/03<br>Rule effective | 3/12/03<br>Application due | 4/12/03<br>DOJ review |
|---|---|---|
| 73.1 Definitions<br>73.2 Purpose and scope<br>73.3 General prohibition<br>73.4 Non-overlap select biological agents and toxins<br>73.5 Overlap select biological agents and toxins<br>73.6 Exemptions from requirements under this part<br>73.9 Responsible Official<br>73.10 Safety<br>73.12 Emergency Response<br>73.13 Training (Safety and Emergency Response Provisions)<br>73.15 Records<br>73.16 Inspections<br>73.17 Notification for theft, loss, or release<br>73.18 Appeals<br>73.19 Civil money penalties<br>73.20 Criminal penalties<br>73.21 Submissions and forms | —Application certifies compliance with effective sections.<br>73.8—Certifies that applications for DOJ review for entity and RO submitted.<br><br>73.14—Transfer section effective ..... | 73.8 Application for DOJ review for individuals submitted.<br>—Entity and RO DOJ review completed. |
| **6/12/03<br>DOJ review/security** | **9/12/03<br>Security/Training plan** | **11/12/03<br>Full compliance** |
| 73.8—Individual DOJ review complete<br>73.11—Development of security plan | 73.11 Security plan implemented .....<br>73.13 Training (security provisions ..... | 73.7—Registration section effective<br>—Entity must be in full compliance with Part 73 |

We have also provided a more limited phase-in for entities that on February 7, 2003, were not already conducting activities under a certificate of registration issued under § 72.6 of this chapter and were not already lawfully possessing select agents as follows:

(1) On and after February 7, 2003, the following sections are applicable: §§ 73.1 through 73.6 (definitions, purpose and scope, general prohibition, HHS select agents and toxins, overlap select agents and toxins, exemptions from requirements under this part); §§ 73.8 through 73.10 (Security risk assessments, Responsible Official, Safety); §§ 73.12 through 73.21 (emergency response, training, transfers, records; inspections; notification for theft, loss, or release; administrative review; civil money penalties; criminal penalties; and submissions and forms) and must hold a valid permit under 9 CFR part 122 and/or 42 CFR part 71.54.

(2) On and after September 12, 2003, the provisions of § 73.11 (security) are applicable.

(3) On and after November 12, 2003, the provisions of § 73.7 (registration) are applicable.

(4) During the period from February 7, 2003, through November 11, 2003, such an entity may not conduct activities regulated under this part unless the entity has submitted to HHS or USDA an application package under § 73.7 certifying compliance with the provisions referred to in paragraph (b)(2) of this section.

**Civil Money Penalties**

In 1981, Congress enacted the civil money penalty statute, section 1128A of the Social Security Act (42 U.S.C. 1320a–7a), as one of several administrative remedies to combat increases in fraud and abuse. The civil money penalty law authorized the HHS Secretary and the Inspector General to impose civil money penalties and program exclusions on individuals and entities whose wrongdoing caused injury to HHS programs or their beneficiaries. Since 1981, the civil money penalty provisions have been expanded to apply by reference to numerous types of fraudulent and abusive activities.

The Act specifically authorized civil money penalties against any individual or other person violating the part 73 regulations (42 U.S.C. 262a (i)). The Act incorporates by reference many of the provisions of section 1128A of the Social Security Act. As a result, and in accordance with section 1128A(j)(2) of the Social Security Act, the Office of the Inspector General may impose a civil money penalty in an amount not exceeding $250,000 in the case of an individual, and up to $500,000 in the case of any other person, who violates the Act. Accordingly, to address this new civil money penalty authority, we added provisions to the part 73 regulations at § 73.19 and are amending 42 CFR parts 1003 as follows:

- In § 1003.100, Basis and purpose, we are revising paragraph (a), redesignating paragraph (b)(3) to read as (b)(4), and adding a new paragraph (b)(3), stating the broad purpose of this new civil money penalty authority.
- In § 1003.101, Definitions, we are adding a definition for the term ''Select agents and toxins'' consistent with the definition in the part 73 regulations.
- In § 1003.102, Basis for CMPs and assessments, we are redesignating existing paragraphs (d) and (e) to read respectively as paragraphs (e) and (f), and adding a new paragraph (d) to cross-reference the implementing regulations and the OIG's authority to impose penalties for determined violations.
- In § 1003.103, Amount of penalty, we are adding a new paragraph (l) to address the $250,000/$500,000 maximum penalty amounts.

The OIG specifically seeks public comments on the possible inclusion of specific mitigating and aggravating factors in considering penalty amounts.

**Disclosure Provisions**

The Act (42 U.S.C. 262a (h)) prohibits the disclosure under the Freedom of Information Act (5 U.S.C. 552) of certain information concerning registrations; transfer documentation; safeguard and security measures; notifications of

releases; and evaluations and reports of inspections.

**Authority for Interim Final Rule**

The Act requires this document to be published as an interim final rule (42 U.S.C. 262a, note).

**Paperwork Reduction Act**

The Centers for Disease Control and Prevention (referred to below as the CDC) has determined that the Paperwork Reduction Act (44 U.S.C. Chapter 35) applies to the data collection activities in this Interim Final Rule. In compliance with the Paperwork Reduction Act, CDC publishes a list of information collection requests under review by the Office of Management and Budget (OMB). To request more information on the proposed data collection or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer at (404) 498–1210.

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. CDC is requesting an emergency clearance from OMB to collect data under the Interim Final Rule. Written comments should be received within 30 days of this notice. Send written comments to Anne O'Connor, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS D–24, Atlanta, Georgia 30333. OMB is expected to act on this request within 60 days of publication of this notice.

*Proposed Project:* Possession, Use, and Transfer of Select Agents and Toxins—New—Office of the Director (OD), Centers for Disease Control and Prevention. As explained above, the Act specifies that the HHS Secretary shall provide for the establishment and enforcement of standards and procedures governing the possession and use of Select Agents. Also as explained above, the part 73 regulations provide that facilities that possess or use within the United States, receive from outside the United States, or transfer within the United States, select agents or toxins must register with the HHS Secretary. The HHS Secretary has designated CDC as the agency responsible for collecting this information.

CDC is proposing to collect this information through the use of five separate forms. These forms are: (1) Application for Registration; (2) Facility Notification Form; (3) Request for Exemption; (4) Transfer of Select Agent Form; and (5) Clinical and Diagnostic Laboratory Reporting Form.

The Application for Registration (CDC Form 0.1319) will be used by facilities to register with CDC. The Application for Registration requests facility information, a list of select agents and toxins in use, possession, or for transfer by the facility, characterization of the select agent, and laboratory information. This form is a modification of an existing form approved under OMB Control No. 0920–0199. Estimated average time to complete this form is 3 hours, 45 minutes for an entity with one principal investigator working with one select agent. CDC estimates that entities will need an additional 45 minutes for each additional investigator or select agent. This is an increase of 1 hour, 45 minutes over the previous form due to new reporting requirements for security and identification of those individuals the entity has designated to have a legitimate need to handle or use select agents or toxins.

Facilities must amend their registration if certain changes occur in the information submitted to the HHS Secretary. To apply for an amendment to a certificate of registration, an entity must obtain the relevant portion of the application package and submit the information requested in the package to CDC. Estimated time to amend a registration package is 60 minutes.

The Facility Notification Form (CDC Form 0.1316) must be completed by facilities whenever there is release of a select agent or theft or loss of a select agent. This is a new form. Estimated average time to complete this form is 60 minutes.

The Request for Exemption Form (CDC Form 0.1317) will be used by facilities that are using select agents or toxins in investigational new drug testing or in cases of public health emergency. This is a new form. Estimated average time to complete this form is 70 minutes.

The Transfer of Select Agent Form (CDC Form EA–101) will be used by facilities requesting transfer of a select agent or toxin to their facilities and by the facility transferring the agent. This is a modification of an existing form approved under OMB Control No. 0920–0199. Estimated average time to complete this form is 1 hour, 45 minutes. This is an increase of 75 minutes due to procedural changes.

The Clinical and Diagnostic Laboratory Exemption Report (CDC Form 0.1318) will be used by clinical and diagnostic laboratories to notify the HHS Secretary that select agents or toxins identified as the result of diagnosis or proficiency testing have been properly disposed of. This is a new form. Estimated average time to complete this form is 60 minutes.

In addition to the standardized forms, the part 73 regulations also outline situations in which an entity must notify or make a request of the HHS Secretary in writing and CDC is requesting OMB approval to collect this information. The regulation states that an entity must notify the HHS Secretary in writing at least five business days before destroying select agents or toxins. The estimated time to gather the information and submit this notification is 30 minutes. An entity may also apply to the HHS Secretary for an expedited review of an individual by the Attorney General. To apply for this expedited review, an entity must submit a request in writing to the HHS Secretary establishing the need for such action. The estimated time to gather the information and submit this request is 30 minutes. Entities should be aware that CDC is not developing standardized forms to use in these situations. Rather, the entity should provide the information as requested in the appropriate section of the regulation.

As part of the safety requirements of this regulation, the Responsible Officer is required to conduct regular inspections (at least annually) of the laboratory where the select agents and toxins are stored. The results of these inspections must be documented. CDC estimates that, on the average, such documentation will take one hour.

Finally, as part of the safety requirements of this regulation, the entity is required to record the identity of the individual trained, the date of training, and the means used to verify that the employee understood the training. Estimated time for this documentation is 2 hours per principal investigator.

An entity or an individual may request administrative review of a decision denying or revoking certification of registration in writing within 30 calendar days after the adverse decision. This request should include a statement of the factual basis for the review. CDC estimates the time to prepare and submit such a request is four hours.

Finally, an entity must implement a system to ensure that certain records

and databases are accurate and that the authenticity of records may be verified. The time to implement such a system is estimated to average four hours.

The total annualized burden for this data collection is 30,777 hours.

| CFR reference | Data collection | Number of respondents | Responses per respondent | Average hourly burden |
|---|---|---|---|---|
| 73.7(b) | Registration Application | 817 | 1 | 3.75 |
| 73.7(d) | Amendment to Registration Application | 817 | 2 | 1 |
| 73.17(a)(e) | Notification Form | 10 | 1 | 1 |
| 73.6(c–e) | Request for Exemption | 17 | 1 | 70/60 |
| 73.14 | Transfer of Select Agent | 1,000 | 5 | 1.75 |
| 73.6(a)(2) | Clinical and Diagnostic Laboratory Exemption Report | 1,000 | 4 | 1 |
| 73.7(h) | Notification of inactivation | 6 | 1 | 30/60 |
| 73.9(g) | Request expedited review | 6 | 1 | 30/60 |
| 73.10(b) | Documentation of Self-Inspection | 817 | 1 | 1 |
| 73.13(f) | Documentation of training | 817 | 1 | 2 |
| 73.18 | Administrative Review | 14 | 1 | 4 |
| 73.15(d) | Ensure secure Recordkeeping System | 817 | 1 | 4 |

**Executive Order 12866 and Regulatory Flexibility Act**

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

In the course of developing the rule, CDC considered the rule's costs and benefits. CDC's analysis is summarized below.

*Affected Entities.* At least 1,653 entities have indicated that they possess select agents or toxins. Of these, 1,167 entities are expected to have HHS select agents or toxins or overlap select agents or toxins used in non-agricultural research. Of these 1,167 entities, only 817 are expected to register under the rule. The remaining 350 entities perform only diagnostic work and would be exempted from most of the provisions of the rule, thereby avoiding most of the regulatory burden associated with the rule.

The entities generally fall into one of four categories: academic institutions and biomedical centers; commercial manufacturing facilities (the pharmaceutical industry); federal, state, and local laboratories, including clinical and diagnostic laboratories; and research facilities. Based on the initial notifications, academic institutions and commercial facilities comprise 81 percent of the regulated entities.

The expected registered entities are estimated to have about 20,000 staff that will be required to submit information to the Attorney General for approval. In general, entities limit access to select agents or toxins to a far smaller population than their overall workforce. In most cases, this smaller population is composed of scientific staff. The number of employees directly handling select agents or toxins typically ranges from approximately three individuals at smaller commercial and state entities to more than one hundred researchers at some large academic institutions. On average, commercial entities authorize approximately 12 individuals to work with select agents or toxins. Similarly, at state entities the average number of authorized employees is estimated at about 15. Authorized populations at research institutes and at federal entities are larger, with approximately 25 employees handling select agents or toxins on average. Academic institutions have the largest staff directly working with select agents or toxins, averaging almost 40 authorized persons per entity.

*Costs.* To determine the burden that the interim final rule will impose, CDC contacted a number of entities to discuss existing practices. To protect staff as well as the public, entities using select agents or toxins already employ a variety of laboratory safety practices. In general, entities are adhering to guidance in the ''Biosafety in Microbiological and Biomedical Laboratories (BMBL),'' 4th Edition, as applicable to their specific biosafety level category (*e.g.*, BSL2, BSL3, BSL4) category. Biosafety levels range from BSL1 through BSL4, although BSL2 represents the minimum level at which laboratories might reasonably work with limited quantities of certain select agents. The analysis assumes that only a relatively small number of laboratories (52 laboratories, or 6.4 percent of the 817 expected to register) use safety practices that are inadequate for appropriate handling of select agents.

There is wide variation in current security practices, although there is a correlation between BSL levels and security levels. For example, BSL–3 laboratories tend to have more security than BSL–2 laboratories. Nevertheless, even for laboratories of the same type or BSL level, some variation exists. There also appears to be systematic variation across laboratories of different types. In general, security is relatively strong at federal laboratories, research institutes, and commercial laboratories; security practices at academic institutions and state laboratories are more variable.

Most entities (approximately 70 percent) have a training program in place that addresses the safety of staff that is in proximity to or handling select agents. Of the remaining entities (that do not have a standard safety training program in place), some of them train people on the job as necessary for the employee to learn some skills or improve his or her proficiency. All commercial entities have a standardized safety training program in place—at the very least for the technical staff that work in the laboratories. The vast majorities of entities (85 percent) have a system in place to record and monitor the inventory of select agents or toxins.

Because many of the laboratories that will register under this rule are already substantially in compliance with the practices required, the costs of the rule are limited. The median annualized cost of the rule is estimated to range from $9,300 to $201,000 (annualized over 20 years). The estimated first year cost of the rule ranges from $23,400 for a small commercial entity with a BSL 3 lab to $730,400 for a medium university with a BSL2–3 lab. The total annualized cost of the rule is estimated to be $41 million.

Most of the cost of the rule (over 60 percent) is attributable to four initial activities: limiting access to select agents and work areas; developing and implementing a security plan; developing and implementing a safety plan; and obtaining risk assessments for existing staff.

*Benefits.* The benefits to public health and safety from implementation of the rule are clear, although difficult to quantify. The benefits of the interim final rule result from the strengthened prevention that the rules provide against

either accidental or intentional release of a select agent or toxin. The cost of such an event in human life could be very high. A release caused by one of the select agents or toxins would require a complicated and expensive emergency response effort. This effort could include extensive public health measures, such as quarantine, preventative treatment and health testing for large numbers of potentially exposed persons, and extensive decontamination. Substantial costs could be incurred by hospitals and other medical facilities and institutions of government at all levels. A release, or widespread fear of one, also would create significant secondary effects. It could disrupt business, transportation, and many other aspects of normal behavior, on both a short-term and potentially a long-term basis.

The impacts resulting from the October 2001 anthrax attacks provide an example of the costs that a limited release could incur. The anthrax attacks caused five fatalities and 17 illnesses, disrupted business and government activities, closed substantial parts of the postal service, and caused widespread apprehension and changes in behavior. Costs included more than $23 million to decontaminate one Senate office building; approximately $2 billion in revenues lost to the postal service, and as much as $3 billion in additional costs to the postal service for cleanup of contamination and procurement of mail-sanitizing equipment. Substantial costs due to lost productivity throughout the economy and from ongoing costs of the investigations into the incident are additional impacts.

Implementation of the interim final rule will provide a means of determining where select agents and toxins are located; ensure that their transfer, storage, and use can be tracked; provide for the screening of personnel with access to such agents or toxins; and require that entities in possession of such agents or toxins develop and implement effective means of biosafety and physical security. The benefit of these provisions is a reduced likelihood of either an accidental or intentional release of select agents and toxins and the consequent avoidance of costs associated with such a release.

In large part, the rule establishes common sense rules that already should be followed by entities conducting activities under the rule. Moreover, any costs of compliance should not be significant. The annualized cost on small entities would not exceed one percent of sales or revenue stream and the initial cost would not exceed three percent of sales or revenue stream. A copy of the economic analysis, ''Regulatory Impact Analysis, 42 CFR part 73, Select Biological Agents and Toxins, Interim Final Rule,'' is available from on the CDC Web site at *http://www.cdc.gov.*

Therefore, the HHS Secretary hereby certifies that the interim final rule will not have a significant economic impact on a substantial number of small entities.

### Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532 that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of $100 million or more in any given year. This rule would have no consequential effect on State, local, or tribal governments.

### List of Subjects in 42 CFR Part 73

Biologics, Packaging and containers, Penalties, Reporting and recordkeeping requirements, Transportation.

### List of Subjects in 42 CFR Part 1003

Administrative practice and procedure, Fraud, Grant programs-health, Health facilities, Health professions, Maternal and child health, Medicaid, Medicare, Penalties, Social security.

Dated: December 4, 2002.

**Tommy G. Thompson,**

*Secretary.*

For the reasons stated in the preamble, 42 CFR Chapters I and V are amended as follows:

1. Part 73 is added to 42 CFR chapter I to read as follows:

## PART 73—SELECT AGENTS AND TOXINS

73.0 Applicability and related requirements.
73.1 Definitions.
73.2 Purpose and scope.
73.3 General prohibition.
73.4 HHS select agents and toxins.
73.5 Overlap select agents and toxins.
73.6 Exemptions from requirements under this part.
73.7 Registration.
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73.9 Responsible Official.
73.10 Safety.
73.11 Security.
73.12 Emergency response.
73.13 Training.
73.14 Transfers.
73.15 Records.
73.16 Inspections.
73.17 Notification for theft, loss, or release.
73.18 Administrative review.
73.19 Civil money penalties.
73.20 Criminal penalties.
73.21 Submissions and forms.

**Authority:** 42 U.S.C. 262a; sections 201–204, 221 and 231 of Title II of Public Law 107–188, 116 Stat. 637 (42 U.S.C. 262a)

### § 73.0 Applicability and related requirements.

(a) For those entities that on February 7, 2003, were conducting activities under a certificate of registration issued under § 72.6 of this chapter, or were lawfully possessing select agents and toxins, the provisions of part 73 and § 72.6 of this chapter are applicable as follows:

(1) On and after February 7, 2003, the following sections are applicable: §§ 73.1 through 73.6 (definitions, purpose and scope, general prohibition, HHS select agents and toxins, overlap select agents and toxins, exemptions from requirements under this part); § 73.9 (Responsible Official); § 73.10 (Safety); § 73.12 (emergency response); and §§ 73.15 through 73.21 (records; inspections; notification for theft, loss, or release; administrative review; civil money penalties; criminal penalties; and submissions and forms).

(2) On and after February 7, 2003, the provisions of § 73.13 concerning training related to safety and emergency response are applicable; and on and after September 12, 2003, the remaining provisions of § 73.13, including those concerning training related to security, are applicable.

(3) On and after March 12, 2003, the provisions of § 73.14 (transfers) are applicable.

(4) On and after April 12, 2003, the provisions of § 73.8 regarding security risk assessments for the entity, the Responsible Official, and any individual who owns or controls the entity are applicable; and on and after June 12, 2003, the remainder of § 73.8 (including the provisions regarding individual risk assessments for other than the Responsible Official or any individual who owns or controls the entity) is applicable.

(5) On and after June 12, 2003, the provisions of § 73.11 regarding the development of a security plan are applicable, and on and after September 12, 2003, the remainder of the provisions of § 73.11, including the provisions regarding the implementation of a security plan, is applicable.

(6) On and after November 12, 2003, the provisions of § 73.7 (registration) are applicable.

(b) The following also applies to those entities that on February 7, 2003, already were conducting activities under a certificate of registration issued

under § 72.6 of this chapter or already were lawfully possessing select agents and toxins:

(1) During the period from March 12, 2003, through November 11, 2003, such an entity may not conduct activities regulated under this part unless the entity has submitted to HHS or USDA an application package under § 73.7 certifying compliance with the provisions referred to in paragraph (a)(1) of this section and the provisions in § 73.13 concerning training related to safety and emergency response.

(2) During the period from March 12, 2003, through April 11, 2003, such an entity may not conduct activities regulated under this part unless the entity has submitted applications for approval under § 73.8 (security risk assessment) to the Attorney General for the entity, the Responsible Official, and any individual who owns or controls the entity.

(3) During the period from April 12, 2003, through June 11, 2003, such an entity may not conduct activities regulated under this part unless the entity has submitted applications for approval under § 73.8 (security risk assessments) to the Attorney General for all individuals (other than the Responsible Official and any individual who owns or controls the entity) with access to select agents and toxins.

(4) Such an entity remains:

(i) Subject to the registration provisions of § 72.6 of this chapter until November 12, 2003, when superseded by § 73.7;

(ii) Subject to the security provisions of § 72.6 of this chapter regarding development of a security plan until June 12, 2003, when superseded by the requirement to develop a security plan under § 73.11;

(iii) Subject to the security provisions of § 72.6 of this chapter regarding implementation of a security plan until September 12, 2003, when superseded by the requirement to fully comply with § 73.11;

(iv) Subject to the training provisions of § 72.6 of this chapter related to security until September 12, 2003, when superseded by the training provisions of § 73.13 relating to security; and

(v) Subject to the transfer provisions of § 72.6 of this chapter until March 12, 2003, when superseded by § 73.14.

(c) For those entities that on February 7, 2003, were not already were conducting activities under a certificate of registration issued under § 72.6 of this chapter and were not already lawfully possessing select agents and toxins, the provisions of part 73 are applicable as follows:

(1) On and after February 7, 2003, the following sections are applicable: §§ 73.1 through 73.6 (definitions, purpose and scope, general prohibition, HHS select agents and toxins, overlap select agents and toxins, exemptions from requirements under this part); §§ 73.8 through 73.10 (Security risk assessments, Responsible Official, Safety); §§ 73.12 through 73.21 (emergency response, training, transfers, records; inspections; notification for theft, loss, or release; administrative review; civil money penalties; criminal penalties; and submissions and forms) and must hold a valid permit under 9 CFR part 122 and/or 42 CFR part 71.54.

(2) The provisions of § 73.11 are applicable on and after September 12, 2003.

(3) On and after November 12, 2003, the provisions of § 73.7 (registration) are applicable.

(4) During the period from February 7, 2003, through November 11, 2003, such an entity may not conduct activities regulated under this part unless the entity has submitted to HHS or USDA an application package under § 73.7 certifying compliance with the provisions referred to in paragraph (b)(2) of this section.

### § 73.1 Definitions.

For purposes of this part:

*Biological agent* means any microorganism (including, but not limited to, bacteria, viruses, fungi, rickettsiae, or protozoa), or infectious substance, or any naturally occurring, bioengineered, or synthesized component of any such microorganism or infectious substance, capable of causing death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism; deterioration of food, water, equipment, supplies, or material of any kind; or deleterious alteration of the environment.

*CDC* means Centers for Disease Control and Prevention of the Department of Health and Human Services.

*Diagnosis* means the analysis of specimens for the purpose of identifying or confirming the presence of a listed select agent *or toxin* provided that such analysis is directly related to protecting the public health or safety.

*Entity* means any government agency (Federal, State, or local), academic institution, corporation, company, partnership, society, association, firm, sole proprietorship, or other legal entity.

*HHS* means the Department of Health and Human Services.

*HHS Secretary* means the Department of Health and Human Services or his or her designee, unless otherwise specified.

*HHS select agent or toxin* means a biological agent or toxin included in § 73.4.

*Overlap select agent or toxin* means a biological agent or toxin included in § 73.5.

*Proficiency testing* means a sponsored, time-limited analytical trial whereby one or more analytes, previously confirmed by the sponsor, are submitted to the testing laboratory for analysis and where final results are graded, scores are recorded and provided to participants, and scores for participants are evaluated.

*Principal investigator* means the one individual who is designated by the entity to direct a project or program and who is responsible to the entity for the scientific and technical direction of that project or program.

*Select agent or toxin* or *select agent and toxin* without identification as HHS or overlap means all of those biological agents or toxins included in §§ 73.4 and 73.5 of this part.

*Toxin* means the toxic material or product of plants, animals, microorganisms (including, but not limited to, bacteria, viruses, fungi, rickettsiae, or protozoa), or infectious substances, or a recombinant or synthesized molecule, whatever their origin and method of production, and includes any poisonous substance or biological product that may be engineered as a result of biotechnology, produced by a living organism; or any poisonous isomer or biological product, homolog, or derivative of such a substance.

*United States* means the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

*USDA* means the United States Department of Agriculture.

*USDA Secretary* means the Department of Agriculture or his or her designee, unless otherwise specified.

*Verification* means the processes required to assure the accuracy, precision, and the analytical sensitivity and specificity of any procedure used for diagnosis.

### § 73.2 Purpose and scope.

(a) This part sets forth requirements regarding the possession or use in the United States, receipt from outside the United States, or transfer within the United States, of select agents and toxins. The requirements are designed to implement provisions of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107–188). The Act was

designed to provide protection against the effects of misuse of select agents and toxins whether inadvertent or the result of terrorist acts against the United States homeland or other criminal acts. The agents and toxins subject to requirements under this part are those that have the potential to pose a severe threat to public health and safety. They are further identified as either HHS select agents and toxins or overlap select agents and toxins. The term HHS select agents and toxins refers to those select agents and toxins subject to these regulations but not subject to USDA requirements at 9 CFR part 121. The overlap group consists of those select agents and toxins subject to requirements promulgated by the HHS Secretary under this part and also subject to corresponding requirements promulgated by USDA at 9 CFR part 121.

(b) This part does not set requirements for the exportation of select agents or toxins. The Department of Commerce has primary responsibility for regulating the exportation of microorganisms and toxins in Title 15 of the Code of Federal Regulations.

(c) This part does not set requirements for the transportation in commerce of select agents or toxins. The Department of Transportation has primary responsibility for regulating the transportation of such select agents and toxins as hazardous materials under 49 CFR parts 171 through 180.

### § 73.3 General prohibition.

An entity or individual may not possess or use in the United States, receive from outside the United States, or transfer within the United States, a select agent or toxin unless such activities are conducted for a lawful purpose and in accordance with the provisions of this part. Registration, exclusions, and exemptions are automatically revoked when any event occurs that results in an entity or individual no longer being eligible.

### § 73.4 HHS select agents and toxins.

Except for exclusions under paragraph (f) of this section, the viruses, bacteria, fungi, toxins, genetic elements, recombinant nucleic acids, and recombinant organisms specified in paragraphs (a) through (e) of this part are HHS select agents and toxins.

(a) Viruses:

(1) Crimean-Congo haemorrhagic fever virus.

(2) Ebola viruses.

(3) Cercopithecine herpesvirus 1 (Herpes B virus).

(4) Lassa fever virus.

(5) Marburg virus.

(6) Monkeypox virus.

(7) South American Haemorrhagic Fever viruses (Junin, Machupo, Sabia, Flexal, Guanarito).

(8) Tick-borne encephalitis complex (flavi) viruses (Central European Tick-borne encephalitis, Far Eastern Tick-borne encephalitis [Russian Spring and Summer encephalitis, Kyasanur Forest disease, Omsk Hemorrhagic Fever]).

(9) Variola major virus (Smallpox virus) and Variola minor virus (Alastrim).

(b) Bacteria:

(1) *Rickettsia prowazekii.*

(2) *Rickettsia rickettsii.*

(3) *Yersinia pestis.*

(c) Fungi: *Coccidioides posadasii.*

(d) Toxins:

(1) Abrin.

(2) Conotoxins.

(3) Diacetoxyscirpenol.

(4) Ricin.

(5) Saxitoxin.

(6) Tetrodotoxin.

(7) Shiga-like ribosome inactivating proteins.

(e) Genetic Elements, Recombinant Nucleic Acids, and Recombinant Organisms:

(1) Select agent viral nucleic acids (synthetic or naturally derived, contiguous or fragmented, in host chromosomes or in expression vectors) that can encode infectious and/or replication competent forms of any of the select agent viruses.

(2) Nucleic acids (synthetic or naturally derived) that encode for the functional form(s) of any of the toxins listed in paragraph (d) of this section if the nucleic acids:

(i) Are in a vector or host chromosome;

(ii) Can be expressed *in vivo* or *in vitro*; or

(iii) Are in a vector or host chromosome and can be expressed *in vivo* or *in vitro.*

(3) Viruses, bacteria, fungi, and toxins listed in paragraphs (a) through (d) of this section that have been genetically modified.

(f) Exclusions:

(1) This section does not include any select agent or toxin that is in its naturally occurring environment provided it has not been intentionally introduced, cultivated, collected, or otherwise extracted from its natural source.

(2) This section does not include non-viable select agent organisms or nonfunctional toxins.

(3) Paragraph (a) of this section does not include the vaccine strain of Junin virus (Candid #1).

(4) Paragraph (d) of this section does not include the following toxins (in the purified form or in combinations of pure and impure forms) if the aggregate amount under the control of a principal investigator does not, at any time, exceed the amount specified: 100 mg of Abrin; 100 mg of Conotoxins; 1,000 mg of Diacetoxyscirpenol; 100 mg of Ricin; 100 mg of Saxitoxin; 100 mg of Shiga-like ribosome inactivating proteins; or 100 mg of Tetrodotoxin.

(5) The HHS Secretary may exclude from this section attenuated strains of HHS select agents or toxins upon a determination that they do not pose a severe threat to the public health and safety. To apply for an exclusion an applicant must submit a request in writing in accordance with § 73.21 to the HHS Secretary establishing that the attenuated strain or toxin is eligible for exclusion. The HHS Secretary will provide a written decision granting the request, in whole or in part, or denying the request. An exclusion will be effective upon notification to the applicant. Exclusions will be published in the notice section of the **Federal Register** and will be listed on the CDC Web site at *http://www.cdc.gov.* Exclusions also will be referenced in this section when changes are made based on periodic reviews.

### § 73.5 Overlap select agents and toxins.

Except for exclusions under paragraph (f) of this section, the viruses, bacteria, fungi, toxins, genetic elements, recombinant nucleic acids, and recombinant organisms specified in paragraphs (a) through (e) of this part are overlap select agents and toxins.

(a) Viruses:

(1) Eastern Equine Encephalitis virus.

(2) Nipah and Hendra Complex viruses.

(3) Rift Valley fever virus.

(4) Venezuelan Equine Encephalitis virus.

(b) Bacteria:

(1) *Bacillus anthracis.*

(2) *Brucella abortus.*

(3) *Brucella melitensis.*

(4) *Brucella suis.*

(5) *Burkholderia mallei* (formerly *Pseudomonas mallei*).

(6) *Burkholderia pseudomallei* (formerly *Pseudomonas pseudomallei*).

(7) Botulinum neurotoxin producing species of *Clostridium.*

(8) *Coxiella burnetii.*

(9) *Francisella tularensis.*

(c) Fungi: *Coccidioides immitis.*

(d) Toxins:

(1) Botulinum neurotoxins.

(2) *Clostridium perfringens* epsilon toxin.

(3) Shigatoxin.

(4) Staphylococcal enterotoxins.

(5) T–2 toxin.

(e) Genetic elements, recombinant nucleic acids, and recombinant organisms:

(1) Select agent viral nucleic acids (synthetic or naturally derived, contiguous or fragmented, in host chromosomes or in expression vectors) that can encode infectious and/or replication competent forms of any of the select agent viruses.

(2) Nucleic acids (synthetic or naturally derived) that encode for the functional form(s) of any of the toxins listed in paragraph (d) of this section if the nucleic acids:

(i) Are in a vector or host chromosome;

(ii) Can be expressed *in vivo* or *in vitro*; or

(iii) Are in a vector or host chromosome and can be expressed *in vivo* or *in vitro.*

(3) Viruses, bacteria, fungi, and toxins listed in paragraphs (a) through (d) of this section that have been genetically modified.

(f) Exclusions:

(1) This section does not include any select agent or toxin that is in its naturally occurring environment provided that it has not been intentionally introduced, cultivated, collected, or otherwise extracted from its natural source.

(2) This section does not include non-viable select agent organisms or nonfunctional toxins.

(3) Paragraph (a) does not include the vaccine strain of Rift Valley fever virus (MP–12) or Venezuelan Equine encephalitis virus vaccine strain TC–83.

(4) Paragraph (d) of this section does not include the following toxins (in the purified form or in combinations of pure and impure forms) if the aggregate amount under the control of a principal investigator does not, at any time, exceed the amount specified: 0.5 mg of Botulinum neurotoxins; 5 mg of Staphylococcal enterotoxins; 100 mg of *Clostridium perfringens* epsilon toxin; 100 mg of Shigatoxin; or 1,000 mg of T–2 toxin.

(5) The HHS Secretary, after consultation with the USDA Secretary, may exclude from this section attenuated strains of overlap select agents or toxins upon a determination that they do not pose a severe threat to the public health and safety and do not meet the criteria in 9 CFR part 121 for inclusion. To apply for an exclusion, an applicant must submit a request in writing in accordance with § 73.21 to the HHS Secretary or the USDA Secretary in accordance with 9 CFR part 121, establishing that the attenuated strain is eligible for exclusion. In response to an application submitted to the HHS Secretary, the HHS Secretary will provide a written decision granting the request, in whole or in part, or denying the request. An exclusion will be effective upon notification to the applicant. Exclusions will be published in the notice section of the **Federal Register** and will be listed on the CDC Web site at *http://www.cdc.gov.* Also, they will be referenced in this section when changes are made based on periodic reviews.

**§ 73.6 Exemptions from requirements under this part.**

(a) An entity is exempt from the provisions of this part, other than § 73.14 (transfer), provided that all of the following apply:

(1) The only activities conducted by the entity that are subject to this part concern select agents or toxins that are contained in specimens or in isolates from specimens presented for diagnosis, verification, or proficiency testing;

(2) Upon identification of a select agent or toxin as the result of diagnosis or verification, the entity immediately reports to the HHS Secretary by telephone, facsimile, or e-mail in accordance with § 73.21 any of the following: Variola major virus (Smallpox virus) and Variola minor (Alastrim), *Bacillus anthracis*, *Yersinia pestis*, Botulinum neurotoxins, *Francisella tularensis*, Ebola viruses, Marburg virus, Lassa fever virus, and South American Haemorrhagic Fever viruses (Junin, Machupo, Sabia, Flexal, Guanarito);

(3) The entity reports as required under Federal, State, or local law, to appropriate authorities;

(4) After the diagnosis, verification, or proficiency testing, the entity either transfers the specimens or isolates containing a select agent or toxin from the specimens to a facility eligible for receiving them under this part, or destroys them on-site by autoclaving, incineration, or by a sterilization or neutralization process sufficient to cause inactivation;

(5) The entity transfers or destroys those select agents or toxins used for diagnosis or testing within seven days after identification, unless directed otherwise by the Federal Bureau of Investigation or other law enforcement entity after consultation with the HHS Secretary; and

(6) The entity transfers or destroys those select agents or toxins used for proficiency testing within 90 days after receipt; and

(7) The entity prepares a record of the identification and transfer or destruction on CDC Form 0.1318, submits the completed form to the HHS Secretary in accordance with § 73.21 within seven days after identification, and maintains a copy of the record for a period of three years.

(b) Unless the HHS Secretary issues an order to an entity making specific provisions of this part applicable to protect the public health and safety, products that are, bear, or contain listed select agents or toxins that are cleared, approved, licensed, or registered under any of the following laws, are exempt from the provisions of this part insofar as their use is only for the approved purpose and meets the requirements of such laws:

(1) The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*);

(2) Section 351 of the Public Health Service Act pertaining to biological products (42 U.S.C. 262);

(3) The Act commonly known as the Virus-Serum-Toxin Act (21 U.S.C. 151–159); or

(4) The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq*).

(c) The HHS Secretary may exempt from the requirements of this part on a case-by-case basis an investigational product that is, bears, or contains a select agent or toxin, when such product is being used in an investigation authorized under a Federal Act referred to in paragraph (b) of this section and additional regulation under this part is not necessary to protect public health and safety. To apply for an exemption an applicant must submit to the HHS Secretary in accordance with § 73.21 a completed CDC Form 0.1317 certifying that the product is being used in an investigation authorized under a Federal Act referred to in paragraph (b) of this section, and that additional regulation under this part is not necessary to protect public health and safety. The HHS Secretary shall make a determination regarding the application within 14 calendar days after receipt, provided the application meets all of the requirements of this section and the application establishes that the investigation has been authorized under the cited Act. The HHS Secretary will provide a written decision granting the request, in whole or in part, or denying the request. The applicant must notify the HHS Secretary when an authorization for an investigation no longer exists. This exemption automatically ceases when such authorization is no longer in effect.

(d) The HHS Secretary may temporarily exempt an entity from the requirements of this part, in whole or in part, based on a determination that the exemption is necessary to provide for the timely participation of the entity in

response to a domestic or foreign public health emergency. With respect to the emergency involved, the exemption may not exceed 30 days, except that the HHS Secretary may grant one extension of an additional 30 days. To apply for an exemption or an extension of an exemption, an applicant must submit to the HHS Secretary in accordance with § 73.21 a completed CDC Form 0.1317 establishing the need to provide for the timely participation of the entity in a response to a domestic or foreign public health emergency. The HHS Secretary will provide a written decision granting the request, in whole or in part, or denying the request.

(e) Upon request of the USDA Secretary, after the USDA Secretary has granted an exemption under section 212(g)(1)(D) of the Agricultural Bioterrorism Protection Act of 2002 based on a finding that there is an agricultural emergency, the HHS Secretary may temporarily exempt an entity from the applicability of the requirements of this part, in whole or in part, to provide for the timely participation of the entity in response to the agricultural emergency. With respect to the emergency, the exemption under this part may not exceed 30 days, except that upon the request of the USDA Secretary, the HHS Secretary may grant one extension of an additional 30 days.

**§ 73.7 Registration.**

(a) An entity may not possess or use in the United States, receive from outside the United States, or transfer within the United States, any select agent or toxin unless the entity has been granted a certificate of registration by the HHS Secretary or the USDA Secretary.

(b) To apply for a certificate of registration an entity must:

(1) Obtain a registration application number from the HHS Secretary and then apply for approval under § 73.8 for the entity, the Responsible Official, and any individual who owns or controls the entity; and

(2) In accordance with § 73.21, submit the information requested to the HHS Secretary or the USDA Secretary as specified in the registration application package [CDC Form 0.1319]. Information submitted will be used to determine whether the applicant would be eligible to conduct activities under this part. Minimum information required includes:

(i) Identification information (*e.g.*, name, address, contact numbers, identification number assigned by the Attorney General for compliance with § 73.8);

(ii) The name, source, and characterization information on select agents and toxins included in the registration, and quantities held at the time of the application;

(iii) The location, including building and room and floor plans for each building and room, where each select agent or toxin will be stored or used;

(iv) Information addressing safety, security, emergency response plans, and training, including descriptions of any equivalent measures adopted pursuant to § 73.11(d);

(v) The name, position, and identification information regarding the Responsible Official, including the identification number assigned by the Attorney General for compliance with § 73.8;

(vi) A list of individuals who will need access to select agents and toxins;

(vii) A certification statement signed by the Responsible Official attesting to the accuracy of the information submitted; and

(viii) Any other information necessary for the determination.

(c) An application that covers any HHS select agents or toxins (regardless of whether it also covers overlap select agents or toxins) must be submitted to the HHS Secretary in accordance with § 73.21. An application that covers only overlap select agents or toxins may be submitted to either the HHS Secretary or the USDA Secretary.

(d) A certificate of registration will be valid only for the specific select agents and toxins, and the specified activities and locations that are consistent with the information provided by the entity upon which the certificate of registration or amendment was granted. The Responsible Official must promptly notify the HHS Secretary in writing in accordance with § 73.21, if a change occurs in any information submitted to the HHS Secretary in the application for the certificate of registration or amendments. This includes modifications to the list of individuals approved under § 73.8, changes in area of work, or changes in protocols or objectives of studies. To apply for an amendment to a certificate of registration to add select agents or toxins or to change specified activities or locations, an entity must obtain the relevant portion of the registration application package and submit the information requested in the package to the agency that issued the certificate of registration. The package must be submitted to the appropriate address specified in the package.

(e) In response to an application to the HHS Secretary for a certificate of registration or amendment for select agents and toxins, the HHS Secretary will issue a certificate of registration or amendment if it is determined that the stated activities would be lawful (based on information submitted by the applicant or otherwise obtained by the HHS Secretary) and meet the requirements of this part. Otherwise, the application for a certificate of registration or amendment will be denied. The HHS Secretary will issue a certificate of registration or amendment for an overlap select agent or toxin only if the USDA Secretary concurs that the requirements for obtaining a certificate of registration or amendment under 9 CFR part 121 have been met. The determination of whether a certificate of registration or amendment will be granted may be contingent upon inspection or submission of additional information.

(f) A certificate of registration will cover activities at only one general physical location (a building or a complex of buildings at a single mailing address).

(g) Unless terminated sooner in accordance with this paragraph, a certificate of registration will be valid for up to three years. To obtain a new certificate of registration an entity must submit a new application. (Note: To help ensure timely processing of an application for a certificate of registration or amendment, the applicant should submit the application at least eight weeks prior to the expiration date.)

(1) The HHS Secretary will terminate a certificate of registration based on a determination that the recipient no longer conducts activities covered by the certificate.

(2) Also, the HHS Secretary may terminate a certificate of registration based on a security risk assessment under § 73.8 or failure to comply with the provisions of this part, and may take such action immediately if necessary to protect the public health or safety. Upon such termination, any select agent or toxin in the possession of the entity must be destroyed or transferred as directed by the HHS Secretary.

(h) An entity must provide notice in writing to the HHS Secretary in accordance with § 73.21 at least five business days before destroying a select agent or toxin, if the destruction would be for the purpose of discontinuing activities with a select agent or toxin covered by a certificate of registration. This will allow the HHS Secretary to observe the destruction or take other action as appropriate.

**§ 73.8 Security risk assessment.**

(a) An entity may not possess or use in the United States, receive from outside the United States, or transfer within the United States, any select agent or toxin unless approved by the HHS Secretary or the USDA Secretary based on a security risk assessment by the Attorney General. This paragraph does not apply to Federal, State, or local governmental agencies, but does apply to the Responsible Official and others working for or otherwise acting on behalf of such agencies.

(b) An entity may not provide an individual access to a select agent or toxin and an individual may not access a select agent or toxin, unless the individual is approved by the HHS Secretary or the USDA Secretary, based on a security risk assessment by the Attorney General.

(c) To obtain a security risk assessment under this section, an entity must submit to the Attorney General the information requested for the entity, the Responsible Official, any individual who owns or controls the entity, and any other individuals required to obtain approval under this section. The determinations regarding approval will be made by the agency that is responsible for making determinations regarding the corresponding certificate of registration. An entity will receive prompt notice of action taken in response to a request for approval for the entity, the Responsible Official, and individuals. An individual will receive prompt notice of a denial of approval.

(d) The Attorney General will conduct a security risk assessment on entities and individuals whose identifying information is properly submitted. Based on the security risk assessment, the Attorney General will notify the HHS Secretary if the Attorney General identifies any entity, individual who owns or controls the entity, or any other individual who is:

(1) A restricted person under 18 U.S.C. 175b; or

(2) Reasonably suspected by any Federal law enforcement or intelligence agency of:

(i) Committing a crime specified in 18 U.S.C. 2332b(g)(5);

(ii) Having a knowing involvement with an organization that engages in domestic or international terrorism (as defined in 18 U.S.C. 2331) or with any other organization that engages in intentional crimes of violence; or

(iii) Being an agent of a foreign power (as defined in 50 U.S.C. 1801).

(e) The HHS Secretary will deny or revoke access to any select agent or toxin to an entity or individual identified by the Attorney General as a restricted person under paragraph (d)(1). The HHS Secretary will deny or revoke access to any select agent or toxin to an entity or individual identified by the Attorney General as meeting the criteria of paragraph (d)(2) unless determined by the HHS Secretary to be warranted in the interest of the public health and safety or national security. For individuals meeting the criteria of paragraph (d)(2) the HHS Secretary may provide a limited approval for a specified time based upon the finding that circumstances warrant such action in the interest of the public health and safety or national security.

(f) Unless a shorter period is granted under paragraph (e) of this section, an approval for an entity or individual under this section will be valid for five years unless terminated sooner. The HHS Secretary may terminate an approval for an entity or an individual based on a request from the entity or individual, a security risk assessment under this section, or a failure to comply with the provisions of this part, and may take such action immediately if necessary to protect the public health and safety, or national security.

(g) The HHS Secretary will request the Attorney General to expedite the review process for an individual and will take action to expedite the HHS Secretary's review process for an individual upon a showing of good cause (*e.g.*, public health or agricultural emergencies, national security, impending expiration of a research grant, a short-term visit by a prominent researcher). To apply for an expedited review, an entity must submit a request in writing in accordance with § 73.21 to the HHS Secretary establishing the need for such action. The HHS Secretary will provide a written decision granting the request, in whole or in part, or denying the request.

**§ 73.9 Responsible Official.**

(a) As a condition of conducting activities regulated under this part, an entity must identify and authorize an individual as the Responsible Official. The Responsible Official may identify one or more individuals, any of whom may serve as the Alternate Responsible Official when the Responsible Official is unavailable. The Responsible Official and all individuals identified to serve as the Alternate Responsible Official must meet all of the qualifications for a Responsible Official. The Responsible Official and all Alternate Responsible Officials must:

(1) Be approved under § 73.8;

(2) Be familiar with the requirements of this part; and

(3) Have authority and responsibility to ensure that the requirements of this part are met, on behalf of the entity.

(b) For purposes of this part, the Alternate Responsible Official acting in the absence of the Responsible Official may conduct all of those activities required under this part to be performed by the Responsible Official.

(c) The Responsible Official is responsible for ensuring compliance with the regulations, including:

(1) Developing and implementing safety, security and emergency response plans in accordance with § 73.10—§ 73.12;

(2) Allowing only approved individuals to have access to select agents or toxins in accordance with § 73.8 and § 73.11;

(3) Providing appropriate training for safety, security and emergency response in accordance with § 73.13;

(4) Transferring select agents or toxins in accordance with § 73.14;

(5) Providing timely notice of any theft, loss, or release of a select agent or toxin in accordance with § 73.13;

(6) Maintaining detailed records of information necessary to give a complete accounting of all activities related to select agents or toxins in accordance with § 73.15.

(7) The reporting of the identification of a select agent or toxin as a result of diagnosis, verification or proficiency testing in accordance with § 73.6.

**§ 73.10 Safety.**

(a) An entity subject to the provisions of this part, must develop and implement a safety plan. In developing a safety plan, an entity should consider:

(1) The biosafety standards and requirements for BSL 2, 3, or 4 operations, as they pertain to the respective select agents, that are contained in the CDC/NIH publication, ''Biosafety in Microbiological and Biomedical Laboratories,'' including all appendices except Appendix F. Copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 371954, Pittsburgh, Pennsylvania, 75250–7954 or call in the Washington, DC metropolitan area 202–512–1800 or outside that area call toll free 1–866–512–1800. Copies may be inspected at the Centers for Disease Control and Prevention, 1600 Clifton Road, Mail Stop E–79, Atlanta, Georgia. This publication is also available on the CDC Web site at *http://www.cdc.gov.*

(2) The specific requirements for handling toxins found in 29 CFR 1910.1450, ''Occupational Exposure to Hazardous Chemicals in Laboratories'' and/or 29 CFR 1910.1200, ''Hazard

Communication,'' whichever applies and specific provisions for handling toxins found in Appendix I in the CDC/NIH publication, ''Biosafety in Microbiological and Biomedical Laboratories,''

(3) For provisions of the safety plan relating to genetic elements, recombinant nucleic acids and recombinant organisms, the ''NIH Guidelines for Research Involving Recombinant DNA Molecules,'' (NIH Guidelines). This includes, among other things, provisions regarding risk assessment, physical containment, biological containment, and local review and applies to all recombinant DNA research, regardless of funding. Copies may be obtained from the Centers for Disease Control and Prevention, 1600 Clifton Road, Mail Stop E–79, Atlanta, Georgia, 30333. Copies may be inspected at the Centers for Disease Control and Prevention, 1600 Clifton Road, Mail Stop E–79, Atlanta, Georgia. The ''NIH Guidelines for Research Involving Recombinant DNA Molecules,'' is also available on the CDC Web site at *http://www.cdc.gov.*

(b) The Responsible Official or his or her designee must conduct regular inspections (at least annually) of the laboratory where select agents and toxins are stored or used to ensure compliance with all of the procedures and protocols of the safety plan. The results of these inspections must be documented, and any deficiencies identified during inspections must be corrected.

(c) An entity may not conduct the following experiments unless approved by the HHS Secretary after consultation with experts:

(1) Experiments utilizing recombinant DNA that involve the deliberate transfer of a drug resistance trait to select agents that are not known to acquire the trait naturally, if such acquisition could compromise the use of the drug to control disease agents in humans, veterinary medicine, or agriculture.

(2) Experiments involving the deliberate formation of recombinant DNA containing genes for the biosynthesis of select toxins lethal for vertebrates at an LD50 < 100 ng/kg body weight.

(d) [Reserved]

### § 73.11 Security.

(a) An entity must develop and implement a security plan establishing policy and procedures that ensure the security of areas containing select agents and toxins. The security plan must be based on a systematic approach in which threats are defined, vulnerabilities are examined, and risks associated with those vulnerabilities are mitigated with a security systems approach.

(b) The plan must:

(1) Describe inventory control procedures, minimal education and experience criteria for those individuals with access to select agents or toxins, physical security, and cyber security;

(2) Contain provisions for routine cleaning, maintenance, and repairs; provisions for training personnel in security procedures; provisions for securing the area (*e.g.*, card access, key pads, locks) and protocols for changing access numbers or locks following staff changes;

(3) Describe procedures for loss or compromise of keys, passwords, combinations, etc.;

(4) Contain procedures for reporting suspicious persons or activities, loss or theft of listed agents or toxins, release of listed agents or toxins, or alteration of inventory records;

(5) Contain provisions for the control of access to containers where listed agents and toxins are stored; and procedures for reporting and removing unauthorized persons;

(6) Contain provisions for ensuring that all individuals with access, including workers and visitors, understand security requirements and are trained and equipped to follow established procedures;

(7) Establish procedures for reporting and removing unauthorized persons; and

(8) Establish procedures for securing the area when individuals approved under § 73.8 are not present (*e.g.*, card access system, key pads, locks), including protocols for changing access numbers or locks following staff changes.

(c) The security plan must be reviewed by the RO at least annually and after any incident.

(d) With respect to areas containing select agents and toxins, the entity must adhere to the following security requirements or implement measures to achieve an equivalent or greater level of security as the provisions below:

(1) Allow unescorted access only to individuals who have been approved under § 73.8 and who are performing a specifically authorized function during hours required to perform the defined job (including delivery to an outside shipping agent for transportation in commerce);

(2) Allow individuals not approved under § 73.8 to conduct routine cleaning, maintenance, repairs, and other non-laboratory functions only when escorted and continually monitored by individuals approved under § 73.8;

(3) Provide for the control of access to containers where select agents and toxins are stored by requiring freezers, refrigerators, cabinets, and other containers where stocks of select agents and toxins are stored to be locked (*e.g.*, card access system, lock boxes) when they are not in the direct view of approved staff, and by using other monitoring measures as needed, such as video surveillance;

(4) Require the inspection of all packages upon entry to and exit from the area;

(5) Establish a protocol for intra-entity transfers, including provisions for ensuring that the packaging, and movement from a laboratory to another laboratory or from a laboratory to a shipping place, is conducted under the supervision of an individual approved under § 73.8;

(6) Require that each approved individual under 73.8 does not share with any other person, his or her unique means (*e.g.*, keycards or passwords) of accessing the area or select agent or toxin;

(7) Require that each individual approved under § 73.8 report any of the following immediately to the Responsible Official:

(i) Any loss or compromise of their keys, passwords, combinations, etc.;

(ii) Any suspicious persons or activities;

(iii) Any loss or theft of select agents or toxins;

(iv) Any release of select agents or toxins; and

(v) Any sign that inventory and use records of select agents or toxins have been altered or otherwise compromised.

(e) The entity must separate areas where select agents and toxins are stored or used from the public areas of the buildings.

(f) Upon termination of the use, a select agent or toxin must be

(1) Securely stored in accordance with the requirements of this section;

(2) Transferred to another registered facility in accordance with § 73.14; or

(3) Destroyed on-site by autoclaving, incineration, or another recognized sterilization or neutralization process.

### § 73.12 Emergency response.

(a) An entity required to register under this part must develop and implement an emergency response plan that meets the requirements of OSHA Hazardous waste operations and emergency response standard at 29 CFR 1910.120. Nothing in this section is to supersede or preempt the enforcement of the emergency response requirements

imposed by the other statute or regulation.

(b) The emergency response plan must be coordinated with any entity-wide plans. The plan must address such events as bomb threats, severe weather (hurricanes, floods), earthquakes, power outages, and other natural disasters or emergencies.

(c) The emergency response plan must address the following:

(1) The hazards associated with the use of the select agents and toxins;

(2) Any hazards associated with response actions that could lead to a spread of a select agent or toxin;

(3) Planning and coordination with outside parties;

(4) Personnel roles, lines of authority, training, and communication;

(5) Emergency recognition and prevention;

(6) Safe distances and places of refuge;

(7) Site security and control;

(8) Evacuation routes and procedures;

(9) Decontamination;

(10) Emergency medical treatment and first aid;

(11) Emergency alerting and response procedures;

(12) Critique of response and follow-up;

(13) Personal protective and emergency equipment; and

(14) Special procedures needed to address the hazards of specific agents.

**§ 73.13 Training.**

(a) An entity required to register under this part and falls outside of the OSHA Bloodborne Pathogen Standard 29 CFR 1910.1030(a) must provide information and training on safety and security for working with select agents and toxins to each individual approved for access under § 73.8 and each unapproved individual working in, or visiting, areas where select agents and toxins are handled or stored. The information and training must meet the requirements of this section and must ensure that all individuals who work in, or visit, the areas understand the hazards of select agents and toxins present in the area.

(b) The entity must provide information and training at the time of an individual's initial assignment to a work area where select agents or toxins are present and prior to assignments involving new exposure situations. The entity must provide refresher training annually.

(c) The Responsible Official must provide appropriate training in safety, containment, and security to all individuals with access to areas where select agents and toxins are handled or stored.

(d) In lieu of initial training for those individuals already involved in handling select agents or toxins, the Responsible Official may certify in writing that the individual has the required knowledge, skills, and abilities to safely carry out the duties and responsibilities.

(e) The entity must ensure that each individual with access to areas where select agents or toxins are handled or stored received and understood the training required by this section unless certified under paragraph (d) of this section. The entity must record the identity of the individual trained, the date of training, and the means used to verify that the employee understood the training.

**§ 73.14 Transfers.**

A select agent or toxin may not be transferred from one entity to another entity within the United States (regardless of whether the transfer is interstate or intrastate), or received by an entity in the United States from an entity outside the United States, unless:

(a) The sender:

(1) Has a certificate of registration that covers the transfer of the particular select agent or toxin to be transferred,

(2) Meets the exemption requirements under § 73.6 (a) for the particular select agent or toxin to be transferred, or

(3) Is transferring the select agent or toxin from outside the United States (and all import requirements are met);

(b) The recipient has a certificate of registration that includes the particular select agent or toxin to be transferred;

(c) Prior to the transfer, the recipient and sender completes CDC Form EA–101, and the recipient submits to the HHS Secretary in accordance with § 73.21 a completed CDC Form EA–101.

(d) CDC has authorized the transfer based on the finding that the recipient has a certificate of registration covering the transfer of the select agent or toxin;

(e) The sender complies with all applicable laws concerning packaging and shipping;

(f) The Responsible Official of the recipient provides a completed paper copy or facsimile transmission of CDC Form EA–101 to the sender and to the HHS Secretary within 2 business days of receipt of the select agent or toxin; and

(g) The recipient immediately reports to the HHS Secretary if the select agent or toxin has not been received within 48 hours after the expected delivery time, or if the package received containing select agents or toxins has been leaking or was otherwise damaged.

(h) When the select agents or toxins are consumed or destroyed after a transfer, the recipient must within five business days report such fact to the HHS Secretary in accordance with § 73.21 on a CDC Form EA–101.

**Note to § 73.14:** This section does not cover transfers within an entity when the sender and the recipient are covered by the same certificate of registration.

**§ 73.15 Records.**

The Responsible Official must maintain complete records relating to the activities covered by this Part. Such records include:

(a) An entity required to register under this part must maintain an up-to-date, accurate list of the individuals approved under § 73.8 for access to select agents and toxins.

(b) The entity must maintain an accurate, current inventory of each select agent and toxin held. The inventory records must include the following information for each select agent and toxin:

(1) The name, characteristics, and source data;

(2) The quantity held on the date of the first inventory (toxins only);

(3) The quantity acquired, the source, and date of acquisition;

(4) The quantity, volume, or mass destroyed or otherwise disposed of and the date of each such action;

(5) The quantity used and date(s) of the use (toxins only);

(6) The quantity transferred, the date of transfer, and individual to whom it was transferred (this includes transfers within an entity when the sender and the recipient are covered by the same certificate of registration);

(7) The current quantity held (toxins only);

(8) Any select agent or toxin lost, stolen, or otherwise unaccounted for; and

(9) A written explanation of any discrepancies.

(c) The entity must maintain the following records:

(1) For access to the select agents or toxins:

(i) The name of each individual who has accessed any select agent or toxin;

(ii) The select agent or toxin used;

(iii) The date when the select agent or toxin was removed, if removed from long-term storage or holdings for stock cultures;

(iv) The quantity removed (toxins only);

(v) The date the select agent or toxin was returned to the long-term storage or holdings for stock cultures; and

(vi) The quantity returned (toxins only);

(2) For access to the area where select agents are used or stored:

(i) The name of each individual who has accessed the area;

(ii) The date and time the individual entered the area;

(iii) The date and time the individual left the area; and

(iv) For individuals not approved under § 73.8, the individual approved under § 73.8 who accompanied the unapproved individual into the area.

(d) The entity must implement a system to ensure that all records and databases created under paragraphs (b) and (c) of this section are accurate, and that the authenticity of records may be verified.

(e) The entity must create a record concerning inspections conducted under § 73.10(b).

(f) Safety, security, and emergency response plans.

(g) Training records.

(h) Transfer documents (CDC Form EA–101) and permits.

(i) Safety and security incident reports.

(j) The entity must maintain all records created under this part for three years.

**§ 73.16 Inspections.**

The HHS Secretary, without prior notification and with or without cause, shall be allowed to inspect any site at which activities regulated by this part are conducted and shall be allowed to inspect and copy any records relating to the activities covered by this part.

**§ 73.17 Notification for theft, loss, or release.**

(a) Upon discovery of a theft or loss of a select agent or toxin, an entity required to register under this part must immediately notify the HHS Secretary and State and local law enforcement. The notification must be reported to the HHS Secretary by either telephone, facsimile, or e-mail in accordance with § 73.21.

(b) Thefts or losses must be reported whether the select agent or toxin is subsequently recovered or the responsible parties are identified.

(c) When reporting a theft or loss, the entity must provide the following information:

(1) The name of the select agent or toxin and any identifying information (*e.g.*, strain or other characterization information);

(2) An estimate of the quantity lost or stolen;

(3) An estimate of the time during which the theft or loss occurred; and

(4) The location (building, room) from which the theft or loss occurred.

(d) The entity shall immediately notify the HHS Secretary and State and local public health agencies of any release of a select agent or toxin causing occupational exposure or release outside of the primary containment barriers. The report must be made to the HHS Secretary by telephone, facsimile, or e-mail in accordance with § 73.21.

(e) When reporting a release, the entity must provide the following information:

(1) The name of the select agent or toxin and any identifying information (*e.g.*, strain or other characterization information);

(2) An estimate of the quantity released;

(3) The time and duration of the release;

(4) The environment into which the release occurred (*e.g.*, in building or outside of building, waste system);

(5) The location (building, room) from which the release occurred;

(6) The number of individuals potentially exposed at the facility.

(7) Actions taken to respond to the release; and

(8) Hazards posed by the release.

(f) Within seven calendar days of theft, loss, or release, the entity must submit a follow-up report in writing to the HHS Secretary on CDC Form 0.1316 in accordance with § 73.21.

**§ 73.18 Administrative review.**

An entity may obtain review of a decision denying or revoking a certificate of registration under § 73.7 and the affected entity or individual may obtain review of a decision denying or revoking approval under § 73.8 by requesting such review in writing within 30 calendar days after the adverse decision. The request for review must state the factual basis for the review, which will be carried out in accordance with 42 U.S.C. 262a(e)(7). Where the adverse decision is in whole or in part based upon notification by the Attorney General under 42 U.S.C. 262a (e)(3), the request for review will be forwarded to the Attorney General for the Attorney General's review and final notification to the HHS Secretary.

**§ 73.19 Civil money penalties.**

(a) The Inspector General of the Department of Health and Human Services is delegated authority to conduct investigation and to impose civil money penalties against any individual or entity in accordance with regulations in 42 CFR part 1003 for violation of the regulations in this part, as authorized by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107–188). The delegation of authority includes all powers contained in section 6 of the Inspector General Act of 1978 (5 U.S.C. App.).

(b) The administrative law judges in, assigned to, or detailed to the Departmental Appeals Board (DAB) have been delegated authority to conduct hearings and to render decisions with respect to the imposition of civil money penalties, as authorized by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107–188). This delegation includes, but is not limited to, the authority to administer oaths and affirmations, to subpoena witnesses and documents, to examine witnesses, to exclude or receive and give appropriate weight to materials and testimony offered as evidence, to make findings of fact and conclusions of law, and to determine the civil money penalties to be imposed.

(c) The DAB of the Department of Health and Human Services is delegated authority to make final determinations with respect to the imposition of civil money penalties for violations of the regulations of this part.

**§ 73.20 Criminal Penalties.**

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107–188) provides specific criminal penalties for violation of provisions of this part. This is in addition to any other criminal penalties that would apply for violation of provisions of this part.

**§ 73.21 Submissions and forms.**

(a) CDC forms referred to in this part, including registration application packages, may be obtained on the Select Agent Program Web site at *http://www.cdc.gov,* or by requesting them in writing from the Select Agent Program, Centers for Disease Control and Prevention, 1600 Clifton Road, NE., Mail Stop E 79, Atlanta, Georgia 30333. Forms (including any required attachments) must be submitted in accordance with the instructions on the form.

(b) Applications, requests, notifications, and other information required to be submitted to the HHS Secretary in writing, but not required to be on a form, unless otherwise specified, must be submitted to the Select Agent Program, Center for Disease Control and Prevention, 1600 Clifton Road, NE., Mail Stop E 79, Atlanta, Georgia 30333, or by e-mail at *lrsat@cdc.gov.*

(c) Information not required to be submitted to the HHS Secretary on a form may be submitted to the Select Agent Program, Center for Disease Control and Prevention, 1600 Clifton

Road, NE., Mail Stop E 79, Atlanta, Georgia 30333, or by e-mail at *lrsat@cdc.gov.*

(d) If an application or request submitted to the HHS Secretary is incomplete or additional information is needed to allow the decision maker to make a determination, the HHS Secretary will notify the applicant or requester in writing of the deficiency and request additional information. If the applicant or requester fails to respond within 30 calendar days (or within such time period agreed upon by the applicant or requester and the HHS Secretary) the application or request will be deemed abandoned.

(e) You may request forms or other information from the USDA at the following address: APHIS, Veterinary Services, National Center for Import and Export, 4700 River Road Unit 40, Riverdale, MD 20737–1231.

## PART 1003—CIVIL MONEY PENALTIES, ASSESSMENTS AND EXCLUSIONS

1. The authority citation for part 1003 is revised to read as follows:

**Authority:** 42 U.S.C. 262a, 1302, 1320–7, 1320a–7a, 1320b–10, 1395u(j), 1395u(k), 1395cc(j), 1395dd(d)(1), 1395mm, 1395nn(g), 1395ss(d), 1396b(m), 11131(c), and 11137(b)(2).

2. Section 1003.100 is amended by revising paragraph (a), republishing the introductory text for paragraphs (b) and (b)(1), revising paragraphs (b)(1)(xiv) and (b)(1)(xv), and by adding a new paragraph (b)(1)(xvi) to read as follows:

### § 1003.100 Basis and purpose.

(a) *Basis.* This part implements sections 1128(c), 1128A, 1140, 1876(i)(6), 1877(g), 1882(d) and 1903(m)(5) of the Social Security Act; sections 421(c) and 427(b)(2) of Pub. L. 99–660; and section 201(i) of Pub. L. 107–188 (42 U.S.C. 1320–7(c), 1320a–7a, 1320b–10, 1395mm, 1395ss(d), 1396b(m), 11131(c), 11137(b)(2) and 262).

(b) *Purpose.* This part—

(1) Provides for the imposition of civil money penalties and, as applicable, assessments against persons who—

* * * * *

(xiv) Have submitted, or caused to be submitted, certain prohibited claims, including claims for services rendered by excluded individuals employed by or otherwise under contract with such person, under one or more Federal health care programs;

(xv) Violate the Federal health care programs' anti-kickback statute as set forth in section 1128B of the Act; or

(xvi) Violate the provisions of part 73 of this chapter, implementing section 351A(b) and (c) of the Public Health Service Act, with respect to the possession and use within the United States, receipt from outside the United States, and transfer within the United States, of select agents and toxins in use, or transfer of listed biological agents and toxins.

* * * * *

3. Section 1003.101 is amended by republishing the introductory text and by adding, in alphabetical order, a definition for the term ''Select agents and toxins'' to read as follows:

### § 1003.101 Definitions.

For purposes of this part:

* * * * *

*Select agents and toxins* means agents and toxins that are listed by the HHS Secretary as having the potential to pose a severe threat to public health and safety, in accordance with section 351A(a)(1) of the Public Health Service Act.

* * * * *

4. Section 1003.102 is amended by republishing the introductory text for paragraph (b), and by adding a new paragraph (b)(16) to read as follows:

### § 1003.102 Basis for civil money penalties and assessments.

* * * * *

(b) The OIG may impose a penalty and, where authorized, an assessment against any person (including an insurance company in the case of paragraphs (b)(5) and (b)(6) of this section) whom it determines in accordance with this part—

* * * * *

(16) Is involved in the possession or use in the United States, receipt from outside the United States, or transfer within the United States, of select agents and toxins in violation of part 73 of this chapter as determined by the HHS Secretary, in accordance with sections 351A(b) and (c) of the Public Health Service Act.

* * * * *

5. Section 1003.103 is amended by adding a new paragraph (l) to read as follows:

### § 1003.103 Amount of penalty.

* * * * *

(l) For violations of section 351A(b) or (c) of the Public Health Service Act and 42 CFR part 73, the OIG may impose a penalty of not more than $250,000 in the case of an individual, and not more than $500,000 in the case of any other person.

[FR Doc. 02–31370 Filed 12–9–02; 4:03 pm]

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Federal Register

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# Part V

# Department of Agriculture

## Animal and Plant Health Inspection Service

**7 CFR Part 331**

**9 CFR Part 121**

**Agricultural Bioterrorism Protecton Act of 2002; Possession, Use and Transfer of Biological Agents and Toxins; Interim Final Rule**

**DEPARTMENT OF AGRICULTURE**

**Animal and Plant Health Inspection Service**

**7 CFR Part 331**

**9 CFR Part 121**

**[Docket No. 02–088–1]**

**RIN 0579–AB47**

## Agricultural Bioterrorism Protection Act of 2002; Possession, Use, and Transfer of Biological Agents and Toxins

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule and request for comments.

**SUMMARY:** In accordance with the Agricultural Bioterrorism Protection Act of 2002, we are establishing, by regulation, standards and procedures governing the possession, use, and transfer of biological agents and toxins that have been determined to have the potential to pose a severe threat to both human and animal health, to animal health, to plant health, or to animal and plant products. This action is necessary to protect animal and plant health, and animal and plant products.

**DATES:** This interim rule is effective on February 11, 2003. We will consider all comments that we receive on or before February 11, 2003.

**ADDRESSES:** You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 02–088–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 02–088–1. If you use e-mail, address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 02–088–1'' on the subject line.

You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS dockets, are available on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

**FOR FURTHER INFORMATION CONTACT:** For information concerning the regulations in 7 CFR part 331, contact Dr. Robert Flanders, Chief, Pest Permit Evaluations Branch, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236, (301) 734–5930.

For information concerning the regulations in 9 CFR part 121, contact Dr. Denise Spencer, Senior Staff Veterinarian, Technical Trade Services, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 40, Riverdale, MD 20737–1231, (301) 734–3277.

**SUPPLEMENTARY INFORMATION:**

### Background

On June 12, 2002, the President signed into law the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Pub. L. 107–188). Title II of Pub. L. 107–188, ''Enhancing Controls on Dangerous Biological Agents and Toxins'' (sections 201 through 231), provides for the regulation of certain biological agents and toxins by the Department of Health and Human Services (subtitle A, sections 201–204) and the Department of Agriculture (subtitle B, sections 211–213), and provides for interagency coordination between the two departments regarding overlap agents and toxins (subtitle C, section 221). Subtitle D (section 231) provides for criminal penalties regarding certain biological agents and toxins. For the Department of Health and Human Services, the Centers for Disease Control and Prevention (CDC) has been designated as the agency with primary responsibility for implementing the provisions of the Act; the Animal and Plant Health Inspection Service (APHIS) is the agency fulfilling that role for the Department of Agriculture (USDA).

In subtitle B (which is cited as the ''Agricultural Bioterrorism Protection Act of 2002,'' referred to below as the Act ), section 212(a) provides, in part, that the Secretary of Agriculture (the Secretary) must establish by regulation a list of each biological agent and each toxin that she determines has the potential to pose a severe threat to animal or plant health, or to animal or plant products. The Act further requires (under section 213(b)) that all persons in possession of any listed biological agent or toxin must, within 60 days of the publication of that interim rule, notify the Secretary of such possession.

In accordance with these statutory requirements, on August 12, 2002, we published in the **Federal Register** (67 FR 52383–52389, Docket No. 02–082–1) an interim rule that established the initial lists of biological agents and toxins and set out the manner in which persons in possession of listed agents and toxins were to provide notice of such possession. To accomplish this, we established two new parts in the Code of Federal Regulations (CFR), one part in the plant-related provisions of title 7, chapter III, and one part in the animal-related provisions of title 9, chapter I. Each part was constructed similarly, with a section that provided definitions for specific terms used in the part, a section that set out the list of biological agents and toxins, and a section that provided guidance on the manner in which notice of possession was to be provided. On September 26, 2002, we published a technical amendment to the interim rule (67 FR 60519–60520, Docket No. 02–082–2) in which we updated the definitions of *biological agent* and *toxin* in each part.

Under section 212 of the Act, the Secretary must also provide by regulation for the establishment and enforcement of standards and procedures governing the possession, use, and transfer of listed biological agents and toxins in order to protect animal and plant health, and animal and plant products. Specifically, sections 212(b) and (c) require that the Secretary:

- Establish and enforce safety procedures for listed agents and toxins, including measures to ensure proper training and appropriate skills to handle agents and toxins, and proper laboratory facilities to contain and dispose of agents and toxins;
- Establish and enforce safeguard and security measures to prevent access to listed agents and toxins for use in domestic or international terrorism or for any other criminal purpose;
- Establish procedures to protect animal and plant health, and animal and plant products, in the event of a transfer or potential transfer of a listed agent or toxin in violation of the safety procedures and safeguard and security measures established by the Secretary; and
- Ensure appropriate availability of biological agents and toxins for research, education, and other legitimate purposes.

This interim rule establishes the regulations required under the Act. To accomplish this, we are amending 7

CFR part 331 and 9 CFR part 121. First, we are changing the title of both parts from ''Possession of Biological Agents and Toxins'' to ''Possession, Use, and Transfer of Biological Agents and Toxins'' to indicate the expanded scope of the regulations. Second, we are adding and removing definitions in §§ 331.1 and 121.1, as detailed below. Third, we are moving the lists of biological agents and toxins out of §§ 331.2 and 121.2 and adding in their place a new section that sets out the purpose and scope of each part. Fourth, we are removing the notification requirements in §§ 331.3 and 121.3, which are no longer applicable, and placing the lists of biological agents and toxins in those sections. We are amending both lists, as discussed below, and moving the exemption provisions found in the original § 121.2 to a new section, § 121.4. Finally, we are adding new sections that set out the effective dates, exemptions, registration requirements, responsibilities of the responsible official, safety and security requirements, transfer requirements, and appeals process. These new sections are discussed in detail below.

**Effective and Applicability Dates**

Both 7 CFR part 331 and 9 CFR part 121 begin with sections that discuss the effective dates of the regulations, §§ 331.0 and 121.0, respectively. Pursuant to section 213(c) of the Act, the Secretary must, not later than 180 days after the Act's enactment, promulgate an interim final rule establishing the standards and procedures governing the possession, use, and transfer of listed biological agents and toxins that shall take effect 60 days after the date on which the rule is promulgated. However, the Act also requires that the interim final rule include timeframes for the applicability of the rule that minimize disruption of research or educational projects that involve biological agents or toxins listed pursuant to section 212(a)(1) and that were underway as of the effective date of such rule.

Accordingly, in 7 CFR 331.0 and 9 CFR 121.0 we provide that the regulations in both parts are effective on February 11, 2003. On and after that date, any individual or entity possessing, using, or transferring any listed agent or toxin must be in compliance with the provisions of each part.

However, to minimize the disruption of research or educational projects (*e.g.*, teaching demonstrations) involving listed agents or toxins that were underway as of the effective date of these regulations, we provide that any individual or entity possessing such agents or toxins as of the effective date (current possessors) will be afforded additional time to reach full compliance with the regulations in each part. Any provision not specifically cited in paragraphs (a) through (f) of 7 CFR 331.0 and 9 CFR 121.0 will applicable as of February 11, 2003.

In recognition of the potential delays in registering individuals and entities under these regulations during the first year of implementation and the subsequent delay of research, we will also afford additional time to reach full compliance with the regulations to individuals and entities who do not currently possess listed agents or toxins. Therefore, we provide that any individual or entity who does not possess listed agents or toxins by the effective date of these regulations, but who wishes to initiate a research or educational project prior to November 12, 2003, must be in compliance with the provisions of these regulations that are applicable for current possessors at the time of application, as provided in paragraphs (a) through (e) of 7 CFR 331.0 and 9 CFR 121.0.

In paragraph (a) of both parts, we set forth the transfer provisions that will be applicable during the phase-in period. Specifically, we provide that, during the period from February 11, 2003, to November 12, 2003, listed agents or toxins may only be transferred to an individual or entity that is not registered under 7 CFR part 331 or 9 CFR part 121 if the individual or entity has been issued a permit by the APHIS Administrator (the Administrator) under 7 CFR part 330 or 9 CFR 122 to import or move interstate that specific agent or toxin. Since some individuals or entities may not have been issued a permit prior to the effective date of these regulations, we further provide that an individual or entity may apply for a permit. In addition to the permit required under 7 CFR part 330 or 9 CFR 122, an individual or entity will also be required to submit APHIS Form 2041, in accordance with §§ 331.13(c) and 121.14(c), respectively.

Because USDA permits do not cover intrastate movement, an individual or entity may not receive a listed agent or toxin that is being moved intrastate until that individual or entity is registered in accordance with 7 CFR part 331 or 9 CFR part 121.

With regard to overlap agents and toxins, we provide that from February 11, 2003, to November 12, 2003, listed overlap agents or toxins may only be transferred to an individual or entity not registered under 9 CFR part 121 using the permit provisions described above or, if the individual or entity is registered under CDC's select agent program for that specific overlap agent or toxin, in accordance with CDC's regulations in 42 CFR part 72. The regulations in 42 CFR part 72 cover all inter-entity transfers of ''select agents,'' which include overlap agents and toxins, whether interstate or intrastate. We note, however, that CDC's regulations in 42 CFR part 72 will be superseded by CDC's new select agent regulations in 42 CFR part 73 on March 12, 2003, and, thereafter, listed overlap agents or toxins may be transferred to an individual or entity not registered under 9 CFR part 121 or 42 CFR part 73 using the permit provisions described above.

In paragraph (b) of both parts, we require that the responsible official submit the registration application package by March 12, 2003, as required in 7 CFR 331.8 and 9 CFR 121.9. In addition, we require that the responsible official submit to the United States Attorney General (the Attorney General) the names and identifying information for the responsible official; alternate responsible official, where applicable; entity; and, where applicable, the individual who owns or controls the entity.

Paragraph (c) of both parts requires the responsible official to submit to the Attorney General by April 11, 2003, the names and identifying information for all individuals whom the responsible official has identified as having a legitimate need and the appropriate training and skills to handle or use listed agents or toxins. We note that these individuals must have received appropriate training in biosafety and/or containment, in accordance with 7 CFR 331.12 or 9 CFR 121.13.

We recognize that developing and implementing the security section of the Biocontainment and Security Plan (7 CFR 331.11) or the Biosafety and Security Plan (9 CFR 121.12) may require additional time to consult with security experts and to obtain the necessary funding. Therefore, in paragraph (d) of both parts, we provide that the responsible official will have until June 12, 2003, to submit the security section of the plan to APHIS or, for overlap agents or toxins, to APHIS or CDC. Then the responsible official has until September 12, 2003, to implement that security plan and provide security training in accordance with 7 CFR 331.12 or 9 CFR 121.13.

Finally, by November 12, 2003, the registration application process must be complete and the entity must be in full compliance with the regulations.

**Definitions**

In 7 CFR 331.1 and 9 CFR 121.1, we define the terms used in the regulations. In our August 2002 interim rule establishing the regulations, we defined the terms *biological agent, facility, person, responsible facility official,* and *toxin* in both parts, while the term *overlap agent or toxin* was defined only in 9 CFR 121.1 (this term is not applicable to the plant-related regulations in 7 CFR part 331).

In this interim rule, we are removing the definition of *person* in both parts because the term is no longer used in 7 CFR part 331 and 9 CFR part 121. In addition, we are removing the definition of *responsible facility official* from both parts and adding *responsible official* in its place. We are removing the definition of *responsible facility official* because the term is no longer used in 7 CFR part 331 and 9 CFR part 121. The term *responsible facility official* (RFO) was initially adopted by CDC for its select agent program (42 CFR part 72) and it is too limited in scope for our purposes. Specifically, the term only refers to transfers (rather than possession, use, and transfers) and dictates who should be the RFO (a safety officer, a senior management official, or both). We believe that these individuals may not always be the appropriate individual to ensure compliance with these regulations.

Therefore, we use the term *responsible official* in 7 CFR part 331 and 9 CFR part 121. We define *responsible official* as ''the individual designated by an entity to act on its behalf. This individual must have the authority and control to ensure compliance with the regulations in this part.'' We believe that this definition is broad enough to allow entities to designate the appropriate individual to be the responsible official, and it places the responsibility of selecting the appropriate individual on the entity, rather than on APHIS.

To be consistent with CDC, we are also removing the definition of *facility* in both parts and adding *entity* in its place. We define *entity* as ''any government agency (Federal, State, or local), academic institution, corporation, company, partnership, society, association, firm, sole proprietorship, or other legal entity.''

Furthermore, in 9 CFR part 121, we are revising the definition of *overlap agent or toxin* to reflect changes made to the definitions of *biological agent* and *toxin* in the September 2002 technical amendment noted previously and changes made to the list in this rule. Thus, *overlap agent or toxin* is defined as ''any microorganism (including, but not limited to, bacteria, viruses, fungi, rickettsiae, or protozoa) or toxin that poses a risk to both human and animal health and that is listed in § 121.3(b).''

In this interim rule, we define the terms *Administrator, APHIS, Attorney General, CDC, diagnostic laboratory, import, interstate, permit, State, United States,* and *USDA* in both 7 CFR 331.1 and 9 CFR 121.1. *Administrator* is defined as ''the Administrator, Animal and Plant Health Inspection Service, or any person authorized to act for the Administrator.'' *APHIS* is defined as ''the Animal and Plant Health Inspection Service of the United States Department of Agriculture.'' *Attorney General* is defined as ''the Attorney General of the United States or any person authorized to act for the Attorney General.'' *CDC* is defined as ''the Centers for Disease Control and Prevention of the United States Department of Health and Human Services.'' *Diagnostic laboratory* is defined as ''a laboratory facility that receives specimens for the purpose of determining identities of pests, pathogens, contaminants, or causes of disease.'' *USDA* is defined as ''the United States Department of Agriculture.''

To clarify the transfer provisions in the regulations, we define *permit* as ''written authorization by the Administrator to import or move interstate biological agents or toxins, under conditions prescribed by the Administrator.'' *Import* means ''to move into, or the act of movement into, the territorial limits of the United States,'' while *interstate* means ''from one State into or through any other State, or within the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.'' In addition, we define *State* as ''any of the several States of the United States, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.'' Finally, the term *United States* means ''all of the States.''

In 7 CFR 331.1, we also define *PPQ* and *specimen*. *PPQ* is defined as ''the Plant Protection and Quarantine Programs of the Animal and Plant Health Inspection Service.'' *Specimen* is defined as ''a sample of material collected for use in testing, such as plant tissues (*e.g.*, stems, seeds, flowers, pollen, leaves, roots, fruits, tubers, tissue cultures, protoplasts), soil, water, swabs, cultures, and suspensions.''

In 9 CFR 121.1, we also define *clinical laboratory*, *proficiency testing*, and *specimen* to clarify the exemption provisions for clinical or diagnostic laboratories in that part. *Clinical laboratory* is defined as ''a laboratory facility that receives patients and collects specimens for processing or shipping to another laboratory,'' while *proficiency testing* is defined as ''a sponsored, time-limited analytical trial whereby one or more analytes, previously confirmed by the sponsor, are submitted to the testing laboratory for analysis and where final results are graded, scores are recorded and provided to participants, and scores for participants are evaluated for acceptance.'' Finally, *specimen* is defined as ''a sample of material collected for use in testing, such as tissues, gastrointestinal contents, feces, bodily fluids (blood, serum, etc.), soil, water, feed or feed ingredients, swabs, cultures, and suspensions.''

**Purpose and Scope**

To facilitate understanding of the regulations, both 7 CFR 331.2 and 9 CFR 121.2 discuss the purpose and scope of the regulations. Specifically, 7 CFR 331.2(a) states that part 331 sets forth the requirements for possession, use, and transfer of biological agents or toxins that have been determined to have the potential to pose a severe threat to plant health or plant products, while 9 CFR 121.2(a) states that part 121 sets forth the requirements for possession, use, and transfer of biological agents or toxins that have been determined to have the potential to pose a severe threat to both human and animal health, or to animal health or animal products. Both 7 CFR 331.2(a) and 9 CFR 121.2(a) note that the purpose of the regulations is to ensure the safe handling of such agents or toxins, and to protect against the use of such agents or toxins in domestic or international terrorism or for any other criminal purpose.

In 7 CFR 331.2(b) and 9 CFR 121.2(b), we further provide that any individual or entity that possesses, uses, or transfers any listed agent or toxin must register in accordance with §§ 331.6 and 121.7, respectively. In order for an entity to register, each entity must designate an individual who has the authority and control to ensure compliance with the regulations to be the responsible official. It is the responsible official who must complete and submit the registration application package to APHIS or, for overlap agents or toxins, to APHIS or CDC. As part of registration, the responsible official, the entity, and, where applicable, the

individual who owns or controls such entity will be subject to a security risk assessment by the Attorney General.

Finally, 7 CFR 331.2(c) and 9 CFR 121.2(c) state that the responsible official is responsible for ensuring compliance with the safety procedures in the regulations, including implementing the Biocontainment and Security Plan (7 CFR 331.11) or the Biosafety and Security Plan (9 CFR 121.12); providing the proper training to individuals that handle or use listed agents or toxins; and providing proper laboratory facilities to contain and dispose of such agents or toxins. In addition, the responsible official is responsible for ensuring compliance with the safeguard and security measures in the regulations, including restricting access to only those individuals who have a legitimate need to handle or use agents or toxins and who have been approved to handle or use such agents or toxins, and transferring listed agents or toxins only to registered individuals or entities.

**List of Biological Agents and Toxins**

In our August 2002 interim rule, we established the initial lists of biological agents and toxins required under section 212(a)(1) of the Act. In this interim rule, we are amending the lists of biological agents and toxins in both 7 CFR 331.3 and 9 CFR 121.3.

We have made several changes to 7 CFR 331.3. In 7 CFR 331.3(a), we have amended the entry for *Ralstonia solanacearum*, race 3. A comment submitted in response to our August 2002 interim rule reported that race 3 strains are common in the United States and should not be listed; however, race 3, biovar 2 strains are not common in the United States and would pose a severe threat to plant health or plant products if introduced. We agree and have amended the entry for *Ralstonia solanacearum* to specify race 3, biovar 2.

In addition, we have added several provisions that limit the applicability of the regulations in part 331. First, in 7 CFR 331.3(b) we provide that any biological agent or toxin listed in that section that is in its naturally occurring environment will not be subject to the requirements of part 331, provided that the biological agent or toxin has not been intentionally introduced, cultivated, collected, or otherwise extracted from its natural source. We have included this provision because we believe that it would be impractical to regulate a biological agent or toxin that is in its naturally occurring environment. Listed agents or toxins could be found in castor beans or corn going to market, for example, and it would be impractical to apply these regulations in such cases.

Second, in 7 CFR 331.3(c) we provide that biological agents or toxins that meet certain criteria do not have the potential to pose a severe threat to plant health or to plant products. Thus, an individual or entity that only possesses, uses, or transfers an agent or toxin that meets any of the following criteria will not be subject to the requirements of this part: (1) Nonviable agents that are, bear, or contain listed agents or toxins; or (2) genetic elements or subunits of listed agents or toxins, if the genetic elements or subunits are not capable of causing disease.

We have also made several changes to the list in 9 CFR 121.3 to be consistent with CDC and to reflect changes in scientific nomenclature. In June 2002, CDC convened an interagency working group to review its list of 36 select agents, some of which are the overlap agents that are listed in our regulations, and develop recommendations regarding possible changes to that list. Because that process was in its initial stages at the time we published the August 2002 interim rule that established the list of biological agents and toxins, the list of overlap agents and toxins reflected the select agent list promulgated by CDC in October 1996. The interagency working group has since submitted its recommendations to CDC.

Based on the interagency working group's recommendations, we have removed aflatoxin from the list of overlap agents and toxins in § 121.3(b), and we have moved Nipah virus from the animal agent and toxin list to the overlap agent and toxin list. In addition, we have added Botulinum neurotoxin producing species of *Clostridium* to the overlap agent and toxin list.

Due to changes in scientific nomenclature, in 9 CFR 121.3(b) we have replaced the entry for equine morbillivirus (Hendra virus) with Hendra virus; replaced *Burkholderia* (*Pseudomonas*) *mallei* with *Burkholderia mallei*; replaced *Burkholderia* (*Pseudomonas*) *pseudomallei* with *Burkholderia pseudomallei*; and replaced Botulinum toxin with Botulinum neurotoxins.

In 9 CFR 121.3(c), we have adopted CDC's provisions regarding genetic elements, recombinant nucleic acids, and recombinant organisms to be consistent with CDC's list of overlap agents and toxins.

To clarify that we are regulating the agent that causes disease rather than the disease itself and to be consistent with CDC's approach, in 9 CFR 121.3(d) we have replaced the entry for avian influenza (highly pathogenic) with avian influenza virus (highly pathogenic); replaced African swine fever with African swine fever virus; replaced classical swine fever with classical swine fever virus; replaced malignant catarrhal fever with malignant catarrhal fever virus (exotic); replaced Peste des petits ruminants with Peste des petits ruminants virus; replaced sheep pox with sheep pox virus; and replaced vesicular stomatitis (exotic) with vesicular stomatitis virus (exotic).

In addition, in 9 CFR 121.3(d) we have replaced the entry for Newcastle disease virus (exotic) with Newcastle disease virus (VVND) to make it clear that we are regulating only velogenic strains.

Moreover, in 9 CFR 121.3 we have added several provisions that limit the applicability of the regulations in part 121. First, in 9 CFR 121.3(e) we provide that any biological agent or toxin listed in that section that is in its naturally occurring environment will not be subject to the requirements of part 121, provided that the biological agent or toxin has not been intentionally introduced, cultivated, collected, or otherwise extracted from its natural source. We have included this provision because we believe that it would be impractical to regulate a biological agent or toxin that is in its naturally occurring environment. Listed agents or toxins could be found in cattle or infected humans, for example, and it would be impractical to apply these regulations in such cases.

Second, in 9 CFR 121.3(f) we provide that biological agents or toxins that meet certain criteria do not have the potential to pose a severe threat to both human and animal health, or to animal health or animal products. Therefore, an individual or entity possessing, using, or transferring an agent or toxin that meets any of the following criteria will not be subject to the requirements of part 121:

(1) Nonviable agents or fixed tissues that are, bear, or contain agents or toxins listed in § 121.3. However, we note that the importation and interstate movement of these nonviable agents and fixed tissues are still subject to the permit requirements under 9 CFR part 122; or

(2) Genetic elements or subunits of animal agents or toxins listed in § 121.3(d), if the genetic elements or subunits are not capable of causing disease. However, we note that the importation and interstate movement of these genetic elements or subunits of listed agents or toxins are still subject to

the permit requirements under 9 CFR part 122; or

(3) Overlap toxins under the control of a principal investigator (or equivalent), if the total aggregate amount does not, at any time, exceed the following amounts: 0.5 mg of Botulinum neurotoxins (types A–G), 100 mg of *Clostridium perfringens* epsilon toxin, 100 mg of Shigatoxin, 5 mg of Staphylococcal enterotoxins, and 1,000 mg of T–2 toxin.

Finally, in 9 CFR 121.3(g) we have established a procedure by which an individual or entity may request a determination by the Administrator that an attenuated strain of a biological agent does not pose a severe threat to both human and animal health, or to animal health or animal products. This provision is necessary because some attenuated strains of a biological agent may not pose a severe threat to both human and animal health, or to animal health or animal products. Therefore, by definition, such attenuated strains would be excluded from the list of biological agents or toxins in § 121.3.

Accordingly, 9 CFR 121.3(h) provides that an individual or entity may request review by the Administrator to determine whether or not a specific attenuated strain poses a severe threat to both human and animal health, or to animal health or animal products. For overlap agents, an individual or entity may request review by APHIS or CDC. If APHIS or CDC determines that a specific attenuated strain does not pose a severe threat to human and animal health, or to animal health or animal products, and the individual or entity in possession of that particular attenuated strain will not be subject to the requirements of part 121. We note, however, that this determination will be limited to the specific attenuated strain and to the specific activities involving that attenuated strain.

APHIS or CDC will notify the applicant and publish a notice in the **Federal Register** if it is determined that a specific attenuated strain does not pose a severe threat to human and animal health, to animal health, or to animal products, the individual or entity in possession of that particular attenuated strain will not be subject to the requirements of part 121. Under 9 CFR 121.3(h)(4), an individual or entity may request reconsideration of an adverse decision in writing to the Administrator.

Section 212(a)(2) of the Act requires that the lists of biological agents and toxins be reviewed and republished biennially, or more often as needed, and revised as necessary. In addition, the Act requires that, when determining whether to include an agent or toxin, the Secretary shall consult with appropriate Federal departments and agencies and with scientific experts representing appropriate professional groups. To accomplish this, we may hold public meetings to provide the opportunity for Federal departments and agencies and scientific experts to comment on the lists in 7 CFR 331.3 and 9 CFR 121.3.

**Exemptions**

Section 212(g)(1) of the Act explicitly sets forth the exemptions for overlap agents and toxins. The exemptions for overlap agents and toxins in 9 CFR 121.4 match the provisions in the Act. We set forth similar provisions for exemptions for plant agents and toxins in 7 CFR 331.4 and animal agents and toxins in 9 CFR 121.5.

In accordance with section 212(g)(1)(B) of the Act, 9 CFR 121.4(a) provides that clinical or diagnostic laboratories and other entities possessing, using, or transferring overlap agents or toxins that are contained in specimens presented for diagnosis or verification will be exempt from the requirements of part 121, provided that the identification of such agents or toxins is immediately reported to the APHIS or CDC, and to other appropriate authorities when required by Federal, State, or local law; and, within 7 days after identification, such agents or toxins are transferred or inactivated, and APHIS Form 2040 is submitted to APHIS or CDC. We further provide that a copy of the completed form must be maintained for 3 years.

Based on information provided by CDC and APHIS' National Veterinary Services Laboratories (NVSL), and taking into consideration the threat posed by listed agents and toxins, we believe that 7 days will provide ample time after identification to inactivate the agent or toxin, or to make transfer arrangements and to transfer the agent or toxin.

To be consistent with the exemptions for overlap agents and toxins, in 7 CFR 331.4(a) and 9 CFR 121.5(a) we have adopted this exemption for diagnostic laboratories (the term clinical laboratories is not applicable to the plant-related regulations in 7 CFR part 331 or the animal-related regulations in 9 CFR part 121). We note, however, that diagnostic laboratories and other entities will still be required to obtain a permit under 7 CFR part 330 and 9 CFR part 122 to import and move interstate any listed agent or toxin.

In 7 CFR 331.4(a), 9 CFR 121.4(a), and 9 CFR 121.5(a), we further provide that, during agricultural emergencies or outbreaks, or in endemic areas, the Administrator may require less frequent reporting. For example, during an outbreak, we may allow biweekly reporting of identifications of a specific agent. In such cases, we will inform the diagnostic laboratories or other entities of this temporary change to the notification requirements.

In 9 CFR part 121, we also provide an exemption for clinical or diagnostic laboratories and other entities conducting proficiency testing. Specifically, in 9 CFR 121.4(b) we provide that clinical or diagnostic laboratories and other entities possessing, using, or transferring overlap agents or toxins that are contained in specimens presented for proficiency testing will be exempt from the requirements of part 121, provided that the identification of such agents or toxins, and their derivatives, is reported to the APHIS or CDC and to other appropriate authorities when required by Federal, State, or local law; and within 90 days of receipt of the agents or toxins, the agents or toxins are transferred or inactivated, and APHIS Form 2040 is submitted to APHIS or CDC. We further provide that a copy of the completed form must be maintained for 3 years.

Paragraph (a) of 9 CFR 121.5 contains the same exemption provision for animal agents or toxins that are contained in specimens presented for proficiency testing. Based on information provided by NVSL, which conducts such proficiency testing, we believe that 90 days will provide ample time to run the necessary tests for any listed agent or toxin.

We wish to emphasize that a clinical or diagnostic laboratory, or other entity, will be exempt only if it satisfies the specific requirements of these exemptions. Clinical or diagnostic laboratories and other entities must register in accordance with the regulations if they wish to maintain a viable agent or active toxin as a positive control. This is consistent with the ''fundamental premise of the [Act]—that all those who maintain possession of a [listed biological agent or toxin] must register and be subject to appropriate security and safety requirements.'' (H.R. Conf. Rep. No. 107–481, at 122 (2002)).

Pursuant to section 212(g)(1)(C) of the Act, the regulations in 9 CFR part 121 provide exemptions for products that are, bear, or contain agents or toxins that have been cleared, approved, licensed, or registered under certain Federal laws. Generally, we believe that it is unnecessary to impose additional regulation on products that have been cleared, approved, licensed, or

registered pursuant to certain Federal laws because these laws already provide adequate safeguards. However, it is possible there will be some instances when existing regulation under Federal law is inadequate. In those instances, the regulations provide that the Administrator may impose additional regulation if he or she determines that it is necessary to protect animal or plant health, and animal or plant products.

Accordingly, for overlap agents or toxins and animal agents or toxins, 9 CFR part 121 (§§ 121.4(c) and 121.5(e), respectively) provides that, unless the Administrator by order determines that additional regulation of a specific product is necessary to protect animal health, or animal products, an individual or entity possessing, using, or transferring products that are, bear, or contain agents or toxins will be exempt from the requirements of this part if the products have been cleared, approved, licensed, or registered pursuant to:

(1) The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*);

(2) Section 351 of Public Health Service Act (42 U.S.C. 262);

(3) The Virus-Serum-Toxin Act (21 U.S.C. 151–159); or

(4) The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 131 *et seq.*).

In addition, in 9 CFR 121.4(d) we provide that an individual or entity possessing, using, or transferring investigational products that are, bear, or contain overlap agents or toxins may be exempt from the requirements of this part if such product is being used in an investigation authorized by any Federal law and the Administrator determines that additional regulation under this part is not necessary to protect animal health or animal products. An individual or entity possessing, using, or transferring such investigational products may apply for an exemption from the requirements of this part by submitting APHIS Form 2042 to APHIS or CDC. Given the time sensitivity of investigational or clinical trials, the Administrator shall make a determination regarding an exemption within 14 days after receipt of the application and notification that the investigation has been authorized under a Federal law.

We have added a similar provision for experimental products in 9 CFR 121.5(f). However, because it is not required by the Act, in § 121.5(f) we did not stipulate that the Administrator will make a determination regarding an exemption within 14 days after receipt of the application and notification that the investigation has been authorized under a Federal law. We did not include this provision in order to give the Administrator the discretion to take longer than 14 days to make a determination, when necessary. However, we expect that the Administrator will make determinations regarding such exemptions in a timely manner.

Furthermore, in 9 CFR 121.5(c) we provide that an individual or entity receiving diagnostic reagents and vaccines that are, bear, or contain listed agents or toxins, also known as high consequence livestock pathogens or toxins, that are produced at USDA diagnostic facilities will be exempt from the requirements of part 121. These diagnostic reagents and vaccines are products that would be cleared, approved, licensed, or registered pursuant to the Virus-Serum-Toxin Act (21 U.S.C. 151–159), but for the fact that they are produced by USDA.

In accordance with section 212(g)(1)(D) of the Act, 9 CFR 121.4(e) provides that the Administrator may exempt an individual or entity from the requirements of the regulations, in whole or in part, for 30 days if it is necessary to respond to a domestic or foreign agricultural emergency involving an overlap agent or toxin. The Administrator may extend the exemption once for an additional 30 days, as deemed necessary.

In 9 CFR 121.4(f), we set forth a similar provision for public health emergencies. Specifically, § 121.4(f) provides that, upon request of the Secretary of Health and Human Services, the Administrator may exempt an individual or entity from the requirements of the regulations, in whole or in part, for 30 days if the Secretary of Health and Human Services has granted an exemption for a public health emergency involving an overlap agent or toxin. The Administrator may extend the exemption once for an additional 30 days, as deemed necessary.

Finally, section 212(g)(2) of the Act provides that the Secretary may grant exemptions from the applicability of the regulations if the Secretary determines that such exemptions are consistent with protecting animal or plant health and animal or plant products. This general exemption authority affords the Secretary more discretion to exempt plant and animal agents and toxins than overlap agents and toxins, since the Act specifically sets forth the exemptions for overlap agents and toxins.

Accordingly, 7 CFR 331.4(b) and 9 CFR 121.5(f) indicate that the Administrator may grant exemptions from the requirements of these parts upon a showing of good cause and a determination that it is consistent with protecting animal or plant health and animal or plant products. For example, such exemptions may be granted for agricultural emergencies involving plant or animal agents or toxins. An individual or entity may request in writing an exemption from the requirements of the regulations.

**Registration Requirements and Procedures**

In accordance with section 212(d) of the Act, 7 CFR 331.5(a) and 9 CFR 121.6(a) require that, unless exempted under those parts, an individual or entity possessing, using, or transferring listed agents or toxins must register with APHIS. Section 121.6(a) of 9 CFR part 121 further requires that an individual or entity possessing, using, or transferring overlap agents or toxins must register with APHIS or CDC.

We note that Congress expected that most registrants would be public and private entities, rather than individuals. (H.R. Conf. Rep. No. 107–481, at 125 (2002)). Thus, 7 CFR 331.5(b) and 9 CFR 121.6(b) indicate that, to apply for a certificate of registration, each entity must designate an individual to be the responsible official. The responsible official must have the authority and control to ensure compliance with the regulations. The responsible official must complete and sign the registration application package, and will be the individual contacted by APHIS or CDC if any questions arise concerning the application or subsequent compliance. As part of registration, the responsible official and the entity will be subject to a security risk assessment by the Attorney General.

While most registrants are likely to be entities, both 7 CFR 331.5(b) and 9 CFR 121.6(b) provide that, in the event that an individual applies for and is granted a certificate of registration, we will consider the individual to be the responsible official.

We wish to emphasize that it is the entity's responsibility to designate the appropriate individual to be the responsible official (i.e., an individual who has the authority and control to *ensure compliance* with the regulations). To satisfy this requirement, a university may choose to designate the Dean of Agriculture to be the responsible official rather than the biosafety officer because the Dean of Agriculture may have better oversight and authority to ensure compliance with the regulations.

Furthermore, we note that a certificate of registration will apply to only one general physical location (*e.g.*, a building or complex of buildings at a

single mailing address). If an entity has more than one general physical location, then the entity must register each location and must designate an individual to be the responsible official for each location.

Although not contemplated by the Act, we recognize that there may be times when the responsible official is unavailable. Since some functions may only be performed by the responsible official (*i.e.*, transfers), this may disrupt research or other approved activities. Therefore, in 7 CFR 331.5(c) and 9 CFR 121.6(c), we provide that an entity may designate one or more individuals to be an alternate responsible official, who may act for the responsible official when that individual is unavailable. These individuals must have the authority and control to ensure compliance with the regulations when acting as the responsible official. These individuals will also be subject to a security risk assessment by the Attorney General as part of registration.

To apply for a certificate of registration, 7 CFR 331.8(a) and 9 CFR 121.9(a) provide that the responsible official must submit all of the information and documentation required in the registration application package to APHIS, including the name, source, and characterization data for each agent or toxin to be registered, as required by section 212(d)(2) of the Act. For overlap agents or toxins, the responsible official must submit all of the information and documentation required in the registration package to either APHIS or CDC. The responsible official must submit the registration application package to APHIS in cases where he/she is seeking registration for either plant and animal agents or toxins, and overlap agents or toxins.

In 7 CFR 331.6(b) and 9 CFR 121.7(b), we provide that APHIS may issue a certificate of registration upon:

(1) Approval of the responsible official; the alternate responsible official, where applicable; the entity; and, where applicable, the individual who owns or controls the entity following a security risk assessment by the Attorney General. As provided for by the Act, we may waive the security risk assessment of the entity and the individual who owns or controls such entity for Federal, State, or local governmental agencies;

(2) Approval of the containment and security of the entity (7 CFR 331.6) or approval of the biosafety, containment, and security of the entity (9 CFR 121.7). For plant-related agents or toxins, the entity's containment and security procedures must be commensurate with the risk of the agent or toxin, given its intended use. Similarly, for overlap and animal agents or toxins, the entity's biosafety, containment, and security procedures must be commensurate with the risk of the agent or toxin, given its intended use. APHIS will review the Biocontainment and Security Plan or the Biosafety and Security Plan, as applicable, and may inspect and evaluate the premises and records to determine compliance with the regulations and the biosafety and/or containment and security requirements. For overlap agents and toxins, APHIS or CDC will review the Biosafety and Security Plan, and may inspect and evaluate the premises and records to determine compliance with the regulations and the biosafety and/or containment and security requirements; and

(3) A determination by the Administrator that the individual or entity seeking to register has a lawful purpose to possess, use, or transfer such agents or toxins.

Furthermore, 9 CFR 121.7(c) provides that APHIS and CDC will review applications for registration and amendments to a certificate of registration for overlap agents or toxins, and a certificate of registration or amendment to a certificate of registration will only be issued if APHIS and CDC concur.

As indicated in 7 CFR 331.6(c) and 9 CFR 121.7(d), a certificate of registration will be valid for only specific agents or toxins, and specific activities and locations. A certificate of registration may cover more than one listed agent or toxin, and it may be amended to cover additional listed agents or toxins. A responsible official may request an amendment to a certificate of registration by submitting the relevant pages from the registration application package to the agency that issued the certificate of registration, either APHIS or CDC.

Furthermore, under 7 CFR 331.6(d) and 9 CFR 121.7(e), a certificate of registration may be amended to reflect changed circumstances (*e.g.*, replacement of the responsible official, changes in ownership or control of the entity, changes in the activities involving the agent or toxin). The responsible official must immediately notify the agency that issued the certificate of registration, either APHIS or CDC, of such changes in circumstances that occur after submission of the application for registration or after receipt of a certificate of registration. We note that replacement of the responsible official or change in ownership or control of an entity will require a security risk assessment for the new individual(s) who owns or controls the entity.

There may be instances where a responsible official wishes to discontinue possessing, using, or transferring one or more agents or toxins for which they are registered. In those instances, 7 CFR 331.5(e) and 9 CFR 121.6(f) state that the responsible official may inactivate the agent or toxin or he/she may transfer the agent or toxin to a registered individuals or entities. The responsible official must notify APHIS or, for overlap agents, APHIS or CDC, 5 business days prior to the planned inactivation so that we may have the opportunity to observe the inactivation of the agents or toxins. APHIS or CDC will notify the responsible official if we wish to observe the inactivation of the agents or toxins.

Finally, 7 CFR 331.6(f) and 9 CFR 121.7(g) indicate that a certificate of registration will be valid for a maximum of 3 years. To minimize the administrative burden associated with this new registration program, initially we will assign expiration dates ranging from 24 to 36 months to stagger the dates for renewing registration. Upon renewal, we expect that all certificates of registration will be valid for 3 years.

**Denial, Revocation, and Suspension of Registration**

Section 212(e)(6)(A) of the Act provides that an individual who seeks to register shall be subject to a database check by the Attorney General. Section 212(e)(6)(B) goes on to provide that other persons (*i.e.*, entities) shall be subject to a database check by the Attorney General, and, where applicable, the individual who owns or control such person (*i.e.*, entity) shall be subject to a database check by the Attorney General.

Pursuant to section 212(e)(3) of the Act, upon receipt of the names and identifying information of those seeking to register, the Attorney General will use criminal, immigration, national security, and other electronic databases for the purpose of identifying whether the individuals are within any of the categories described in 18 U.S.C. 175b (relating to restricted persons). According to 18 U.S.C. 175b, the term ''restricted person'' means an individual who:

(A) Is under indictment for a crime punishable for a term exceeding 1 year;

(B) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year;

(C) Is a fugitive from justice;

(D) Is an unlawful user of any controlled substance (as defined in

section 102 of the Controlled Substances Act (21 U.S.C. 802));

(E) Is an alien illegally or unlawfully in the United States;

(F) Has been adjudicated as a mental defective or has been committed to any mental institution;

(G) Is an alien (other than an alien lawfully admitted for permanent residence) who is a national of a country as to which the Secretary of State, pursuant to section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j), section 620A of chapter 1 of part M of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), or section 40(d) of chapter 3 of the Arms Export Control Act (22 U.S.C. 2780(d)), has made a determination (that remains in effect) that such country has repeatedly provided support for acts of international terrorism; or

(H) Has been discharged from the Armed Services of the United States under ''dishonorable conditions.''

Section 212(e)(3) of the Act further provides that the Attorney General will use criminal, immigration, national security, and other electronic databases for the sole purpose of identifying whether the individuals are reasonably suspected by any Federal law enforcement or intelligence agency of committing a crime set forth in 18 U.S.C. 2332b(g)(5); knowing involvement with an organization that engages in domestic or international terrorism (as defined in 18 U.S.C. 2331) or with any other organization that engages in intentional crimes of violence; or being an agent of a foreign power as defined in 50 U.S.C. 1801.

Accordingly, in 7 CFR 331.7(a) and 9 CFR 121.8(a) we provide that APHIS may deny an application for registration or revoke registration if the Attorney General identifies the individual as within any of the categories described in the previous paragraphs.

With regard to overlap agents or toxins, 9 CFR 121.8(b) provides that APHIS or CDC will deny an application for registration or revoke registration if the Attorney General identifies the individual as a ''restricted person'' as described in 18 U.S.C. 175b. APHIS or CDC may deny an application for registration or revoke registration if the Attorney General identifies the individual as within any of the remaining categories described above.

Furthermore, in keeping with the safety and security requirements of the Act, in 7 CFR 331.7(a) and 9 CFR 121.8(a), we provide that APHIS may deny an application for registration or revoke registration if the responsible official does not have a lawful purpose to possess, use, or transfer listed agents or toxins; the responsible official is an individual who handles or uses listed agents or toxins and he/she does not have the necessary training or skills to handle such agents or toxins; the entity does not meet the biosafety and/or containment and security requirements prescribed by the Administrator; there are egregious or repeated violations of the biosafety, containment, or security requirements; or the Administrator determines that such action is necessary to protect animal or plant health, and animal or plant products.

We may summarily revoke or suspend registration for any of the reasons set forth in 7 CFR 331.7(a) and in paragraphs (a) and (b) of 9 CFR 121.8. In accordance with 7 CFR 331.7(c) and 9 CFR 121.8(d), we will notify the responsible official in writing if an application for registration is denied or a certificate of registration is revoked or suspended. For overlap agents or toxins, APHIS or CDC will provide the necessary notification.

Finally, both parts provide that denial of an application for registration, revocation of registration, and suspension of registration may be appealed under §§ 331.16 and 121.17, respectively.

**Responsibilities of the Responsible Official**

To facilitate compliance with the regulations, 7 CFR 331.9 and 9 CFR 121.10 both set out the responsibilities of the responsible official. Specifically, the regulations indicate the responsible official is responsible for:

- Developing and implementing a Biocontainment and Security Plan or a Biosafety and Security Plan, as applicable;
- Allowing only approved individuals within the entity to have access to listed agents or toxins;
- Providing appropriate training in biosafety and/or containment and security procedures for all personnel;
- Transferring agents or toxins only to registered individuals or entities;
- Ensuring that all visitors are informed of and follow the entity's security requirements and procedures;
- Notifying APHIS or, for overlap agents, APHIS or CDC, of changes in circumstances;
- Providing timely notice of any theft, loss, or release of a biological agent or toxin; and
- Maintaining detailed records of information necessary to give a complete accounting of all of the entity's activities related to agents or toxins.

In addition, both parts provide that the responsible official for a diagnostic laboratory or other entity possessing, using, or transferring listed agents or toxins that are contained in specimens presented for diagnosis must immediately report the identification of such agents or toxins to the Administrator and to other appropriate authorities when required by Federal, State, or local law. Furthermore, both parts provide that the Administrator may require less frequent reporting during agricultural emergencies or outbreaks, or in endemic areas. We are adopting these reporting requirements because this information will help us to identify outbreaks and to monitor activities related to listed agents and toxins.

Finally, to be consistent with CDC, we have adopted the CDC's approach on experiments involving recombinant DNA. We believe this provision will address concerns about laboratory manipulation of microbes that alter their characteristics (*e.g.*, increased virulence, pathogenicity, or host range; alter mode of transmission or route of exposure) and increase the risks to human, animal, or plant health.

Accordingly, in 9 CFR 121.10(c) we provide that a responsible official must ensure that the following experiments are not conducted unless approved by the Administrator, after consultation with experts:

(1) Experiments utilizing recombinant DNA that involve the deliberate transfer of a pathogenic trait or drug resistance trait to biological agents that are not known to acquire the trait naturally, if such acquisition could compromise the use of the drug to control disease agents in humans, veterinary medicine, or agriculture; and

(2) Experiments involving the deliberate formation of recombinant DNA containing genes for the biosynthesis of toxins lethal for vertebrates at an $LD_{50}$<100 ng/kg body weight.

In addition, we request comments concerning what additional experiments, regardless if regulated under these regulations, might warrant similar scrutiny in the interest of safety. In particular, we request comments addressing issues concerning experiments with biological agents that could possibly increase their virulence or pathogenicity, change their natural mode of transmission, route of exposure, or host range in ways adverse to human, animal, or plant health; or result in the deliberate transfer a drug resistant trait or a toxin-producing capability to a microorganism by means that do not involve recombinant DNA techniques. We also request comments regarding the form oversight should

take; for example, the rule could require that, whenever laboratory manipulation of a microorganism increases its risk profile significantly, whether intentionally or inadvertently, the responsible official report such to the Administrator and discontinue work with the modified organism until the Administrator has made recommendations regarding appropriate safety practices.

**Restricting Access to Biological Agents and Toxins**

Section 212(e)(1) of the Act provides that the Secretary shall establish appropriate safeguard and security requirements for persons possessing, using, or transferring biological agents or toxins commensurate with the risk such agent poses to animal and plant health, and animal and plant products (including the risk of use in domestic or international terrorism). Section 212(e)(2)(A) goes on to state that the regulations must include provisions to ensure that the registered person provides access to listed agents and toxins to only those individuals whom the registered person has determined have a legitimate need to handle or use such agents or toxins. In addition, section 212(b)(1)(A) requires that the Secretary establish and enforce safety procedures for agents and toxins, including measures to ensure proper training and appropriate skills to handle such agents and toxins.

Accordingly, 7 CFR 331.10(a) and 9 CFR 121.11(a) provide that an individual may not have access to biological agents or toxins listed in §§ 331.3 and 121.3, respectively, unless approved by APHIS or, for overlap agents, APHIS or CDC. Both parts require the responsible official to ensure that only approved individuals within the entity have access to listed agents or toxins. In addition, the responsible official must request such access for only those individuals who have a legitimate need to handle or use listed agents or toxins, and who have the appropriate training and skills to handle such agents or toxins.

We recognize that a responsible official may want to minimize the number of individuals who require access approval. Accordingly, we reiterate that such approval is necessary only for those individuals who have a legitimate need to *handle or use* agents or toxins, and who have the appropriate training and skills to handle such agents or toxins. For those individuals who do not have a legitimate need to handle or use agents or toxins, or who do not have the appropriate training and skills to handle agents or toxins (*e.g.*, visitors, janitorial and maintenance staff, and contractors), a responsible official may restrict access to agents or toxins by requiring that such individuals be escorted at all times by an individual with access approval from APHIS or CDC. If a responsible official adopts such a practice, it should be contained in the Biocontainment and Security Plan or the Biosafety and Security Plan, as applicable.

To ensure that individuals who handle or use listed agents or toxins have the appropriate training and skills, 7 CFR 331.10(c) requires that the responsible official must provide appropriate training in containment and security procedures to all individuals with access to agents and toxins in accordance with 7 CFR 331.12. Similarly, 9 CFR 121.11(c) requires that the responsible official must provide appropriate training in biosafety and/or containment and security procedures to all individuals with access to agents and toxins in accordance with 9 CFR 121.13.

Furthermore, the responsible official must provide APHIS with information about the individual's training and skills, such as a curriculum vitae for principal investigators and researchers, and a description of training completed by support personnel (7 CFR 331.10(e) and 9 CFR 121.11(e)).

In order to obtain access approval for an individual, section 212(e)(2)(B) of the Act requires that the responsible official submit the names and identifying information for those individuals deemed to have a legitimate need to handle or use listed agents or toxins to the Secretary and the Attorney General, promptly after determining the individuals need access, and periodically thereafter, not less frequently than once every 5 years. We note that the screening of employees working with agents or toxins is the primary responsibility of the responsible official, not the individual employee. (H.R. Conf. Rep. No. 107–481, at 125 (2002)).

Both 7 CFR 331.10(d) and 9 CFR 121.11(d) indicate that, for each individual identified by the responsible official as having a legitimate need to handle or use listed agents or toxins, the responsible official must submit that individual's name and identifying information to APHIS and the Attorney General. Paragraph (d) of 9 CFR 121.11 further provides that, for overlap agents, the responsible official must submit this information to either APHIS or CDC and the Attorney General.

Pursuant to section 212(e)(3) of the Act, upon receipt of the names and identifying information, the Attorney General will use criminal, immigration, national security, and other electronic databases for the purpose of identifying whether the individuals are within any of the categories described in 18 U.S.C. 175b (relating to restricted persons). Section 212(e)(3) of the Act further provides that the Attorney General will use criminal, immigration, national security, and other electronic databases for the purpose of identifying whether the individuals are reasonably suspected by any Federal law enforcement or intelligence agency of committing a crime set forth in 18 U.S.C. 2332b(g)(5); knowing involvement with an organization that engages in domestic or international terrorism (as defined in 18 U.S.C. 2331) or with any other organization that engages in intentional crimes of violence; or being an agent of a foreign power as defined in 50 U.S.C. 1801.

In 7 CFR 331.10(h) and 9 CFR 121.11(h), we provide that we may deny or limit access of an individual to listed agents or toxins if the Attorney General identifies the individual as within any of the categories described in the previous paragraph. This is consistent with the requirements in section 212(e)(2)(C)(i) of the Act.

With regard to overlap agents or toxins, 9 CFR 121.11(i) provides that APHIS or CDC will deny an individual access to overlap agents or toxins if the Attorney General identifies the individual as a ''restricted person'' as described in 18 U.S.C. 175b. APHIS or CDC may deny or limit access of an individual if the Attorney General identifies the individual as within any of the remaining categories described above.

Furthermore, in keeping with the safety and security requirements of the Act, both 7 CFR 331.10(h) and 9 CFR 121.11(h) provide that we may deny or limit access if the individual does not have a legitimate need to handle listed agents or toxins; the individual does not have the necessary training or skills to handle listed agents or toxins; or the Administrator determines that such action is necessary to protect animal or plant health or animal or plant products.

The Administrator will determine what constitutes limited access on a case-by-case basis. The determination will take into consideration all the facts at hand and be commensurate with the risks posed by the agent or toxin. Generally, we expect that an individual granted limited access will only be allowed to handle or use an agent or toxin under the direct supervision of an approved individual.

Section 212(e)(3)(C) of the Act provides that the Attorney General will

notify the Secretary whether the individual is within any of the categories discussed previously. Then the Secretary will notify the responsible official if an individual is granted or denied access to listed agents or toxins (section 212(e)(4)).

Accordingly, both 7 CFR 331.10(g) and 9 CFR 121.11(g) provide that we will notify the responsible official if an individual is granted full or limited access, or denied access, to biological agents or toxins, and we will notify the individual if he/she is denied access or granted only limited access to such agents or toxins. Paragraph (g) of 9 CFR 121.11 further provides that, for overlap agents or toxins, APHIS or CDC will provide the necessary notification.

Pursuant to section 212(e)(5) of the Act, 7 CFR 331.10(f) and 9 CFR 121.11(f) indicate that we may expedite the access approval process for individuals upon request by the responsible official and a showing of good cause, such as public health or agricultural emergencies, national security, impending expiration of a research grant, or a short-term visit by a prominent researcher. We note, however, that the Act specifically provides that expedited review is not available for individuals or entities seeking to register (section 212(e)(6)).

Both 7 CFR 331.10(j) and 9 CFR 121.11(k) provide that access approval for individuals is valid for 5 years and, thereafter, the responsible official shall request access approval every 5 years for as long as the individual needs access to such agents or toxins. This is consistent with the requirements of the Act.

In 7 CFR 331.10(k) and 9 CFR 121.11(l), we further provide that the responsible official must immediately notify APHIS or, for overlap agents or toxins, APHIS or CDC, when an individual's access to listed agents or toxins is terminated by the entity and the reasons therefore. We believe this information will be relevant to any subsequent determinations to allow that individual access to listed agents or toxins.

Section 212(e)(7)(A)(i) of the Act requires that the regulations provide for an opportunity for review by the Secretary, when requested by the individual involved, of a determination to deny that individual access to listed agents or toxins. Thus, 7 CFR 331.10(i) and 9 CFR 121.11(j) provide that an individual may appeal the Administrator's decision to deny or limit access to biological agents or toxins, in accordance with §§ 331.16 and 121.17, respectively.

**Biocontainment and Security Plan/ Biosafety and Security Plan**

Sections 212(b) and (c) of the Act require that the Secretary establish and enforce safety procedures for listed agents and toxins, including measures to ensure proper training and appropriate skills to handle agents and toxins, and proper laboratory facilities to contain and dispose of agents and toxins. In addition, sections 212(b) and (c) of the Act require that the Secretary establish and enforce safeguard and security measures to prevent access to listed agents and toxins for use in domestic or international terrorism or for any other criminal purpose. Pursuant to section 212(e)(1), the safeguard and security requirements must be commensurate with the risk posed by the agent or toxin.

Because different agents and toxins pose differing degrees of risk, depending on factors such as their escape potential and availability of a suitable habitat (for plant-related agents) and transmission and effect of exposure to the agent or toxin (for overlap and animal agents or toxins), we believe that it would be counterproductive to attempt to prepare a detailed list of prescriptive requirements for entities (*i.e.*, a ''one size fits all'' design standard). Rather, we have prepared a brief set of performance standards that we will consider to the degree to which they are appropriate to the risks presented by a particular agent or toxin, given its intended use and the location of the entity.

Accordingly, 7 CFR 331.11 requires that, as a condition of registration, an individual or entity must develop and implement a Biocontainment and Security Plan. Similarly, 9 CFR 121.12 requires that, as a condition of registration, an individual or entity must develop and implement a Biosafety and Security Plan. The titles and provisions of the plans are different because the agents listed under 7 CFR 331.3 do not pose a severe threat to human health and, therefore, it is unnecessary to require that the plant-related plan address personnel safety and health.

In 7 CFR 331.11, we provide that the plan must contain sufficient information and documentation to describe the containment procedures and the security systems and procedures. The plan's containment and security provisions must be commensurate with the risk posed by the agent or toxin, given its intended use.

Similarly, in 9 CFR 121.12 we provide that the plan must contain sufficient information and documentation to describe the biosafety and containment procedures, and the security systems and procedures. The plan's biosafety, containment, and security provisions must be commensurate with the risk posed by the agent or toxin, given its intended use.

Pursuant to section 212(e)(9) of the Act, we will provide technical assistance and guidance upon request to help individuals and entities develop their plans.

In 7 CFR 331.11(a)(1), we provide that the plan's containment procedures must be sufficient to contain the agent or toxin (*e.g.*, physical structure and features of the entity, and operational and procedural safeguards) while in 9 CFR 121.12(a)(1) we provide that the plan's biosafety and containment procedures must be sufficient to contain the agent or toxin (*e.g.*, physical structure and features of the entity, and operational and procedural safeguards). As previously noted, these provisions are different because the agents listed under 7 CFR 331.3 do not pose a severe threat to human health and, therefore, it is unnecessary to require that the plant-related plan address personnel safety and health.

We expect that a number of the individuals or entities seeking to register under these regulations will have previously been issued permits under 7 CFR part 330 or 9 CFR part 122, or will have been registered under CDC's select agent regulations in 42 CFR part 72 and thus will have appropriate biosafety and/or containment procedures already in place. It is likely that these biosafety and/or containment procedures will meet the requirements of the regulations or could be easily modified to meet the requirements of the regulations. Therefore, we encourage individuals or entities seeking to register to make use of existing biosafety and/or containment procedures, and to modify such procedures as necessary.

In 7 CFR 331.11(a)(2) and 9 CFR 121.12(a)(2), we further provide that the security systems and procedures must be designed according to a site-specific risk assessment and must provide graded protection in accordance with the threat posed by the agent or toxin. This site-specific risk assessment should involve a threat assessment and risk analysis in which threats are defined, vulnerabilities examined, and risks associated with those vulnerabilities are identified.

The security systems and procedures must be tailored to address site-specific characteristics and requirements, ongoing programs, and operational needs and must mitigate the risks identified in the risk assessment. The

plan must describe inventory control procedures, personnel suitability for those individuals with access to listed agents or toxins, physical security, and cybersecurity. The plan must also contain provisions for routine cleaning, maintenance, and repairs; provisions for securing the area (*e.g.*, card access, key pads, locks) and protocols for changing access numbers or locks following staff changes; procedures for loss or compromise of keys, passwords, combinations, etc.; procedures for reporting suspicious persons or activities, loss or theft of listed agents or toxins, release of listed agents or toxins, or alteration of inventory records; provisions for the control of access to containers where listed agents and toxins are stored; and procedures for reporting and removing unauthorized persons.

Moreover, with respect to areas containing listed agents or toxins, an entity or individual must adhere to the following security requirements or implement measures to achieve an equivalent or greater level of security as the provisions below:

- Allow unescorted access only to approved individuals who are performing a specifically authorized function during hours required to perform that job;
- Allow individuals not approved under 7 CFR 331.10 or 9 CFR 121.11 to conduct routine cleaning, maintenance, repairs, and other non-laboratory functions only when escorted and continually monitored by approved individuals;
- Provide for the control of access to containers where listed agents and toxins are stored by requiring that such containers be locked when not in the direct view of an approved individual and by using other monitoring measures, as needed;
- Require the inspection of all packages upon entry and exit;
- Establish a protocol for intra-entity transfers, including provisions for ensuring that the packaging and movement, is conducted under the supervision of an approved individual;
- Require that approved individuals do not share with any other person their unique means of accessing the area or listed agents or toxins; and
- Require that approved individuals immediately report any of the following to the responsible official: Any loss or compromise of keys, passwords, combinations, etc.; any suspicious persons or activities; any loss or theft of listed agents or toxins; any release of a listed agent or toxin; and any sign that inventory and use records for listed agents and toxins have been altered or otherwise compromised.

We recommend that security experts be consulted to ensure that the individual or entity develops security systems and procedures that will meet the requirements of this section. However, we recognize that this may not be possible in every instance. Therefore, we reiterate that we will provide technical assistance and guidance upon request.

In 7 CFR 331.11(a)(3) and 9 CFR 121.12(a)(3), we also require that the plans include incident response plans for containment breach, security breach, inventory violations, non-biological incidents such as workplace violence, and cybersecurity breach. Under 7 CFR 331.11(a)(3), the incident response plans must address containment, inventory control, and notification of managers and responders; while under 9 CFR 121.12(a)(3) the incident response plans must address containment, personnel safety and health, inventory control, and notification of managers and responders. As discussed above, it is unnecessary for 7 CFR 331.11(a)(3) to address personnel safety and health because the plant-related agents do not pose a severe threat to human health.

Finally, to ensure that the Biocontainment and Security Plan continues to meet the entity's containment and security needs, in 7 CFR 331.11(b) we require that the plan be reviewed, performance tested, and updated annually. The plan must also be reviewed and revised, as necessary, after any incident. We include these same requirements in 9 CFR121.12(b) in order to ensure that the Biosafety and Security Plan continues to meet the entity's biosafety, containment, and security needs.

**Training**

To ensure that individuals who handle or use listed agents or toxins have the appropriate training and skills, 7 CFR 331.12(a) provides that the responsible official must provide appropriate training in containment and security procedures to all individuals with access to listed agents and toxins while 9 CFR 121.13(a) provides that the responsible official must provide appropriate training in biosafety, containment, and security procedures to all individuals with access to listed agents and toxins. These provisions are different because the agents listed under 7 CFR 331.3 do not pose a severe threat to human health and, therefore, it is unnecessary to require that the plant-related plan address personnel safety and health.

Both 7 CFR 331.12 and 9 CFR 121.13 provide that the responsible official must provide information and training to an individual at the time the individual is assigned to work with a listed agent or toxin. In addition, the responsible official must provide refresher training annually.

**Transfer of Biological Agents and Toxins**

In accordance with 212(b) of the Act, 7 CFR 331.13 and 9 CFR 121.14 set forth the transfer requirements for biological agents and toxins. Both 7 CFR 331.13 and 9 CFR 121.14 provide that a listed biological agent or toxin may only be transferred to individuals or entities registered to possess, use, or transfer that particular agent or toxin. However, the sender of an agent or toxin may be an individual or entity that has a certificate of registration for the agent or toxin, an individual or entity that is exempt from the requirements of the regulations, or an individual or entity located outside of the United States. Biological agents or toxins may only be transferred under the conditions in each section and must be authorized by APHIS or, for overlap agents or toxins, by APHIS or CDC, prior to the transfer.

Both 7 CFR 331.13(a) and 9 CFR 121.14(a) incorporate the existing permit requirements under the plant pest regulations in 7 CFR part 330 and the organisms and vectors regulations in 9 CFR part 122, respectively. We believe the current permitting systems provided for by the existing plant pest and organisms and vectors regulations will complement the requirements under these new regulations, and will provide additional protections for the transfer of listed agents and toxins. We do not expect that these permit requirements will be burdensome, since permits for listed biological agents or toxins issued under 7 CFR part 330 and 9 CFR part 122 are valid for up to 1 year and can be renewed.

Thus, §§ 331.13(a) and 121.14(a) provide that, in addition to the permit required under 7 CFR part 330 or 9 CFR part 122, respectively, biological agents or toxins may only be imported or moved interstate with the prior authorization of APHIS or, for overlap agents or toxins, APHIS or CDC. To obtain such authorization, the sender and the responsible official for the recipient must complete and submit APHIS Form 2041 to APHIS or CDC, in accordance with §§ 331.13(c) and 121.14(c).

Furthermore, under 7 CFR 331.12(b), plant agents or toxins listed in 7 CFR 331.3 may be moved intrastate only with the prior authorization of APHIS,

and under 9 CFR 121.14(b), animal agents or toxins listed in 9 CFR 121.3(c) may be moved intrastate only with the prior authorization of APHIS and overlap agents or toxins listed in 9 CFR 121.3(b) may be moved intrastate only with the prior authorization of APHIS or CDC. Again, to obtain such authorization, the sender and the responsible official for the recipient must complete and submit APHIS Form 2041 to APHIS or CDC, in accordance with §§ 331.13(c) and 121.14(c).

To track the actual transfer of the agents and toxins, we are adopting CDC's transfer process to be consistent with CDC and because a number of regulated parties are already familiar with this transfer process. This transfer process is designed to provide an accurate record of the transfer; such information may be crucial in the event of a criminal or epidemiological investigation.

Both 7 CFR 331.13(c) and 9 CFR 121.14(c) set out the transfer process and procedures (APHIS Form 2041). Specifically, both parts provide that, prior to each transfer, the sender and the responsible official for the recipient must complete APHIS Form 2041. Then the sender must submit the form to APHIS or, for overlap agents or toxins, to APHIS or CDC.

After reviewing the form, APHIS will authorize the transfer based on a finding that the recipient has a certificate of registration covering the transfer of the listed agent or toxin. For overlap agents and toxins, APHIS or CDC will authorize the transfer based on a finding that the recipient has a certificate of registration covering the transfer of the listed agent or toxin.

To confirm the transfer, 7 CFR 331.13(c)(3) and 9 CFR 121.14(c)(3) provide that the responsible official for the recipient must notify the agency authorizing the transfer (either APHIS or CDC) and the sender upon receipt of the agent or toxin by mailing or faxing a completed APHIS Form 2041 to APHIS or CDC within 2 business days.

Furthermore, 7 CFR 331.13(c)(4) and 9 CFR 121.14(c)(4) provide that the recipient must notify APHIS or, for overlap agents, APHIS or CDC, immediately if the agent or toxin has not been received within 48 hours after the expected delivery or if the package containing the agent or toxin is leaking or has been damaged.

Finally, both 7 CFR 331.13(d) and 9 CFR 121.14(d) provide that the sender must comply with all applicable laws governing packaging and shipping.

Although not contained in this interim rule, pursuant to section 212(b) of the Act, we note that APHIS has incident response procedures in place to protect animal and plant health and animal and plant products in the event of a transfer or potential transfer in violation of the safety procedures and safeguard and security measures established by these regulations. Generally, these incident response procedures consist of coordinating with appropriate Federal, State, and local agencies; communicating with stakeholders, industry partners, and diagnostic laboratories about the potential threat; elevating surveillance; and communicating with international agencies, if necessary.

**Records**

The recordkeeping requirements in 7 CFR 331.14 and 9 CFR 121.15 are designed to document an entity's compliance with the regulations and to satisfy the investigational needs of APHIS and the Attorney General, in accordance with section 212 of the Act. In 7 CFR 331.14 and 9 CFR 121.15, we provide that the responsible official must maintain complete records of information necessary to give an accounting of all of the activities related to agents or toxins listed in §§ 331.3 and 121.3, respectively. Such records must include the Biocontainment and Security Plan or the Biosafety and Security Plan, as applicable; a current list of all individuals with access to agents or toxins; training records for such individuals; accurate and current inventory records (including source and characterization data); permits and transfer documents (APHIS Form 2041) issued by APHIS or, for overlap agents and toxins, APHIS or CDC; security records (*e.g.*, transactions from automated access control systems, testing and maintenance of security systems, visitor logs); and biosafety, containment, and security incident reports.

We require that the responsible official maintain such records for 3 years and produce such records, upon request, to APHIS or CDC inspectors, and appropriate Federal, State, or local law enforcement authorities.

**Inspections**

Section 212(f) of the Act provides that the Secretary shall have the authority to inspect persons to ensure compliance with the regulations, including prohibitions on restricted persons and other provisions of subsection 212(e) of the Act. Accordingly, in 7 CFR 331.15(a) we require that any APHIS inspector be allowed, without previous notification, to enter and inspect the entire premises, all materials and equipment, and all records required to be maintained by the regulations. Likewise, in 9 CFR 121.16(a) we require that any APHIS or CDC inspector be allowed to conduct such inspections.

As previously noted, APHIS may inspect and evaluate the premises and records prior to issuing a certificate of registration in order to ensure compliance with the regulations (7 CFR 331.15(b) and 9 CFR 121.16(b)). APHIS or CDC may conduct such inspections for overlap agents or toxins. Once registered, inspections of the premises and records will be conducted to ensure compliance with the regulations.

**Notification in the Event of Theft, Loss, or Release**

The Act specifically requires notification in the event of theft, loss, or release of a biological agent or toxin. Therefore, 7 CFR 331.16(a) and 9 CFR 121.17(a) provide that the responsible official must orally notify APHIS and appropriate Federal, State, and local law enforcement agencies immediately upon discovery of the theft or loss of agents or toxins listed in §§ 331.3 and 121.3, respectively. The regulations further provide that the oral notification must be followed by a written report within 7 days. We are allowing 7 days for the submission of the written report to give the responsible official ample time to compile information and investigate the theft or loss in order to provide a more detailed report.

Similarly, 7 CFR 331.16(b) and 9 CFR 121.17(b) provide that the responsible official must orally notify APHIS immediately upon discovery that a release of a listed agent or toxin has occurred outside of the biocontainment area. As with notification of theft or loss, the regulations provide that oral notification of a release must be followed by a written report within 7 days. The regulations further provide that APHIS will notify relevant Federal, State, and local authorities, and the public, if necessary. In § 121.17(b), we additionally provide that, if the release involves an overlap agent or toxin, we will also notify the Secretary of Health and Human Services.

**Administrative Review**

Section 212(e)(7)(A)(i) of the Act states that the regulations shall provide for an opportunity for review by the Secretary, when requested by the individual involved, of a determination to deny that individual access to listed agents or toxins and, when requested by the person involved, of a determination to deny or revoke registration for that person.

Accordingly, both 7 CFR 331.17 and 9 CFR 121.18 provide that an individual

or entity may appeal a denial or revocation of registration. An individual who has been denied access to listed agents or toxins or who has been granted only limited access to listed agents or toxins may appeal that decision. We note that an entity may not appeal the denial or limitation of an individual's access to listed agents or toxins.

Both 7 CFR 331.17 and 9 CFR 121.18 provide that the appeal must be in writing and submitted to the Administrator within 30 days of the decision. The appeal must state all of the facts and reasons upon which the individual or entity disagrees with the decision. Where the denial or revocation of registration or the denial or limitation of an individual's access approval is based solely upon an identification by the Attorney General, APHIS will forward the request for review to the Attorney General to review.

In accordance with section 212(e)(7)(A)(iii), the decision of the Administrator constitutes final agency action for purposes of 5 U.S.C. 702.

Section 212(e)(7)(A)(ii) of the Act provides that the Secretary, during a review of a determination, may consider information relevant to the review ex parte to the extent that disclosure of the information could compromise national security or an investigation by any law enforcement agency.

## Civil and Criminal Penalties

While not reflected in the regulations, we note that the Act provides for civil and criminal penalties for violations of the regulations. Under section 212(i) of the Act, any person who violates any provision of these regulations will be subject to a civil money penalty, in addition to any other penalties that may apply under law. The civil money penalty shall not exceed $250,000 for an individual and $500,000 for any other person.

Section 231 of the Act sets out the criminal penalties for violations of the regulations. Section 231(b)(2) of the Act provides that whoever transfers a biological agent or toxin to a person who the transferor knows or has reasonable cause to believe is not registered shall be fined or imprisoned for no more than 5 years, or both. Similarly, section 231(c)(2) provides that whoever knowingly possesses a biological agent or toxin without registering under the regulations shall be fined or imprisoned no more than 5 years, or both.

## Immediate Action

Immediate action is necessary in order for USDA to comply with the requirements of Title II, subtitle B, of Pub. L. 107–188, which requires the publication of this interim rule not later than December 9, 2002. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest.

We will consider comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

## Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

For this rule, we have prepared an economic analysis. The economic analysis provides a cost-benefit analysis as required by Executive Order 12866, as well as an analysis of the potential economic effects of this proposed rule on small entities, as required under 5 U.S.C. 603. The economic analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Pub. L. 107–188), the Secretary of Agriculture is required to provide by regulation for the establishment and enforcement of standards and procedures governing the possession and use of the listed biological agents and toxins; the establishment and enforcement of safety requirements for the transfer of listed agents and toxins; the establishment and enforcement of safeguard and security measures to prevent access to listed agents and toxins for use in domestic or international terrorism or other criminal purpose; and the establishment of procedures to protect animal and plant health, and animal and plant products, in the event of a transfer in violation of the established safety and security measures. For the Health and Human Services Department (HHS), CDC is taking similar measures related to biological agents and toxins that have the potential to adversely affect human health or human and animal health.

## Small Entities

The Regulatory Flexibility Act requires that agencies specifically consider the economic effects of their rules on small entities. The entities most likely to be affected by this rule are those laboratories and other institutions conducting research and related activities that involve the use of listed biological agents and toxins. Most affected entities (other than Federal or State governmental entities) would be considered part of North American Industrial Classification System (NAICS) code 541710, ''Research and Development in the Physical, Engineering, and Life Sciences.'' Some affected entities would be considered part of NAICS 541940, ''Veterinary Services;'' NAICS 611310, ''Colleges, Universities and Professional Schools;'' NAICS 325412, ''Pharmaceutical Preparation Manufacturing;'' NAICS 325413, ''In-Vitro Diagnostic Substance Manufacturing;'' and NAICS 325414, ''Biological Product (except Diagnostic) Manufacturing.''

The Small Business Administration (SBA) has established guidelines for determining when establishments are to be considered ''small'' under the Regulatory Flexibility Act. An entity in NAICS 541710, 325413, or 325414 is considered to be a small entity if it has 500 or fewer employees; for NAICS 325412, that threshold is 750 or fewer employees. An entity in NAICS 611310 is considered small with annual receipts/revenues of $6 million or less.

According to the 1997 Economic Census, no less [1] than 95 percent of life sciences research and development establishments subject to Federal income tax, and no less than 92 percent of those establishments not subject to Federal income taxes, can be considered small. More than 99 percent of ''biological (except diagnostic) manufacturing'' establishments, more than 98 percent of ''diagnostic manufacturing'' establishments, and at least 94 percent of ''pharmaceutical manufacturing'' establishments are considered small. The economic census does not contain information on the establishment size of veterinary service entities. According to data from the U.S. Department of Education, about 31 percent of reporting postsecondary institutions had revenue of less than $6 million in fiscal year 1995–96.

## Benefits of the Rule

Benefits associated with this rule are the avoided losses to animals or plants that could be attacked by these organisms, and their products and markets. Losses include reduction in

[1] The establishment size breakdown in the economic census does not precisely fit the SBA guidelines.

yield and productivity of affected hosts, public and private control costs, and loss in export revenue due to trade embargoes. The listed agents and toxins include viruses, bacteria, and fungi that potentially pose a severe threat to plant health or plant products. The listed pathogens could threaten a number of important crops including citrus, corn, potatoes, rice, stone fruit, and soybeans. In 2001, soybean production alone was valued at more than $12 billion. The rule also covers biological agents and toxins that have been determined to have the potential to pose a sever threat to both human and animal health, to animal health, or to animal products. Paragraph (b) of 9 CFR 121.2 lists 21 overlap agents and toxins. This list was drawn from CDC's list of select agents, the overlap being those select agents that pose a risk to both human and animal health. The 23 agents and toxins listed in 9 CFR 121.2(d) include the causative agents of 14 of the 15 diseases classified by the Office International des Epizooties (OIE) as ''List A'' diseases. (The causative agent of the fifteenth List A disease, Rift Valley fever, is an overlap agent listed in the above part.) List A diseases are, according to OIE, those transmissible diseases that have the potential for very serious and rapid spread, irrespective of national borders, that are of serious socioeconomic or public health consequence and that are of major importance in the international trade of animals and animal products. Five of the remaining nine agents and toxins are OIE List B diseases, *i.e.*, transmissible diseases that are considered to be of socioeconomic and/or public health importance within countries and that are significant in the international trade of animals and animal products. The three remaining diseases/disease agents—two restricted foreign animal pathogens and one emerging paramyxovirus—were included on the list based on the determination that they potentially pose a severe threat to animal health or animal products.

The costs associated with outbreaks can be very high as is demonstrated by natural outbreaks that have occurred. For example, it has been estimated that the losses to agriculture and the food chain from the recent FMD outbreak in the United Kingdom, including the costs compensated by the government amount to about £3.1 billion ($4.7 billion). In 1999, Ekboir estimated the potential impacts of an FMD outbreak in California alone at between $8.5 and $13.5 billion.[2] Also, a BSE crisis occurred in the UK (which has a cattle industry about 1/10 the size of that in the United States) in 1996. It has been estimated[3] that the total resource costs to the UK economy as a result of BSE in the first 12 months after the onset of the 1996 crisis were in the range of £740 million to £980 million ($1.2 billion to $1.5 billion), or just over 0.1 percent of the gross domestic product of the United Kingdom. In addition to these losses, the UK lost its entire export market for beef following the crisis.

The above cited consequences relate to natural or accidental introduction. Deliberate introduction greatly increases the probability of an agent or toxin becoming established and causing wide-ranging and devastating impacts on the economy, disruption to society, diminished confidence in public and private institutions, and possible loss of life. The perpetrators would have the advantage of controlling the time of introduction of the agent, introducing agents into remote or highly susceptible areas, multiple introductions of the same agent, or simultaneous release of different agents. Intentional introductions permit an increased probability of survival of a pathogen, the use of highly virulent strains and high concentrations of inoculum, and precise timing of release to coincide with maximal colonization potential.[4]

## Costs of the Rule

Facilities that possess listed agents and toxins will be affected by this rule. Those facilities are primarily research and diagnostic facilities. They include Federal, State, and university laboratories, and commercial enterprises.

Because affected entities vary widely and the information needed to determine an individual facility's biosafety, containment and physical security situation will not be available until the registration process occurs, information on specific necessary changes at any individual facility and thus those costs are not available. However, some general observations regarding the potential costs can be made.

## Affected Entities

There are approximately 33 academic, commercial, and State and Federal government facilities that have indicated their possession of listed plant pathogens and thus affected by this rule. This information was obtained from the notifications received by Plant Protection and Quarantine, APHIS–USDA.

In addition, there are approximately 619 commercial diagnostic facilities, university research and diagnostic facilities, State and Federal diagnostic and research facilities, and others in possession of animal and/or overlap agents or toxins that are expected to be affected by this rule.[5]

The facilities that deal with listed plant agents and toxins are academic institutions, commercial diagnostic and research facilities, and State and Federal Government facilities. Almost 60 percent of the affected facilities are academic and almost 30 percent government. The affected facilities tend to be small.

The facilities that deal with animal and overlap agents are academic, commercial, government, non-profit, and other. Twenty-nine percent of the facilities with listed agents and toxins are identified academic institutions, 45 percent as private commercial or non-profit entities, and 15 percent as government. The remaining 11 percent are not identified, but include veterinary practices. Animal and overlap agents are used primarily in diagnostic work and research.

The level of security at the facilities dealing with listed agents and toxins is currently very diverse, ranging from a locked freezer to a lock on the door to razor wire perimeter fencing, a guard post, locks or coded entry, and visitor escorts.

## Exemptions From the Rule

Clinical and diagnostic laboratories are specifically exempted from the provisions of the regulations for possessing, using, or transferring animal

[2] Ekboir, J.M., ''Potential impact of foot-and-mouth disease in California: The role and contribution of animal health surveillance and monitoring services.'' Davis, CA: Agricultural Issues Center, Division of Agriculture and Natural Resources, University of California, Davis, 1999.

[3] DTZ Pieda Consulting, ''Economic Impact of BSE on the UK economy.'' A Report commissioned by the UK Agricultural Departments and HM Treasury.

[4] National Research Council.

[5] As of October 18, 2002, 1,653 entities had submitted notifications that they possess biological agents or toxins affecting animals and/or humans listed by either USDA or HHS. In this analysis, we use 1,653 entities. In coordination with CDC, we assumed that those facilities with animal agents and those with animal and overlap agents will be affected by the APHIS rule. Those facilities with human agents and those human and overlap agents were assumed to be affected by the CDC rule. About one-half of those facilities with only overlap agents were assumed to be affected by the APHIS rule (50 percent of facilities with only overlaps, except all medical practices which were attributed to the CDC rule and all veterinary practices which were attributed to the APHIS rule). Facilities with both animal and human agents were considered in both analyses. This may cause some double counting if entities with both animal and human agents do not also have separate laboratories for that work. Numbers provided by Ed Gaunt, ASI—contractor collecting and compiling notification information.

or overlap agents or toxins that are contained in specimens presented for diagnosis or verification, and for agents that are contained in specimens presented for proficiency testing; provided that the facilities follow the requirements on disposal, transfer and notification. Facilities that handle fixed tissues that are, bear, or contain listed animal agents or toxins will be exempt from the registration requirements, provided that a permit has been issued to the facility under 9 CFR part 122. In addition, the Secretary may grant exemptions from the applicability of the regulations as they apply to animal only and plant agents and toxins if the Secretary determines that such exemptions are consistent with protecting animal and plant health, and animal and plant products. Registered diagnostic laboratories will also be required to report identifications of listed agents and toxins when presented for diagnosis. APHIS expects to receive 1,000 required notifications of identification and 250 exemption applications in a given year. It is estimated that complying with the exemption requirements will cost $72 per notification and $84 per exemption application.[6]

**Registration**

Under this rule, unless exempted a person or facility shall not possess, use, or transfer any listed agent or toxin without a certificate of registration issued by APHIS or CDC. The registration process is designed to obtain critical information concerning persons or facilities in possession of certain agents or toxins, as well as the specific characteristics of the agents and toxins. Information to determine that persons seeking to register have a lawful purpose to possess, use, or transfer agents or toxins will also be required as part of the registration process. This will involve security risk assessments by the U.S. Department of Justice, and collecting and providing the required information. Also as a condition of registration, a Biocontainment and Security Plan or Biosafety and Security Plan must be developed. It is estimated that it will cost between $414 and $778 per facility to collect and provide the required information. Registration amendments are expected to cost $86 each. In addition, it is estimated that re-applying for registration will cost $299 to $459 for those facilities to re-apply, as the registration is valid for up to 3 years.[7] It is estimated that the development of the biosafety/biocontainment plan will cost $2,777 at those facilities needing one. The security plan should be covered in the facility security assessment below. Complying with inactivation requirements is estimated to cost $43 per notification.

**Transfer**

Under this rule, listed biological agents and toxins may only be transferred to persons registered to possess, use, or transfer that particular agent or toxin. However, the sender may be an individual or facility exempt from the requirements of this rule, or an individual or facility located outside the United States. Transfer must occur only with prior authorization, notification of receipt by the recipient, and notification of overdue or damaged shipments. It is estimated that complying with these requirements will cost $124 for each of an expected 6,520 transfers in a year.

**Biosafety and Containment Procedures**

Biosafety and containment requirements ensure that the combination of work practices and physical containment are proportional to the risk associated with the agent or toxin. USDA permits dealing with the listed agents and toxins already required the biosafety and containment level commensurate with the risk associated with the pathogen covered in the permit or registration. Therefore, to the extent that affected entities are already permittees, the biosafety and containment requirements of this rule will have already been required at those facilities. There are almost 400 individual permittees with listed agents and toxins representing an unknown number of facilities.[8] In addition, some portion of the potentially affected entities will be exempt from the requirements of this rule, and therefore not affected by the biosafety requirements.

**Physical Security Procedures**

This rule will require that any facility where listed agents and toxins are held adequately provide for the physical security of the premises. This rule does not specify how security needs are to be met, only that they are adequate. Because the current level of security is very diverse, physical security components may have to be added in various quantities (including none) to meet the specific security needs of a given facility.

An example of security spending at USDA laboratories shows security upgrades at NVSL in Ames, IA, completed in 2002 cost $550,077 ($6.63/ft$^2$, 83,000 ft$^2$ total area). Installations of electronic security components can include closed-circuit television (CCTV) (*e.g.*, cameras, VCR, and control equipment), intrusion detection system (access-control card readers, card-keys, operating computer and software), all cabling associated with the security system, and integrating the system with the off-site monitoring. Other security related expenses that could be needed at a given facility included a facility security assessment (to prepare the security plan required in the rule) and entry control equipment (x-ray, metal detectors). Other features would entail yearly recurring costs (*i.e.*, off-site monitoring, an equipment maintenance agreement, and guard service).

The average cost per square foot of electronic portion of security for budget purposes ranges from $6.25/ft$^2$ for facilities under 80,000 ft$^2$ to $8.33/ft$^2$ for facilities in excess of 150,000 ft$^2$. This is based on average actual security system installations for APHIS facilities, and includes CCTV, intrusion detection systems, integration, perimeter protection, design, construction, and construction management, but not biometric technology, and assumes single-story facilities and has been adjusted for laboratory-type facilities.

This rule will require that all information resources related to listed biological agents and toxins have an appropriate level of protection in the system that is used to acquire, store, manipulate, manage, move, control, display, switch, interchange, receive or transmit that information. Most affected entities have a variety of compelling reasons, including regulatory requirements, for already protecting information.

**Other Costs**

Other costs associated with this rule include the costs of any additional training that may occur, record keeping, complying with the requirements for theft/loss/release notification, and appealing rulings. It is estimated that yearly recordkeeping will cost from $450 to $1,499 per registered facility. It is estimated that theft, loss, and release reporting will cost $72 for each occurrence. It is estimated that appeal requirements will cost $311 for each

[6] Based on Bureau of Labor Statistics data. Labor rates used are the same as used by CDC in their analysis of listed agents and toxins. See Supporting Statement for Information Collection Request ''Part 73—Select Biological Agents and Toxins'' for CDC rule covering 42 CFR part 73.

[7] Registrations will be valid for up to 3 years. It is estimated that approximately two-thirds of all facilities will be required to reapply within the first 3 years.

[8] Because of the data on notification of possession of listed agents and toxins, we cannot directly link permittees to facilities.

occurrence, and that the requests for expedited reviews will cost $43 each.

**Costs to APHIS**

Costs to APHIS that may be incurred as a result of the rule include the cost for processing facility registrations, notifications of identification of agents and toxins, exemption applications, transfer applications, theft/loss/release notifications and appeals, and performing facility inspections. It is estimated that APHIS will incur costs associated with this rule of as much as $1.5 million in the first year. Paperwork processing will cost APHIS $744,705 per year. In addition, APHIS may incur costs associated with providing technical assistance on compliance with this rule. Inspections are expected to cost between $240 and $997 per facility and occur every 3 years along with registration, or $156,000 to $650,000 for all facilities. Additional inspector training to cover the needs of this rule may be needed as well. The cost may be similar to the current level. In 2002, APHIS spent $35,480 on inspector training. Background checks or security clearances for all inspectors could be expected to cost $45,000. User fees to offset government costs will not be collected by APHIS under this rule.

**Potential Impact of This Rule**

Approximately 70 percent of research and development (commercial and non-profit laboratories dealing with human, animal, and plant agents), biological (except diagnostic) manufacturing, diagnostic manufacturing, pharmaceutical manufacturing, and other private establishments affected by this rule have fewer than 20 employees, and another 15 percent have between 20 and 49 employees.[9] Plant laboratories (Federal, commercial, non-profit, and academic) tend to be very small with fewer than 10 persons having access to the agents or toxins. Veterinary diagnostic laboratories (commercial, State or university) and university research laboratories likely have fewer than 100 employees.[10] Federal facilities covered by the rule will be affected by the registration requirements but should not have to make alterations due to the biosafety, containment and security requirements of this rule because they already must meet or exceed the requirements of this rule. In addition, an unknown portion of facilities will be exempt from the provisions of the rule. The level of security at the facilities dealing with listed agents and toxins is currently very diverse, ranging from a lock on the door to razor wire perimeter fencing, a guard post, locks or coded entry and visitor escorts.

For the purpose of assessing the impact of the security requirements of the rule, we make the following assumptions based on the available information on the size distribution of the affected entities:

- Eighty percent of affected facilities have an area to be secured of approximately 10,000 $ft^2$;[11]
- Five percent of affected facilities are Federal facilities and will not need security upgrades as a result of this rule;
- Fifteen percent of affected facilities have an area to be secured of approximately 30,000 $ft^2$;[12] and
- Because facilities will have varying levels of existing security, security needs, and methods of meeting those needs, the average security upgrades in APHIS facilities is used as a proxy for upgrades at these facilities. (The proxy is based on upgrading to state of the art equipment, which may or may not be used at a given facility.)

Using an average budget estimate for upgrading the electronic portion of a security system of $6.25/$ft^2$, a facility with 10,000 $ft^2$ to secure by installing electronic security countermeasures would need to budget $62,500 and a facility with 30,000 $ft^2$ to secure would need to budget $187,500. To obtain an aggregate cost estimate we apply these budget estimates to the 95 percent of facilities with area to be secured based on the size of that area. It should be noted that, as indicated above, utilizing APHIS' costs as a proxy implies that all facilities have baseline levels of electronic security similar to that of APHIS facilities and will upgrade to state-of-the-art technology. However, because the baseline level of security present at each facility is unknown and ultimate security needs are varied, this may or may not be the case. A given facility may be exempt and need no upgrade, may already have adequate security in place, or may need an upgrade but not to state-of-the-art.

Applying a budget cost of $62,500 to the 80 percent of affected facilities with 10,000 $ft^2$ to secure gives an overall cost of $32.6 million. Applying a budget cost of $187,500 to the 15 percent of affected entities with 30,000 $ft^2$ to secure gives a cost of $18.4 million.

In addition, a facility could need none, some, or all of the following:

- Facility security assessment, including developing a security plan as per the rule; $8.9 million if the 80 percent with smaller spaces all need a $17,000 assessment and $2.5 million if the 15 percent with larger spaces all need a $25,000 assessment.
- Entry control equipment; includes x-ray—small unit ($28,000 per unit), x-ray—large unit ($40,000 per unit), and metal detector(s) ($20,000 per unit). Other features would entail yearly recurring costs.
- Yearly recurring costs: Off-site monitoring ($10,000 to $45,000 per year); an equipment maintenance agreement ($12,000 to $30,000 per year); and guard service—unarmed ($30.00/hr per security post), armed ($35.00/hr per security post), and a supervisor ($40.00/hr).

This rule will involve other costs to the regulated community. It is estimated that complying with the exemption and notification of identification requirements will have a total cost of $93,000 per year. The rule will also involve the costs associated with the registration requirements. It is estimated that it will cost $315,980 to collect and provide the required information. Registration amendments are expected to cost $100,964 in the first year. In addition, it is estimated that it will cost $214,809 for facilities to collect and provide the required information for re-application. Complying with the requirements concerning the transfer of listed agents and toxins could cost $808,480 per year. The rule could also entail costs for any needed upgrades to biosafety and containment, and cybersecurity. These costs are expected to be small. To the extent that affected entities are already permittees, the biosafety and containment requirements of the new act will have already been required at those facilities. Affected entities have a variety of compelling reasons, including legislation, for already protecting information. The rule also requires that a biosafety and security plan be developed. It is estimated that the development of the biosafety portion of the plan could cost

[9] 1997 Economic Census. Department of Commerce, Census Bureau.

[10] AAVLD provided information on 10 diagnostic laboratories. These laboratories ranged in size from 11 to 100 employees including faculty, staff (part- and full-time), and students. In addition, the AAVLD president estimated that diagnostic labs in general would likely have between 6 and 80 employees. According to Dr. Denise Spenser, USDA–APHIS, university research on listed agents likely involves fewer than 100 persons (3 to 5 principal investigators out of about 25 faculty members in each of 3 or 4 departments—microbiology (veterinary microbiology), chemistry, and physiology, 3 to 5 (20 at most) investigators, technicians, and students in each laboratory).

[11] In addition to laboratory space, these facilities can have offices, conference rooms, administration space, mechanical/electrical rooms and storage space. The building code allowance for business use type buildings, which includes laboratories, is 100 $ft^2$ per occupant. We assume that the actual space at these facilities is 2 to 5 times this allowance. This would cover facilities with fewer than 50 employees.

[12] This space is larger and assumed to be able to house more than 50 employees.

in total $1.5 million if one-half of the 652 affected facilities need to develop new plans. The security portion would be developed as part of the facility security assessment above. It is estimated that notifications of inactivation would cost $1,376 per year. Other costs of the rule also include record keeping costs, estimated at $425,265 per year. The estimated total cost associated with notifications of theft, loss and release of listed agents or toxins is $144 per year. The estimated total cost associated with appeals under this rule is estimated to be $311 per year. The estimated total cost associated with expedited reviews under this rule is estimated to be $14,018 per year.

The costs to APHIS include processing facility registrations, notifications of identification of agents and toxins, exemption applications, transfer applications, theft/loss notifications, appeals, performing facility inspections, and providing technical assistance for compliance. It is estimated that this will cost as much as $1.5 million in the first year. Paperwork processing is estimated to cost APHIS $744,705 per year.[13] In addition, APHIS may incur costs associated with providing technical assistance on compliance with this rule. Facility inspections will occur every 3 years and are estimated to cost between $240 and $997 each, or between $156,480 and $650,044 for all registered facilities.[14] Additional inspector training could cost $35,480 annually and security clearances $45,000 for all inspectors.

TABLE 1.—SUMMARY OF POTENTIAL COSTS

| Activity | One-time costs | Recurring costs |
|---|---|---|
| Exemptions from the regulations: | | |
| Applications | | $72,000/year. |
| Notifications of identification | | $21,000/year. |
| Registration: | | |
| Application | $315,980 | |
| Renewal | | $214,809/every 3 years. |
| Amendments to registration | | $100,964/year (first year). |
| Biosafety/Biocontainment plan | $1.5 million | |
| Inactivations | | $1,376. |
| Security plan/security assessment | $11.4 million [1] | |
| Transfer | | $808,480/year. |
| Physical security procedures [2]: | | |
| Electronic security (cameras, card readers, etc.) [3] | $51 million [4] | |
| Entry control (X-ray, metal detectors) | $20,000–$40,000 each (as needed) | |
| Off-site monitoring | | $10,000–$45,000/year (as needed). |
| Maintenance agreement | | $12,000–$30,000/year (as needed). |
| Guard service | | $30–$40/hour (as needed). |
| Other costs: | | |
| Recordkeeping | | $425,265/year. |
| Theft/loss/release notification | | $144/year. |
| Appeals | | $311/year. |
| Expedited reviews | | $14,018/year. |
| Costs to APHIS: | | |
| Processing paperwork | | $744,705/year. |
| Inspections | | $156,000–$650,000 every 3 years. |
| Inspector training | | $35,480/year. |
| Inspector security clearances | $45,000 | |

[1] Assumes $17,000 for small facility, $25,000 for large facility.
[2] Because security needs are site specific and the rule allows for site specific security solutions, the approaches and applications will be varied. Actual additional physical security measures added will vary (including none) based on the current level of security and the specific security needs of a given facility.
[3] Estimate of the aggregate cost is based on an average facility cost per square foot to upgrade to state of the art technology.
[4] Based on $62,500 for 10,000 $ft^2$ (assuming 80 percent of facilities), $187,500 for 30,000 $ft^2$ (assuming 15 percent of facilities), and $0 for no upgrades (assuming 5 percent of facilities).

The above is given to provide perspective on the magnitude of the potential costs associated with the rule. The facilities covered in this rule can and do vary from a small laboratory contained within a larger facility to large dedicated buildings to large groups of buildings and land. Because security needs are site specific and the rule allows for site specific security solutions, the approaches and applications will be varied. Physical security measures may have to be added in various quantities (including none) to meet the specific security needs of a facility. Also, some of the impacts of this rule are somewhat offset by previous requirements, funding from other sources for upgrades that would otherwise be mandated by this rule, and flexibility in the rule that allows for site-specific needs to be met in the most cost effective manner possible.

**Summary**

While the costs associated with this rule could be considerable, some of those impacts are somewhat offset by previous requirements, funding from other sources for upgrades that would otherwise be mandated by this rule, and flexibility in the rule that allows for site specific needs to be met in the most cost effective manner possible. In addition, these costs are greatly outweighed by the benefits of preventing a deliberate introduction of a listed agent or toxin into the United States. Should any listed agent or toxin be intentionally introduced, the consequences would be significant as demonstrated by natural outbreaks that have occurred.

[13] Costs to Government for information Collections for Select Agent Registrations.

[14] These costs are based on current APHIS user fees for facility inspections: Biosecurity Level (BSL) 3, a flat $997, and BSL2 $60 to $80/hr for about 4 hours. Under this rule, users will not be charged for the inspections and thus the Government will absorb the cost of those inspections.

Consequences could include costs of eradication efforts, disruption of markets, difficulties in sustaining an adequate food and fiber supply, and the potential spread of disease infestations over large areas. Deliberate introduction greatly increases the probability of an agent or toxin becoming established and causing wide-ranging and devastating impacts on the economy, disruption to society, diminished confidence in public and private institutions, and possible loss of life.

**Executive Order 12372**

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

**Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

In accordance with section 3507(j) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection and recordkeeping requirements included in this interim rule have been submitted for emergency approval to the Office of Management and Budget (OMB). When OMB notifies us of its decision, we will publish a document in the **Federal Register** providing notice of the assigned OMB control number or, if approval is denied, providing notice of what action we plan to take.

We plan to request continuation of that approval for 3 years. Please send written comments on the 3-year approval request to the following addresses: (1) Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503; and (2) Docket No. 02–088–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 02–088–1 and send your comments within 60 days of publication of this rule.

This interim rule establishes regulations governing the possession, use, and transfer of biological agents and toxins that have been determined to have the potential to pose a severe threat to both human and animal health, to animal health, to plant health, or to animal products and plant products. Unless specifically exempted under the regulations, an individual or entity must register with APHIS or, for overlap agents or toxins, APHIS or CDC, in order to possess, use, or transfer biological agents or toxins.

To register, an individual or entity must submit a registration application package; develop and implement a Biocontainment and Security Plan or Biosafety and Security Plan, as applicable; and request access approval for individuals who have been identified as having a legitimate need to handle or use listed agents or toxins and who have the appropriate training and skills to handle or use such agents or toxins.

We are soliciting comments from the public (as well as affected agencies) concerning our information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, 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 information collection on those who are to respond (such as 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).

*For 7 CFR part 331:*

*Estimate of burden:* Public reporting burden for this collection of information is estimated to average 4.5590 hours per response.

*Respondents:* Researchers, universities, research and development organizations, diagnostic laboratories and other interested parties who possess, use, or transfer agents or toxins deemed a severe threat to animal or plant health, or animal or plant products.

*Estimated annual number of respondents:* 33

*Estimated annual number of responses per respondent:* 4.8787.

*Estimated annual number of responses:* 161.

*Estimated total annual burden on respondents:* 734.

*For 9 CFR part 121:*

*Estimate of burden:* Public reporting burden for this collection of information is estimated to average 2.56493 hours per response.

*Respondents:* Researchers, universities, research and development organizations, diagnostic laboratories and other interested parties who possess, use, or transfer agents or toxins deemed a severe threat to animal or plant health, or animal or plant products.

*Estimated annual number of respondents:* 619.

*Estimated annual number of responses per respondent:* 15.573.

*Estimated annual number of responses:* 9,640.

*Estimated total annual burden on respondents:* 24,726.

(Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

**Government Paperwork Elimination Act Compliance**

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this interim rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

**List of Subjects**

*7 CFR Part 331*

Agricultural research, Laboratories, Plant diseases and pests, Reporting and recordkeeping requirements.

*9 CFR Part 121*

Agricultural research, Animal diseases, Laboratories, Medical research, Reporting and recordkeeping requirements.

Accordingly, we are revising 7 CFR part 331 and 9 CFR part 121 to read as follows:

**7 CFR Chapter III**

## PART 331—POSSESSION, USE, AND TRANSFER OF BIOLOGICAL AGENTS AND TOXINS

Sec.

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**Authority:** Secs. 211–213, Title II, Pub. L. 107–188, 116 Stat. 647 (7 U.S.C. 8401).

### § 331.0 Effective and applicability dates.

The regulations in this part are effective on February 11, 2003.On and after that date, any person possessing, using, or transferring any agent or toxin listed in § 331.3 must be in compliance with the provisions of this part. However, so as not to disrupt research or educational projects involving listed agents or toxins that were underway as of the effective date of this part, any person possessing such agents or toxins as of the effective date (current possessors) will be afforded additional time to reach full compliance with this part. Any provision not specifically cited in paragraphs (a) through (f) of this section will be applicable as of February 11, 2003. In addition, any individual or entity who does not possess listed agents or toxins by the effective date of this part, but who wishes to initiate a research or educational project prior to November 12, 2003, must be in compliance with the provisions of this part that are applicable for current possessors at the time of application, as provided in paragraphs (a) through (e) of this section.

(a) During the period from February 11, 2003, to November 12, 2003, biological agents or toxins listed in § 331.3 may only be transferred to an individual or entity that is not registered under this part if the individual or entity has been issued a permit by the Administrator under part 330 of this chapter to import or move interstate that specific agent or toxin. If an individual or entity has not been issued a permit under part 330 of this chapter, the individual or entity may apply for a permit. To receive an agent or toxin, an individual or entity will also be required to submit APHIS Form 2041, in accordance with § 331.13(c). Because USDA permits do not cover intrastate movement, an individual or entity may not receive a listed agent or toxin that is being moved intrastate until that individual or entity is registered in accordance with this part.

(b) By March 12, 2003, the responsible official must submit the registration application package as required in § 331.8. In addition, the responsible official must submit to the Attorney General the names and identifying information for the responsible official; alternate responsible official, where applicable; entity; and, where applicable, the individual who owns or controls the entity.

(c) By April 11, 2003, the responsible official must submit to the Attorney General the names and identifying information for all individuals whom the responsible official has identified as having a legitimate need to handle or use listed agents or toxins, and who have the appropriate training and skills to handle such agents or toxins, as required in § 331.10.

(d) By June 12, 2003, the responsible official must submit to APHIS the security section of the Biocontainment and Security Plan required in § 331.11.

(e) By September 12, 2003, the responsible official must implement the security section of the Biocontainment and Security Plan, as required in § 331.11, and provide security training in accordance with 7 CFR 331.12.

(f) By November 12, 2003, the registration application process must be complete and the entity in full compliance with the regulations in this part.

### § 331.1 Definitions.

*Administrator.* The Administrator, Animal and Plant Health Inspection Service, or any person authorized to act for the Administrator.

*Animal and Plant Health Inspection Service (APHIS).* The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

*Attorney General.* The Attorney General of the United States or any person authorized to act for the Attorney General.

*Biological agent.* Any microorganism (including, but not limited to, bacteria, viruses, fungi, rickettsiae, or protozoa), or infectious substance, or any naturally occurring, bioengineered, or synthesized component of any such microorganism or infectious substance, capable of causing:

(1) Death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(2) Deterioration of food, water, equipment, supplies, or material of any kind; or

(3) Deleterious alteration of the environment.

*Centers for Disease Control and Prevention (CDC).* The Centers for Disease Control and Prevention of the United States Department of Health and Human Services.

*Diagnostic laboratory.* A laboratory facility that receives specimens for the purpose of determining the identities of pests, pathogens, contaminants, or causes of disease.

*Entity.* Any government agency (Federal, State, or local), academic institution, corporation, company, partnership, society, association, firm, sole proprietorship, or other legal entity.

*Import.* To move into, or the act of movement into, the territorial limits of the United States.

*Interstate.* From one State into or through any other State, or within the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

*Permit.* A written authorization by the Administrator to import or move interstate biological agents or toxins, under conditions prescribed by the Administrator.

*PPQ.* The Plant Protection and Quarantine Programs of the Animal and Plant Health Inspection Service

*Responsible official.* The individual designated by an entity to act on its behalf. This individual must have the authority and control to ensure compliance with the regulations in this part.

*Specimen.* A sample of material collected for use in testing, such as plant tissues (*e.g.*, stems, seeds, flowers, pollen, leaves, roots, fruits, tubers, tissue cultures, protoplasts), soil, water, swabs, cultures, and suspensions.

*State.* Any of the several States of the United States, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

*Toxin.* The toxic material or product of plants, animals, microorganisms (including, but not limited to, bacteria, viruses, fungi, rickettsiae, or protozoa), or infectious substances, or a recombinant or synthesized molecule, whatever their origin and method of production, and includes:

(1) Any poisonous substance or biological product that may be engineered as a result of biotechnology produced by a living organism; or

(2) Any poisonous isomer or biological product, homolog, or derivative of such a substance.

*United States.* All of the States.

*USDA.* The United States Department of Agriculture.

**§ 331.2 Purpose and scope.**

(a) This part sets forth the requirements for possession, use, and transfer of biological agents or toxins that have been determined to have the potential to pose a severe threat to plant health or to plant products. The purpose of this part is to ensure the safe handling of such agents or toxins, and to protect against the use of such agents or toxins in domestic or international terrorism or for any other criminal purpose.

(b) Accordingly, this part provides that any individual or entity that possesses, uses, or transfers any agent or toxin listed in § 331.3 must register in accordance with § 331.6. To register, each entity must designate an individual who has the authority and control to ensure compliance with the regulations to be the responsible official. The responsible official must complete and submit the registration application package to APHIS. As part of registration, the responsible official, the entity, and, where applicable, the individual who owns or controls such entity will be subject to a security risk assessment by the Attorney General.

(c) The responsible official is responsible for ensuring compliance with the safety procedures in this part, including implementing the Biocontainment and Security Plan in accordance with § 331.11, providing the proper training to individuals who handle or use agents or toxins listed in § 331.3, and providing proper laboratory facilities to contain and dispose of such agents or toxins. In addition, the responsible official is responsible for ensuring compliance with the safeguard and security measures in this part, including restricting access to only those individuals who have a legitimate need to handle or use agents or toxins and who have been approved in accordance with § 331.10, and transferring such agents or toxins only to registered individuals or entities in accordance with § 331.13.

**§ 331.3 List of biological agents and toxins.**

(a) The biological agents and toxins listed in this section have been determined to have the potential to pose a severe threat to plant health or to plant products.

*Liberobacter africanus, Liberobacter asiaticus*
*Peronosclerospora philippinensis*
*Phakopsora pachyrhizi*
Plum pox potyvirus
*Ralstonia solanacearum,* race 3, biovar 2
*Sclerophthora rayssiae* var. *zeae*
*Synchytrium endobioticum*
*Xanthomonas oryzae* pv. *oryzicola*
*Xylella fastidiosa* (citrus variegated chlorosis strain)

(b) The Administrator has determined that it would be impractical to regulate a biological agent or toxin that is in its naturally occurring environment. Therefore, any biological agent or toxin listed in this section that is in its naturally occurring environment will not be subject to the requirements of this part, provided that the biological agent or toxin has not been intentionally introduced, cultivated, collected, or otherwise extracted from its natural source.

(c) The Administrator has determined that biological agents or toxins that meet any of the following criteria do not have the potential to pose a severe threat to plant health or to plant products. Therefore, an individual or entity that only possesses, uses, or transfers an agent or toxin that meets any of the following criteria will not be subject to the requirements of this part:

(1) Nonviable agents that are, bear, or contain listed agents or toxins;

(2) Genetic elements or subunits of listed agents or toxins, if the genetic elements or subunits are not capable of causing disease.

**§ 331.4 Exemptions.**

(a) Diagnostic laboratories [1] and other entities possessing, using, or transferring agents or toxins that are contained in specimens presented for diagnosis or verification will be exempt from the requirements of this part, provided that:

(1) The identification of such agents or toxins is immediately reported to the Administrator and to other appropriate authorities when required by Federal, State, or local law; and

(2) Within 7 days after identification, the agents or toxins are transferred or inactivated, and APHIS Form 2040 is submitted to the Administrator.[2] During agricultural emergencies or outbreaks, or in endemic areas, the Administrator may require less frequent reporting. A copy of the completed form must be maintained for 3 years.

(b) In addition to the exemption provided in paragraph (a) of this section, the Administrator may grant a specific exemption upon a showing of good cause and upon his or her determination that such exemption is consistent with protecting animal or plant health, and animal or plant products. An individual or entity that possesses, uses, or transfers agents or toxins may request in writing an exemption from the requirements of this part. If granted, such exemptions are valid for a maximum of 3 years; thereafter, an individual or entity must request a new exemption. If a request for exemption is denied, an individual or entity may request reconsideration in writing to the Administrator. The request for reconsideration must state all of the facts and reasons upon which the individual or entity relies to show that the exemption was wrongfully denied. The Administrator will grant or deny the request for reconsideration as promptly as circumstances allow and will state, in writing, the reasons for the decision. If there is a conflict as to any material fact, the individual or entity may request a hearing to resolve the conflict.[3]

**§ 331.5 Registration; who must register.**

(a) Unless exempted under § 331.4, any individual or entity that possesses, uses, or transfers any agent or toxin listed in § 331.3 must register with APHIS.

(b) Each entity must designate an individual to be its responsible official. The responsible official must have the authority and control to ensure compliance with the regulations. The responsible official must complete and sign the registration application package, and will be the individual contacted by APHIS if any questions arise concerning the application or subsequent compliance with the regulations in this part. As part of registration, the responsible official and the entity will be subject to a security risk assessment by the Attorney General. While most registrants are likely to be entities, in the event that an individual applies for and is granted a certificate of registration, APHIS will consider the individual to be the responsible official.

(c) An entity may designate an individual to be an alternate responsible official, who may act for the responsible

[1] However, diagnostic laboratories and other persons will still be required to obtain a permit under part 330 of this chapter in order to import or move interstate any listed agent or toxin.

[2] A diagnostic laboratory or other person must immediately notify APHIS by calling (301) 734–5519. APHIS Form 2040 may be obtained by calling (301) 734–5519 or faxing a request to (301) 734–8700. The form is also available on the Internet at *http://www.aphis.usda.gov/ppq/permits.* The completed form may be mailed to Biological and Technical Services, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236; or faxed to (301) 734–8700.

[3] A request for exemption may be mailed to biological and Technical Services, PPQ, APHIS, 4700 River road Unit 133, Riverdale, MD 20737–1236; or faxed to (301) 734–8700.

official when he/she is unavailable. This individual must have the authority and control to ensure compliance with the regulations when acting for the responsible official. This individual will also be subject to a security risk assessment by the Attorney General as part of registration.

**§ 331.6 Registration; general provisions.**

(a) Unless exempted under this part, an individual or entity shall not possess, use, or transfer any agent or toxin listed in § 331.3 without a certificate of registration issued by APHIS.

(b) A certificate of registration may be issued upon:

(1) Approval of the responsible official; the alternate responsible official, where applicable; the entity; and, where applicable, the individual who controls the entity following a security risk assessment by the Attorney General;[4] and

(2) Approval of the containment and security of the entity. The entity's containment and security procedures must be commensurate with the risk of the agent or toxin, given its intended use. APHIS will review the Biocontainment and Security Plan, and may inspect and evaluate the premises and records to determine compliance with the regulations and the containment and security requirements; and

(3) A determination by the Administrator that the individual or entity seeking to register has a lawful purpose to possess, use, or transfer such agents or toxins.

(c) A certificate of registration will be valid for only the specific agents or toxins listed on the certificate and specific activities and locations. A certificate of registration may cover more than one listed agent or toxin, and it may be amended to cover additional listed agents or toxins.

(d) A certificate of registration may be amended to reflect changed circumstances (*e.g.*, replacement of the responsible official, changes in ownership or control of the entity,[5] changes in the activities involving the agent or toxin). The responsible official must immediately notify APHIS of such changes in circumstances that occur after submission of the application for registration or after receipt of a certificate of registration.

(e) If a responsible official wishes to discontinue possessing, using, or transferring a particular agent or toxin, the responsible official may inactivate the agent or toxin or he/she may transfer the agent or toxin to a registered individuals or entities in accordance with § 331.12. The responsible official must notify APHIS 5 business days prior to the planned inactivation so that we may have the opportunity to observe the inactivation of the agents or toxins. We will notify the responsible official if we wish to observe the inactivation of the agents or toxins.

(f) A certificate of registration will be valid for a maximum of 3 years.

**§ 331.7 Denial, revocation, or suspension of registration.**

(a) APHIS may deny an application for registration or revoke registration if:

(1) The Attorney General identifies the responsible official, entity, or the individual who owns or controls the entity as within any of the categories described in 18 U.S.C. 175b; or

(2) The Attorney General identifies the responsible official, entity, or the individual who owns or controls the entity as reasonably suspected by any Federal law enforcement or intelligence agency of:

(i) Committing a crime set forth in 18 U.S.C. 2332b(g)(5); or

(ii) Knowing involvement with an organization that engages in domestic or international terrorism (as defined in 18 U.S.C. 2331) or with any other organization that engages in intentional crimes of violence; or

(iii) Being an agent of a foreign power as defined in 50 U.S.C. 1801; or

(3) The responsible official does not have a lawful purpose to possess, use, or transfer agents or toxins listed in § 331.3; or

(4) The responsible official is an individual who handles or uses listed agents or toxins and he/she does not have the necessary training or skills to handle such agents or toxins; or

(5) The entity does not meet the containment and security requirements prescribed by the Administrator;[6] or

(6) There are egregious or repeated violations of the containment or security requirements; or

(7) The Administrator determines that such action is necessary to protect animal or plant health, and animal or plant products.

(b) APHIS may summarily revoke or suspend registration for any of the reasons set forth in paragraph (a) of this section.

(c) APHIS will notify the responsible official in writing if an application for registration is denied or a certificate of registration is revoked or suspended.

(d) Denial of an application for registration, revocation of registration, and suspension of registration may be appealed under § 331.16.

**§ 331.8 Registration; how to register.**

(a) To apply for a certificate of registration, an individual or entity must submit all of the information and documentation required in the registration application package to APHIS, including the name, source, and characterization data for each agent or toxin to be registered.

(b) The registration application package may be obtained by calling (301) 734–5519 or faxing a request to (301) 734–8700. It is also available on the Internet at *http://www.aphis.usda.gov/ppq/permits.* The completed registration application package may be mailed to APHIS, Plant Protection and Quarantine, Biological and Technical Services, 4700 River Road Unit 133, Riverdale, MD 20737–1236; or faxed to (301) 734–8700. Assistance in completing the registration application may be requested by calling (301) 734–5519.

**§ 331.9 Responsibilities of the responsible official.**

(a) The responsible official is responsible for ensuring compliance with the regulations, including:

(1) Developing and implementing a Biocontainment and Security Plan in accordance with § 331.11;

(2) Allowing only approved individuals within the entity to have access to any agents or toxins listed in § 331.3 in accordance with § 331.10;

(3) Providing appropriate training in containment and security procedures for all personnel in accordance with § 331.12;

(4) Transferring agents or toxins only to registered individuals or entities in accordance with § 331.13;

(5) Ensuring that all visitors are informed of and follow the entity's security requirements and procedures;

(6) Notifying APHIS of changes in circumstances in accordance with § 331.6;

(7) Providing timely notice of any theft, loss, or release of a biological agent or toxin in accordance with § 331.16;

(8) Maintaining detailed records of information necessary to give a complete accounting of all of the activities related to agents or toxins listed in § 331.3 in accordance with § 331.14.

[4] The security risk assessment of the entity and the individual who owns or controls such entity may be waived for Federal, State, or local governmental agencies.

[5] Any change in ownership or control of an entity will require a security risk assessment for the new individual(s) who owns or controls the entity.

[6] If registration is denied for this reason, we may provide technical assistance and guidance.

(b) In addition to the requirements in paragraph (a) of this section, the responsible official for a diagnostic laboratory or other entity possessing, using, or transferring agents or toxins listed in § 331.3 that are contained in specimens presented for diagnosis must immediately report the identification of such agents or toxins to the Administrator and to other appropriate authorities when required by Federal, State, or local law.[7] During agricultural emergencies or outbreaks, or in endemic areas, the Administrator may require less frequent reporting.

**§ 331.10 Restricting access to biological agents and toxins.**

(a) An individual may not have access to biological agents or toxins listed in § 331.3 unless approved by APHIS. APHIS will grant, limit, or deny access of individuals to listed agents or toxins.

(b) The responsible official is responsible for ensuring that only approved individuals within the entity have access to any agents or toxins listed in § 331.3. The responsible official must request such access for only those individuals who have a legitimate need to handle or use listed agents or toxins, and who have the appropriate training and skills to handle such agents or toxins.

(c) The responsible official must provide appropriate training in containment and security procedures to all individuals with access to agents and toxins listed in § 331.3, in accordance with § 331.12.

(d) For each individual identified by the responsible official as having a legitimate need to handle or use listed agents or toxins, the responsible official must submit that individual's name and identifying information to APHIS and the Attorney General.

(e) In addition, the responsible official must submit information about the individual's training and skills to APHIS (*e.g.*, curriculum vitae for principal investigators and researchers, and a description of training completed by support personnel).

(f) APHIS may expedite the access approval process for individuals upon request by the responsible official and a showing of good cause (*e.g.*, agricultural emergencies, national security, impending expiration of a research grant, a short-term visit by a prominent researcher).

(g) APHIS will notify the responsible official if an individual is granted full or limited access, or denied access to listed agents or toxins. APHIS will also notify the individual if he/she is denied access or granted only limited access.

(h) APHIS may deny or limit access of an individual to listed agents or toxins if:

(1) The Attorney General identifies the individual as within any of the categories described in 18 U.S.C. 175b;

(2) The Attorney General identifies the individual as reasonably suspected by any Federal law enforcement or intelligence agency of committing a crime set forth in 18 U.S.C. 2332b(g)(5); knowing involvement with an organization that engages in domestic or international terrorism (as defined in 18 U.S.C. 2331) or with any other organization that engages in intentional crimes of violence; or being an agent of a foreign power as defined in 50 U.S.C. 1801;

(3) The individual does not have a legitimate need to handle listed agents or toxins;

(4) The individual does not have the necessary training or skills to handle listed agents or toxins;

(5) The Administrator determines that such action is necessary to protect plant health or plant products.

(i) An individual may appeal the Administrator's decision to deny or limit access under § 331.15.

(j) Access approval is valid for 5 years; thereafter, the responsible official shall request renewal of access approval every 5 years for as long as the individual needs access to agents or toxins listed in § 331.3.

(k) The responsible official must immediately notify APHIS when an individual's access to listed agents or toxins is terminated by the entity and the reasons therefor.

**§ 331.11 Biocontainment and security plan.**

(a) As a condition of registration, an individual or entity must develop and implement a Biocontainment and Security Plan.[8] The Biocontainment and Security Plan must contain sufficient information and documentation to describe the containment procedures and the security systems and procedures. The plan must be commensurate with the risk of the agent or toxin, given its intended use.

(1) *Containment procedures.* The containment procedures must be sufficient to contain the agent or toxin (*e.g.*, physical structure and features of the entity, and operational and procedural safeguards). At a minimum, the plan must address containment and inventory control.

(2) *Security systems and procedures.*[9] The security systems and procedures must be designed according to a site-specific risk assessment and must provide graded protection in accordance with the threat posed by the agent or toxin.

(i) The site-specific risk assessment should involve a threat assessment and risk analysis in which threats are defined, vulnerabilities examined, and risks associated with those vulnerabilities are identified.

(ii) The security systems and procedures must be tailored to address site-specific characteristics and requirements, ongoing programs, and operational needs, and must mitigate the risks identified under paragraph (a)(2)(i) of this section.

(iii) The plan must describe inventory control procedures, personnel suitability for those individuals with access to agents or toxins listed in § 331.3, physical security, and cybersecurity. The plan must also contain provisions for securing the area (*e.g.*, card access, key pads, locks) and protocols for changing access numbers or locks following staff changes; procedures for loss or compromise of keys, passwords, combinations, etc.; procedures for reporting suspicious persons or activities, loss or theft of listed agents or toxins, release of listed agents or toxins, or alteration of inventory records; provisions for the control of access to containers where listed agents and toxins are stored; provisions for routine cleaning, maintenance, and repairs; and procedures for reporting and removing unauthorized persons.

(iv) With respect to areas containing listed agents or toxins, an entity or individual must adhere to the following security requirements or implement measures to achieve an equivalent or greater level of security as the provisions below:

(A) Allow unescorted access only to approved individuals who are performing a specifically authorized function during hours required to perform that job;

[7] A diagnostic laboratory or other person must immediately notify APHIS by calling (301) 734–5519.

[8] Technical assistance and guidance may be obtained by calling (301) 734–5519.

[9] For guidance, see the USDA Departmental Manual No. 9610–001, ''USDA Security Policies and Procedures for Biosafety Level-3 Facilities'' (August 30, 2002). The manual may be obtained by calling (301) 734–5519. The manual is also available on the Internet at *http://www.usda.gov/ocio/directives/DM/DM9610–001.htm. See* also Appendix F, ''Biosafety in Microbiological and Biomedical Laboratories,'' in Morbidity and Mortality Weekly Report (2002). This document may be obtained by writing to Select Agent Program, Centers for Disease Control and Prevention, 1600 Clifton Road, NE, Mail Stop E 79, Atlanta, GA 30333. It is also available on the Internet at *http://www.cdc.gov/mmwr.*

(B) Allow individuals not approved under § 331.10 to conduct routine cleaning, maintenance, repairs, and other non-laboratory functions only when escorted and continually monitored by approved individuals;

(C) Provide for the control of access to containers where listed agents and toxins are stored by requiring that such containers be locked when not in the direct view of an approved individual and by using other monitoring measures, as needed;

(D) Require the inspection of all packages upon entry and exit;

(E) Establish a protocol for intra-entity transfers, including provisions for ensuring that the packaging and movement, is conducted under the supervision of an approved individual;

(F) Require that approved individuals do not share with any other person their unique means of accessing the area or listed agents or toxins; and

(G) Require that approved individuals immediately report any of the following to the responsible official:

(*1*) Any loss or compromise of keys, passwords, combinations, etc.;

(*2*) Any suspicious persons or activities;

(*3*) Any loss or theft of listed agents or toxins;

(*4*) Any release of a listed agent or toxin; and

(*5*) Any sign that inventory and use records for listed agents and toxins have been altered or otherwise compromised.

(3) *Incident response procedures.*[10] The Biocontainment and Security Plan must also include incident response plans for containment breach, security breach, inventory violations, non-biological incidents such as workplace violence, and cybersecurity breach. The incident response plans must address containment, inventory control, and notification of managers and responders. The incident response plans must also address such events as bomb threats, severe weather (floods, hurricanes, tornadoes), earthquakes, power outages, and other natural disasters or emergencies.

(b) The Biocontainment and Security Plan must be reviewed, performance tested, and updated annually. The plan must also be reviewed and revised, as necessary, after any incident.

**§ 331.12 Training.**

(a) The responsible official must provide appropriate training in containment and security procedures to all individuals with access to agents and toxins listed in § 331.3.

(b) The responsible official must provide information and training to an individual at the time the individual is assigned to work with a listed agent or toxin. The responsible official must provide refresher training annually.

**§ 331.13 Transfer of biological agents and toxins.**

Biological agents and toxins listed in § 331.3 may only be transferred to an individual or entity registered to possess, use, or transfer that particular agent or toxin. However, the sender of an agent or toxin may be an individual or entity that has a certificate of registration for the agent or toxin, an individual or entity that is exempt from the requirements of this part, or an individual or entity located outside of the United States. Biological agents or toxins may only be transferred under the conditions of this section and must be authorized by APHIS prior to the transfer.

(a) *Importation and interstate movement.* In addition to the permit required under part 330 of this chapter, biological agents or toxins listed in § 331.3 may be imported or moved interstate only with the prior authorization of APHIS. To obtain such authorization, the sender and the responsible official for the recipient must complete and submit APHIS Form 2041 to APHIS, in accordance with paragraph (c) of this section.

(b) *Intrastate movement.* Biological agents or toxins listed in § 331.3 may be moved intrastate only with the prior authorization of APHIS. To obtain authorization, the sender and the responsible official for the recipient must complete and submit APHIS Form 2041 to APHIS prior to each transfer, in accordance with paragraph (c) of this section.

(c) *APHIS Form 2041; process and procedures.* (1) Prior to each transfer, the sender and the responsible official for the recipient must complete APHIS Form 2041, and the sender must submit the form to APHIS.[11]

(2) APHIS will authorize the transfer based on a finding that the recipient has a certificate of registration covering the transfer of the listed agent or toxin.

(3) The responsible official for the recipient entity must notify APHIS and the sender upon receipt of the agent or toxin by mailing or faxing a completed APHIS Form 2041 within 2 business days.

(4) The responsible official for the recipient must notify APHIS immediately if the agent or toxin has not been received within 48 hours after the expected delivery or if the package containing the agent or toxin is leaking or has been damaged.

(d) The sender must comply with all applicable laws governing packaging and shipping.

**§ 331.14 Records.**

(a) The responsible official must maintain complete, up-to-date records of information necessary to give an accounting of all of the activities related to agents or toxins listed in § 331.3. Such records must include the following:

(1) The Biocontainment and Security Plan;

(2) A current list of all individuals with access to agents or toxins listed in § 331.3;

(3) Training records for individuals with access to such agents or toxins;

(4) Accurate and current inventory records (including source and characterization data);

(5) Permits and transfer documents (APHIS Form 2041) issued by APHIS;

(6) Security records (*e.g.*, transactions from automated access control systems, testing and maintenance of security systems, visitor logs); and

(7) Containment and security incident reports.

(b) The responsible official must maintain such records for 3 years.

(c) All records must be produced upon request to APHIS inspectors, and appropriate Federal, State, or local law enforcement authorities.

**§ 331.15 Inspections.**

(a) To ensure compliance with the regulations, any APHIS inspector must be allowed, without previous notification, to enter and inspect the entire premises, all materials and equipment, and all records required to be maintained by this part.

(b) Prior to issuing a certificate of registration to an entity or individual, APHIS may inspect and evaluate their premises and records to ensure compliance with the regulations and the containment and security requirements.

**§ 331.16 Notification in the event of theft, loss, or release of a biological agent or toxin.**

(a) The responsible official must orally notify APHIS and appropriate Federal, State, or local law enforcement

[10] The requirements in this paragraph do not supercede or preempt the enforcement of emergency response requirements imposed by other statutes or regulations.

[11] APHIS Form 2041 may be obtained by calling (301) 734–5519 or faxing a request to (301) 734–8700. The form is also available on the Internet at *http://www.aphis.usda.gov/ppq/permits.* APHIS Form 2041 may be mailed to Biological and Technical Services, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236; or faxed to (301) 734–8700.

agencies immediately upon discovery of the theft or loss of agents or toxins listed in § 331.3. The oral notification must be followed by a written report (APHIS Form 2043) within 7 days.

(b) The responsible official must orally notify APHIS immediately upon discovery that a release of an agent or toxin has occurred outside of the biocontainment area. The oral notification must be followed by a written report (APHIS Form 2043) within 7 days. Upon notification and a finding that the release poses a threat to animal or plant health, or animal or plant products, APHIS will notify relevant Federal, State, and local authorities, and the public, if necessary.

(c) The responsible official must orally notify APHIS of a theft, loss, or release of an agent or toxin by calling (301) 734–5519. A copy of APHIS Form 2043 may be obtained by writing to Biological and Technical Services, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236, or by calling (301) 734–5519. APHIS Form 2043 may be mailed to the same address or faxed to (301) 734–8700.

### § 331.17 Administrative review.

An individual or entity may appeal a denial or revocation of registration under this part. An individual who has been denied access to listed agents or toxins or who has been granted only limited access to listed agents or toxins under this part may appeal that decision.[12] The appeal must be in writing and submitted to the Administrator within 30 days of the decision. The appeal must state all of the facts and reasons upon which the individual or entity disagrees with the decision. Where the denial or revocation of registration or the denial or limitation of an individual's access approval is based solely upon an identification by the Attorney General, APHIS will forward the request for review to the Attorney General. The Administrator's decision constitutes final agency action.

**9 CFR Chapter I**

## PART 121—POSSESSION, USE, AND TRANSFER OF BIOLOGICAL AGENTS AND TOXINS

Sec.

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**Authority:** Secs. 211–213, Title II, Pub. L. 107–188, 116 Stat. 647 (7 U.S.C. 8401).

### § 121.0 Effective and applicability dates.

The regulations in this part are effective on February 11, 2003. On and after that date, any person possessing, using, or transferring any agent or toxin listed in § 121.3 must be in compliance with the provisions of this part. However, so as not to disrupt research or educational projects involving listed agents or toxins that were underway as of the effective date of this part, any person possessing such agents or toxins as of the effective date (current possessors) will be afforded additional time to reach full compliance with this part. Any provision not specifically cited in paragraphs (a) through (f) of this section will be applicable as of February 11, 2003. In addition, any person who does not possess listed agents or toxins by the effective date of this part, but who wishes to initiate a research or educational project prior to November 12, 2003, must be in compliance with the provisions of this part that are applicable for current possessors at the time of application, as provided in paragraphs (a) through (e) of this section.

(a) During the period from February 11, 2003, to November 12, 2003, biological agents or toxins listed in § 121.3 may only be transferred to an individual or entity that is not registered under this part if:

(1) The individual or entity is registered by CDC for that specific overlap agent or toxin in accordance with 42 CFR part 72; or

(2) The individual or entity has been issued a permit by the Administrator under part 122 of this subchapter to import or move interstate that specific agent or toxin. If an individual or entity has not been issued a permit under part 122 of this subchapter, the individual or entity may apply for a permit. To receive an agent or toxin, an individual or entity will also be required to submit APHIS Form 2041, in accordance with § 121.14(c). Because USDA permits do not cover intrastate movement, unless registered by CDC under 42 CFR part 72, an individual or entity may not receive a listed agent or toxin that is being moved intrastate until that individual or entity is registered in accordance with this part.

(b) By March 12, 2003, the responsible official must submit the registration application package as required in § 121.9. In addition, the responsible official must submit to the Attorney General the names and identifying information for the responsible official; alternate responsible official, where applicable; entity; and, where applicable, the individual who owns or controls the entity.

(c) By April 11, 2003, the responsible official must submit to the Attorney General the names and identifying information for all individuals whom the responsible official has identified as having a legitimate need to handle or use listed agents or toxins, and who have the appropriate training and skills to handle such agents or toxins, as required in § 121.11.

(d) By June 12, 2003, the responsible official must submit the security section of the Biosafety and Security Plan required in § 121.12 to APHIS or, for overlap agents or toxins, to APHIS or CDC.

(e) By September 12, 2003, the responsible official must implement the security section of the Biosafety and Security Plan, as required in § 121.12, and provide security training in accordance with 9 CFR 121.13.

(f) By November 12, 2003, the registration application process must be complete and the entity in full compliance with the regulations in this part.

### § 121.1 Definitions.

*Administrator.* The Administrator, Animal and Plant Health Inspection Service, or any person authorized to act for the Administrator.

*Animal and Plant Health Inspection Service (APHIS).* The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

*Attorney General.* The Attorney General of the United States or any person authorized to act for the Attorney General.

*Biological agent.* Any microorganism (including, but not limited to, bacteria, viruses, fungi, rickettsiae, or protozoa), or infectious substance, or any naturally occurring, bioengineered, or synthesized component of any such microorganism

[12] An entity may not appeal the denial or limitation of an individual's access to listed agents or toxins.

or infectious substance, capable of causing:

(1) Death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(2) Deterioration of food, water, equipment, supplies, or material of any kind; or

(3) Deleterious alteration of the environment.

*Centers for Disease Control and Prevention (CDC).* The Centers for Disease Control and Prevention of the United States Department of Health and Human Services.

*Clinical laboratory.* A laboratory facility that receives patients and collects specimens for processing or shipping to another laboratory.

*Diagnostic laboratory.* A laboratory facility that receives specimens for the purpose of determining the identities of pests, pathogens, contaminants, or causes of disease.

*Entity.* Any government agency (Federal, State, or local), academic institution, corporation, company, partnership, society, association, firm, sole proprietorship, or other legal entity.

*Import.* To move into, or the act of movement into, the territorial limits of the United States.

*Interstate.* From one State into or through any other State, or within the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

*Overlap agent or toxin.* Any microorganism (including, but not limited to, bacteria, viruses, fungi, rickettsiae, or protozoa) or toxin that poses a risk to both human and animal health and that is listed in § 121.3(b).

*Permit.* A written authorization by the Administrator to import or move interstate biological agents or toxins, under conditions prescribed by the Administrator.

*Proficiency testing.* A sponsored, time-limited analytical trial whereby one or more analytes, previously confirmed by the sponsor, are submitted to the testing laboratory for analysis and where final results are graded, scores are recorded and provided to participants, and scores for participants are evaluated for acceptance.

*Responsible official.* The individual designated by an entity to act on its behalf. This individual must have the authority and control to ensure compliance with the regulations in this part.

*Specimen.* A sample of material collected for use in testing, such as tissues, gastrointestinal contents, feces, bodily fluids (blood, serum, etc.), soil, water, feed or feed ingredients, swabs, cultures, and suspensions.

*State.* Any of the several States of the United States, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

*Toxin.* The toxic material or product of plants, animals, microorganisms (including, but not limited to, bacteria, viruses, fungi, rickettsiae, or protozoa), or infectious substances, or a recombinant or synthesized molecule, whatever their origin and method of production, and includes:

(1) Any poisonous substance or biological product that may be engineered as a result of biotechnology produced by a living organism; or

(2) Any poisonous isomer or biological product, homolog, or derivative of such a substance.

*United States.* All of the States.

*USDA.* The United States Department of Agriculture.

### § 121.2 Purpose and scope.

(a) This part sets forth the requirements for possession, use, and transfer of biological agents or toxins that have been determined to have the potential to pose a severe threat to both human and animal health, to animal health, or to animal products. The purpose of this part is to ensure the safe handling of such agents or toxins, and to protect against the use of such agents or toxins in domestic or international terrorism or for any other criminal purpose.

(b) Accordingly, this part provides that any individual or entity that possesses, uses, or transfers any agent or toxin listed in § 121.3 must register in accordance with § 121.7. To register, each entity must designate an individual who has the authority and control to ensure compliance with the regulations to be the responsible official. The responsible official must complete and submit the registration application package to APHIS or, for overlap agents or toxins, to APHIS or CDC. As part of registration, the responsible official, the entity, and, where applicable, the individual who owns or controls such entity will be subject to a security risk assessment by the Attorney General.

(c) The responsible official is responsible for ensuring compliance with the safety procedures in this part, including implementing the Biosafety and Security Plan in accordance with § 121.12, providing the proper training to individuals who handle or use agents or toxins listed in § 121.3, and providing proper laboratory facilities to contain and dispose of such agents or toxins. In addition, the responsible official is responsible for ensuring compliance with the safeguard and security measures in this part, including restricting access to only those individuals who have a legitimate need to handle or use agents or toxins and who have been approved in accordance with § 121.11, and transferring such agents or toxins only to registered individuals or entities in accordance with § 121.13.

### § 121.3 List of biological agents and toxins.

(a) Except as provided in paragraphs (f) and (g) of this section, the Administrator has determined that the biological agents and toxins listed in this section have the potential to pose a severe threat to both human and animal health, to animal health, or to animal products.

(b) *Overlap agents and toxins.*

*Bacillus anthracis*
Botulinum neurotoxins
Botulinum neurotoxin producing species of *Clostridium*
*Brucella abortus*
*Brucella melitensis*
*Brucella suis*
*Burkholderia mallei*
*Burkholderia pseudomallei*
*Clostridium botulinum*
*Clostridium perfringens* epsilon toxin
*Coccidioides immitis*
*Coxiella burnetii*
Eastern equine encephalitis virus
*Francisella tularensis*
Hendra virus
Nipah virus
Rift Valley fever virus
Shigatoxin
Staphylococcal enterotoxins
T–2 toxin
Venezuelan equine encephalitis virus

(c) Genetic elements, recombinant nucleic acids, and recombinant organisms of overlap agents or toxins:

(1) Biological agent viral nucleic acids (synthetic or naturally derived, contiguous or fragmented, in host chromosomes or in expression vectors) that can encode infectious and/or replication competent forms of any of the biological agent viruses.

(2) Nucleic acids (synthetic or naturally derived) that encode for the functional form(s) of any of the toxins listed in paragraph (b) of this section, if the nucleic acids:

(i) Are in a vector or host chromosome;

(ii) Can be expressed *in vivo* or *in vitro*; or

(iii) Are in a vector or host chromosome and can be expressed in *vivo* or *in vitro*.

(3) Viruses, bacteria, fungi, and toxins listed in paragraph (b) of this section that have been genetically modified.

(d) *Animal agents and toxins.*

African horse sickness virus
African swine fever virus
Akabane virus
Avian influenza virus (highly pathogenic)
Bluetongue virus (exotic)
Bovine spongiform encephalopathy agent
Camel pox virus
Classical swine fever virus
*Cowdria ruminantium* (Heartwater)
Foot-and-mouth disease virus
Goat pox virus
Japanese encephalitis virus
Lumpy skin disease virus
Malignant catarrhal fever virus (exotic)
Menangle virus
*Mycoplasma capricolum/M.* F38/*M. mycoides capri* (contagious caprine pleuropneumonia)
*Mycoplasma mycoides mycoides* (contagious bovine pleuropneumonia)
Newcastle disease virus (VVND)
Peste des petits ruminants virus
Rinderpest virus
Sheep pox virus
Swine vesicular disease virus
Vesicular stomatitis virus (exotic)

(e) The Administrator has determined that it would be impractical to regulate a biological agent or toxin that is in its naturally occurring environment. Therefore, any biological agent or toxin listed in this section that is in its naturally occurring environment will not be subject to the requirements of this part, provided that the biological agent or toxin has not been intentionally introduced, cultivated, collected, or otherwise extracted from its natural source.

(f) The Administrator has determined that biological agents or toxins that meet any of the following criteria do not have the potential to pose a severe threat to both human and animal health, or to animal health or animal products. Therefore, an individual or entity that only possesses, uses, or transfers an agent or toxin that meets any of the following criteria will not be subject to the requirements of this part:

(1) Nonviable agents or fixed tissues that are, bear, or contain agents or toxins listed in this section.[1]

(2) Genetic elements or subunits of agents or toxins listed in paragraph (d) of this section, if the genetic elements or subunits are not capable of causing disease.[2]

(3) Overlap toxins under the control of a principal investigator (or equivalent), if the total aggregate amount does not, at any time, exceed the following amounts: 0.5 mg of Botulinum neurotoxins (types A–G), 100 mg of *Clostridium perfringens* epsilon toxin, 100 mg of Shigatoxin, 5 mg of Staphylococcal enterotoxins, and 1,000 mg of T–2 toxin.

(g) *Attenuated strains.* Attenuated strains of biological agents listed in this section may not have the potential to pose a severe threat to both human and animal health, to animal health, or to animal products. Thus, an individual or entity may request review by the Administrator to determine whether a specific attenuated strain poses a severe threat to both human and animal health, or to animal health or animal products. For overlap agents, an individual or entity may request review by APHIS or CDC.

(1) If APHIS or CDC determines that a specific attenuated strain does not pose a severe threat to human and animal health, or to animal health or animal products, an individual or entity will not be subject to the requirements of this part. This determination will be limited to the specific attenuated strain and to the specific activities involving that attenuated strain.

(2) An individual or entity may request a review by writing to the Administrator or, for overlap agents, by writing to the Administrator or CDC.[3]

(3) If it is determined that a specific attenuated strain does not pose a severe threat, APHIS or CDC will notify the applicant and publish a notice in the **Federal Register**.

(4) An individual or entity may request reconsideration of an adverse decision in writing to the Administrator. The request for reconsideration must state all of the facts and reasons upon which the individual or entity relies upon to show the decision was incorrect. The Administrator will grant or deny the request for reconsideration as promptly as circumstances allow and will state, in writing, the reasons for the decision. If there is a conflict as to any material fact, the individual or entity may request a hearing to resolve the conflict.

### § 121.4 Exemptions for overlap agents or toxins.

(a) Clinical or diagnostic laboratories and other entities possessing, using, or transferring overlap agents or toxins that are contained in specimens presented for diagnosis or verification will be exempt from the requirements of this part, provided that:

(1) The identification of such agents or toxins is immediately reported to APHIS or CDC, and to other appropriate authorities when required by Federal, State, or local law; and

(2) Within 7 days after identification, the agents or toxins are transferred or inactivated, and APHIS Form 2040 is submitted to APHIS or CDC.[4] During agricultural emergencies or outbreaks, or in endemic areas, the Administrator may require less frequent reporting. A copy of the completed form must be maintained for 3 years.

(b) Clinical or diagnostic laboratories and other entities possessing, using, or transferring overlap agents or toxins that are contained in specimens presented for proficiency testing will be exempt from the requirements of this part, provided that:

(1) The identification of such agents or toxins, and their derivatives, is immediately reported to the APHIS or CDC, and to other appropriate authorities when required by Federal, State, or local law; and

(2) Within 90 days of receipt, the agents or toxins are transferred or inactivated, and APHIS Form 2040 is submitted to APHIS or CDC. A copy of the completed form must be maintained for 3 years.

(c) Unless the Administrator by order determines that additional regulation of a specific product is necessary to protect animal or plant health, or animal or plant products, an individual or entity possessing, using, or transferring products that are, bear, or contain overlap agents or toxins will be exempt from the requirements of this part if the products have been cleared, approved, licensed, or registered pursuant to:

(1) The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*);

(2) Section 351 of Public Health Service Act (42 U.S.C. 262);

(3) The Virus-Serum-Toxin Act (21 U.S.C. 151–159); or

(4) The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 131 *et seq.*).

(d) An individual or entity possessing, using, or transferring investigational products that are, bear, or contain

[1] However, the importation and interstate movement of these genetic elements or subunits of listed agents or toxins are still subject to the permit requirements under part 122 of this subchapter.

[2] See footnote 1.

[3] A request to review an attenuated strain may be mailed to National Center for Import and Export, VS, APHIS, 4700 River Road Unit 40, Riverdale, MD 20737–1231; or faxed to (301) 734–3652. For overlap agents, a request for review may be mailed to the above address or to Select Agent Program, Centers for Disease Control and Prevention, 1600 Clifton Road, NE, Mail Stop E 79, Atlanta, GA 30333; or faxed to (404) 498–2265.

[4] A clinical or diagnostic laboratory, or other entity, may immediately notify APHIS by faxing (301) 734–3652. APHIS Form 2040 may be obtained by calling APHIS at (301) 734–3277 or by calling CDC at (404) 498–2265. The form is also available on the Internet at *http://www.aphis.usda.gov/vs/ncie.bta.html* or *http://www.cdc.gov/od/ohs/lrsat.htm*. The completed form may be mailed or faxed to APHIS or CDC, as provided in footnote 3.

overlap agents or toxins may be exempt from the requirements of this part if such product is being used in an investigation authorized by any Federal law and the Administrator determines that additional regulation under this part is not necessary to protect animal or plant health, and animal or plant products.

(1) An individual or entity possessing, using, or transferring such investigational products may apply for an exemption from the requirements of this part by submitting APHIS Form 2042 to APHIS or CDC.

(2) For investigational products authorized under any of the Federal laws specified in paragraph (c) of this section, the Administrator shall make a determination regarding an exemption within 14 days after receipt of the application and notification that the investigation has been authorized under a Federal law.

(e) The Administrator may exempt an individual or entity from the requirements of this part, in whole or in part, for 30 days if it is necessary to respond to a domestic or foreign agricultural emergency involving an overlap agent or toxin. The Administrator may extend the exemption once for an additional 30 days.

(f) Upon request of the Secretary of Health and Human Services, the Administrator may exempt an individual or entity from the requirements of this part, in whole or in part, for 30 days if the Secretary of Health and Human Services has granted an exemption for a public health emergency involving an overlap agent or toxin. The Administrator may extend the exemption once for an additional 30 days.

### § 121.5 Exemptions for animal agents and toxins.

(a) Diagnostic laboratories and other entities possessing, using, or transferring agents or toxins that are contained in specimens presented for diagnosis or verification will be exempt from the requirements of this part, provided that:

(1) The identification of such agents or toxins is immediately reported to the Administrator and to other appropriate authorities when required by Federal, State, or local law; and

(2) Within 7 days after identification, the agents or toxins are transferred or inactivated, and APHIS Form 2040 is submitted to the Administrator.[5] During agricultural emergencies or outbreaks, or in endemic areas, the Administrator may require less frequent reporting. A copy of the completed form must be maintained for 3 years.

(b) Diagnostic laboratories and other entities possessing, using, or transferring agents or toxins that are contained in specimens presented for proficiency testing will be exempt from the requirements of this part, provided that:

(1) The identification of such agents or toxins, and their derivatives, is immediately reported to the Administrator, and to other appropriate authorities when required by Federal, State, or local law; and

(2) Within 90 days of receipt, the agent or toxins are transferred or inactivated, and APHIS Form 2040 is submitted to the Administrator. A copy of the completed form must be maintained for 3 years.

(c) An individual or entity receiving diagnostic reagents and vaccines that are, bear, or contain listed agents or toxins, also known as high consequence livestock pathogens or toxins, that are produced at USDA diagnostic facilities will be exempt from the requirements of this part.

(d) Unless the Administrator by order determines that additional regulation is necessary to protect animal health or animal products, an individual or entity possessing, using, or transferring products that are, bear, or contain listed agents or toxins will be exempt from the requirements of this part if the products have been cleared, approved, licensed, or registered pursuant to:

(1) The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*);

(2) Section 351 of Public Health Service Act (42 U.S.C. 262);

(3) The Virus-Serum-Toxin Act (21 U.S.C. 151–159); or

(4) The Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 131 *et seq.*).

(e) An individual or entity possessing, using, or transferring experimental products that are, bear, or contain listed agents or toxins may be exempt from the requirements of this part if such product is being used in an investigation authorized by any Federal law and the Administrator determines that additional regulation under this part is not necessary to protect animal or plant health, and animal or plant products. An individual or entity possessing, using, or transferring such experimental products may apply for an exemption from the requirements of this part by submitting APHIS Form 2042 to APHIS.

(f) In addition to the exemptions provided in paragraphs (a) through (e) of this section, the Administrator may grant a specific exemption upon a showing of good cause and upon his or her determination that such exemption is consistent with protecting animal health and animal products. An individual or entity that possesses, uses, or transfers agents or toxins may request in writing an exemption from the requirements of this part. If granted, such exemptions are valid for a maximum of 3 years; thereafter, an individual or entity must request a new exemption. If a request for exemption is denied, an individual or entity may request reconsideration in writing to the Administrator. The request for reconsideration must state all of the facts and reasons upon which the individual or entity relies to show that the exemption was wrongfully denied. The Administrator will grant or deny the request for reconsideration as promptly as circumstances allow and will state, in writing, the reasons for the decision. If there is a conflict as to any material fact, the individual or entity may request a hearing to resolve the conflict.[6]

### § 121.6 Registration; who must register.

(a) Unless exempted under §§ 121.4 or 121.5, any individual or entity that possesses, uses, or transfers any agent or toxin listed in § 121.3 must register with APHIS or, for overlap agents or toxins, APHIS or CDC.

(b) Each entity must designate an individual to be its responsible official. The responsible official must have the authority and control to ensure compliance with the regulations. The responsible official must complete and sign the registration application package, and will be the individual contacted by APHIS or CDC if any questions arise concerning the application or subsequent compliance with the regulations in this part. As part of registration, the responsible official and the entity will be subject to a security risk assessment by the Attorney General. While most registrants are likely to be entities, in the event that an individual applies for and is granted a certificate of registration, APHIS will consider the individual to be the responsible official.

[5] A diagnostic laboratory or other entity must immediately notify APHIS by faxing (301) 734–3652. APHIS Form 2040 may be obtained by calling (301) 734–3277. The form is also available on the Internet at *http://www.aphis.usda.gov/vs/ncie.bta.html.* The completed form may be mailed to National Center for Import and Export, VS, APHIS, 4700 River Road Unit 40, Riverdale, MD 20737–1231; or faxed to (301) 734–3652.

[6] A request for exemption may be mailed to National Center for Import and Export, VS, APHIS, 4700 River Road Unit 40, Riverdale, MD 20737–1231; or faxed to (301) 734–3652.

(c) An entity may designate one or more individuals to be an alternate responsible official, who may act for the responsible official when he/she is unavailable. These individuals must have the authority and control to ensure compliance with the regulations when acting as the responsible official. These individuals will also be subject to a security risk assessment by the Attorney General as part of registration.

**§ 121.7 Registration; general provisions.**

(a) Unless exempted under §§ 121.4 or 121.5, an individual or entity shall not possess, use, or transfer any agent or toxin listed in § 121.3 without a certificate of registration issued by APHIS or CDC.

(b) A certificate of registration may be issued upon:

(1) Approval of the responsible official; the alternate responsible official, where applicable; the entity; and, where applicable, the individual who owns or controls the entity following a security risk assessment by the Attorney General;[7] and

(2) Approval of the biosafety, containment, and security of the entity. The entity's biosafety, containment, and security procedures must be commensurate with the risk of the agent or toxin, given its intended use. APHIS or CDC will review the Biosafety and Security Plan, and may inspect and evaluate the premises and records to determine compliance with the regulations and the biosafety, containment, and security requirements; and

(3) A determination by the Administrator that the individual or entity seeking to register has a lawful purpose to possess, use, or transfer such agents or toxins.

(c) For overlap agents, APHIS and CDC will review applications for registration and amendments to a certificate of registration, and a certificate of registration or amendment to a certificate of registration will only be issued if APHIS and CDC concur.

(d) A certificate of registration will be valid for only the specific agents or toxins listed in the certificate and specific activities and locations. A certificate of registration may cover more than one listed agent or toxin, and it may be amended to cover additional listed agents or toxins.

(e) A certificate of registration may be amended to reflect changed circumstances (*e.g.*, replacement of the responsible official, changes in ownership or control of the entity,[8] changes in the activities involving the agent or toxin). The responsible official must immediately notify the agency that issued the certificate of registration, either APHIS or CDC, of such changes in circumstances that occur after submission of the application for registration or after receipt of a certificate of registration.

(f) If a responsible official wishes to discontinue possessing, using, or transferring a particular agent or toxin, the responsible official may inactivate the agent or toxin or he/she may transfer the agent or toxin to a registered individual or entity in accordance with § 121.13. The responsible official must notify APHIS or, for overlap agents or toxins, APHIS or CDC, 5 business days prior to the planned inactivation so that we may have the opportunity to observe the inactivation of the agents or toxins. APHIS or CDC will notify the responsible official if we wish to observe the inactivation of the agents or toxins.

(g) A certificate of registration will be valid for a maximum of 3 years.

**§ 121.8 Denial, revocation, or suspension of registration.**

(a) APHIS may deny an application for registration or revoke registration if:

(1) The Attorney General identifies the responsible official, entity, or individual who owns or controls the entity as within any of the categories described in 18 U.S.C. 175b; or

(2) The Attorney General identifies the responsible official, entity, or individual who owns or controls the entity as reasonably suspected by any Federal law enforcement or intelligence agency of:

(i) Committing a crime set forth in 18 U.S.C. 2332b(g)(5); or

(ii) Knowing involvement with an organization that engages in domestic or international terrorism (as defined in 18 U.S.C. 2331) or with any other organization that engages in intentional crimes of violence; or

(iii) Being an agent of a foreign power as defined in 50 U.S.C. 1801; or

(3) The responsible official does not have a lawful purpose to possess, use, or transfer agents or toxins listed in § 121.3; or

(4) The responsible official is an individual who handles or uses agents or toxins listed in § 121.3 and he/she does not have the necessary training or skills to handle such agents or toxins; or

(5) The entity does not meet the biosafety, containment, and security requirements prescribed by the Administrator;[9] or

(6) There are egregious or repeated violations of the biosafety, containment, or security requirements; or

(7) The Administrator determines that such action is necessary to protect animal or plant health, and animal or plant products.

(b) For overlap agents or toxins, APHIS or CDC shall deny an application for registration or revoke registration if the Attorney General identifies the responsible official, entity, or individual who owns or controls the entity as within any of the categories described in 18 U.S.C. 175b. APHIS or CDC may also deny registration or revoke registration for the reasons set forth in paragraphs (a)(2) through (a)(7) of this section.

(c) APHIS may summarily revoke or suspend registration for any of the reasons set forth in paragraphs (a) and (b) of this section.

(d) APHIS will notify the responsible official in writing if an application for registration is denied or a certificate of registration is revoked or suspended. For overlap agents or toxins, APHIS or CDC will notify the responsible official in writing if an application for registration is denied or a certificate of registration is revoked or suspended.

(e) Denial of an application for registration, revocation of registration, and suspension of registration may be appealed under § 121.17.

**§ 121.9 Registration; how to register.**

(a) To apply for a certificate of registration, the responsible official must submit all of the information and documentation required in the registration application package to APHIS, including the name, source, and characterization data for each agent or toxin to be registered. For overlap agents or toxins, the responsible official must submit all of the information and documentation required in the registration package to either APHIS or CDC. The responsible official must submit the registration application package to APHIS in cases where he/she is seeking registration for both animal and overlap agents and toxins.

(b) For animal agents and toxins, the registration application package may be obtained by calling (301) 734–3277 or faxing a request to (301) 734–3652. It is also available on the Internet at *http://www.aphis.usda.gov/vs/ncie.bta.html.* The completed registration application package must be mailed to National Center for Import and Export, VS, APHIS, 4700 River Road Unit 40,

[7] The security risk assessment of the entity and the individual who owns or controls such entity may be waived for Federal, State, or local governmental agencies.

[8] Any change in ownership or control of an entity will require a security risk assessment for the new individual(s) who owns or controls the entity.

[9] If registration is denied for this reason, we may provide technical assistance and guidance.

Riverdale, MD 20737–1231. Assistance in completing the registration application may be requested by calling (301) 734–3277.

(c) For overlap agents and toxins, the registration application package may be obtained by contacting APHIS, as set forth in paragraph (b) of this section, or by calling CDC at (404) 498–2255; faxing a request to (404) 498–2265; or writing to Select Agent Program, Centers for Disease Control and Prevention, 1600 Clifton Road, NE, Mail Stop E 79, Atlanta, GA 30333. It is also available on the Internet at *http://www.cdc.gov/od/ohs/lrsat.htm.* The completed registration application package may be mailed to APHIS at the address provided in paragraph (b) of this section or to CDC's Select Agent Program at the address provided in this paragraph. Assistance in completing the registration application may be requested by calling APHIS or CDC at the telephone numbers provided in this section.

**§ 121.10 Responsibilities of the responsible official.**

(a) The responsible official is responsible for ensuring compliance with the regulations, including:

(1) Developing and implementing a Biosafety and Security Plan in accordance with § 121.12;

(2) Allowing only approved individuals within the entity to have access to any agents or toxins listed in § 121.3 in accordance with § 121.11;

(3) Providing appropriate training in biosafety, containment, and security procedures for all personnel in accordance with § 121.13;

(4) Transferring agents or toxins only to registered individuals or entities in accordance with § 121.14;

(5) Ensuring that all visitors are informed of and follow the entity's security requirements and procedures;

(6) Notifying APHIS or, for overlap agents or toxins, APHIS or CDC, of changes in circumstances in accordance with § 121.7;

(7) Providing timely notice of any theft, loss, or release of a biological agent or toxin in accordance with § 121.17;

(8) Maintaining detailed records of information necessary to give a complete accounting of all of the activities related to agents or toxins listed in § 121.3 in accordance with § 121.15.

(b) In addition to the requirements in paragraph (a) of this section, the responsible official for a diagnostic laboratory or other entities possessing, using, or transferring agents or toxins listed in § 121.3 that are contained in specimens presented for diagnosis must immediately report the identification of such agents or toxins to the Administrator and to other appropriate authorities when required by Federal, State, or local law.[10] During agricultural emergencies or outbreaks, or in endemic areas, the Administrator may require less frequent reporting.

(c) In addition to the requirements in paragraph (a) of this section, the responsible official must ensure that the following experiments are not conducted unless approved by the Administrator, after consultation with experts:

(1) Experiments utilizing recombinant DNA that involve the deliberate transfer of a pathogenic trait or drug resistance trait to biological agents that are not known to acquire the trait naturally, if such acquisition could compromise the use of the drug to control disease agents in humans, veterinary medicine, or agriculture.

(2) Experiments involving the deliberate formation of recombinant DNA containing genes for the biosynthesis of toxins lethal for vertebrates at an $LD_{50}$<100 ng/kg body weight.

**§ 121.11 Restricting access to biological agents and toxins.**

(a) An individual may not have access to biological agents or toxins listed in § 121.3 unless approved by APHIS or CDC. APHIS will grant, limit, or deny access of individuals to listed agents or toxins. APHIS or CDC will grant, limit, or deny access of individuals to overlap agents or toxins.

(b) The responsible official is responsible for ensuring that only approved individuals within the entity have access to any agents or toxins listed in § 121.3. The responsible official must request such access for only those individuals who have a legitimate need to handle or use agents or toxins, and who have the appropriate training and skills to handle such agents or toxins.

(c) The responsible official must provide appropriate training in biosafety, containment, and security procedures to all individuals with access to agents and toxins listed in § 121.3.

(d) For each individual identified by the responsible official as having a legitimate need to handle or use agents or toxins, the responsible official must submit that individual's name and identifying information to APHIS and the Attorney General. For overlap agents or toxins, the responsible official must submit this information to either APHIS or CDC and the Attorney General.

(e) In addition, the responsible official must submit information about the individual's training and skills to APHIS or, for overlap agents or toxins, APHIS or CDC (*e.g.*, curriculum vitae for principal investigators and researchers, and a description of training completed by support personnel).

(f) APHIS may expedite the access approval process for individuals upon request by the responsible official and a showing of good cause (*e.g.*, public health or agricultural emergencies, national security, impending expiration of a research grant, a short-term visit by a prominent researcher).

(g) APHIS will notify the responsible official if an individual is granted full or limited access, or denied access to listed agents or toxins. APHIS will also notify the individual if he/she is denied access or granted only limited access. For overlap agents or toxins, APHIS or CDC will provide the necessary notification.

(h) APHIS may deny or limit access of an individual to listed agents or toxins if:

(1) The Attorney General identifies the individual as within any of the categories described in 18 U.S.C. 175b;

(2) The Attorney General identifies the individual as reasonably suspected by any Federal law enforcement or intelligence agency of committing a crime set forth in 18 U.S.C. 2332b(g)(5); knowing involvement with an organization that engages in domestic or international terrorism (as defined in 18 U.S.C. 2331) or with any other organization that engages in intentional crimes of violence; or being an agent of a foreign power as defined in 50 U.S.C. 1801;

(3) The individual does not have a legitimate need to handle listed agents or toxins;

(4) The individual does not have the necessary training or skills to handle listed agents or toxins;

(5) The Administrator determines that such action is necessary to protect animal health or animal products.

(i) For overlap agents or toxins, APHIS or CDC will deny an individual access to such agents or toxins if the Attorney General identifies the individual as within any of the categories described in 18 U.S.C. 175b. APHIS or CDC may also deny or limit access of an individual for the reasons set forth in paragraphs (f)(2) through (f)(5) of this section.

(j) An individual may appeal the Administrator's decision to deny or limit access under § 121.17.

[10] A diagnostic laboratory or other entity must immediately notify APHIS by faxing (301) 734–3652.

(k) Access approval is valid for 5 years; thereafter, the responsible official shall request renewal of access approval every 5 years for as long as the individual needs access to agents or toxins listed in § 121.3.

(l) The responsible official must immediately notify APHIS or, for overlap agents or toxins, APHIS or CDC, when an individual's access to agents or toxins listed in § 121.3 is terminated by the entity and the reasons therefore.

**§ 121.12 Biosafety and security plan.**

(a) As a condition of registration, the responsible official must develop and implement a Biosafety and Security Plan.[11] The Biosafety and Security Plan must contain sufficient information and documentation to describe the biosafety and containment procedures, and the security systems and procedures. The plan must be commensurate with the risk of the agent or toxin, given its intended use.

(1) *Biosafety and containment procedures.*[12] The biosafety and containment procedures must be sufficient to contain the agent or toxin (*e.g.*, physical structure and features of the entity, and operational and procedural safeguards). At a minimum, the plan must address containment, personnel safety and health, and inventory control.

(2) *Security systems and procedures.*[13] The security systems and procedures must be designed according to a site-specific risk assessment and must provide graded protection in accordance with the threat posed by the agent or toxin.

(i) The site-specific risk assessment should involve a threat assessment and risk analysis in which threats are defined, vulnerabilities examined, and risks associated with those vulnerabilities are identified.

(ii) The security systems and procedures must be tailored to address site-specific characteristics and requirements, ongoing programs, and operational needs and must mitigate the risks identified under paragraph (a)(2)(i) of this section.

(iii) The plan must describe inventory control procedures, personnel suitability for those individuals with access to agents or toxins listed in § 121.3, physical security, and cybersecurity. The plan must also contain provisions for routine cleaning, maintenance, and repairs; provisions for securing the area (*e.g.*, card access, key pads, locks) and protocols for changing access numbers or locks following staff changes; procedures for loss or compromise of keys, passwords, combinations, etc.; procedures for reporting suspicious persons or activities, loss or theft of listed agents or toxins, release of listed agents or toxins, or alteration of inventory records; provisions for the control of access to containers where listed agents and toxins are stored; and procedures for reporting and removing unauthorized persons.

(iv) With respect to areas containing listed agents or toxins, an entity or individual must adhere to the following security requirements or implement measures to achieve an equivalent or greater level of security as the provisions below:

(A) Allow unescorted access only to approved individuals who are performing a specifically authorized function during hours required to perform that job;

(B) Allow individuals not approved under § 121.11 to conduct routine cleaning, maintenance, repairs, and other non-laboratory functions only when escorted and continually monitored by approved individuals;

(C) Provide for the control of access to containers where listed agents and toxins are stored by requiring that such containers be locked when not in the direct view of an approved individual and by using other monitoring measures, as needed;

(D) Require the inspection of all packages upon entry and exit;

(E) Establish a protocol for intra-entity transfers, including provisions for ensuring that the packaging and movement, is conducted under the supervision of an approved individual;

(F) Require that approved individuals do not share with any other person their unique means of accessing the area or listed agents or toxins; and

(G) Require that approved individuals immediately report any of the following to the responsible official:

(*1*) Any loss or compromise of keys, passwords, combinations, etc.;

(*2*) Any suspicious persons or activities;

(*3*) Any loss or theft of listed agents or toxins;

(*4*) Any release of a listed agent or toxin; and

(*5*) Any sign that inventory and use records for listed agents and toxins have been altered or otherwise compromised.

(3) *Incident response procedures.*[14] The Biosafety and Security Plan must also include incident response plans for containment breach, security breach, inventory violations, non-biological incidents such as workplace violence, and cybersecurity breach. The incident response plans must address personnel safety and health, containment, inventory control, and notification of managers and responders. The incident response plans must also address such events as bomb threats, severe weather (floods, hurricanes, tornadoes), earthquakes, power outages, and other natural disasters or emergencies.

(b) The Biosafety and Security Plan must be reviewed, performance tested, and updated annually. The plan must also be reviewed and revised, as necessary, after any incident.

**§ 121.13 Training.**

(a) The responsible official must provide appropriate training in biosafety, containment, and security procedures to all individuals with access to agents and toxins listed in § 121.3.

(b) The responsible official must provide information and training to an individual at the time the individual is assigned to work with a listed agent or toxin. The responsible official must provide refresher training annually.

**§ 121.14 Transfer of biological agents and toxins.**

Biological agents and toxins listed in § 121.3 may only be transferred to individuals or entities registered to possess, use, or transfer that particular agent or toxin. However, the sender of an agent or toxin may be an individual or entity that has a certificate of registration for the agent or toxin, an individual or entity that is exempt from the requirements of this part, or an individual or entity located outside of the United States. Biological agents or toxins may only be transferred under the conditions of this section and must be authorized by APHIS or, for overlap agents or toxins, by APHIS or CDC, prior to the transfer.

[11] Technical assistance and guidance may be obtained by calling (301) 734–3277.

[12] For guidance on biosafety and containment procedures, see the CDC/NIH publication, ''Biosafety in Microbiological and Biomedical Laboratories'' (4th ed. 1999).

[13] For guidance, see the USDA Departmental Manual No. 9610–001, ''USDA Security Policies and Procedures for Biosafety Level-3 Facilities'' (August 30, 2002). The manual may be obtained by calling (301) 734–3277. The manual is also available on the Internet at *http://www.usda.gov/ocio/directives/DM/DM9610–001.htm.* See also Appendix F, ''Biosafety in Microbiological and Biomedical Laboratories,'' in Morbidity and Mortality Weekly Report (2002). This document may be obtained by writing to Select Agent Program, Centers for Disease Control and Prevention, 1600 Clifton Road, NE, Mail Stop E 79, Atlanta, GA 30333. It is also available on the Internet at *http://www.cdc.gov/mmwr.*

[14] The requirements in this paragraph do not supercede or preempt the enforcement of emergency response requirements imposed by other statutes or regulations.

(a) *Importation and interstate movement.* In addition to the permit required under part 122 of this subchapter, biological agents or toxins listed in § 121.3 may be imported or moved interstate only with the prior authorization of APHIS or, for overlap agents or toxins, APHIS or CDC. To obtain such authorization, the sender and the responsible official for the recipient must complete and submit APHIS Form 2041 to APHIS or CDC, in accordance with paragraph (c) of this section.

(b) *Intrastate movement.* Biological agents or toxins listed in § 121.3 may be moved intrastate only with the prior authorization of APHIS or, for overlap agents or toxins, APHIS or CDC. To obtain such authorization, the sender and the responsible official for the recipient must complete and submit APHIS Form 2041 to APHIS or CDC, in accordance with paragraph (c) of this section.

(c) *APHIS Form 2041; process and procedures.* (1) Prior to each transfer, the responsible official for the recipient and sender must complete APHIS Form 2041, and the sender must submit the form to APHIS or, for overlap agents or toxins, to APHIS or CDC.[15]

(2) APHIS or CDC will authorize the transfer based on a finding that the recipient has a certificate of registration covering the transfer of the listed agent or toxin.

(3) The responsible official for the recipient must notify the agency authorizing the transfer (either APHIS or CDC) and the sender upon receipt of the agent or toxin by mailing or faxing a completed APHIS Form 2041 to APHIS or CDC within 2 business days.

(4) The responsible official for the recipient must notify APHIS or CDC immediately if the agent or toxin has not been received within 48 hours after the expected delivery or if the package containing the agent or toxin is leaking or has been damaged.

(d) The sender must comply with all applicable laws governing packaging and shipping.

[15] APHIS Form 2041 may be obtained by calling APHIS at (301) 734–3277 or by calling CDC at (404) 498–2265. The form is also available on the Internet at *http://www.aphis.usda.gov/vs/ncie.bta.html* or *http://www.cdc.gov/od/ohs/lrsat.htm.* APHIS Form 2041 may be mailed to National Center for Import and Export, VS, APHIS, 4700 River Road Unit 40, Riverdale, MD 20737–1231; or faxed to (301) 734–3652. For overlap agents and toxins, it may be mailed to the above address or to Select Agent Program, Centers for Disease Control and Prevention, 1600 Clifton Road, NE, Mail Stop E 79, Atlanta, GA 30333; or faxed to (404) 498–2265.

**§ 121.15 Records.**

(a) The responsible official must maintain complete, up-to-date records of information necessary to give an accounting of all of the activities related to agents or toxins listed in § 121.3. Such records must include the following:

(1) The Biosafety and Security Plan;

(2) A current list of all individuals with access to agents or toxins listed in § 121.3;

(3) Training records for individuals with access to such agents or toxins;

(4) Accurate and current inventory records (including source and characterization data);

(5) Permits and transfer documents (APHIS Form 2041) issued by APHIS and CDC;

(6) Security records (*e.g.*, transactions from automated access control systems, testing and maintenance of security systems, visitor logs);

(7) Biosafety, containment, and security incident reports.

(b) The responsible official must maintain such records for 3 years.

(c) All records must be produced upon request to APHIS or CDC inspectors, and appropriate Federal, State, or local law enforcement authorities.

**§ 121.16 Inspections.**

(a) To ensure compliance with the regulations, any APHIS or CDC inspector must be allowed, without previous notification, to enter and inspect the entire premises, all materials and equipment, and all records required to be maintained by this part.

(b) Prior to issuing a certificate of registration to an entity or individual, APHIS or CDC may inspect and evaluate the premises and records to ensure compliance with the regulations and the biosafety, containment, and security requirements.

**§ 121.17 Notification in the event of theft, loss, or release of a biological agent or toxin.**

(a) The responsible official must orally notify APHIS and appropriate Federal, State, or local law enforcement agencies immediately upon discovery of the theft or loss of agents or toxins listed in § 121.3. The oral notification must be followed by a written report (APHIS Form 2043) within 7 days.

(b) The responsible official must orally notify APHIS immediately upon discovery that a release of an agent or toxin has occurred outside of the biocontainment area. The oral notification shall be followed by a written report (APHIS Form 2043) within 7 days. Upon notification and a finding that the release poses a threat to animal or plant health, or animal or plant products, APHIS will notify relevant Federal, State, and local authorities, and the public, if necessary. If the release involves an overlap agent or toxin, APHIS will also notify the Secretary of Health and Human Services.

(c) The responsible official must orally notify APHIS of a theft, loss, or release of an agent or toxin by calling (866) 994–5698. A copy of APHIS Form 2043 may be obtained by writing to National Center for Import and Export, VS, APHIS, 4700 River Road Unit 40, Riverdale, MD 20737–1231; or by calling (301) 734–3277. The form is also available on the Internet at *http://www.aphis.usda.gov/vs/ncie.bta.html.* APHIS Form 2043 may be mailed to the same address or faxed to (301) 734–3652.

**§ 121.18 Administrative review.**

An individual or entity may appeal a denial or revocation of registration under this part. An individual who has been denied access to listed agents or toxins or who has been granted only limited access to listed agents or toxins under this part may appeal that decision.[16] The appeal must be in writing and submitted to the Administrator within 30 days of the decision. The appeal must state all of the facts and reasons upon which the individual or entity disagrees with the decision. Where the denial or revocation of registration or the denial or limitation of an individual's access approval is based solely upon an identification by the Attorney General, APHIS will forward the request for review to the Attorney General. The Administrator's decision constitutes final agency action.

Done in Washington, DC this 9th day of December 2002 .

**Charles D. Lambert,**

*Acting Under Secretary for Marketing and Regulatory Programs.*

[FR Doc. 02–31373 Filed 12–9–02; 4:03 pm]

BILLING CODE 3410–34–P

[16] An entity may not appeal the denial or limitation of an individual's access to listed agents or toxins.

Federal Register

Friday,
December 13, 2002

# Part VI

# Department of Labor

## Pension and Welfare Benefits Administration

## Publication of Year 2002 Form M–1; Notice

## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

### Publication of Year 2002 Form M–1

**AGENCY:** Pension and Welfare Benefits Administration, Department of Labor.

**ACTION:** Notice on the Availability of the Year 2002 Form M–1.

**SUMMARY:** This document announces the availability of the Year 2002 Form M–1, Annual Report for Multiple Employer Welfare Arrangements and Certain Entities Claiming Exception. A copy of this new form is attached.

**FOR FURTHER INFORMATION CONTACT:** Amy J. Turner, Pension and Welfare Benefits Administration, Department of Labor, at (202) 693–8335.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Form M–1 is required to be filed under section 101(g) and section 734 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and 29 CFR 2520.101–2.

### II. The Year 2001 Form M–1

This document announces the availability of the Year 2002 Form M–1, Annual Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs). A copy of the new form is attached. This year's Form M–1 is substantively identical to the Year 2001 Form M–1. In addition, the filing deadlines for the Year 2002 Form M–1 parallel those for last year's form. Specifically, the Year 2002 Form M–1 is generally due March 1, 2003, with an extension until May 1, 2003 available. These Year 2002 deadlines were also previously published; they are included in the Department of Labor's regulations implementing the Form M–1 filing requirement and they were set forth in last year's Form M–1.

PWBA is committed to working together with administrators to help them comply with this filing requirement. Additional copies of the Form M–1 are available on the Internet at: *http://www.dol.gov/pwba.* In addition, after printing, copies will be available by calling the PWBA toll-free publication hotline at 1–866–275–7922. Questions on completing the form are being directed to the PWBA help desk at (202) 693–8360.

*Statutory Authority*

Sec. 29 U.S.C. 1024, 1027, 1059, 1132(c)(5), 1135, 1181–1183, 1185, 1185a, 1185b, 1191, 1191a, 1191b, 1191c; Sec. 101, Pub. L. 104–191, 101 Stat. 1936 (29 U.S.C. 1181); Secretary of Labor's Order No. 1–87, 52 FR 13139, April 21, 1987.

Signed at Washington, DC, this 9th day of December, 2002.

**Ann L. Combs,**

*Assistant Secretary, Pension and Welfare Benefits Administration.*

BILLING CODE 4510–29–P

# 2002 Form M-1

**MEWA/ECE Form**

This Form is Open to Public Inspection

## Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs)

This report is required to be filed under section 101(g) of the Employee Retirement Income Security Act of 1974 and 29 CFR 2520.101-2.
➔ See separate instructions before completing this form.

OMB No. 1210-0116

Department of Labor
Pension and Welfare Benefits Administration

## PART I REPORT IDENTIFICATION INFORMATION

Complete either Item **A** or Item **B** (as applicable) and Item **C**.

**A** If this is an annual report, specify whether it is for:
(*1*) ❑ The 2002 calendar year; or
(*2*) ❑ The fiscal year beginning _____ and ending _____ .
mm/dd/yyyy mm/dd/yyyy

**B** If this is a special filing, specify whether it is:
(*1*) ❑ A 90-day origination report;
(*2*) ❑ An amended report; or
(*3*) ❑ A request for an extension.

**C** If this is a final report, check here . . . . . ➔ ❑

## PART II MEWA OR ECE IDENTIFICATION INFORMATION

| | |
|---|---|
| **1a** Name and address of the MEWA or ECE | **1b** Telephone number of the MEWA or ECE |
| | **1c** Employer Identification Number (EIN) |
| | **1d** Plan Number (PN) |
| **2a** Name and address of the administrator of the MEWA or ECE | **2b** Telephone number of the administrator |
| | **2c** Employer Identification Number (EIN) |
| **3a** Name and address of the entity sponsoring the MEWA or ECE | **3b** Telephone number of the sponsor |
| | **3c** Employer Identification Number (EIN) |

## PART III REGISTRATION INFORMATION

**4** Specify the most recent date the MEWA or ECE was originated . . . . . ➔ _____

**5** Complete the following chart. (See Instructions for **Item 5**)

| 5a | 5b | 5c | 5d | 5e | 5f | 5g |
|---|---|---|---|---|---|---|
| Enter all States where the entity provides coverage. | Is the entity a licensed health insurance issuer in this State? | If you answer "yes" to **5b**, list any NAIC number. | If you answer "no" to **5b**, is the entity fully insured? | If you answer "yes" to **5d**, enter the name of the insurer and its NAIC number. | Does the entity purchase stop-loss coverage? | If you answer "yes" to **5f**, enter the name of the stop-loss insurer and its NAIC number. |
| | ❑ Yes ❑ No | | ❑ Yes ❑ No | | ❑ Yes ❑ No | |
| | ❑ Yes ❑ No | | ❑ Yes ❑ No | | ❑ Yes ❑ No | |
| | ❑ Yes ❑ No | | ❑ Yes ❑ No | | ❑ Yes ❑ No | |
| | ❑ Yes ❑ No | | ❑ Yes ❑ No | | ❑ Yes ❑ No | |
| | ❑ Yes ❑ No | | ❑ Yes ❑ No | | ❑ Yes ❑ No | |

**For Paperwork Reduction Act Notice, see page 8 of the instructions.**

**6** Of the States identified in **Item 5a**, list those States in which the MEWA or ECE conducted 20 percent or more of its business (based on the number of participants receiving coverage for medical care under the MEWA or ECE).

**7** Total number of participants covered under the MEWA or ECE . . . . . → _____

## PART IV INFORMATION FOR COMPLIANCE WITH PART 7 OF ERISA

**8a** Has the MEWA or ECE been involved in any litigation or enforcement proceeding in which noncompliance with any provision of Part 7 of Subtitle B of Title I (Part 7) of ERISA was alleged? Answer for the year to which this filing applies and any time since then up to the date of completing this form. Answer "Yes" for any State or Federal litigation or enforcement proceeding (including any administrative proceeding), whether the allegation concerns a provision under Part 7 of ERISA, a corresponding provision under the Internal Revenue Code or Public Health Service Act, a breach of any duty under Title I of ERISA if the underlying violation relates to a requirement under Part 7 of ERISA, or a breach of a contractual obligation if the contract provision relates to a requirement under Part 7 of ERISA. (The instructions to this form contain additional information that may be helpful in answering this question.) . . . . . → ❑ Yes ❑ No

**8b** If you answered "Yes" to **Item 8a**, identify each litigation or enforcement proceeding. With respect to each, include (if applicable): (1) the case number, (2) the date, (3) the nature of the proceedings, (4) the court, (5) all parties (for example, plaintiffs and defendants or petitioners and respondents), and (6) the disposition. You may answer this question by attaching a copy of the complaint with the name of the MEWA or ECE, the disposition of the case, and the phrase "Item 8b Attachment," noted in the upper right corner.

**9** Complete the following. (Note: The instructions to this form contain four detailed worksheets which may be helpful in completing this item. Please read the instructions carefully before answering the following questions.)

| | | | |
|---|---|---|---|
| **9a** Is the coverage provided by the MEWA or ECE in compliance with the portability provisions of the Health Insurance Portability and Accountability Act of 1996 and the Department's regulations issued thereunder? (See Worksheet A) . . . . . → | ❑ Yes | ❑ No | ❑ N/A |
| **9b** Is the coverage provided by the MEWA or ECE in compliance with the Mental Health Parity Act of 1996 and the Department's regulations issued thereunder? (See Worksheet B) . . . . . → | ❑ Yes | ❑ No | ❑ N/A |
| **9c** Is the coverage provided by the MEWA or ECE in compliance with the Newborns' and Mothers' Health Protection Act of 1996 and the Department's regulations issued thereunder? (See Worksheet C) . . . . . → | ❑ Yes | ❑ No | ❑ N/A |
| **9d** Is the coverage provided by the MEWA or ECE in compliance with the Women's Health and Cancer Rights Act of 1998? (See Worksheet D) . . . . . → | ❑ Yes | ❑ No | ❑ N/A |

**IF MORE SPACE IS REQUIRED FOR ANY ITEM, YOU MAY ATTACH ADDITIONAL PAGES. (SEE INSTRUCTIONS SECTION 2.4)**

**Caution:** *Penalties may apply in the case of a late or incomplete filing of this report.*

Under penalty of perjury and other penalties set forth in the instructions, I declare that I have examined this report, including any accompanying attachments, and to the best of my knowledge and belief, it is true and correct. Under penalty of perjury and other penalties set forth in the instructions, I also declare that, unless this is an extension request, this report is complete.

Signature of administrator → _____ Date → _____

Type or print name of administrator → _____

Department of Labor
**Pension and Welfare Benefits Administration**

# Year 2002
# Instructions for Form M-1

## Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs)

*ERISA refers to the Employee Retirement Income Security Act of 1974, as amended*

### Notes on the 2002 Form M-1

- This year's Form M-1 is substantively identical to the 2001 Form M-1.
- A minor procedural change was made to the Report Identification Information in Part I of the form. A new Item C was added to indicate whether this is a final report. For more information on new Item C, see the line-by-line instructions in Section 3.1.
- The Year 2002 Form M-1 is generally due March 1, 2003, with an extension until May 1, 2003, available.

### Introduction

This form is required to be filed under sections 101(g) and 734 of ERISA and 29 CFR 2520.101-2.

The Department of Labor, Pension and Welfare Benefits Administration (PWBA), is committed to working together with administrators to help them comply with this filing requirement. Additional copies of the Form M-1 are available by calling the **PWBA toll-free hotline** at **1-866-275-7922** and on the Internet at: **www.dol.gov/pwba**. If you have any questions (such as whether you are required to file this report) or if you need any assistance in completing this report, please call the **PWBA help desk** at **(202) 693-8360.**

All Form M-1 reports are subject to a computerized review. It is in the filer's best interest that the responses accurately reflect the circumstances they were designed to report.

### Contents

The instructions are divided into three main sections.


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## SECTION 1

### 1.1 Definitions

"Administrator"
For purposes of this report, the "administrator" is the person specifically designated by the terms of the MEWA or ECE. However, if the MEWA or ECE is a group health plan and the administrator is not so designated, the "plan sponsor" is the administrator. ("Plan sponsor" is defined in ERISA section 3(16)(B) as (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.) Moreover, in the case of a MEWA or ECE for which an administrator is not designated and a plan sponsor cannot be identified, the administrator is the person or persons actually responsible (whether or not so designated under the terms of the MEWA or ECE) for the control, disposition, or management of the cash or property received by or contributed to the MEWA or ECE, irrespective of whether such control, disposition, or management is exercised directly by such person or persons or indirectly through an agent or trustee designated by such person or persons.

"Employer Identification Number" or "EIN"
An EIN is a nine-digit employer identification number. For example, 00-1234567. Entities who do not have an EIN can apply for one on Form SS-4, Application for Employer Identification Number. This form can be obtained at most IRS or Social Security Administration offices. PWBA does NOT issue EINs.

"Entity Claiming Exception" or "ECE"
For purposes of this report, the term "entity claiming exception" or "ECE" means any plan or other arrangement that is established or maintained for the purpose of offering or providing medical benefits to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, and that claims it is not a MEWA because the plan or other arrangement claims the exception relating to plans established or maintained pursuant to one or more collective bargaining agreements (contained in section 3(40)(A)(i) of ERISA).

The administrator of an ECE must file this report each year for the first 3 years after the ECE is "originated." (Warning: An ECE may be "originated" more than once. Each time an ECE is "originated," more filings are triggered.)

"Employee Welfare Benefit Plan"
In general, an employee welfare benefit plan means any plan, fund, or program established or maintained by an employer or by an employee organization, or by both, to the extent such plan, fund, or program provides its participants or beneficiaries the benefits listed in section 3(1) of ERISA (including benefits for medical care).

"Excepted Benefits"
Part 7 of Subtitle B of Title I (Part 7) of ERISA does not apply to any group health plan or group health insurance issuer in relation to its provision of excepted benefits.

Certain benefits that are generally not health coverage are excepted in all circumstances. These benefits are: coverage only for accident (including accidental death and dismemberment), disability income insurance, liability insurance (including general liability insurance and automobile liability insurance), coverage issued as a supplement to liability insurance, workers' compensation or similar insurance, automobile medical payment insurance, credit-only insurance (for example, mortgage insurance), and coverage for on-site medical clinics.

Other benefits that generally are health coverage are excepted if certain conditions are met. Specifically, limited scope dental benefits, limited scope vision benefits, and long-term care benefits are excepted if they are provided under a separate policy, certificate, or contract of insurance, or are otherwise not an integral part of the group health plan. For more information on these limited excepted benefits, see the Department of Labor's regulations at 29 CFR 2590.732(b)(3).

In addition, noncoordinated benefits may be excepted benefits. The term "noncoordinated benefits" refers to coverage for a specified disease or illness (such as cancer-only coverage) or hospital indemnity or other fixed dollar indemnity insurance (such as insurance that pays $100/day for a hospital stay as its only insurance benefit), if three conditions are met. First, the benefits must be provided under a separate policy, certificate, or contract of insurance. Second, there can be no coordination between the provision of these benefits and another exclusion of benefits under a group health plan maintained by the same plan sponsor. Third, benefits must be paid without regard to whether benefits are provided with respect to the same event under a group health plan maintained by the same plan sponsor. For more information on these noncoordinated excepted benefits, see the Department of Labor's regulations at 29 CFR 2590.732(b)(4).

Finally, supplemental benefits may be excepted if certain conditions are met. Specifically, the benefits are excepted only if they are provided under a separate policy, certificate or contract of insurance, and the benefits are medicare supplemental (commonly known as "Medigap" or "MedSupp") policies, TRICARE supplements, or supplements to certain employer group health plans. Such supplemental coverage cannot duplicate primary coverage and must be specifically designed to fill gaps in primary

coverage, coinsurance, or deductibles. Note that retiree coverage under a group health plan that coordinates with Medicare may serve a supplemental function similar to that of a Medigap policy. However, such employer-provided retiree "wrap around" benefits are not excepted benefits (because they are expressly excluded from the definition of a Medicare supplemental policy in section 1882(g)(1) of the Social Security Act). For more information on supplemental excepted benefits, see the Department of Labor's regulations at 29 CFR 2590.732(b)(5).

"Group Health Plan"
In general, a group health plan means an employee welfare benefit plan to the extent that the plan provides benefits for medical care to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise. See ERISA section 733(a).

"Health Insurance Issuer" or "Issuer"
The term "health insurance issuer" or "issuer" is defined, in pertinent part, in 2590.701-2 of the Department's regulations as "an insurance company, insurance service, or insurance organization (including an HMO) that is required to be licensed to engage in the business of insurance in a State and that is subject to State law which regulates insurance . . . . Such term does not include a group health plan."

"Multiple Employer Welfare Arrangement" or "MEWA"
In general, a multiple employer welfare arrangement (MEWA) is an employee welfare benefit plan or other arrangement that is established or maintained for the purpose of offering or providing medical benefits to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that the term does not include any such plan or other arrangement that is established or maintained under or pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements, by a rural electric cooperative, or by a rural telephone cooperative association. See ERISA section 3(40). (Note: Many States regulate entities as MEWAs using their own, State definition of the term. Whether or not an entity meets a State's definition of a MEWA for purposes of regulation under State law is a matter of State law.)

For more information on MEWAs, visit PWBA's Web site at **www.dol.gov/pwba** or call the **PWBA's toll-free hotline** at **1-866-275-7922** and ask for the booklet entitled, "MEWAs: Multiple Employer Welfare Arrangements Under the Employee Retirement Income Security Act: A Guide to Federal and State Regulation."

For information on State MEWA regulation, contact your State Insurance Department.

"Originated"
For purposes of this report, a MEWA or ECE is "originated" each time any of the following events occur:

**(1)** The MEWA or ECE first begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals);

**(2)** The MEWA or ECE begins offering or providing such coverage after any merger of MEWAs or ECEs (unless all MEWAs or ECEs involved in the merger were last originated at least 3 years prior to the merger); or

**(3)** The number of employees to which the MEWA or ECE offers or provides coverage for medical care is at least 50 percent greater than the number of such employees on the last day of the previous calendar year (unless such increase is due to a merger with another MEWA or ECE under which all MEWAs and ECEs that participate in the merger were last originated at least 3 years prior to the merger).

Therefore, a MEWA or ECE may be originated more than once.

"Plan Number" or "PN"
A PN is a three-digit number assigned to a plan or other entity by an employer or plan administrator. For plans or other entities providing welfare benefits, the first plan number should be number 501 and additional plans should be numbered consecutively.

"Sponsor"
For purposes of this report, the "sponsor" means:

**(1)** If the MEWA or ECE is a group health plan, the sponsor is the "plan sponsor," which is defined in ERISA section 3(16)(B) as (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan; or

**(2)** If the MEWA or ECE is not a group health plan, the sponsor is the entity that establishes or maintains the MEWA or ECE.

## 1.2 Who Must File

General Rules
The administrator of a multiple employer welfare arrangement (MEWA) generally must file this report for every calendar year, or portion thereof, that the MEWA offers or provides benefits for medical care to the employees of two or more employers (including one or more self-employed individuals). The administrator of an entity claiming exception (ECE) must file the report if the ECE was last originated at any time within 3 years before the annual filing due date. (See the definition of "originated" in Section 1.1 and the discussion of when to file in Section 1.3.) (**Caution:** An ECE may be "originated" more than once. Each time an ECE is "originated," more filings are triggered.)

Exception
Irrespective of the general rules (described above), in no event is reporting required by the administrator of a MEWA or ECE if the MEWA or ECE is licensed or authorized to operate as a health insurance issuer in every State in which it offers or provides coverage for medical care to employees (or to their beneficiaries).

Additional Guidance
**(1)** In response to comments, and consistent with the question-and-answer guidance published in April and June of 2000, no penalties will be assessed against the administrator of a MEWA or ECE if the MEWA or ECE meets any of the following conditions:

**(i)** It provides coverage that consists solely of excepted benefits (defined above), which are not subject to Part 7 of ERISA. (However, if the MEWA or ECE provides coverage that consists both of excepted benefits and other benefits for medical care that are not excepted benefits, the administrator of the MEWA or ECE is required to file the Form M-1.)

**(ii)** It is an employee welfare benefit plan that is not subject to ERISA, including a governmental plan, church plan, or plan maintained only for the purpose of complying with workers' compensation laws, within the meaning of sections 4(b)(1), 4(b)(2), or 4(b)(3) of ERISA, respectively.

**(iii)** It provides coverage only through employee welfare benefit plans that are not covered by ERISA, including governmental plans, church plans, and plans maintained only for the purpose of complying with workers' compensation laws, within the meaning of sections 4(b)(1), 4(b)(2), and 4(b)(3) of ERISA, respectively.

**(2)** In addition, in response to comments, and consistent with the question-and-answer guidance published in April and June of 2000, no penalties will be assessed against the administrator of an entity that would not constitute a MEWA or ECE but for the following circumstances:

**(i)** It provides coverage to the employees of two or more trades or businesses that share a common control interest of at least 25 percent at any time during the plan year, applying principles similar to the principles applied under section 414 of the Internal Revenue Code.

**(ii)** It is created by a change in control of businesses (such as a merger or acquisition) that is for a bona fide business purpose (that is, for a purpose other than avoiding Form M-1 filing) and is temporary in nature (that is, it does not extend beyond the end of the plan year following the year in which the change in control occurs).

**(iii)** It is a group health plan that covers a very small number of participants who are not employees (or former employees) of the plan sponsor, such as non-employee members of the board of directors or independent contractors. The number of non-employee participants covered by the plan is very small if it does not exceed one percent of the total number of participants, determined as of the last day of the year to be reported (or, in the case of a 90-day origination report, determined as of the 60th day following the origination date).

Good Faith Determinations Regarding Whether an Entity is an ECE
Accordingly, subject to the exceptions described above, the administrator of a MEWA is required to file annually. By contrast, the administrator of an ECE is required to file for 3 years following an origination.

Whether or not an entity is a MEWA or ECE is determined by the administrator acting in good faith. Therefore, if an administrator makes a good faith determination at the time of the filing that the entity is maintained pursuant to one or more collective bargaining agreements, then the entity is an ECE. Moreover, if the administrator makes a further good faith determination at the time of the filing that the ECE is not required to file because its most recent origination was more than 3 years ago, then a filing is not required. Even if the entity is later determined to be a MEWA, filings are not required prior to the determination that the entity is a MEWA if at the time the filings were due, the administrator made a good faith determination that the entity was an ECE. However, filings are required for the years after the determination that the entity is a MEWA.

In contrast, while an administrator's good faith determination that an entity is an ECE may eliminate the requirement that the administrator of the entity file under this section for more than 3 years after the entity's origination date, the administrator's determination does not affect the applicability of State law to the entity. Accordingly, incorrectly claiming the exception may eliminate the need to file under this section, if the claiming of the exception is done in good faith. However, the claiming of the exception for ECEs under this filing requirement does not prevent the application of State law to an entity that is later determined to be a MEWA. This is because the filing, or the failure to file, under this section does not in any way affect the application of State law to a MEWA.

## 1.3 When to File

General Rule
The administrator of a MEWA or ECE that is required to file must file the Form M-1 no later than March 1 following any calendar year for which a filing is required (unless March 1 is a Saturday, Sunday, or Federal holiday, in which case the form must be filed no later than the following business day).

90-Day Origination Report
In general, an expedited filing is also required after a MEWA or ECE is originated. To satisfy this requirement, the administrator must complete and file the Form M-1 within 90 days of the date the MEWA or ECE is originated (unless the last day of the 90-day period is a Saturday, Sunday, or Federal holiday, in which case the form must be filed no later than the following business day).

Exception to the 90-Day Origination Report Requirement
No 90-Day Origination Report is required if the entity was originated in October, November, or December.

Extensions
A one-time extension of time to file will automatically be granted if the administrator of the MEWA or ECE requests an extension. To request an extension, the administrator must: (1) complete Parts I and II of the Form M-1 (and check Box B(3) in Part I); (2) sign, date, and type the administrator's name at the end of the form; and (3) file this request for extension no later than the normal due date for the report. In such a case, the administrator will have an additional 60 days to file a completed Form M-1. A copy of this request for extension must be attached to the completed Form M-1 when filed.

### 1.4 Where to File

Completed copies of the Form M-1 should be sent to:
Public Documents Room, PWBA
Room N-1513, U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

### 1.5 Penalties

ERISA provides for the assessment or imposition of a penalty for failure to file a report, failure to file a completed report, and late filings. In the event of no filing, an incomplete filing, or a late filing, a penalty may apply of up to $1,000 a day for each day that the administrator of the MEWA or ECE fails or refuses to file a complete report (or a higher amount if adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996). In addition, certain other penalties may apply.

## SECTION 2

### 2.1 Year to be Reported

General Rule
The administrator of a MEWA or ECE that is required to file should complete the form using the previous calendar year's information. (For example, for a filing due by March 1, 2003, calendar year 2002 information should be used.)

Fiscal Year Exception
The administrator of a MEWA or ECE that is required to file may report using fiscal year information if the administrator of the MEWA or ECE has at least 6 continuous months of fiscal year information to report. (Thus, for example, for a filing that is due by March 1, 2003, fiscal year 2002 information may be used if the administrator has at least 6 continuous months of fiscal year 2002 information to report.) In this case, the administrator should check Box A(2) in Part I and specify the fiscal year.

### 2.2 The 90-Day Origination Report

When a MEWA or ECE is originated, a 90-Day Origination Report is generally required. (See Section 1.3 on When to File). When filing a 90-Day Origination Report, the administrator is required to complete the Form M-1 using information based on at least 60 continuous days of operation by the MEWA or ECE.

Remember, there is an exception to the 90-Day Origination Report requirement. No 90-Day Origination Report is required if the entity was originated in October, November, or December.

### 2.3 Signature and Date

The administrator must sign and date the report. The signature must be original. The name of the individual who signed as the administrator must be typed or printed clearly on the line under the signature line.

### 2.4 Attaching Additional Pages

If more space is needed to complete any item on the Form M-1, additional pages may be attached. Additional pages must be the same size as this form (8½" x 11") and should include the name of the MEWA or ECE, the Item number, and the word "Attachment" in the upper right corner. In addition, the attachment for any item should be in a format similar to that item on the form.

### 2.5 Amended Report

To correct errors and/or omissions on a previously filed Form M-1, submit a completed Form M-1 with Part I, Box B(2) checked and an original signature. When filing an amended report, answer all questions and circle the amended line numbers.

## SECTION 3

Important: "Yes/No" questions must be marked "Yes" or "No," but not both. "N/A" is not an acceptable response unless expressly permitted in the instructions to that line.

### 3.1 Line-By-Line Instructions

Part I - Report Identification Information
Complete either Item A or Item B, as applicable.

**Annual Reports:** If this is an annual report, check either box A(1) or box A(2).

**Box A(1):** Check this box if calendar year information is being used to complete this report. (See Section 2.1 on Year to be Reported.)

**Box A(2):** Check this box if fiscal year information is being used to complete this report. Also specify the fiscal year. (For example, if fiscal year 2002 information is being used instead of calendar year 2002 information, specify the dates the fiscal year begins and ends.) (See Section 2.1 on Year to be Reported.)

**Special Filings:** If this is a special filing, check either box B(1), box B(2), or box B(3).

**Box B(1):** Check this box if the filing is a 90-Day Origination Report. (See Section 1.2 on Who Must File, Section 1.3 on When to File, and Section 2.2 on 90-Day Origination Reports.)

**Box B(2):** Check this box if the filing is an Amended Report. (See Section 2.5 on Amended Reports.)

**Box B(3):** Check this box if the administrator of the MEWA or ECE is requesting an extension. (See Section 1.3 on When to File.)

**Final Reports:** Check the box in Item C if the administrator does not intend to file a Form M-1 next year. For example, if this is the third filing following an origination for an ECE, or if a MEWA has ceased operations, the administrator should check this box.

Part II – MEWA or ECE Identification Information

**Items 1a through 1d:** Enter the name, address, and telephone number of the MEWA or ECE, and any employer identification number (EIN) and plan number (PN) used by the MEWA or ECE in reporting to the Department of Labor or the Internal Revenue Service. If the MEWA or ECE does not have any EINs associated with it, leave Item 1c blank. If the MEWA or ECE does not have any PNs associated with it, leave Item 1d blank. In answering these questions, list only EINs and PNs used by the MEWA or ECE itself and not those used by group health plans or employers that purchase coverage through the MEWA or ECE. For more information on EINs or PNs, see Section 1.1 on Definitions.

**Items 2a through 2c:** Enter the name, address, and telephone number of the administrator of the MEWA or ECE, and the EIN used by the administrator in reporting to the Department of Labor or the Internal Revenue Service. For this purpose, use only an EIN associated with the administrator as a separate entity. Do not use any EIN associated with the MEWA or ECE itself. For more information on the definition of "administrator," and on EINs or PNs, see Section 1.1 on Definitions.

**Items 3a through 3c:** Enter the name, address, and telephone number of the entity sponsoring the MEWA or ECE, and any EIN used by the sponsor in reporting to the Department of Labor or the Internal Revenue Service. For this purpose, use only an EIN associated with the sponsor. Do not use any EIN associated with the MEWA or ECE itself. For more information on the definition of "sponsor," and on EINs or PNs, see Section 1.1 on Definitions. If there is no such entity, leave Item 3 blank and skip to Item 4.

Part III - Registration Information

**Item 4:** Enter the date the MEWA or ECE was most recently "originated." For this purpose, see the definition of "originated" in Section 1.1.

**Item 5:** Complete the chart. If the report is a 90-Day Origination Report, complete this item with information that is current as of the 60th day following the origination date. Otherwise, complete this item with information that is current as of the last day of the year to be reported. (See Section 2.1 on Year to be Reported.) When completing the chart, complete Item 5a first. Then for each row, complete Item 5b through Item 5g as it applies to the State listed in Item 5a.

Item 5a. Enter all States in which the MEWA or ECE provides benefits for medical coverage. For this purpose, list the State(s) where the employers (of the employees receiving coverage) are domiciled. In answering this question, a "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Northern Mariana Islands. Enter one State per row.

Item 5b. For each State listed in Item 5a, specify whether the MEWA or ECE is licensed or otherwise authorized to operate as a health insurance issuer in the State listed in that row. (For a definition of the term "health insurance issuer," see Section 1.1.) For more information on whether an entity that is a licensed or registered MEWA in a State meets the definition of a health insurance issuer in that State, contact the State Insurance Department.

Item 5c. For each "yes" answer in Item 5b, enter the National Association of Insurance Commissioners (NAIC) number.

Item 5d. For each "no" answer in Item 5b, specify whether the MEWA or ECE is fully insured through one or more health insurance issuers in each State.

Item 5e. For each "yes" answer in Item 5d, enter the name of the insurer and its NAIC number (if available). If there is more than one insurer, enter all insurers and their NAIC numbers (if applicable).

Item 5f. In each State listed in Item 5a, specify whether the MEWA or ECE has purchased any stop-loss coverage. For this purpose, stop-loss coverage includes any coverage defined by the State as stop-loss coverage. For this purpose, stop-loss coverage also includes any financial reimbursement instrument that is related to liability for the payment of health claims by the MEWA or ECE, including reinsurance and excess loss insurance.

Item 5g. For each "yes" answer in Item 5f, enter the name of the stop-loss insurer and its NAIC number (if available). If there is more than one stop-loss insurer, enter all stop-loss insurers and their NAIC numbers (if applicable).

**Item 6:** Of the States identified in Item 5a, identify all States in which the MEWA or ECE conducted 20 percent or more of its business (based on the number of participants receiving coverage for medical care under the MEWA or ECE).

For example, consider a MEWA that offers or provides coverage to the employees of six employers. Two employers are located in State X and 70 participants in the MEWA receive coverage through these two employers. Three employers are located in State Y and 30 participants in the MEWA receive coverage through these three employers. Finally, one employer is located in State Z and

200 participants in the MEWA receive coverage through this employer. In this example, the administrator of the MEWA should specify State X and State Z under Item 6 because the MEWA conducts $23^1/_3$ percent of its business in State X (70/300 = $23^1/_3$ percent) and $66^2/_3$ percent of its business in State Z (200/300 = $66^2/_3$ percent). However, the administrator should not specify State Y because the MEWA conducts only 10 percent of its business in State Y (30/300 = 10 percent).

If the report is a 90-Day Origination Report, complete this item with information that is current as of the 60th day following the origination date. Otherwise, complete this item with information that is current as of the last day of the year to be reported. (See Section 2.1 on Year to be Reported.)

**Item 7:** Identify the total number of participants covered under the MEWA or ECE. For more information on determining the number of participants, see the Department of Labor's regulations at 29 CFR 2510.3-3(d).

If the report is a 90-Day Origination Report, complete this item with information that is current as of the 60th day following the origination date. Otherwise, complete this item with information that is current as of the last day of the year to be reported. (See Section 2.1 on Year to be Reported.)

Part IV - Information for Compliance with Part 7 of ERISA

**Background Information on Part 7 of ERISA:** On August 21, 1996, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted. On September 26, 1996, both the Mental Health Parity Act of 1996 (MHPA) and the Newborns' and Mothers' Health Protection Act of 1996 (Newborns' Act) were enacted. On October 21, 1998, the Women's Health and Cancer Rights Act of 1998 (WHCRA) was enacted. All of the foregoing laws amended Part 7 of Subtitle B of Title I (Part 7) of ERISA with new requirements for group health plans. With respect to most of these requirements, corresponding provisions are contained in Chapter 100 of Subtitle K of the Internal Revenue Code (Code) and Title XXVII of the Public Health Service Act (PHS Act). These provisions generally are substantively identical.

The Departments of Labor, the Treasury, and Health and Human Services first issued interim final regulations implementing HIPAA's portability, access, and renewability provisions on April 1, 1997 (published in the Federal Register on April 8, 1997, 62 FR 16893). Two clarifications of the HIPAA regulations were published in the Federal Register on December 29, 1997, at 62 FR 67687. Regulations implementing the MHPA provisions were published in the Federal Register on December 22, 1997, at 62 FR 66931. Also, regulations implementing the substantive provisions of the Newborns' Act were published in the Federal Register on October 27, 1998, at 63 FR 57545. Moreover, the notice requirements with respect to group health plans that provide coverage for maternity or newborn infant coverage are described in the Department of Labor's summary plan description content regulations at 2520.102-3(u). Finally, the Department of Labor has published two sets of informal, question-and-answer guidance on WHCRA. These sets of question-and-answer guidance are available on the Department's website at **www.dol.gov/pwba** and from **PWBA's toll-free hotline** at **1-866-275-7922**.

**General Information Regarding the Applicability of Part 7:** In general, the foregoing provisions apply to group health plans and health insurance issuers in connection with a group health plan.

Many MEWAs and ECEs are group health plans or health insurance issuers. However, even if a MEWA or ECE is neither a group health plan nor a health insurance issuer, if the MEWA or ECE offers or provides benefits for medical care through one or more group health plans, the coverage is required to comply with Part 7 of ERISA and the MEWA or ECE is required to complete Items 8a through 9d.

**Relation to Other Laws:** States may, under certain circumstances, impose stricter laws with respect to health insurance issuers. Generally, questions concerning State laws should be directed to that State's Insurance Department.

**For More Information:** PWBA has published two compliance assistance publications on these recent health care laws. The first, "Compliance Assistance Guide: Recent Changes in Health Care Law," includes comprehensive information on HIPAA, MHPA, the Newborns' Act, and WHCRA. The second, "Compliance Assistance for Group Health Plans: HIPAA and Other Recent Health Care Laws" provides key compliance considerations for group health plans. You may obtain these publications, or speak to a benefits advisor about these laws, by calling the **PWBA toll-free hotline** at **1-866-275-7922**. These booklets are also available on the Internet at: **www.dol.gov/pwba**.

**Items 8a and 8b:** With respect to Item 8a, check "yes" or "no" as applicable. For this purpose, do not include any audit that does not result in required corrective action. If you answer "yes" under Item 8a, identify, in Item 8b, any such litigation or enforcement proceeding.

**Item 9a:** The HIPAA portability requirements added sections 701, 702, and 703 of ERISA.

General Applicability. In general, you should answer "yes" or "no" to this question if you are the administrator of a MEWA or ECE that is a group health plan or if you are providing benefits for medical care to employees through one or more group health plans.

Exceptions. You may answer "N/A" if either of the following paragraphs apply:

**(1)** The MEWA or ECE is a small health plan (as described in section 732(a) of ERISA and 2590.732(a) of the Department's regulations).

**(2)** The MEWA or ECE offers coverage only to small group health plans (as described in section 732(a) of ERISA and 2590.732(a) of the Department's regulations).

Worksheet. For purposes of determining if a MEWA or ECE is in compliance with these provisions, Worksheet A may be helpful.

**Item 9b:** MHPA added section 712 of ERISA.

General Applicability. In general, you should answer "yes" or "no" to this question if you are the administrator of a MEWA or ECE that is a group health plan or if you are providing benefits for medical care to employees through one or more group health plans.

Exceptions. You may answer "N/A" if any of the following paragraphs apply:

**(1)** The MEWA or ECE is a small group health plan (as described in section 732(a) of ERISA and 2590.732(a) of the Department's regulations).

**(2)** The MEWA or ECE offers coverage only to small group health plans (as described in section 732(a) of ERISA and 2590.732(a) of the Department's regulations).

**(3)** The MEWA or ECE does not provide both medical/surgical benefits and mental health benefits.

**(4)** The MEWA or ECE offers or provides coverage only to small employers (as described in the small employer exemption contained in section 712(c)(1) of ERISA and 2590.712(e) of the Department's regulations).

**(5)** The coverage has satisfied the requirements for the increased cost exemption (described in section 712(c)(2) of ERISA and 2590.712(f) of the Department's regulations).

Worksheet. For purposes of determining if a MEWA or ECE is in compliance with these provisions, Worksheet B may be helpful.

**Item 9c:** The Newborns' Act added section 711 of ERISA.

General Applicability. In general, you should answer "yes" or "no" to this question if you are the administrator of a MEWA or ECE that is a group health plan or if you are providing benefits for medical care to employees through one or more group health plans.

Exceptions. You may answer "N/A" if either of the following paragraphs apply:

**(1)** The MEWA or ECE does not provide benefits for hospital lengths of stay in connection with childbirth.

**(2)** The MEWA or ECE is subject to State law regulating such coverage, instead of the federal Newborns' Act requirements, in all States identified in Item 5a, in accordance with section 711(f) of ERISA and 2590.711(e) of the Department's regulations.

Worksheet. For purposes of determining if a MEWA or ECE is in compliance with these provisions, Worksheet C may be helpful.

**Item 9d:** WHCRA added section 713 of ERISA.

General Applicability. In general, you should answer "yes" or "no" to this question if you are the administrator of a MEWA or ECE that is a group health plan or if you are providing benefits for medical care to employees through one or more group health plans.

Exceptions. You may answer "N/A" if any of the following paragraphs apply:

**(1)** The MEWA or ECE is a small health plan (as described in section 732(a) of ERISA and 2590.732(a) of the Department's regulations).

**(2)** The MEWA or ECE offers coverage only to small group health plans (as described in section 732(a) of ERISA and 2590.732(a) of the Department's regulations).

**(3)** The MEWA or ECE does not provide medical/surgical benefits with respect to a mastectomy.

Worksheet. For purposes of determining if a MEWA or ECE is in compliance with these provisions, Worksheet D may be helpful.

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### 3.2 Voluntary Worksheets

Voluntary worksheets, which may be used to help assess an entity's compliance with Part 7 of ERISA, are included on the following pages of these instructions. These worksheets may also be helpful in answering Items 9a through 9d of the Form M-1.

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### Paperwork Reduction Act Notice

We ask for the information on this form to carry out the law as specified in ERISA. You are required to give us the information. We need it to determine whether the MEWA or ECE is operating according to law. You are not required to respond to this collection of information unless it displays a current, valid OMB control number.

The average time needed to complete and file the form is estimated below. These times will vary depending on individual circumstances.

**Learning about the law or the form:** 2 hrs.

**Preparing the form:** 50 min. - 1 hr. and 35 min.

**Worksheet A**

**(Form M-1)**

## Determining Compliance with the HIPAA Provisions in Part 7 of Subtitle B of Title I of ERISA

Do NOT file this worksheet.

Department of Labor
Pension and Welfare Benefits Administration

This worksheet may be used to help assess an entity's compliance with the HIPAA provisions of Part 7 of Subtitle B of Title I (Part 7) of the Employee Retirement Income Security Act of 1974, as amended (ERISA). However, it is not a complete description of all the provisions and is not a substitute for a comprehensive compliance review. Use of this worksheet is voluntary, and it should not be filed with your Form M-1.

**If you answer "No" to any of the questions below, you should review your entity's operations because the entity may not be in full compliance with the HIPAA provisions in Part 7 of ERISA. If you need help answering these questions or want additional guidance, you should contact the U.S. Department of Labor's Pension and Welfare Benefits Administration (PWBA) office in your region or consult with legal counsel or a professional employee benefits advisor.**

(1) Does the coverage provided by the MEWA or ECE issue complete certificates of creditable coverage automatically to individuals who lose coverage under the MEWA or ECE and to individuals upon request? . . . . . ❑ Yes ❑ No

- Section 701(e) of ERISA and § 2590.701-5 of the Department's regulations require group health plans and group health insurance issuers to issue, free of charge, certificates of creditable coverage automatically to individuals who lose coverage and to any individual upon request.
- To be complete, the certificate must include: the date, the name of the plan, the participant and/or beneficiary's name and identification information, the plan administrator's contact information (name, address, and telephone number, a telephone number to call for further information (if different than the plan administrator's number)), and the individual's creditable coverage information, as described below. (**__TIP__: Don't forget dependent information.)
- With respect to an individual's creditable coverage information, the certificate must reflect either: (1) that an individual has at least 18 months of creditable coverage; or (2) the date any waiting period (or affiliation period) began and the date creditable coverage began. In addition, the certificate must reflect either: (1) the date creditable coverage ended; or (2) that coverage is continuing. (**__TIP__: Don't forget waiting period information.)
- For a certificate issued automatically upon loss of coverage, the certificate should reflect the last continuous period of coverage. For a certificate issued upon request, the certificate should reflect each period of continuous coverage that the individual had in the 24 months prior to the date of request (up to 18 months of creditable coverage).
- Most health coverage is creditable coverage. However, coverage consisting solely of excepted benefits is not creditable coverage. Examples of benefits that __may__ be excepted benefits include limited-scope dental benefits, limited-scope vision benefits, hospital indemnity benefits, and Medicare supplemental benefits.
- If you have a question about whether health coverage offered by a MEWA or ECE is creditable coverage or is coverage consisting solely of excepted benefits, contact **PWBA toll-free** at **1-866-275-7922.**

(2) Does the coverage provided by the MEWA or ECE make available a procedure for individuals to request and receive certificates? . . . . . ❑ Yes ❑ No

- Section 2590.701-5(a)(4)(ii) of the Department's regulations requires group health plans and group health insurance issuers to establish a procedure for individuals to request and receive certificates.

(3) If the coverage provided by the MEWA or ECE imposes a preexisting condition exclusion period, are notices provided informing individuals of the exclusion, the terms of the exclusion, and the right of individuals to demonstrate creditable coverage to reduce the period of the exclusion? . . . . . ❑ Yes ❑ No ❑ N/A

- Section 2590.701-3(c) of the Department's regulations prohibits a group health plan, and a group health insurance issuer, from imposing a preexisting condition exclusion with respect to a participant or a dependent of the participant before notifying the participant, in writing, of the existence and terms of any preexisting condition exclusion under the plan and of the rights of individuals to demonstrate creditable coverage.

*Question # 3 is continued on the next page.*

- **TIP: Check for "hidden" preexisting condition exclusion periods. Coverage or exclusion provisions that limit benefits based on the fact that a condition was present before an individual's effective date of coverage are preexisting condition exclusions and must either be eliminated, or must comply with HIPAA's limitations on preexisting condition exclusion periods, including this general notice provision, the individual notice provision described in Question #4, and HIPAA's other limits on preexisting condition exclusion periods, described in Question #5.

- The description of the rights of individuals to demonstrate creditable coverage includes a description of the right of the individual to request a certificate from a prior plan or issuer, if necessary, and a statement that the current plan or issuer will assist in obtaining a certificate from any prior plan or issuer, if necessary.

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(4) If the coverage provided by the MEWA or ECE imposes a preexisting condition exclusion period, are letters of determination and notification of creditable coverage provided within a reasonable time after the receipt of individuals' creditable coverage information? . . . . . ❑ Yes ❑ No ❑ N/A

- Section 2590.701-5(d) of the Department's regulations states that, within a reasonable time following receipt of evidence of creditable coverage, a plan or issuer seeking to impose a preexisting condition exclusion with respect to an individual is required to disclose to the individual, in writing, its determination of any preexisting condition exclusion period that applies to the individual, and the basis for such determination, including the source and substance of any information on which the plan or issuer relied.

- In addition, the plan or issuer is required to provide the individual with a written explanation of any appeal procedures established by the plan or issuer and with a reasonable opportunity to submit additional evidence of creditable coverage.

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(5) If the coverage provided by the MEWA or ECE imposes a preexisting condition exclusion, does it comport with HIPAA's other limitations on preexisting condition exclusions? . . . . . ❑ Yes ❑ No ❑ N/A

- **TIP: Again, check for "hidden" preexisting condition exclusion periods. Coverage or exclusion provisions that limit benefits based on the fact that a condition was present before an individual's effective date of coverage are preexisting condition exclusions and must either be eliminated or must comply with HIPAA's limitations on preexisting condition exclusion periods.

- Section 701(a)(1) of ERISA and § 2590.701-3(a)(1)(i) of the Department's regulations provide that a plan or issuer may impose a preexisting condition exclusion period only if it relates to a condition for which medical advice, diagnosis, care, or treatment was recommended or received within the 6-month period ending on the individual's enrollment date in the plan or coverage. (Therefore, genetic information is not treated as a preexisting condition in the absence of a diagnosis of the condition related to such information.) (In addition, for health insurance issuers, State law may prescribe a shorter period than the 6-month period that generally applies.)

- The enrollment date, for purposes of the HIPAA limitations on preexisting condition exclusion periods, is the first day of coverage or, if there is a waiting period, the first day of the waiting period. (**TIP: If the MEWA or ECE imposes a waiting period, ensure that the 6-month look-back period ends on the first day of the waiting period, not the first day of coverage.)

- Section 701(a)(2) of ERISA and § 2590.701-3(a)(1)(ii) of the Department's regulations provide that any preexisting condition exclusion period is limited to 12 months (18 months for late enrollees) after an individual's enrollment date in the plan or coverage. (For health insurance issuers, State law may prescribe a shorter period.) (**TIP: If the MEWA or ECE imposes a waiting period, ensure that the 12-month (or 18-month for late enrollees) maximum preexisting condition exclusion period begins on the first day of the waiting period, not the first day of coverage.)

- Section 701(a)(3) of ERISA and § 2590.701-3(a)(1)(iii) of the Department's regulations provide that any preexisting condition exclusion period is reduced by the number of days of an individual's creditable coverage prior to his or her enrollment date.

- When determining the number of days of creditable coverage, the plan or issuer is not required to take into account any days that occur prior to a significant break in coverage. The Federal law defines a significant break in coverage as a break of 63 days or more. However, State law applicable to health insurance coverage offered or provided by health insurance issuers may provide for a longer period.

- In any case, section 701(d) of ERISA and § 2590.701-3(b) of the Department's regulations provide that a group health plan, and a group health insurance issuer, may not impose any preexisting condition exclusion period with regard to a child who enrolls in a group heath plan within 30 days of birth, adoption, or placement for adoption and who does not incur a subsequent significant break in coverage. In addition, a group health plan, and a group health insurance issuer, may not impose a preexisting condition exclusion relating to pregnancy. (For health insurance issuers, State law may further restrict the extent to which a preexisting condition exclusion may be imposed.)

(6) Does the coverage provided by the MEWA or ECE provide notices of special enrollment rights to employees who are eligible to enroll in the plan or coverage? . . . . . ❑ Yes ❑ No

- Section 2590.701-6(c) of the Department's regulations requires that, on or before the time an employee is offered the opportunity to enroll in a group health plan or coverage, the plan or issuer provide the employee with a description of the plan's special enrollment rules.

- For this purpose, the plan may use the following model description of special enrollment rules:

  If you are declining enrollment for yourself or your dependents (including your spouse) because of other health insurance coverage, you may in the future be able to enroll yourself or your dependents in this plan, provided that you request enrollment within 30 days after your other coverage ends. In addition, if you have a new dependent as a result of marriage, birth, adoption, or placement for adoption, you may be able to enroll yourself and your dependents, provided that you request enrollment within 30 days after the marriage, birth, adoption, or placement for adoption.

(7) Does the coverage provided by the MEWA or ECE provide special enrollment rights to individuals who lose other coverage and to individuals who acquire a new dependent, if they request enrollment within 30 days of the loss of coverage, marriage, birth, adoption, or placement for adoption? ❑ Yes ❑ No

- Section 701(f) of ERISA and § 2590.701-6 of the Department's regulations require group health plans, and group health insurance issuers, if certain conditions are met, to permit an employee who is eligible, but not enrolled, for coverage under the terms of the plan (or a dependent of such an employee if the dependent is eligible, but not enrolled, for coverage under such terms) to enroll for coverage under the terms of the plan if the individual either: (1) has a new dependent through marriage, birth, adoption, or placement for adoption; or (2) loses eligibility for other group health plan or health insurance coverage or employer contributions towards the other coverage terminate.

- **TIP: Ensure that the MEWA or ECE provides special enrollment to all individuals who qualify. Among others, this includes individuals who lose eligibility for individual market coverage, individuals who voluntarily terminate employment and lose group health plan coverage (even if they are eligible for COBRA continuation coverage), individuals who exhaust COBRA, children who "age out" of eligibility under another parent's group health plan, individuals who move out of a group health plan's HMO service area, and individuals whose employers cease contributing towards their group health plan coverage (even if coverage does not cease).

- For individuals who special enroll after marriage or loss of other coverage, coverage must be made effective no later than on the first day of the first calendar month following the date the completed request for enrollment is received. For individuals who special enroll after birth, adoption, or placement for adoption, coverage must be made effective no later than the date of such birth, adoption, or placement for adoption. (**TIP: Ensure that effective dates of coverage for special enrollees are correct.)

- For State laws applicable to health insurance issuers that may provide individuals with additional special enrollment rights, check with an attorney or the Insurance Department in your State.

(8) Does the coverage provided by the MEWA or ECE have rules for eligibility (including continued eligibility) that comply with the nondiscrimination requirements that prohibit discrimination against any individual or a dependent based on any health factor? . . . . . ❑ Yes ❑ No

- Section 702(a) of ERISA and § 2590.702(a) of the Department's regulations provide that a group health plan, and a group health insurance issuer, may not establish rules for eligibility (including continued eligibility, rules defining any applicable waiting periods, and rules relating to late and special enrollment) of any individual to enroll under the terms of the plan based on a health factor.

- The health factors are: health status, medical condition (including both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of acts of domestic violence and participation in activities such as motorcycling, snowmobiling, all-terrain vehicle riding, horseback riding, skiing, and other similar activities), and disability.

*Question #8 is continued on the next page.*

- These rules prohibit discrimination within a group of similarly situated individuals. Under §2590.702(d) of the Department's regulations, plans may treat distinct groups of similarly situated individuals differently, if the distinctions between or among the group are not based on a health factor. If distinguishing among groups of participants, plans and issuers must base distinctions on bona fide employment-based classifications consistent with the employer's usual business practice. Whether an employment-based classification is bona fide is based on relevant facts and circumstances, such as whether the employer uses the classification for purposes independent of qualification for health coverage. Bona fide employment-based classifications might include: full-time versus part-time employee status; different geographic location; membership in a collective bargaining unit; date of hire or length of service; or differing occupations. In addition, plans may treat participants and beneficiaries as two separate groups of similarly situated individuals. Plans may also distinguish among beneficiaries. Distinctions among groups of beneficiaries may be based on bona fide employment-based classifications of the participant through whom the beneficiary is receiving coverage, relationship to the participant (such as spouse or dependent), marital status, age or student status of dependent children, or any other factor that is not a health factor.

- Also, nothing prohibits a plan from establishing more favorable rules for eligibility for individuals with an adverse health factor, such as disability.

- **TIP: Ensure that the plan does not require individuals to present evidence of insurability, such as passing a physical exam, providing a certificate of good health, or demonstrating good health through answers to a health care questionnaire, in order to enroll in the plan. (This is a violation, even if the plan provision is imposed only at late enrollment.)

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(9) Does the coverage provided by the MEWA or ECE comply with the nondiscrimination rules by providing benefits uniformly to participants and beneficiaries? . . . . . ❑ Yes ❑ No

- Under § 2590.702(b)(2) of the Department's regulations, a plan is not required to provide any benefits, but benefits provided must be uniformly available and any benefit restrictions must be applied uniformly to all similarly situated individuals and cannot be directed at any individual participants or beneficiaries based on a health factor. (A plan amendment applicable to all similarly situated individuals and made effective no earlier than the first day of the next plan year is not considered directed at individual participants and beneficiaries.)

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(10) If the coverage provided by the MEWA or ECE imposes a source-of-injury restriction, does it comply with the nondiscrimination provisions? . . . . . ❑ Yes ❑ No ❑ N/A

- Under § 2590.702(b)(2)(iii) of the Department's regulations, plans may exclude benefits for treatment of certain injuries based on the source of that injury, except that plans may not exclude benefits otherwise provided for treatment of an injury if that injury results from an act of domestic violence or a medical condition.

- **TIP: An example of a permissible source-of-injury exclusion would include a plan provision that provides benefits for head injuries generally, but excludes benefits for head injuries sustained while participating in bungee jumping, as long as the injuries do not result from a medical condition or domestic violence. However, an example of an impermissible source-of-injury exclusion would include a plan provision that excludes coverage for self-inflicted injuries (or injuries resulting from attempted suicide) if the injuries are otherwise covered by the plan and if the injuries are the result of a medical condition, such as depression.

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(11) Does the coverage provided by the MEWA or ECE comply with the nondiscrimination requirements that prohibit requiring any individual (as a condition of enrollment or continued enrollment) to pay a premium or contribution that is greater than the premium or contribution for a similarly situated individual enrolled in the plan on the basis of any health factor? ❑ Yes ❑ No

- Section 702(b) of ERISA and § 2590.702(b) of the Department's regulations provide that a group health plan, and a group health insurance issuer, may not require any individual (as a condition of enrollment or continued enrollment under the plan) to pay a premium or contribution that is greater than the premium or contribution for a similarly situated individual enrolled in the plan on the basis of any health factor.

- However, nothing restricts the amount that an employer may be charged for coverage under a group health plan and nothing prevents a plan or issuer from establishing premium discounts or rebates or modifying applicable copayments or deductibles in return for adherence to bona fide wellness programs. On January 8, 2001, the Department published proposed rules describing bona fide wellness programs under § 2590.702(f). Essentially, these proposed rules permit rewards that are not contingent on an individual meeting a standard related to a health factor. In addition, these proposed rules permit rewards that are contingent on an individual meeting a standard related to a health factor if:

Question #11 is continued on the next page.

- The reward does not exceed a specified percentage of the total employee-only premium. (Comments were invited as to whether a 10 percent, 15 percent, or 20 percent limitation might be appropriate.)
- The program is reasonably designed to promote good health or prevent disease. (For this purpose, a program must allow individuals an opportunity to qualify for the reward at least once each year.)
- The reward is available to all similarly situated individuals. In particular, the program must allow a reasonable alternative standard for individuals for whom it is unreasonably difficult due to a medical condition to satisfy the original program standard or for whom it is medically inadvisable to attempt to satisfy the original program standard during that time period. (The plan must also disclose the availability of a reasonable alternative standard in all plan materials describing the terms of the program.)

• (Note: Nothing prohibits a plan from establishing more favorable premium rates for indivduals with an adverse health factor, such as disability.)

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(12) Does the coverage provided by the MEWA or ECE comply with the rules prohibiting list billing? . . . . ❑ Yes ❑ No

• Section 2590.702(c)(2)(ii) of the Department's regulations prohibits charging or quoting group health plans separate rates that vary for individuals based on health factors. This practice is commonly referred to as list billing. This does not prevent MEWAs or ECEs from taking the health factors of each individual into account in establishing a blended/aggregate rate for providing coverage to the plan.

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(13) Does the coverage provided by the MEWA or ECE comply with the nondiscrimination regulations by providing coverage without any nonconfinement clauses? . . . . . ❑ Yes ❑ No

• Typically, a nonconfinement clause will deny or delay eligibility for some or all benefits if an individual is confined to a hospital or other health care institution. Sometimes nonconfinement clauses also deny or delay eligibility if an individual cannot perform ordinary life activities. Section 2590.702(e)(1) of the Department's regulations explains that these clauses violate ERISA sections 702(a) (if the clause delays or denies eligibility) and 702(b) (if the clause raises individual premiums).

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(14) Does the coverage provided by the MEWA or ECE comply with the nondiscrimination regulations by providing coverage without any impermissible actively-at-work clauses? . . . . . ❑ Yes ❑ No

• Typically, actively-at-work provisions delay eligibility for benefits based on an individual being absent from work. Section 2590.702(e)(2) of the Department's regulations explains that actively-at-work provisions generally violate ERISA sections 702(a) (if the clause delays or denies eligibility) and 702(b) (if the clause raises individual premiums or contributions), unless absence from work due to a health factor is treated, for purposes of the plan, as if the individual is at work. Nonetheless, an exception provides that a plan may establish a rule for eligibility that requires an individual to begin work for the employer sponsoring the plan before eligibility commences. Further, plans may establish rules for eligibility or set an individual's premium or contribution rate in accordance with the rules relating to similarly situated individuals in § 2590.702(d) of the Department's regulations. For example, a plan that treats full-time and part-time employees differently for other employment-based purposes, such as eligibility for other employee benefits, may distinguish, in rules for eligibility under the plan, between full-time and part-time employees.

• **TIP: An impermissible actively-at-work provision would include a plan provision under which employees generally become eligible to enroll 30 days after the first day of employment. However, if an employee is not actively at work on the first day after the end of the 30-day period, then eligibility is delayed until the first day the employee is actively at work. Note: If the plan treated any employee absent from work due to a health factor as being actively at work, then the provision would not violate § 2590.702(e)(2) and section 702(a) of ERISA.

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(15) If the entity is a group health plan which is a multiemployer plan or a MEWA, does it comply with the guaranteed renewability requirements, which generally prohibit it from denying an employer whose employees are covered under a group health plan continued access to the same or different coverage under the terms of the plan? . . ❑ Yes ❑ No ❑ N/A

• Section 703 of ERISA provides that a group health plan that is a multiemployer plan or a MEWA may not deny an employer whose employees are covered under the plan continued access to the same or different coverage under the terms of the plan, other than: for nonpayment of contributions; for fraud or other intentional misrepresentation of material fact by the employer; for noncompliance with material plan provisions; because the plan is ceasing to offer any coverage in a geographic area; in the case of a plan that offers benefits through a network plan, because there is no longer any individual enrolled through the employer who lives, resides, or works in the service area of the network plan and the plan acts without regard to the claims experience of the employer or any health factor in relation to those individuals or their dependents; and for failure to meet the terms of an applicable collective bargaining agreement, to renew a collective bargaining or other agreement requiring or authorizing contributions to the plan, or to employ employees covered by such an agreement.

• For other laws applicable to health insurance issuers that may provide additional guaranteed renewability requirements, check with an attorney or the Insurance Department in your State.

**Worksheet B**

**(Form M-1)**

## Determining Compliance with the MHPA Provisions in Part 7 of Subtitle B of Title I of ERISA

Do NOT file this worksheet.

Department of Labor
Pension and Welfare Benefits
Administration

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This worksheet may be used to help assess an entity's compliance with the MHPA provisions of Part 7 of Subtitle B of Title I (Part 7) of the Employee Retirement Income Security Act of 1974, as amended (ERISA). However, it is not a complete description of all the provisions and is not a substitute for a comprehensive compliance review. Use of this worksheet is voluntary, and it should not be filed with your Form M-1.

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**If you answer "No" to the question below, you should review your entity's operations because the entity may not be in full compliance with the MHPA provisions in Part 7 of ERISA. If you need help answering this question or want additional guidance, you should contact the U.S. Department of Labor's Pension and Welfare Benefits Administration (PWBA) office in your region or consult with legal counsel or a professional employee benefits advisor.**

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Q. If the MEWA or ECE offers or provides coverage for both mental health benefits and medical/surgical benefits, does the coverage comply with the requirements of the MHPA provisions, which are contained in section 712 of ERISA? . . . . . ❑ Yes ❑ No ❑ N/A

- Section 712 of ERISA and § 2590.712 of the Department's regulations generally provide for parity in the application of aggregate lifetime dollar limits and in the application of annual dollar limits between benefits for medical and surgical care and benefits for mental health coverage.
- These provisions do not require a group health plan or group health insurance coverage to provide any mental health coverage. Further, MHPA does not apply to benefits for treatment of substance abuse or chemical dependency.
- There are also exemptions for small employers and certain plans or coverage with increased costs. For more information on these exemptions, contact **PWBA toll free** at **1-866-275-7922**.

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**Worksheet C**

**(Form M-1)**

## Determining Compliance with the Newborns' Act Provisions in Part 7 of Subtitle B of Title I of ERISA

Do NOT file this worksheet

Department of Labor
Pension and Welfare Benefits
Administration

This worksheet may be used to help assess an entity's compliance with the Newborns' Act provisions of Part 7 of Subtitle B of Title I (Part 7) of the Employee Retirement Income Security Act of 1974, as amended (ERISA). However, it is not a complete description of all the provisions and is not a substitute for a comprehensive compliance review. Use of this worksheet is voluntary, and it should not be filed with your Form M-1.

**If you answer "No" to either of the questions below, you should review your entity's operations because the entity may not be in full compliance with the Newborns' Act provisions in Part 7 of ERISA. If you need help answering these questions or want additional guidance, you should contact the U.S. Department of Labor's Pension and Welfare Benefits Administration (PWBA) office in your region or consult with legal counsel or a professional employee benefits advisor.**

(1) If the MEWA or ECE offers or provides benefits for hospital stays in connection with childbirth and is subject to the Newborns' Act, does the coverage comply with the Newborns' Act's substantive requirements, which are contained in section 711 of ERISA? . . . . . ❑ Yes ❑ No ❑ N/A

- Section 711 of ERISA and § 2590.711 of the Department's regulations generally provide that a group health plan, and a group health insurance issuer, that offers benefits for hospital lengths of stay in connection with childbirth may not restrict benefits for any hospital length of stay in connection with childbirth for the mother or her newborn child, following a vaginal delivery to less than 48 hours, and following a cesarean section to less than 96 hours, unless the attending provider, in consultation with the mother, decides to discharge earlier.

- In addition, such a plan or issuer may not require that the provider obtain authorization from the plan or issuer for prescribing any length of hospital stay up to 48 hours following a vaginal delivery and up to 96 hours following a cesarean section. Nor may such a plan or issuer penalize an attending provider for providing care in a manner consistent with this law or provide incentives to an attending provider to provide care in a manner that is inconsistent with this law. Nor may such a plan or issuer deny the mother or newborn eligibility or continued eligibility, or provide incentives to mothers to encourage them to accept less than the minimum length of stay required. Nor may such a plan or issuer restrict benefits for any portion of a period within a hospital length of stay required by this law in a manner that is less favorable than the benefits provided for any preceding portion of the stay.

- **__TIP__: Check whether the Federal Newborns' Act's requirements in section 711 of ERISA apply, or whether the coverage is instead subject to State law regulating such coverage. For this purpose, the following information is helpful:

  (A) Self-insured coverage: The Federal Newborns' Act's requirements in section 711 of ERISA apply to self-insured benefits offered in connection with childbirth.

  (B) Insured coverage: On the other hand, State law (rather than Federal law) applies to health insurance coverage offered in connection with childbirth if the State law meets certain criteria specified in ERISA section 711(f). Based on a preliminary review of State laws as of July 1, 2002, State law rather than Federal law applies to health insurance coverage offered in connection with childbirth in all States and other U.S. jurisdictions except:

  Wisconsin, Puerto Rico, the Virgin Islands, American Samoa, Wake Island, and the Northern Mariana Islands.

  Therefore, the Federal Newborns' Act provisions appear to apply to health insurance coverage in these States and jurisdictions.

(2) If the MEWA or ECE offers or provides benefits in connection with childbirth, are the disclosure requirements under the Newborns' Act satisfied? . . . . . ❑ Yes ❑ No ❑ N/A

- Section 2520.102-3(u) of the Department's regulations requires all group health plans providing maternity benefits to include a statement in their summary plan descriptions (SPDs) advising of the requirements under Federal or State law applicable to the coverage relating to hospital lengths of stay in connection with childbirth for a mother or newborn child. If the Federal law applies in some areas and State law applies in other areas, the SPD should describe the different areas and the Federal or State requirements applicable in each. (Note: Parallel disclosure requirements are contained in section 711(d) of ERISA, if applicable (see discussion of federal Newborns' Act applicability above under Question 1).)

- For this purpose, a MEWA or ECE that is subject to the Newborns' Act's disclosure requirements through ERISA may use the following sample language:

  Group health plans and health insurance issuers generally may not, under Federal law, restrict benefits for any hospital length of stay in connection with childbirth for the mother or newborn child to less than 48 hours following a vaginal delivery, or less than 96 hours, following a cesarean section. However, Federal law generally does not prohibit the mother's or newborn's attending provider, after consulting with the mother, from discharging the mother or her newborn earlier than 48 hours (or 96 hours, as applicable). In any case, plans and issuers may not, under Federal law, require that a provider obtain authorization from the plan or the issuer for prescribing a length of stay not in excess of 48 hours (or 96 hours).

- A similar disclosure requirement applies to nonfederal governmental plans. For mandated language required to be used with respect to such plans, see 45 CFR 146.130(d)(2) (published in the Federal Register at 63 FR 57561 on October 27, 1998).

**Worksheet D**

**(Form M-1)**

## Determining Compliance with the WHCRA Provisions in Part 7 of Subtitle B of Title I of ERISA

Do NOT file this worksheet

Department of Labor
Pension and Welfare Benefits
Administration

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This worksheet may be used to help assess an entity's compliance with the WHCRA provisions of Part 7 of Subtitle B of Title I (Part 7) of the Employee Retirement Income Security Act of 1974, as amended (ERISA). However, it is not a complete description of all the provisions and is not a substitute for a comprehensive compliance review. Use of this worksheet is voluntary, and it should not be filed with your Form M-1.

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**If you answer "No" to either of the questions below, you should review your entity's operations because the entity may not be in full compliance with the WHCRA provisions in Part 7 of ERISA. If you need help answering these questions or want additional guidance, you should contact the U.S. Department of Labor's Pension and Welfare Benefits Administration (PWBA) office in your region or consult with legal counsel or a professional employee benefits advisor.**

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(1) If the MEWA or ECE offers or provides mastectomy coverage, does the coverage comply with WHCRA's substantive requirements, which are contained in section 713 of ERISA? . . . . . ❑ Yes ❑ No ❑ N/A

- Section 713 of ERISA generally provides that a group health plan, and a group health insurance issuer, that offers mastectomy coverage must also provide coverage for reconstructive surgery in a manner determined in consultation with the attending physician and the patient. Coverage includes all stages of reconstruction of the breast on which the mastectomy was performed, surgery and reconstruction of the other breast to produce a symmetrical appearance, prostheses, and treatment of physical complications of the mastectomy, including lymphedemas.

- In addition, a plan or issuer may not deny a patient eligibility, or continued eligibility, to enroll or to renew coverage under the terms of the plan, solely for the purpose of avoiding the requirements of WHCRA. Nor may a plan or issuer penalize or otherwise reduce or limit the reimbursement of an attending provider, or provide incentives (monetary or otherwise) to an attending provider, to induce such provider to furnish care to an individual participant or beneficiary in a manner inconsistent with WHCRA.

- Plans and issuers may impose deductibles or coinsurance requirements for reconstructive surgery, prostheses, and treatment of physical complications in connection with a mastectomy, but only if the deductibles and coinsurance are consistent with those established for other benefits under the plan or coverage.

- State law protections may apply to certain health insurance coverage if the State law was in effect on October 21, 1998 (the date of enactment of WHCRA) and the State law requires at least the coverage for reconstructive breast surgery that is required by WHCRA.

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(2) If the MEWA or ECE offers or provides mastectomy coverage, are the disclosure requirements under WHCRA satisfied? . . . . . ❑ Yes ❑ No ❑ N/A

- Section 713(a) of ERISA establishes a disclosure requirement under which group health plans, and their health insurance issuers, must describe the benefits required under WHCRA. The notice is to be provided to participants upon enrollment in the plan and annually thereafter.

- The enrollment notice must describe the benefits that WHCRA requires group health plans and issuers to cover. If the following information is provided, then the group health plan is in compliance with this requirement:

  If you have had or are going to have a mastectomy, you may be entitled to certain benefits under the Women's Heallth and Cancer Rights Act of 1998 (WHCRA). For individuals receiving mastectomy-related benefits, coverage will be provided in a manner determined in consultation with the attending physician and the patient, for:

  - All stages of reconstruction of the breast on which the mastectomy was performed;

*Question #2 is continued on the next page.*

- Surgery and reconstruction of the other breast to produce a symmetrical appearance;
- Prostheses; and
- Treatment of physical complications of the mastectomy, including lymphedemas.

These benefits will be provided subject to the same deductibles and coinsurance applicable to other medical and surgical benefits provided under this plan. Therefore, the following deductibles and coinsurance apply: [ insert deductibles and coinsurance applicable to these benefits].

If you would like more information on WHCRA benefits, call your Plan Administrator [insert phone number].

- WHCRA's annual notice must be provided once each year. The following language may be used to satisfy the annual notice requirement:

  Do you know that your plan, as required by the Women's Health and Cancer Rights Act of 1998, provides benefits for mastectomy-related services including all stages of reconstruction and surgery to achieve symmetry between the breasts, prostheses, and complications resulting from a mastectomy, including lymphedemas? Call your Plan Administrator [insert phone number] for more information.

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Federal Register

Friday,
December 13, 2002

# Part VII

# Federal Election Commission

**41 CFR Parts 100, 101, et al.**

**Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rule**

**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 100, 110, 111, and 113**

**[Notice 2002–25]**

## Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is issuing final rules regarding disclaimers in political communications, fraudulent solicitations, civil penalties, personal use of campaign funds, and a technical amendment under the Federal Election Campaign Act of 1971, as amended (''FECA'' or ''the Act''). The final rules implement portions of the Bipartisan Campaign Reform Act of 2002 (''BCRA'') that govern new requirements for disclaimers accompanying radio, television, print, and other campaign communications, expand the FECA's fraudulent misrepresentation prohibition, increase the FECA's civil penalties for violating the prohibition on contributions made in the name of another, and codify the ''irrespective'' test regarding the personal use of campaign funds by candidates and Federal office holders.

The Commission had planned to address BCRA-related rules for inaugural committees in this rulemaking; however, inaugural committees will now instead be addressed in a future rulemaking. Further information is provided in the supplementary information that follows.

**EFFECTIVE DATES:** January 13, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. John C. Vergelli, Acting Assistant General Counsel, or Attorneys, Ms. Ruth Heilizer (personal use), Ms. Dawn Odrowski (fraudulent solicitations and civil penalties), or Mr. Richard Ewell (disclaimers), 999 E Street, NW., Washington, DC, 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002 (''BCRA''), Pub. L. 107–155, 116 Stat. 81 (March 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971 (''FECA'' or ''the Act''), as amended, 2 U.S.C. 431 *et seq.* This is one in a series of rulemakings the Commission is undertaking to implement the provisions of BCRA and to meet the rulemaking deadlines set out in BCRA.

Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA, which is December 22, 2002. The final rules do not apply with respect to runoff elections, recounts, or election contests resulting from the November 2002 general election. 2 U.S.C. 431 note.

Because of the brief period before the statutory deadline for promulgating these rules, the Commission received and considered public comments expeditiously. The Notice of Proposed Rulemaking (''NPRM''), on which these final rules are based, was published in the **Federal Register** on August 29, 2002. 67 FR 55348 (Aug. 29, 2002). Thirteen written comments were received. The names of the commenters and their comments are available at *http:www.fec.gov/register.htm* under ''Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds.'' A public hearing was not held.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules on disclaimers, fraudulent solicitation, civil penalties, and personal use of campaign funds were transmitted to Congress on December 9, 2002.

### Explanation and Justification

*Introduction*

These final rules address changes to: disclaimer requirements for campaign communications (2 U.S.C. 441d); fraudulent misrepresentations for purposes of soliciting contributions or donations (2 U.S.C. 441h); civil penalties for a particular knowing and willful violation of FECA (2 U.S.C. 437g); permissible uses of campaign funds by candidates and officeholders (2 U.S.C. 439a); and a technical amendment to the definition of ''Act'' to include BCRA amendments to FECA.

*11 CFR 100.18 Act (2 U.S.C. 431(19))*

Pre-BCRA, 11 CFR 100.18 defined ''Act'' to mean the Federal Election Campaign Act as amended by the 1974, 1976, and 1980 amendments. The final rules amend this definition to include the amendments to FECA within the Bipartisan Campaign Reform Act.

*11 CFR 110.11 Communications; advertising; disclaimers (2 U.S.C. 441d)*

Under 2 U.S.C. 441d, certain communications must include disclaimers identifying who paid for and, where applicable, who authorized the communication. In BCRA, Congress added new specificity to these requirements, expanded the disclaimer requirement to reach disbursements to finance ''any communication'' made by political committees through any type of general public political advertising, and required that ''electioneering communications'' include disclaimers. *See* 2 U.S.C. 441d. Congress also enacted ''stand by your ad'' requirements for certain radio and television communications. 2 U.S.C. 441d(d).

The Commission is implementing these statutory changes by deleting pre-BCRA 11 CFR 110.11 in its entirety, and adopting a new section 110.11 that is organized into a more easily understandable rule. As explained in detail below, revised section 110.11 incorporates many substantive provisions from the pre-BCRA version of the section.

11 CFR 110.11(a) Scope

Paragraph (a) sets out the scope of the section by specifying which communications must carry disclaimers. Under 2 U.S.C. 441d(a), as amended by Congress through BCRA section 311, disclaimers are required whenever a person makes a disbursement for an electioneering communication, whenever a political committee makes a disbursement for the purpose of financing ''any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising,'' or whenever any person makes a disbursement for the purpose of financing ''communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising.'' The descriptive list of ''through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising'' is similar to the language used by Congress in BCRA to describe a ''public communication,'' as defined in 2 U.S.C. 431(22). *See also* 11 CFR 100.26 (67 FR 49111 (July 29, 2002)). The two descriptive lists differ in three respects. First, a ''public communication'' covers ''any broadcast, cable, or satellite transmission,'' whereas section 441d(a) refers only to communications through ''any broadcasting station.'' Second, a

''public communication'' includes a ''telephone bank to the general public,'' as defined in 2 U.S.C. 431(24), whereas telephone banks are not specifically mentioned in section 441d(a). Third, a ''public communication'' includes a ''mass mailing,'' which is defined as more than 500 pieces of substantially similar mail. 2 U.S.C. 431(22), (23). Section 441d(a) refers to a ''mailing,'' without any numerical minimum. Congress, through BCRA, removed the pre-BCRA reference to a ''*direct* mailing'' (emphasis added).

The Commission noted in the NPRM that the 2 U.S.C. 441d(a) references to ''communication'' share a fundamental similarity with the definition of ''public communication'' (2 U.S.C. 431(22)) in that both contain the virtually identical and broadly inclusive phrase, ''or any other type [form] of general public political advertising,'' to describe what is encompassed by the respective definitions.[1] Because of the inclusion of this virtually identical phrase, the Commission interprets each term listed in the definition of ''public communication'' or in 2 U.S.C. 441d(a) as a specific example of one form of ''general public political advertising.'' In other words, the universe of ''general public political advertising,'' as it has been functionally defined by Congress through both the definition of ''public communication'' and in section 441d(a), encompasses all the terms explicitly included by Congress, in addition to other potential forms of general public political advertising not specifically listed.

The Commission sought comment on whether the description of ''communication'' in 2 U.S.C. 441d(a) should be equated with the term ''public communication,'' as defined in 2 U.S.C. 431(22). The Commission noted that one effect of using the consistent terminology of ''public communication'' to describe the 2 U.S.C. 441d(a) communications would be that ''telephone banks to the general public'' would be subject to the disclaimer requirements. Another effect of using the consistent terminology of ''public communication'' would be to harmonize the meaning of ''mailing'' with ''mass mailing,'' and the coverage of ''any broadcasting station'' with ''any broadcast, cable, or satellite transmission.''

The Commission received two comments on this issue. Both commenters argued that the terms ''public communication'' and ''communication,'' as used in the section 441d(a) context, should be treated as distinct terms with separate definitions. One commenter, advised against any interpretation that would have the effect of making the disclaimer requirements applicable to telephone banks. That commenter asserted that the existence of several state laws limiting or prohibiting taped phone messages are already sufficient to deter abuse in this area, and disclaimer requirements would only serve to chill speech.

The Commission does not agree with this commenter that state laws regarding taped calls are sufficient to supplant the statutory disclaimer requirement, even in those few states that do have laws limiting taped calls. Requiring a caller to identify himself or herself serves important disclosure functions consistent with Congressional intent to broaden the reach of the previous laws regarding disclaimers and would likely complement state laws limiting the use of taped calls.

The other commenter stated that treating the term ''communication'' in 2 U.S.C. 441d(a) the same as ''public communication'' would ''conflate and confuse two separate concepts that Congress established to meet two distinct purposes.'' That commenter also asserted that the inclusion of other forms of ''general public political advertising'' does not indicate that the two terms share the same meaning. The commenter supported this assertion by citing to the Commission's previous explanation that ''general language following a listing of specific terms * * * does not evidence Congressional intent to include a separate and distinct term that is not listed * * *'' *See* Final Rules and Explanation and Justification, ''Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money,'' 67 FR 49072 (July 29, 2002).

The Commission notes that its prior statement cited by the commenter was made in the context of a decision not to include Internet communications within the definition of ''public communication.'' Unlike the term ''telephone bank to the general public'' and the other terms listed in the BCRA definition of ''public communication,'' communications over the Internet were not specifically listed as one of the forms of ''general public political advertising.'' But while general language following a list of specific terms may not, by itself, provide sufficient evidence of Congressional intent, the Commission believes that such intent can be found where Congress has provided additional guidance as to the proper interpretation of that general language elsewhere in the same statute. In the Commission's judgment, the use of the phrase ''or any other type [form] of general public political advertising,'' which is used in BCRA only in the two locations specified above,[2] should be interpreted in a virtually identical manner. Therefore, each form of communication specifically listed in the definition of ''public communication,'' as well as each form of communication listed with reference to a ''communication'' in 2 U.S.C. 441d(a), must be a form of ''general public political advertising.'' To include the term ''telephone bank to the general public'' within the meaning of ''general public political advertising'' in one part of the statute but not the other would be to provide two different meanings to the term ''general public political advertising.'' Rather than conflating and confusing two separate concepts, the Commission, when appropriate, is establishing a consistent meaning from the repeated use of a single statutory phrase in order to promote simplicity and symmetry between the various statutory provisions and within the regulations.

This approach also incorporates Congressional intent, apparent in 2 U.S.C. 441d(d), to regulate communications by radio and television, and the Commission's judgment that it would be unsupportable to require a disclaimer for a television communication that was broadcast, while not requiring a disclaimer for the same communication merely because it was carried on cable or satellite. It is also consistent with other uses (or proposed uses) of the term ''public communication'' in its regulations. The Commission has used the term ''public communication'' to clarify the definition of ''generic campaign activity,''[3] *see* 11 CFR 100.25, and has proposed the use of ''public communication'' in a separate and ongoing rulemaking to describe communications that may be coordinated with a candidate, authorized committee, or political party committee. *See* proposed 11 CFR 109.21(c) and 109.37(a)(2), Notice of Proposed Rulemaking on Coordinated and Independent Expenditures, 67 FR

[1] Section 431(22) uses the word ''form,'' while section 441d(a) uses the word ''type;'' the Commission discerns no substantive differences arising from the choice of synonyms.

[2] See the definition of ''public communication'' in BCRA section 101 (2 U.S.C. 431(22)) and with reference to the scope of the disclaimer provisions in BCRA section 311 (2 U.S.C. 441d(a).)

[3] Congress defined ''generic campaign acitivity'' in BCRA as a ''*campaign activity*'' that promotes a political party and does not promote a candidate or non-Federal candidate. Pub. L. 107–155, sec. 101 (March 27, 2002) emphasis added).

60042, 60065 and 60068 (Sept. 24, 2002).

In addition, by employing the term ''public communication'' in the section 110.11 disclaimer rules, the Commission avoids assigning different meanings to the term ''mailing'' in 2 U.S.C. 441d(a) and ''mass mailing,'' the term used in the definition of ''public communication'' and defined by Congress in BCRA as more than 500 pieces of substantially similar mail. *See* 2 U.S.C. 431(23). In BCRA, Congress amended 2 U.S.C. 441d(a)(1) by removing the adjective ''direct'' from the pre-BCRA term ''direct mailing,'' thereby removing a term that had been defined differently than the BCRA definition of ''mass mailing.'' In the NPRM in this rulemaking, however, the Commission proposed a definition of the term ''mailing'' for purposes of the disclaimer requirements that would have treated ''mailing'' differently than the term ''mass mailing.'' The Commission has reconsidered this separate definition of ''mailing'' in light of its efforts to promote simplicity and symmetry within its regulations. Both ''mass mailing'' and ''mailing'' are examples of ''general public political advertising,'' as set forth in the definition of ''public communication'' at 2 U.S.C. 431(22) and at 2 U.S.C. 441d(a). Congress did not provide a separate definition of ''mailing.'' Therefore, in the Commission's judgment, the statutory term ''mailing'' used in 2 U.S.C. 441d(a) should not be given a separate meaning from ''mass mailing'' in the Commission's regulations. As a result, disclaimers would not be required for mailings unless the mailings are comprised of more than 500 pieces of substantially similar mail. See 2 U.S.C. 431(23).

While the term ''public communication'' serves generally to describe the proper reach of the disclaimer rules, the Commission has decided that certain Internet-based communications also should be covered. The Commission has for years interpreted the statute to require disclaimers on electronic mail and Internet website communications. *See*, *e.g.*, Advisory Opinions 1995–9 and 1999–37. In view of the widespread use of this technology in modern campaigning, and the relatively non-intrusive nature of disclaimer requirements, the Commission has concluded that the interests served by prompt public disclosure warrant application of the disclaimer provisions.

Nonetheless, to avoid overreaching in this area, and to maintain some symmetry with the definition of ''public communication,'' the Commission is limiting the coverage of electronic mail to situations involving more than 500 substantially similar unsolicited communications. This approach would not require a disclaimer on electronic mail where the recipients have taken some affirmative step to be on a list used by the sender, such as responding positively to a request to be on such list. Moreover, regarding websites, the Commission is extending the disclaimer requirements only to political committee websites. This will assure, for example, that a website created and paid for by an individual will not have to include a disclaimer. At the same time, arguably, the most significant use of electronic mail and websites to conduct campaign activity will have to provide the public notice of who is responsible.

In order to incorporate the foregoing Internet-based applications in the final disclaimer rules, 11 CFR 110.11(a) provides that for purposes of the section, the term ''public communication'' also covers more than 500 unsolicited electronic mail communications and websites of political committees. This is the Commission's only divergence from the 11 CFR 100.26 definition of ''public communication.''

The Commission notes that it has initiated a separate rulemaking regarding several Internet-related issues. The disclaimer provisions may be revisited in that rulemaking.

Paragraphs (a)(1) through (4) of the final rules in 11 CFR 110.11 enumerate the particular types of such communications to which the disclaimer requirements apply. For the reasons described above and unless otherwise specified, the term ''communications'' is used in the preceding sentence and the remainder of the narrative below as a shorthand reference that encompasses both ''public communications'' and ''electioneering communications.'' Throughout revised section 110.11, the word ''type'' is used, rather than ''form,'' as in the pre-BCRA version of the regulation. This change has no substantive effect and only serves to conform the regulation to the language of the statute. *See* 2 U.S.C. 441d; *see also* 11 CFR 100.27.

In BCRA, Congress provided that ''any communication'' for which a political committee makes a disbursement must include a disclaimer, expanding the scope of the disclaimer requirement for political committees beyond communications constituting express advocacy and communications soliciting contributions. Compare pre- and post-BCRA versions of 2 U.S.C. 441d(a). Revised paragraph (a)(1) of section 110.11 reads, ''[a]ll public communications for which a political committee makes a disbursement.''

In contrast, revised paragraph (a)(2) of section 110.11 requires that ''[a]ll public communications by any person that expressly advocate the election or defeat of a clearly identified candidate'' must include a disclaimer. 2 U.S.C. 441d(a). The revised rule does not substantively change the disclaimer requirement for express advocacy communications from the pre-BCRA version of the regulation because BCRA does not alter the reach of the disclaimer requirements for persons that are not political committees, except with regard to electioneering communications (*see* below).

Similarly, paragraph (a)(3) of section 110.11 requires ''[a]ll public communications by any person'' that solicit a contribution must include a disclaimer. 2 U.S.C. 441d(a). Here, too, the revised rule does not change the disclaimer requirement for solicitations from the pre-BCRA version of the rule because BCRA makes no changes in this regard.

Congress amended 2 U.S.C. 441d(a) to require that ''electioneering communications'' include disclaimers. In paragraph (a)(4) of section 110.11, the Commission requires that ''[a]ll electioneering communications by any person'' include a disclaimer. The term ''electioneering communication'' is defined in 11 CFR 100.29(a). *See* Electioneering Communications Final Rules and Explanation and Justification 67 FR 65190 (Oct. 23, 2002).

The Internal Revenue Service (''IRS'') commented generally on the scope of the Commission's proposed rules and found no direct conflict with the Internal Revenue Code or the regulations thereunder. The IRS noted that the Commission proposed at 11 CFR 110.11(a)(1)(iii) to require a disclaimer statement for all types of ''general public political advertising'' by any person soliciting contributions. The IRS also requested that for the benefit of tax-exempt organizations the Commission should restate certain requirements of section 6113 of the Internal Revenue Code (26 U.S.C. 6113). The IRS stated that section 6113 provides that certain tax-exempt organizations that are not eligible to receive tax deductible charitable contributions, and whose gross annual receipts normally exceed $100,000, must disclose in an ''express statement (in a conspicuous and easily recognizable format)'' that contributions to the organization are not deductible for Federal income tax purposes as charitable contributions. This provision

applies to organizations that are not eligible to receive deductible charitable contributions and are described in section 501(c), section 501(d), or section 527. The Internal Revenue Service issued Notice 88–120 to provide safe harbors for meeting the requirements of section 6113.

*11 CFR 110.11(b) General Content Requirements*

Paragraph (b) of section 110.11 sets out the general content requirements for disclaimers, depending on who paid for the communication and, where applicable, who authorized the communication. Pre-BCRA paragraphs (a)(1)(i) and (ii) of section 110.11, which applied to communications authorized and paid for by a candidate and communications authorized by a candidate but paid for by another person, respectively, are redesignated as paragraphs (b)(1) and (2) in the revised regulation, respectively, without substantive revision.

Paragraph (b)(3) of section 110.11 applies to a communication, including any solicitation, that is not paid for or authorized by a candidate. The provisions of pre-BCRA 11 CFR 110.11(a)(1)(iii) are replaced with paragraph (b)(3), with one substantive change. In BCRA, Congress provided that a covered communication not authorized by a candidate, his or her authorized committees or agents must have a disclaimer that includes the ''permanent street address, telephone number, or World Wide Web address'' of the person who paid for the communication. 2 U.S.C. 441d(a)(3). Similar language is being added in paragraph (b)(3).

The Commission is not including pre-BCRA 11 CFR 110.11(a)(1)(iv) in revised section 110.11. This paragraph applied to ''solicitations directed to the general public on behalf of a political committee which is not an authorized committee of a candidate'' and required that these solicitations only state the name of the person who paid for the communication. In the NPRM the Commission proposed deleting paragraph (a)(1)(iv). Given that Congress amended 2 U.S.C. 441d(a) to extend the disclaimer requirements to apply ''whenever a political committee makes a disbursement for the purpose of financing any communication'' through any type of general public political advertisement, and given that Congress did not create a specific exception for authorization language in solicitations by unauthorized committees, the Commission is not retaining pre-BCRA 11 CFR 110.11(a)(1)(iv).

*11 CFR 110.11(c) Disclaimer Specifications*

A. Specifications for All Disclaimers

In BCRA, Congress created a number of specific requirements for disclaimers to be included in communications covered by the statute. These statutory requirements vary, depending on whether the communication is printed or broadcast through radio or television, and on whether a candidate or another person pays for the communication. 2 U.S.C. 441d(c), (d). Paragraph (c) combines the disclaimer requirements in pre-BCRA 11 CFR 110.11(a)(5) with the new requirements Congress added in BCRA.

Paragraph (c)(1) sets forth a general, ''clear and conspicuous'' requirement applicable to all disclaimers, regardless of the medium in which the communication is transmitted. Paragraph (c)(1) is a slightly revised version of the ''clear and conspicuous'' requirement in pre-BCRA 11 CFR 110.11(a)(5). The final sentence of paragraph (c)(1) provides that a disclaimer is not clear and conspicuous if it is difficult to read or hear, or if its placement is easily overlooked. This modifies the corresponding pre-BCRA provision, which was focused on print communications only, by generalizing it to apply to communications made through other media as well. This generalization is justified by BCRA's revision to section 441d, which broadened the scope of the statute. No commenters addressed this paragraph.

B. Specific Requirements for Printed Communications

Several of the specific disclaimer requirements added by BCRA apply only to printed communications. 2 U.S.C. 441d(c)(1). Paragraph (c)(2) of section 110.11 implements the new statutory specifications, and also incorporates three of the print-specific provisions of pre-BCRA 11 CFR 110.11.

One commenter suggested that the pre-BCRA disclaimer regulations work well and should not be changed except where required under BCRA. For the most part, the Commission agrees, but with the recognition that Congress has in fact required a number of changes in the disclaimer provisions through BCRA. For example, the pre-BCRA requirement that a disclaimer be ''clear and conspicuous'' was limited to printed communications. In BCRA, Congress added a new requirement that the disclaimer in a printed communication be of ''sufficient type-size to be clearly readable by the recipient of the communication.'' 2 U.S.C. 441d(c)(1). Given the specificity of the statutory requirements added by BCRA, new paragraph (c)(2)(i) restates the ''sufficient type size'' requirement verbatim, while new paragraphs (c)(2)(ii) and (c)(2)(iii) also precisely track 2 U.S.C. 441d(c)(2) and (3), respectively.

The Commission sought comment on whether the term ''sufficient type size'' requires additional clarification or a ''safe harbor'' provision. Three commenters responded and each stated that the Commission should provide some additional guidance or ''safe harbor'' in the form of an ''objective'' standard for type size. One commenter advocated a type-size requirement related to the smallest font size of a communication, but a different commenter warned that such a requirement could be easily circumvented by reducing the type-size of one sentence, or even one word, in the communication. Two commenters also expressed concerns that a type-size requirement based on the size of the largest font size in the communication would be ''unworkable'' or ''overly complex.'' One commenter supported an approach that would set a fixed minimum type size.

The Commission shares the concerns expressed by the commenters regarding formulas fixed to the smallest or largest type size in a communication's core message text. However, the Commission is also reluctant to set one fixed minimum type size for all communications because a type size that can be easily read in a newspaper might be completely unreadable when included on a billboard or other large, printed communication. Therefore, in 11 CFR 110.11(c)(2)(i), the Commission is creating a ''safe harbor'' provision that establishes a fixed, twelve-point type size as a sufficient size for disclaimer text in newspapers, magazines, flyers, signs and other printed communications that are no larger than the common poster size of 24 inches by 36 inches. However, no specific safe harbor provision would apply to larger printed communications because the Commission concludes that the vast differences in the potential size and manner of display of larger printed communications would render fixed type-size examples ineffective and inappropriate. Whether a disclaimer on a larger printed communication is of sufficient type size to be clearly readable is therefore to be determined on a case-by-case basis, taking into account the vantage point from which the communication is intended to be seen or read as well as the actual size of the disclaimer text.

Paragraph (c)(2)(ii) of section 110.11 specifies that the disclaimer included in printed communications must be contained within a printed box set apart from the other contents of the communication. 2 U.S.C. 441d(c)(2). Paragraph (c)(2)(iii) specifies that the text of the disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement. 2 U.S.C. 441d(c)(3). Both of these requirements apply regardless of the size of the printed material under paragraph (c)(2)(i).

In the NPRM, the Commission sought comment on whether the statutory phrase ''reasonable degree of color contrast'' should be further defined, and specifically whether the color contrast for the disclaimer notice should be related to the color contrast of the core message text. One commenter drew a distinction between the statutory requirement of color contrast between the ''background and printed statement,'' 2 U.S.C. 441d(c)(3), and the Commission's suggestion in the narrative of the NPRM that a color contrast is required between the disclaimer text and the core message text. The Commission notes that color contrast between the disclaimer text and the core message text is not required by the statute, and is not required by the final rules. This should alleviate the commenter's concern that such an additional requirement might require three different colors (a background color, a core message text color, and a disclaimer text color), thereby effectively prohibiting simple black and white communications and possibly raising the cost for the communication. Therefore, paragraph (c)(2)(iii) addresses only the contrast between the text and background of a communication, and provides two ''safe harbor'' examples that, when followed, comply with the color-contrast requirement. First, paragraph (c)(2)(iii) specifies that the color contrast requirement is met if the disclaimer is printed in black text on a white background. Second, paragraph (c)(2)(iii) specifies that the color contrast requirement is met if the degree of contrast between the background color and the disclaimer text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication. Please note that these two examples do not constitute the only ways to satisfy the color contrast requirements, and that they are safe harbors, not mandatory requirements. This approach is intended to provide a clear, flexible safe harbor that will ensure that the disclaimer does not blend in with the background of the communication any more than a headline or other key part of the core message text, and thereby providing certainty to persons making communications needing disclaimers.

Paragraphs (c)(2)(iv) and (v) incorporate pre-BCRA regulatory provisions specific to print communications. Paragraph (c)(2)(iv), to which the provisions of pre-BCRA paragraph (a)(5)(i) are redesignated without substantive revision, states that a disclaimer need not appear on the front or cover page of a communication, except for communications that only contain a front face, such as billboards. Paragraph (c)(2)(v), to which the provisions of pre-BCRA paragraph (a)(5)(ii) are redesignated without substantive change, states that a communication that would require a disclaimer if distributed separately, and that is included in a package of materials, must contain the required disclaimer.

C. Specific Requirements for Radio and Television Communications That Are Authorized by Candidates

In BCRA, Congress added new requirements for disclaimers in radio and television communications paid for by candidates or persons authorized by candidates. 2 U.S.C. 441d(d)(1). Paragraph (c)(3) implements these specific statutory requirements as described below.

Paragraph (c)(3)(i) tracks the new statutory language requiring that a communication that is paid for or authorized by a candidate or the candidate's authorized committee and transmitted through radio must include an audio statement spoken by the candidate himself or herself. 2 U.S.C. 441d(d)(1)(A). The statement must identify the candidate, and state that the candidate has approved the communication. *Id.*

Likewise, paragraphs (c)(3)(ii) tracks the new statutory language requiring that a communication that is paid for or authorized by a candidate or the candidate's authorized committee and transmitted through television have an oral disclaimer spoken by the candidate himself or herself. 2 U.S.C. 441d(d)(1)(B). The provision requires the candidate to identify himself or herself, and to state that he or she has approved the communication. In addition, Congress specified that the candidate must convey that message in one of two ways: through a full-screen view of the candidate making the statement or through a ''clearly identifiable photographic or similar image of the candidate'' that appears during the candidate's voice-over statement. Paragraph (c)(3)(ii)(A) sets forth the first option, while paragraph (c)(3)(ii)(B) sets forth the second option and provides additional guidance regarding the meaning of ''clearly identifiable.'' The only commenter who specifically addressed this issue suggested that the picture of the candidate should only be considered ''clearly identifiable'' if it is displayed in a full-screen view. However, the Commission notes that although Congress specifically required a full-screen view when the candidate is shown making the statement, Congress did not require a full-screen view for the still picture. The Commission views this as an intentional distinction that contemplated an alternative to the full-screen view. Therefore, the Commission is establishing a safe harbor provision whereby a still picture of the candidate shall be considered ''clearly identifiable'' if it occupies at least 80% of the vertical screen height. That size is, in the Commission's judgment, a meaningful alternative to the full-screen requirement, and complies with Congress's mandate that the picture be ''clearly identifiable.''

Congress also established a third disclaimer requirement for communications paid for or authorized by a candidate and transmitted through television. In addition to the oral statement described above, each television communication must contain a ''clearly readable'' written statement that appears at the end of the communication ''for a period of at least four seconds'' with a ''reasonable degree of color contrast'' between the background and the disclaimer statement. *See* 2 U.S.C. 441d(d)(2)(B)(ii). These statutory requirements are implemented in new 11 CFR 110.11(c)(3)(iii).

The pre-BCRA regulations provided that a written disclaimer appearing on the screen of a television communication ''shall be considered clear and conspicuous if [it] appear[s] in letters equal to or greater than four (4) percent of the vertical picture height for not less than four (4) seconds.'' Pre-BCRA 11 CFR 110.11(a)(5)(iii). Two commenters urged the Commission to retain the four-percent height provision as a ''safe harbor.'' However, the new Congressional color-contrast requirement in 2 U.S.C. 441d(d)(2)(B)(ii) renders the pre-BCRA ''safe harbor'' incomplete because the four-percent-for-four-seconds provision does not address color contrast.

The Commission is therefore setting forth the statutory ''clearly readable''

requirement in paragraph 11 CFR 110.11(c)(3)(iii) and is employing the same four percent height provision and the four-second duration provision as two of the three specific criteria that will determine whether a statement is ''clearly readable.'' Rather than providing a ''safe harbor,'' paragraphs 11 CFR 110.11(c)(3)(iii)(A), (B), and (C) provide, respectively, that the statement will not be considered ''clearly readable'' unless it appears in letters equal to or greater than four percent of the vertical picture height, it appears for at least four seconds, and the statement contains a reasonable degree of color contrast with the background.

Paragraph (c)(3)(iii)(B) sets forth the four-second duration requirement in accordance with the BCRA language. 2 U.S.C. 441d(d)(1)(B).

Paragraph 11 CFR 110.11(c)(3)(iii)(C) addresses the new color contrast requirement in BCRA, which is the third criterion used to determine whether a statement is clearly readable. Because the statute did not define ''reasonable degree of color contrast,'' the Commission requested comment on several different approaches. To continue the same ''safe harbor'' approach of pre-BCRA paragraph (a)(5)(iii), the regulations would have to describe ''reasonable degree of color contrast'' in an objective manner. The same commenter who addressed the color contrast issue in the context of printed communications also suggested that the Commission avoid overly complicated or cost-incurring definitions of ''reasonable degree of color contrast'' in the context of television communications. For the same reasons stated above with reference to the color contrast requirements for printed communications, the Commission is providing ''safe harbors'' for disclaimers that are printed in black text on a white background, as well as disclaimers that have at least the same degree of contrast with the background color as the degree of contrast between the background color and the color of the largest text used in the communication. 11 CFR 110.11(c)(3)(iii)(C). Either of these disclaimer formats would satisfy the color-contrast requirement, which is the third criterion used to determine whether the statement is ''clearly readable.''

The Commission received no comments on the two proposed examples of spoken disclaimers that, if used by a candidate, will satisfy the requirements of paragraphs (c)(3)(i), (ii) and (iii). These examples, located in paragraph (c)(3)(iv), are not mandatory and are not the only acceptable disclaimers. Paragraph (c)(3)(iv) is intended to provide a clear ''safe harbor'' for candidates, authorized committees, and others required to include disclaimers in communications.

D. Specific Requirements for Radio and Television Communications Paid for by Other Persons and Not Authorized by Candidates

In BCRA, Congress set forth a scripted audio statement required for disclaimers in communications transmitted through radio or television and paid for by persons other than candidates or persons authorized by candidates. 2 U.S.C. 441d(d)(2). New paragraph (c)(4) tracks the statutory language by requiring the name of the political committee or other person responsible for the communication and any connected organization to be included in the communication. ''Connected organization'' is defined in 11 CFR 100.6. Paragraph (c)(4) also requires that communications transmitted through a telephone bank, as defined in 11 CFR 100.28, carry the same statement. *See* discussion regarding the inclusion of telephone banks within the term ''public communication,'' above, and the discussion of specific requirements for radio, telephone bank, and television communications authorized by candidates, above. The scripted statement is: ''XXX is responsible for the content of this advertising.'' 2 U.S.C. 441d(d)(2).

Furthermore, in the case of a television transmission, Congress required that the statement be conveyed by a ''full-screen view of a representative of the political committee or other person making the statement,'' or in a ''voice-over'' by such representative. 2 U.S.C. 441d(d)(2). The Commission sought comment on whether the regulation should specify who may represent the payor for this purpose. One commenter urged the Commission to require an officer of the organization to make the statement, rather than a volunteer or paid celebrity. In contrast, another commenter argued that any restriction on who could make the statement ''would far exceed the scope of BCRA,'' which allows a ''representative of the committee *or other person*'' to make the statement. *See* 2 U.S.C. 441d(d)(2) (emphasis added). The Commission agrees with the latter commenter that the statute does not appear to contemplate any additional restrictions on the choice of the person making the disclaimer statement. Furthermore, the Commission sees no reason to remove additional flexibility where the plain emphasis of the relevant statutory provision is the content and conspicuousness of the disclaimer, not the individual speaking those words. The Commission also notes that where Congress clearly intended that a specific person convey the disclaimer message for an authorized radio or television communication, it did so explicitly by providing that the candidate must make the statement. *Compare* 2 U.S.C. 441d(d)(1) with 2 U.S.C. 441d(d)(2). Thus, 11 CFR 110.11(c)(4)(ii) does not include any specific limitation regarding who must speak the required message. In addition, unlike the requirements for television communications authorized by candidates, the audio statement required for television communications that are not authorized by candidates can be accomplished through voice-over without any requirement of a photograph or similar representation of the speaker.

Finally, as with authorized television communications, the disclaimer statement for a television communication that is not authorized by any candidate must also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement for a period of at least four seconds. 2 U.S.C. 441d(d)(2). Paragraphs 11 CFR 110.11(c)(4)(iii)(A), (B), and (C) are therefore identical to 11 CFR 110.11(c)(3)(iii)(A), (B), and (C). *See* above explanation of 11 CFR 110.11(c)(3)(iii).

*11 CFR 110.11(d) Coordinated and Independent Expenditures by Political Party Committees*

Paragraph (d) of section 110.11 covers disclaimers for communications that constitute coordinated party expenditures and independent expenditures by national, state, district, and local political party committees. The relevant pre-BCRA provisions of 11 CFR 110.11(a)(2) are being redesignated as paragraph (d)(1), with one minor grammatical change and without substantive change.

Although the Commission did not propose any significant substantive changes for disclaimer requirements related to coordinated party expenditures, one commenter expressed concern that a communication paid for by a political party committee with funds subject to the 2 U.S.C. 441a(d) coordinated expenditure limits would, solely by virtue of being a 2 U.S.C. 441a(d) coordinated expenditure, be considered to be ''authorized'' communications subject to the requirements of 11 CFR 110.11(c)(3).

The Commission does not intend such a result and believes that such an interpretation would be contrary to its longstanding policy of permitting political party committees to avail themselves of the 2 U.S.C. 441a(d) limits, both before and after a party's primary, without any showing of candidate authorization or actual ''coordination'' with a candidate. *See* ''Party Expenditures vs. Contributions: Similarities,'' *Campaign Guide for Political Party Committees* at p.16 (1996) (''It is up to the party committee to decide.'') Therefore, the Commission is adding new paragraph (d)(2) to 11 CFR 110.11 to make it clear that a communication paid for by a political party committee through a section 441a(d) expenditure will not be considered to be authorized by a candidate solely by virtue of using the funds subject to the section 441a(d) limits. 11 CFR 110.11(d)(3). Please note, however, that while this clarification recognizes a political party committee's freedom to characterize its payment as a ''coordinated expenditure'' even when no actual coordination occurred, the communication would be considered authorized by the candidate (and would therefore require an authorization statement to that effect) if the candidate approves the communication. The Commission is also making clear that communications made by a political party committee pursuant to 2 U.S.C. 441a(d) that are distributed prior to the date the party committee's candidate is nominated need not carry disclaimers indicating that the communication was authorized by any candidate, but only must indicate who paid for the communication. 11 CFR 110.11(d)(1)(ii).

Paragraph (d)(3) covers communications that constitute independent expenditures by political party committees. It states that the disclaimer provisions apply to such communications, and that a ''non-authorization notice'' is required, as with any other independent expenditure communication. *See* pre-BCRA 11 CFR 109.3 and proposed 11 CFR 109.10(e) (as proposed in a separate Notice of Proposed Rulemaking on Consolidated Reporting, 67 FR 64555 (October 21, 2002).)

*11 CFR 110.11(e) Exempt Activities*

The Commission is redesignating the provisions of pre-BCRA 11 CFR 110.11(a)(4), pertaining to communications that qualify as ''exempt activities,'' as paragraph (e) of section 110.11. In the NPRM, the Commission proposed to make only minor, non-substantive revisions. 67 FR 55351. Although not so expressly stated in the NPRM, the Commission based this proposal on the tentative conclusion that Congress did not intend, in BCRA, to overturn the Commission's longstanding approach to disclaimers for exempt activities. The Commission received no comments on this proposal.

The Commission has concluded that no substantive revisions are necessary. The Commission has, however, rewritten the paragraph to make it clear that public communications that constitute exempt activities are covered by the requirements of paragraphs (a), (b), (c)(1), and (c)(2) of section 110.11, but are not subject to the new ''stand by your ad'' requirements in paragraphs (c)(3) and (c)(4) of section 110.11. This revision is not intended to change the rule substantively; rather, it is only intended to clarify the rule in light of the new provisions added by BCRA.

*11 CFR 110.11(f) Exceptions*

Exceptions to the disclaimer requirements are set out in paragraph (f). The exceptions in pre-BCRA paragraphs (a)(6)(i), (ii), and (iii) are being redesignated as paragraphs (f)(1)(i), (ii), and (iii), respectively, with only grammatical, non-substantive revision.

The Commission is incorporating the provisions of pre-BCRA 11 CFR 110.11(a)(7), regarding certain communications by a separate segregated fund or its connected organization, in paragraph (f)(2), because this provision is essentially an exception. In addition, in paragraph (f)(2), the word ''form'' is being changed to ''type.'' This change has no substantive effect, and is being done only to conform to the language of the statute. *See* 2 U.S.C. 441d(a). In addition, the reference ''general public political advertising'' in pre-BCRA 11 CFR 110.11(a)(7) is replaced with a reference to a ''public communication.'' 11 CFR 110.11(f)(2). No commenters addressed this provision.

*11 CFR 110.11(g) Comparable Rate for Campaign Purposes*

Paragraph (g) of section 110.11 continues the pre-BCRA rule pertaining to comparable rates for print advertising. That is, the contents of pre-BCRA 11 CFR 110.11(b) are being redesignated as paragraph (g). Other than the addition of a heading for the paragraph, there are no revisions to the pre-BCRA rule. Paragraph (g) tracks 2 U.S.C. 441d(b), as did its pre-BCRA predecessor. No commenters addressed this provision.

*11 CFR 110.16 Prohibitions on Fraudulent Misrepresentations*

BCRA adds a subsection to the fraudulent misrepresentation statute at 2 U.S.C. 441h. The new provision, 2 U.S.C. 441h(b), prohibits a person from fraudulently misrepresenting that the person is speaking, writing or otherwise acting for, or on behalf of, a Federal candidate or political party, or an employee or agent of either, for the purpose of soliciting contributions or donations. It also prohibits persons from participating in, or conspiring to participate in, plans, schemes, or designs to make such fraudulent misrepresentations in soliciting contributions and donations. BCRA also non-substantively amends the existing fraudulent misrepresentation statute by redesignating it as subsection (a) of 2 U.S.C. 441h. The regulation implementing this provision, together with the pre-BCRA fraudulent misrepresentation regulation formerly found at 11 CFR 110.9(b),[4] is combined in new 11 CFR 110.16.

The pre-BCRA fraudulent misrepresentation provision, now codified at 2 U.S.C. 441h(a), is aimed at fraudulent misrepresentation of campaign authority. For additional background, *see Legislative History of Federal Election Campaign Act Amendments of 1974* at 521. The statute prohibits a candidate, his or her employee or agent, or an organization under the candidate's control, from purporting to speak, write, or act for another candidate or political party on a matter that is damaging to the other candidate or party. Section 441h(a) encompasses, for example, a candidate who distributes letters containing statements damaging to an opponent and who fraudulently attributes them to the opponent. The Commission has determined that ''on a matter that is damaging'' includes actions or spoken or written communications that are intended to suppress votes for the candidate or party who has been

[4] Another BCRA rulemaking amended 11 CFR 110.9, formerly entitled ''Miscellaneous Provisions,'' to address only violations of the contribution limits and was re-titled accordingly. *See* Final Rules and Explanation and Justification for Contribution Limitations and Prohibitions, 67 FR 69928 (Nov. 19, 2002). Other provisions previously addressed in 11 CFR 110.9 include fraudulent misrepresentation, price index increase and voting age population. This rulemaking redesignates and amends the fraudulent misrepresentation provision. The ''Contribution Limitations and Prohibitions'' rulemaking redesignates and amends the price index increase provision. *See id.* A third BCRA rulemaking project entitled ''Coordination and Independent Expenditures'' proposes to redesignate and amend the voting age population provision. *See* NPRM at 67 FR 60042, 60060 (Sept. 24, 2002).

fraudulently misrepresented. A violation of section 441h(a) does not depend on whether the candidate or party who is fraudulently represented goes on to win an election. While the precise harm may be difficult to quantify, harm is presumed from the nature of the communication. Proof of financial damages is unnecessary.

Because the language and purpose of the pre-BCRA misrepresentation statute encompasses only misrepresentations by a candidate or the candidate's employee or agent, the Commission has historically been unable to take action in enforcement matters where persons unassociated with a candidate or candidate's authorized committee have solicited funds by purporting to act on behalf of a specific candidate or political party. Candidates have complained that contributions that contributors believed were going to benefit the candidate were diverted to other purposes, harming both the candidate and contributor. Consequently, the Commission has frequently included in its annual legislative recommendations to Congress a recommendation that 2 U.S.C. 441h be amended to specifically prohibit any person from fraudulently misrepresenting a candidate or political party in solicitations. *See Federal Election Commission Annual Reports* for 2000 at 39, for 1999 at 47–48, for 1998 at 52, and 1997 at 47. BCRA's prohibition on fraudulent solicitations of contributions and donations implements those legislative recommendations. 2 U.S.C. 441h(b); *see* 148 Cong. Rec. S3122 (daily ed. March 29, 2001) (statement of Sen. Nelson).

The Commission received one comment on the proposed rules to implement BCRA's fraudulent solicitation provision and to redesignate the pre-BCRA fraudulent misrepresentation rule. The commenter expressed support for combining these two provisions in a new rule. The commenter agreed that an anti-fraud provision aimed at fraudulent fundraising and applicable to a broader range of persons was needed.

The final rule at 11 CFR 110.16(a) remains unchanged from the proposed rule in the NPRM. Paragraph (a) amends the pre-BCRA fraudulent misrepresentation regulation, formerly found at 11 CFR 110.9(b), by adding the title, ''In general.'' This change follows BCRA, which added a similar heading to section (a) of 2 U.S.C. 441h. Technical amendments also make the wording of paragraph (a) gender-neutral. Finally, paragraph (a)(2) has been amended from the pre-BCRA rule to include the word ''scheme'' so that it tracks the statute.

The final rule at 11 CFR 110.16(b) tracks the statutory language in BCRA. No changes are being made from the proposed rule. Paragraph (b)(1) prohibits a person from fraudulently misrepresenting that the person speaks, writes, or otherwise acts for or on behalf of a candidate, political party, or an employee or agent of either, in soliciting contributions or donations. As used in section 110.16(b)(1), ''donation'' has the same meaning as in 11 CFR 300.2(e). *See* Final Rules for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49122 (July 29, 2002). Paragraph (b)(2) prohibits a person from willfully and knowingly participating in, or conspiring to participate in, any plan, scheme, or design to violate proposed paragraph (b)(1).

The Commission notes that the fraudulent misrepresentations prohibited in both 11 CFR 441h(a) and (b) and 11 CFR 110.16(a) and (b) differ from common law fraud. Unlike common law fraudulent misrepresentation, section 441h gives rise to no tort action. Section 441h is part of a Federal statute designed to address campaign finance abuses, not common law fraud. *See generally Buckley* v. *Valeo*, 424 U.S. 1, 26–27 (1976).

The Supreme Court has recognized that statutes that address schemes to defraud, such as sections 441h(a)(2) and (b)(2), do not require proof of the common law requirements of ''justifiable reliance'' and ''damages.'' *Neder* v. *United States*, 527 U.S. 1, 24–25 (1999) (''The common law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in federal fraud statutes * * *'' ''By prohibiting the 'scheme to defraud' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted''), *citing United States* v. *Stewart*, 872 F.2d 957, 960 (10th Cir. 1989).

Another indication that the fraudulent misrepresentations prohibited by section 441h differ from common law fraud is that section 441h(a) states that the fraudulent misrepresentation must be ''on a matter which is damaging to [the misrepresented] candidate or political party.'' If the statute were to require proof of damage in common law fraudulent misrepresentation, then the phrase ''on a matter which is damaging'' is superfluous. Courts construe statutes so ''as to avoid rendering superfluous any parts thereof.'' *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104 (1991); *see also Federal Election Commission* v. *Arlen Specter '96*, 150 F. Supp.2d 797, 806 (2001), quoting *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997).

*11 CFR 111.24 Civil Penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.).*

The Act imposes civil penalties on anyone violating any portion of FECA or the Presidential Election Campaign Fund Act (''Fund Act'') or the Presidential Primary Matching Payment Account Act (''Matching Payment Act''). The Act's civil penalties, found at 2 U.S.C. 437g(a)(5), (6), and (12), are organized into two tiers of monetary penalties; one tier of penalties for violations of the Act, and a second tier of penalties for ''knowing and willful'' violations of the Act.

BCRA amends sections 437g(a)(5)(B) and 437g(a)(6)(C) by separating out and increasing the penalties for a subset of knowing and willful violations, namely, contributions that are made in the name of another. *See* 2 U.S.C. 441f. Such contributions are often made through a conduit to circumvent the contribution limits. The amendment to 2 U.S.C. 437g(a)(5)(B) increases the civil penalties for such violations to ''not less than 300 percent of the amount involved in the violation'' and ''not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation.''

Section 437g(a)(6)(C) of FECA, authorizing a court to impose civil penalties on a person who knowingly and willfully violates the Act, has been similarly amended by BCRA. Accordingly, the Commission amends 11 CFR 111.24 to implement these amendments to FECA.

Specifically, the Commission is dividing 11 CFR 111.24(a) into paragraphs (a)(1), and (a)(2)(i) and (ii). Paragraph (a)(1) contains the unchanged language of the pre-BCRA regulation for civil penalties for violations of the Act or the Fund Act or Matching Payment Act. Paragraph (a)(2) addresses ''knowing and willful'' violations and is further divided into paragraphs (a)(2)(i) and (ii). Paragraph (a)(2)(i) contains the unchanged language of the pre-BCRA regulation for civil penalties for knowing and willful violations of FECA or the Fund Act or the Matching Payment Act. 11 CFR 111.24(a)(2)(ii) implements BCRA's amendments to FECA increasing civil penalties for knowing and willing violations involving contributions made in the name of another. In the case of a knowing and willful violation of the prohibition on contributions in the name of another, the civil penalty is not

less than an amount that is equal to 300 percent of the amount of the violation, and the civil penalty is not more than $50,000 or an amount equal to 1,000 percent of the amount of the violation, whichever is greater. The Commission received no comments on these amended rules, which are identical to the proposed rules, previously published.

*11 CFR Part 113 Use of Campaign Accounts for Non-Campaign Purposes (2 U.S.C. 439a)*

Introduction

In BCRA, Congress deleted 2 U.S.C. 439a in its entirety, and replaced it with an entirely new section. Subsection (a) of the amended section sets forth the following four categories of ''permitted uses'' of campaign funds: (1) Otherwise authorized expenditures in connection with a candidate's campaign for Federal office; (2) ordinary and necessary expenses incurred in connection with a Federal officeholder's duties; (3) contributions to certain tax-exempt organizations; and (4) transfers, without limitation, to national, state or local political party committees. 2 U.S.C. 439a(a)(1) through (4). Congress also included a list of non-exhaustive, *per se* prohibited personal uses of campaign funds, including home mortgage, rent or utility payments, clothing purchases, noncampaign-related automobile expenses, country club memberships, vacations or other noncampaign-related trips, household food items, tuition payments, noncampaign-related admissions to entertainment events, such as sporting events, concerts, and theatres, and health club dues. 2 U.S.C. 439a(b)(2)(A) through (I).

Former 2 U.S.C. 439a was the statutory basis for the Commission's pre-BCRA ''personal use'' rules. It allowed candidates and Federal officeholders to use excess campaign funds to pay for ordinary and necessary expenses incurred in connection with their duties as Federal officeholders, certain contributions to tax-exempt organizations, and other lawful purposes, including transfers, without limitation, to national, state or local political party committees. The former section 439a also generally prohibited candidates and Federal officeholders from converting their excess campaign funds to personal uses.

Two pre-BCRA regulations implemented the statutory conversion-to-personal-use prohibition. 11 CFR 113.1(g)(1)(i) set out a non-exhaustive list of *per se* prohibited personal uses, and 11 CFR 113.1(g)(1)(ii) described uses that the Commission evaluated on a case-by-case basis. In addition, the latter regulation stated that uses that would exist ''irrespective'' of a candidate's campaign or a Federal officeholder's duties constitute personal use. Finally, another pre-BCRA regulation, which described the permissible uses of excess campaign funds, included the ''any other lawful purpose'' language from former section 439a. 11 CFR 113.2(d).

In the NPRM, the Commission proposed regulations that would implement amended section 439a. The Commission also requested comments on several issues. With regard to the personal use regulations, the Internal Revenue Service commented that it saw no direct conflict between the Commission's proposals and the Internal Revenue Code or the regulations thereunder. Other comments are addressed below.

Unchanged Provisions of 11 CFR 113.1(e) and 11 CFR 113.2

1. Per se Personal Uses

The pre-BCRA version of 2 U.S.C. 439a contained a general prohibition against the personal use of campaign funds, but did not specify any particular impermissible uses. In contrast, the Commission's pre-BCRA personal use regulations specifically defined certain uses of campaign funds or donations as *per se* prohibited personal uses. 11 CFR 113.1(g)(1)(i).

When Congress enacted BCRA, it amended 2 U.S.C. 439a(b) to include a non-exhaustive list of prohibited personal uses of campaign funds. As one of BCRA's principal sponsors explained, amended section 439a *''[c]odifies FEC regulations relating to the personal use of campaign funds by candidates''* (emphasis added). 148 *Cong. Rec.* S1993–4 (daily ed. March 18, 2002) (statement of Sen. Feingold). However, the Commission noted in the NPRM that several of the personal use provisions in amended section 439a were not adopted verbatim, but were instead summaries of pre-BCRA personal use regulations. For example, the statute now prohibits the use of campaign contributions for ''a clothing purchase'' (2 U.S.C. 439a(b)(2)(B)); whereas the pre-BCRA corresponding regulation at 11 CFR 113.1(g)(1)(i)(C) prohibited the personal use of ''[c]lothing, other than items of *de minimis* value that are used in the campaign, such as campaign 'T-shirts' or caps with campaign slogans.'' In addition, amended section 439a did not incorporate all of the pre-BCRA *per se* personal use rules in their entirety. *Compare* post-BCRA 2 U.S.C. 439a(b)(2)(A) through (I) with pre-BCRA 11 CFR 113.1(g)(1)(i). In the NPRM, the Commission stated that it interpreted new subsection (b) of 2 U.S.C. 439a to provide an even firmer statutory foundation for the *per se* rules at 11 CFR 113.1(g)(1)(i) than did the pre-BCRA version of section 439a. No commenters opposed this interpretation, and two commenters supported it. Accordingly, aside from the exceptions noted below, the Commission is retaining its pre-BCRA *per se* personal use regulations.

2. Irrespective test

As the Commission noted in the NPRM, pre-BCRA section 113.1(g)(1)(ii) stated that a use that would exist ''irrespective'' of a candidate's campaign or a Federal officeholder's duties would constitute a prohibited personal use. In BCRA, Congress codified the ''irrespective'' test as part of new section 439a(b)(2) (''For the purposes of paragraph (1), a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office * * *'') As the Commission explained in the NPRM, BCRA's ''irrespective'' test is virtually identical to the language in section 113.1(g)(1)(ii). The Commission proposed to continue to apply the ''irrespective'' test as it had done prior to BCRA. No comments were received specifically on this issue, although one commenter cited BCRA's ''irrespective'' language in the context of the commenter's analysis of the ''noncampaign-related trip'' language in proposed 11 CFR 113.1(g)(i)(K). (Noncampaign-related trips are discussed below.) Therefore, in the final rule, the Commission is not revising the ''irrespective'' test.

Amended Provisions of 11 CFR 113.1

1. 11 CFR 113.1(b) and (e)—Excess Campaign Funds

In BCRA, Congress deleted the phrase ''in excess of any amount necessary to defray'' campaign expenses from section 439a. Former section 113.1(e) defined ''excess campaign funds'' to mean ''amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures.'' In the NPRM, the Commission proposed not to change section 113.1(e), but raised the issue of whether Congress intended to eliminate the discretion of candidates and Federal

officeholders to use these excess campaign funds ''for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.'' 2 U.S.C. 439a(a)(2). No commenters opposed the Commission's proposal to leave section 113.1(e) unchanged, and one commenter supported leaving the ''excess campaign funds'' phrase intact.

To ensure that 11 CFR part 113 is consistent with the plain language of BCRA, the Commission has decided that the term ''excess campaign funds'' should be dropped. Accordingly, the title of part 113, (formerly ''Excess Campaign Funds and Funds Donated to Support Federal Officeholder Activities'') now reads ''Campaign Funds and Funds Donated to Support Federal Officeholder Activities.'' In addition, the references to the term ''excess campaign funds'' throughout part 113 are being deleted.

The Commission is also deleting 11 CFR 113.1(e), which previously defined ''excess campaign funds'' as ''amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures.''

The Commission is also making the following conforming amendments. In paragraphs (e)(1)(i), (e)(5), and (f), the term ''campaign funds'' is being substituted for ''excess campaign funds.'' Lastly, the Commission is also changing ''excess campaign funds'' to ''campaign funds'' in paragraph (b), which defines ''office accounts.''

2. 11 CRF 113.1(g)(1)(i)(B)—Funeral Expenses

Notwithstanding a principal sponsor's statement that the BCRA codifies the Commission's personal use regulations, amended section 439a failed to include two per se examples of personal use contained in 11 CFR 113.1(g). One of these, funeral, cremation or burial expenses, is being retained with significant exceptions. These would include such expenses for a candidate, employee or volunteer of authorized committees whose death arises out of, or in the course of, campaign activity. While there is no legislative history pertaining to this particular category of personal uses, it is at least a permissible construction of the BCRA to conclude that Congress deliberately excluded funeral expenses from its list of excluded uses of campaign funds. Norman J. Singer, Statutes and Statutory Construction § 47.23 (6th ed. 2000) (''When 'include' is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded. * * * It has also been assumed that when the legislature expresses things through a list, the court assumes that what is not listed is excluded.'').

In any event, limiting the use of campaign funds for funeral expenses resulting from a death that arises out of, or in the course of, campaign activity meets the Commission's ''irrespective'' test now codified in 2 U.S.C. 439a(b)(2). The phrase, ''arises out of, or in the course of,'' is a term of art employed in workers'' compensation statutes and insurance contracts and would cover, for instance, deaths resulting from injuries suffered during campaign activity.

In addition, with respect to funeral expenses for authorized committee staff and volunteers who die in the course of campaign activity, public policy considerations counsel the permission of the payment of such expenses from campaign funds as campaign volunteers and staff, unlike officeholders and their staff, generally do not receive any fringe benefits that would cover the cost of funeral expenses.

3. 11 CFR 113.1(g)(1)(i)(I)—Using Contributions To Pay Salaries to Candidates

In the NPRM, the Commission proposed adding a new rule, 11 CFR 113.1(g)(1)(i)(I), which would prohibit candidates from using campaign funds to pay themselves salaries or otherwise compensate themselves for income lost as a result of campaigning for Federal office. In AO 1999–1, the Commission banned the use of campaign funds to pay candidate salaries, in part because candidates would otherwise be able to spend campaign funds received as salaries for prohibited personal uses such as food, clothing, utilities, mortgages and other prohibited uses. Also, although the Commission noted that one of BCRA's principal sponsors stated that BCRA was intended to codify the Commission's current regulations but not its advisory opinions (148 *Cong. Rec.* S2143 (daily ed. March 20, 2002) (statement of Sen. Feingold)), the Commission preliminarily concluded that this proposed addition to its regulations would be consistent with the non-exhaustive list of prohibited personal uses in amended 2 U.S.C. 439a(b)(2).

The Commission sought comment as to whether or not principal campaign committees should be able to pay a candidate's salary out of campaign funds. Three commenters opposed the NPRM's proposal to prohibit the payment of candidate salaries and no commenter supported the proposal. One commenter argued that the definition of personal use does not encompass a payment to, as distinguished from an obligation of, a candidate. The same commenter also argued that because many candidates must forego salary in order to conduct the business of the campaign, a candidate who is dependent on an income is put at a severe disadvantage compared to an incumbent who is free to campaign at all times without any reduction in compensation or to an affluent challenger, who can afford to campaign without receiving any compensation.

The commenter also noted that AO 1999–1, which cites AOs 1996–34, 1995–42, and 1995–20, stated that the Commission has permitted the use of campaign funds to enable candidates and immediate family members to attend campaign events. Finally, the commenter concluded that candidates without significant resources might not be able to forego salary payments in order to run for Federal office, and recommended that the Commission promulgate a regulation permitting candidates to be paid salaries from campaign funds, with restrictions sufficient to prevent abuse.

A second commenter, citing the above-mentioned statement by one of BCRA's principal sponsors that the new law was not intended to codify the Commission's advisory opinions, asserted that the Commission lacked the authority to characterize salary payments to candidates from campaign funds as a *per se* prohibited personal use. This commenter also argued that, were it not for their campaign responsibilities, candidates would not have to leave their jobs and give up their salaries. Thus, the commenter concluded, this situation fulfills BCRA's ''irrespective'' test. The commenter also maintained that paying salaries to candidates so that they can buy personal items and services is akin to corporate employees making political contributions from their salaries. The commenter drew the analogy that, because corporate contributions are illegal but contributions from corporate employees are not, candidates should be able to draw salaries from campaign funds and should be allowed to purchase personal goods and services. Noting that would-be candidates of modest means might not be able to run for Federal office without salaries, the commenter urged the Commission not to change existing rules on this subject, but rather to either reconsider AO 1999–1 or let Congress decide the issue.

Finally, a third commenter, who joined in the comments of the previous two commenters, maintained that the

Commission's proposal exceeds both Congress's mandate in BCRA and congressional intent. The commenter also stated that the proposal would exacerbate what the commenter characterized as ''enhanced advantages conferred upon the wealthy, including incumbent federal office holders,'' by BCRA. The commenter concluded that, unlike officeholders, persons of average means need a salary in order to pay expenses while running for office.

The Commission agrees with the commenters that the payment of a salary to a candidate is not a prohibited personal use as defined under Commission regulations since, but for the candidacy, the candidate would be paid a salary in exchange for services rendered to an employer. The Commission's personal use regulations issued on February 9, 1995 adopted the ''irrespective test'' in determining whether expenses would be deemed personal use. In the Explanation and Justification, the Commission explained that ''if campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an officeholder, that use is not personal use.'' Explanation and Justification, Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 FR 7862, at 7863–7864 (Feb. 9, 1995). A salary paid to a candidate would be in return for the candidate's services provided to the campaign and the necessity of that salary would not exist irrespective of the candidacy. As the Commission has previously stated, under the Act and Commission regulations, a candidate and the candidate's campaign committee have wide discretion in making expenditures to influence the candidate's election, but may not convert excess campaign funds to personal use. 2 U.S.C. 431(9) and 439a, AOs 1992–4, 1991–2, 1988–13, 1987–2, 1987–1, 1984–42, 1984–8, 1980–138 and 1980–49. Therefore, the Commission will permit a candidate's principal campaign committee to pay a salary to the candidate, thus superseding AO 1999–1.

Advisory Opinions 2001–10, 2001–03, 2000–40, 2000–37, and 2000–12 state the Commission will permit the use of campaign funds for salary payments to a member of the candidate's family provided that that the family member is providing bona fide services to the campaign and the salary does not exceed fair market value for the services provided. Unlike the payment of salaries to members of a candidate's family, however, there need not be any showing that a candidate is providing bona fide services to the campaign; the fact that the candidate's work is valuable to his or her campaign shall be presumed.

Note that a candidate's salary does not, however, constitute a qualified campaign expense as that term is defined in 11 CFR 9002.11 and 9032.9.

The payment of salaries to candidates from campaign funds is subject to certain conditions in the final rules. First, the candidate's salary must be paid from his or her principal campaign committee only, as defined in 11 CFR 100.5(e)(1). This condition precludes the possibility of multiple salaries, and generally adds clarifying specificity.

Second, the salary payment to the candidate must not exceed the minimum annual salary for the Federal office sought. Thus, if a candidate seeks a seat held by a member of the House of Representatives or the Senate who holds a leadership position, and is thus paid more than the minimum salary payable to a member of the House of Representatives or the Senate, respectively, the candidate's salary payment shall nonetheless not exceed the lowest salary for the Federal office that he or she seeks. Any salary payment to a candidate from campaign funds in excess of the salary paid to a Federal officeholder—U.S. House, U.S. Senate, or the Presidency—shall be considered personal use. *See* definition of ''Individual holding Federal office,'' 11 CFR 300.2(o). *See also* 11 CFR 113.1(c) and 11 CFR 100.4. Further, any earned income that the candidate receives from salaries or wages from any other source will count towards the limit of the minimum annual salary for the Federal office sought. This condition will prevent candidates from paying themselves a salary from campaign funds on top of other earned income that they receive from other sources, such as from private-sector employment, to the extent that such combined payments exceed the minimum annual salary for the Federal office that the candidate is seeking. This ceiling on permissible candidate salaries from campaign funds is intended to prevent possible abuse in terms of candidates paying themselves exorbitant salaries, and will likewise ensure that a challenger may be paid out of campaign funds no more than the officeholder whom he or she is running against is paid by the government for his or her government service. Additionally, no candidate may receive a salary from campaign funds in excess of what he or she received as earned income in the year prior to becoming a candidate. This additional safeguard will help ensure that campaign salaries are not used to enrich candidates, but instead used to compensate candidates for lost income that is forgone due to becoming a candidate.

Third, the final rule requires candidates who avail themselves of this salary provision to provide income tax records from the relevant years and other evidence of earned income upon the request of the Commission.

Fourth, payments made under this paragraph must be computed on a pro-rata basis. This is intended to prevent a candidate's principal campaign committee from paying the candidate the entire minimum annual salary for the Federal office sought by the candidate, unless he or she is a candidate, as defined by 11 CFR 100.3(a), for at least one year. Any tax payments required by the Internal Revenue Service, or state and/or local governments, are the responsibility of the candidate.

Fifth, an incumbent Federal officeholder, as defined in 11 CFR 100.5(f)(1), must not receive salary payments as a candidate from campaign funds. Otherwise, of course, such an incumbent officeholder would be receiving two salaries, one from his or her campaign and one for his or her official duties.

Sixth, under the final rules at 11 CFR 113.1(g)(1)(i)(I), the first payment of a salary from campaign funds to a candidate must be made no earlier than the filing deadline for access to the primary election ballot for Federal candidates, as determined by State law, or in those states that do not conduct primaries, on January 1 of each even-numbered year. *See* 11 CFR 100.24(a)(1)(i). If the candidate wins the primary election, the principal campaign committee may continue to pay him or her a salary from campaign funds through the date of the general election, up to and including the date of any general runoff. Id. If the candidate loses the primary, withdraws from the race, or otherwise ceases to be a candidate, no salary payments may be paid beyond that date. In odd-numbered years in which a special election for a Federal office occurs, the principal campaign committee of a candidate may pay him or her a salary from campaign funds starting on the date the special election is set and ending on the day of the special election. *See* 11 CFR 100.24(a)(1)(ii).

In making this decision, the Commission is satisfied that, because all candidate and family members' salaries will be fully disclosed to the public, those who contribute to the campaign and who support the candidate will be able to voice their approval, or

disapproval, of this use of campaign funds.

4. 11 CFR 113.1(g)(1)(i)(J) and 11 CFR 113.1(g)(1)(ii)(C)—Noncampaign-Related Trips

One issue on which the Commission requested comment is raised by 2 U.S.C. 439a(b)(2)(E), which specifically included a *''vacation or other noncampaign-related trip''* (emphasis added) as a *per se* statutorily prohibited personal use. The NPRM accordingly proposed to add ''[a] vacation or other noncampaign-related trip'' to the regulatory list of *per se* personal uses in proposed 11 CFR 113.1(g)(1)(i)(K). The Commission also proposed to modify the pre-BCRA case-by-case rules at 11 CFR 113.1(g)(1)(ii)(C), which applies to ''travel expenses'' to reflect the changes made by BCRA. Seven sets of commenters, including the principal sponsors of BCRA, addressed the Commission's proposal.

The principal sponsors of BCRA stated that Congress had intentionally left intact the statutory provision that states that campaign funds may be used ''for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.'' [5] *Compare* pre-BCRA 2 U.S.C. 439a with new 2 U.S.C. 439a(a)(2); *see also* 11 CFR 113.1(g)(5). The principal sponsors explained that Congress did not intend to modify current law or practice governing the use of campaign funds for travel expenses in connection with officeholders' duties. Consequently, they requested that the Commission modify the following regulations: proposed 11 CFR 113.1(g)(1)(i)(J); proposed 113.1(g)(1)(i)(K); proposed 11 CFR 113.1(g)(ii)(C); and 11 CFR 113.1(g)(5).

Another group of commenters also observed that new section 439a(a)(2) states that campaign funds may be used ''for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.'' This language, these commenters stated, expresses Congress's intent to allow Senators to use campaign funds for their official expenses, including fact-finding trips. These commenters also pointed out that fact-finding trips, which members would not take but for their official duties, would not occur ''irrespective'' of their official duties. Therefore, these trips constitute part of members' official duties and do not constitute a prohibited personal use of campaign funds.

Finally, two commenters acknowledged that 2 U.S.C. 439a(b)(2) includes a vacation or noncampaign-related trip in the list of prohibited uses. Nonetheless, they asserted that, if the Commission were to issue regulations to ban the use of campaign funds for noncampaign-related travel, it would be ignoring Congress's clear authorization in amended 2 U.S.C. 439a(a)(2) to allow the use of campaign funds for expenses incurred in connection with an individual's duties as a Federal officeholder, and the ''irrespective'' test, which, as stated above, is now part of amended 2 U.S.C. 439a(b)(2). They urged the Commission to construe the statute as a whole.

Other commenters also argued that the Commission should not prohibit the use of campaign funds to pay for all noncampaign-related travel, including fact-finding trips. As did the previous commenters, these commenters noted that BCRA permits the use of campaign funds ''for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.'' Therefore, the commenters urged the Commission not to adopt regulations defining ''noncampaign-related'' travel as a *per se* prohibited personal use, but rather to evaluate travel on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(C), as has been the Commission's rule.

Another commenter asserted that the Commission has historically treated the use of campaign funds for campaign-related travel and for officeholder travel as permissible. This commenter argued that the language of amended 2 U.S.C. 439a(a) has explicitly made this practice permissible by listing both campaign expenditures and officeholder-related expenses as acceptable uses of campaign funds. If, according to the commenter, Congress intended to change its longstanding practice, it would have done so explicitly, in its list of *per se* prohibited personal uses. This commenter concluded that Congress's failure to specifically exclude officeholder-related travel from the *per se* list of prohibited personal uses in amended 2 U.S.C. 439a(b)(2) was inadvertent, and recommended that the Commission exclude both officeholder-related travel and campaign-related travel from proposed 11 CFR 113.1(g)(1)(i)(K).

A commenter stated that there is no need to change the Commission's current personal use regulations because Congress did not intend either to limit or ban an officeholder's ability to use campaign funds for officeholder travel, even if the travel is not campaign-related, such as fact-finding trips. A different commenter maintained that campaign funds should not be used for fact-finding trips. Instead, the commenter recommended that campaign funds not be used for anything other than campaign costs, such as advertising and campaign literature, with the exception of charitable contributions.[6]

Based on Congressional guidance and the reasoning expressed in other comments concerning this matter, the Commission is not adding the ''noncampaign-related trip'' language to the list of *per se* personal uses in the final rules in 11 CFR 113.1(g)(1)(i)(J). Thus, this paragraph provides only that the use of campaign funds for a vacation is a *per se* personal use. (This proposed provision was designated as paragraph (g)(1)(i)(K) in the proposed rules.) The Commission is persuaded that amended section 439a(a), which provides that campaign funds may be used ''for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office,'' encompasses certain noncampaign-related travel, notwithstanding the language of 2 U.S.C. 439a(b)(2)(E). Accordingly, aside from vacations, which are enumerated as a *per se* personal use in the final rules in 11 CFR 113.1(g)(1)(i)(J), the Commission will continue to evaluate travel expenses on a case-by-case basis under existing 11 CFR 113.1(g)(1)(ii)(C).

5. 11 CFR 113.1(g)(1)(ii)(D)—Noncampaign-Related Automobile Expenses

BCRA amended 2 U.S.C. 439a by including ''a noncampaign-related automobile expense'' in the list of *per se* prohibited uses of campaign funds. Given that statutory provision, the Commission proposed to delete vehicle expenses from the case-by-case rules set out in 11 CFR 113.1(g)(1)(ii).

Two sets of commenters addressed this proposal. BCRA's principal sponsors stated that the Commission's proposed regulation could be read, incorrectly, to completely prohibit the use of campaign funds for any vehicle expenses (other than for *de minimis* amounts), including campaign-related expenses. The other commenters argued

[5] For a detailed explanation of how the Commission's personal use rules interact with the rules of the House of Representatives and the Senate, *see* the Commission's 1995 Explanation and Justification of its rules concerning personal use of campaign funds at 60 FR 7870–7871 (Feb. 9, 1995).

[6] According to the commenter, charitable contributions made with campaign funds should be allowed as long as the candidates themselves do not receive tax deductions for the charitable contributions. The Commission notes that contributions to certain charities are permitted by 2 U.S.C. 439a(a)(3) and 11 CFR 113.1(g)(2). Whether those contributions are tax-deductible falls within the jurisdiction of the Internal Revenue Service.

that the Commission should not interpret BCRA to prohibit the use of campaign funds for all noncampaign-related vehicle expenses. Instead, these commenters urged the Commission to continue to permit, on a case-by-case basis, vehicle expenses paid for with campaign funds that are used for Federal officeholder purposes.

The Commission agrees with these reasons to continue to assess vehicle expenses on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(D). The text of proposed 11 CFR 113.1(g)(1)(i)(J) was identical to that of pre-BCRA 11 CFR 113.1(g)(1)(ii)(D). The Commission further notes that one of BCRA's principal sponsors explained that the '' * * * personal use * * * provision is intended to *codify the FEC's current regulations* on the use of campaign funds for personal expenses * * *'' (emphasis added). 148 *Cong. Rec.* S2143 (daily ed. March 20, 2002) (statement of Sen. Feingold).

The Commission acknowledges the BCRA's sponsors' observation that the beginning of paragraph (g)(1)(ii)(D) could be read to prohibit campaign and officeholder-related uses of vehicles funded by campaign contributions. (''Vehicle expenses, unless they are a *de minimis* amount.'') 11 CFR 113.1(g)(1)(ii)(D)). The Commission notes, however, that this provision must be read together with the next sentence (''If a committee uses campaign funds to pay expenses associated with a vehicle that is used for both personal activities beyond a *de minimis* amount and campaign or officeholder related activities, the portion of the vehicle expenses associated with the personal activities is personal use, unless the person(s) using the vehicle for personal activities reimburse(s) the campaign account within thirty days for the expenses associated with the personal activities.'').

6. 11 CFR 113.1(g)(5) and 11 CFR 113.1(g)(6)—Technical Changes

The Commission is making non-substantive changes to two cross-references in 11 CFR 113.1(g)(5) to the definition of ''expenditure,'' and to one cross-reference in 11 CFR 113.1(g)(6) to the definition of ''contribution.'' These citation changes conform to the reorganized regulations on ''contributions'' and ''expenditures.'' 67 FR 50582 (Aug. 5, 2002).

7. 11 CFR 113.1(g)(7) Members of Candidate Family

The Commission is revising the provision in this regulation that includes as a member of the candidate's family a person who shares a residence with the candidate. This change was not addressed in the NPRM, but is being included to clarify the intent of the regulation and to eliminate any potential conflict with the Defense of Marriage Act, 1 U.S.C. § 7. While the personal use prohibition applies to ''any person,'' the regulations apply special scrutiny to members of a candidate's family as potential conduits for evasion of the personal use prohibition. At the same time, the regulations recognize that a joint account shared with one or more family members may be used to pay a candidate's personal living expenses without the role of the family members in such payments being treated as a contribution. 11 CFR 113.1(g)(6)(ii).

The revised regulation recognizes that any payments to a person sharing a residence with a candidate could serve as a means of supporting the candidate's personal living expenses and thus bans gifts from the campaign to family members or persons residing with the candidate, 11 CFR 113.1(g)(4), subjects salary payments by the campaign to such persons to certain conditions, 11 CFR 113.1(g)(1)(H), and limits payments for real or personal property owned by family members and used for campaign purposes. 11 CFR 113.1(g)(1)(E)(2). Use of campaign funds for mortgage, rent or utility payments for the residence of a candidate or of a member of the candidate's family is also prohibited, 11 CFR 113.1(g)(1)(E)(1), but would not operate any differently in the case of a family member who resides with the candidate. Similarly, anyone actually residing with a candidate could pay a share of living expenses without having those payments be deemed contributions to the candidate's campaign. Finally, personal funds of candidates would include the candidate's share of any joint accounts held by the candidate and a person residing with the candidate. 11 CFR 113.1(g)(6)(ii).

The revised regulation includes any person residing with the candidate within the definition of ''Members of the candidate's family.'' The provision formerly included ''a person who has a committed relationship with the candidate, such as sharing a residence and having mutual responsibility for each other's personal welfare or living expenses.'' The ''committed relationship'' condition could have been read as an approximation of marriage, especially as the 1995 Explanation and Justification for this provision, 60 FR 7872 (Feb. 29, 1995), stated that persons in this committed relationship category ''will be treated as the equivalent of the candidate's spouse.'' This rendering of the statute appears to be prohibited by the Defense of Marriage Act, 1 U.S.C. § 7, which provides that ''[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, of interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.''

In addition, the Commission was concerned that a committed relationship does not represent a generally recognized legal test (for instance, most states do not recognize non-marital relationships contemplated by the ''committed relationship'' provision) and thus would be difficult for the Commission to ascertain and enforce if called upon to do so. The question of residence or domicile on the other hand is a factual matter that does not call upon the Commission to inquire into or make judgments about the nature of the relationship between a candidate and persons residing with the candidate.

8. 11 CFR 113.1(g)(8)—Recordkeeping Requirement

In the NPRM, the Commission proposed new 11 CFR 113.1(g)(8), a recordkeeping requirement for campaign funds used for expenses that may be partly personal in nature. Such expenses may include vehicle, legal, meal, and travel expenses. *See* 11 CFR 113.1(g)(1)(ii)(A) through (D) and 11 CFR 113.2. As stated in the NPRM, the proposed regulation is based on the analysis in AO 2001–3, which advised that a member of Congress who proposed to pay for a vehicle with campaign funds and use it for a combination of campaign, official, and personal uses, should keep a log detailing each use of the car. Keeping such logs will help the Commission to determine to what extent ''case-by-case'' expenses are personal in nature. No commenters addressed this provision. The Commission adopts this provision as 11 CFR 113.1(g)(8), with one modification to clarify that the log will also serve to distinguish personal uses from uses related to a Federal office holder's duties.

Amended Provisions of 11 CFR 113.2

Given the amendments BCRA made to 2 U.S.C. 439a described above regarding the deletion of the phrase ''excess campaign funds'' and the amendments being made to 11 CFR 113.1, the Commission is revising section 113.2 in several respects. First, the title and the introductory portion of this section are

being changed to more clearly convey that this section sets forth the permissible non-campaign uses of funds in a campaign account, rather than uses of what were previously called ''excess campaign funds.''

In the NPRM, the Commission noted that former 2 U.S.C. 439a included the phrase ''for any other lawful purpose'' in addition to enumerating permissible uses of excess campaign funds. BCRA amended section 439a by deleting ''any other lawful purpose'' from the list of permitted uses. Nonetheless, in the NPRM, the Commission proposed retaining that term in pre-BCRA 11 CFR 113.2(d). One commenter disagreed with the Commission's proposed rule and recommended that the ''any other lawful purpose'' language be deleted from the regulation. This commenter noted that pre-BCRA 11 CFR 113.2(d), which closely tracks the wording of section 439a, provides for four broad permissible uses of campaign funds: (1) Ordinary and necessary expenses incurred in connection with the duties of a holder of Federal office; (2) contributions to an organization described in 26 U.S.C. 170(c); (3) transfers to a national, state or local party committee; and (4) any other lawful purpose, except that such funds may not be converted to personal use, other than to defray officeholder expenses or repay loans made by the candidate for campaign purposes. Pointing out that BCRA deletes ''any other lawful purpose'' as an expressly permissible use of campaign funds, the commenter argued that BCRA reduces the categories of permissible uses of campaign funds from four to three. Thus, the commenter concluded that the ''any other lawful purpose'' language in 11 CFR 113.2(d) should be deleted and that the regulation should be revised accordingly.

The Commission concludes that the commenter's reasoning is correct, and therefore is removing and reserving paragraph (d) of former section 113.2, which referred to ''any other lawful purpose.'' With this revision, it is now clear that in addition to defraying expenses in connection with a campaign for federal office, campaign funds may be used only for the enumerated non-campaign purposes identified in paragraphs (a), (b), and (c) of section 113.2, and that this listing of permissible non-campaign purposes is exhaustive.

The Commission notes that, pursuant to 2 U.S.C. 432(e)(3)(B), authorized committees also may make contributions of $1,000 or less to authorized committees of other candidates. This provision was not amended by BCRA which otherwise generally increased contribution limits to $2,000 per person. Authorized committees may make contributions to organizations other than those described in section 170(c) of the Internal Revenue Code of 1986 and other authorized committees (subject to the $1,000 limit) unless those contributions are in connection with the campaign for Federal office of the authorizing candidate. In furtherance of a Federal candidate's election, that Federal candidate may contribute to state and local candidates pursuant to this section.

A provision addressing the repayment of candidate loans has been deleted from section 113.2 as part of the removal of paragraph (d). The Commission will, if necessary, address this issue in the upcoming ''Millionaires' Amendment'' rulemaking. *See* 2 U.S.C. 441a(j).

Although the Commission is not amending section 113.2(e)(1), which refers to ''excess funds,'' it is changing section 113.2(e)(1)(i), which refers to ''any excess campaign or donated funds.'' These rules permit qualified Members of Congress who served in the 102d Congress or an earlier Congress to convert to personal use the unobligated balance of their excess funds as of Nov. 30, 1989. Paragraph (e)(1) addresses ''excess funds,'' rather than ''excess campaign funds,'' and sets forth detailed instructions to determine this amount. Revised paragraph (e)(1)(i) now refers simply to ''campaign funds.''

In light of Congress deleting the phrase ''in excess of any amount to defray'' campaign expenses from section 439a, and the Commission's revision herein to 11 CFR 113.1 and 113.2, officeholders may spend campaign funds to defray campaign expenses and expenses incurred in connection with the recipient's duties as a holder of federal office, and that such expenses may be paid in any order, at their discretion.

**Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that national, State, and local party committees of the two major political parties to which the fraudulent solicitation, disclaimers, and civil penalties rules apply are not small entities under 5 U.S.C. 601. In addition, the rules for personal use only affect individuals, not entities, and the rules for the prohibition on fraudulent solicitation do not carry an economic impact. Furthermore, the requirements of the disclaimer rules as applied to small entities are no more than what is necessary to comply with the new statute enacted by Congress, and in any event, such entities will not incur significant additional costs in complying with these requirements. The increase in civil penalties do not unduly burden small entities since a small entity would pay a civil penalty only if the entity engaged in a specific knowing and willful violation of the Act.

**List of Subjects**

*11 CFR Part 100*

Elections.

*11 CFR Part 110*

Campaign funds, and political committees and parties.

*11 CFR Part 111*

Campaign funds, and political committee and parties.

*11 CFR Part 113*

Campaign funds, and political candidates.

For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the *Code of Federal Regulations* is amended as follows:

## PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for part 100 continues to read as follows:

**Authority:** 2 U.S.C. 431, 434, 438(a)(8).

2. Section 100.18 is revised to read as follows:

### § 100.18 Act (2 U.S.C. 431(19)).

*Act* means the Federal Election Campaign Act of 1971 (Pub. L. 92–225), as amended in 1974 (Pub. L. 93–443), 1976 (Pub. L. 94–283), 1980 (Pub. L. 96–187), and 2002 (Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155).

## PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

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

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h, and 441k.

4. Section 110.11 is revised to read as follows:

### § 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).

(a) *Scope.* This section applies only to public communications, defined for this

section to include the communications at 11 CFR 100.26 plus unsolicited electronic mail of more than 500 substantially similar communications and Internet websites of political committees available to the general public, and electioneering communications as defined in 11 CFR 100.29. The following types of such communications must include disclaimers, as specified in this section:

(1) All public communications for which a political committee makes a disbursement.

(2) All public communications by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications by any person that solicit any contribution.

(4) All electioneering communications by any person.

(b) *General content requirements.* A disclaimer required by paragraph (a) of this section must contain the following information:

(1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state that the communication has been paid for by the authorized political committee;

(2) If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee, or agent; or

(3) If the communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

(c) *Disclaimer specifications.*

(1) *Specifications for all disclaimers.* A disclaimer required by paragraph (a) of this section must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.

(2) *Specific requirements for printed communications.* In addition to the general requirement of paragraphs (b) and (c)(1) of this section, a disclaimer required by paragraph (a) of this section that appears on any printed public communication must comply with all of the following:

(i) The disclaimer must be of sufficient type size to be clearly readable by the recipient of the communication. A disclaimer in twelve (12)-point type size satisfies the size requirement of this paragraph (c)(2)(i) when it is used for signs, posters, flyers, newspapers, magazines, or other printed material that measure no more than twenty-four (24) inches by thirty-six (36) inches.

(ii) The disclaimer must be contained in a printed box set apart from the other contents of the communication.

(iii) The disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(2)(iii) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.

(iv) The disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication, except on communications, such as billboards, that contain only a front face.

(v) A communication that would require a disclaimer if distributed separately, that is included in a package of materials, must contain the required disclaimer.

(3) *Specific requirements for radio and television communications authorized by candidates.* In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication that is authorized or paid for by a candidate or the authorized committee of a candidate (*see* paragraph (b)(1) or (b)(2) of this section) that is transmitted through radio or television, or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio must include an audio statement by the candidate that identifies the candidate and states that he or she has approved the communication; or

(ii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must include a statement that identifies the candidate and states that he or she has approved the communication. The candidate shall convey the statement either:

(A) Through an unobscured, full-screen view of himself or herself making the statement, or

(B) Through a voice-over by himself or herself, accompanied by a clearly identifiable photographic or similar image of the candidate. A photographic or similar image of the candidate shall be considered clearly identified if it is at least eighty (80) percent of the vertical screen height.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the television communication. To be clearly readable, this statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the text of the statement. A statement satisfies the color contrast requirement of this paragraph (c)(3)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the statement is no less than the color contrast between the background and the largest type size used in the communication.

(iv) The following are examples of acceptable statements that satisfy the spoken statement requirements of paragraph (c)(3) of this section with respect to a radio, television, or other broadcast, cable, or satellite communication, but they are not the only allowable statements:

(A) ''I am [insert name of candidate], a candidate for [insert Federal office sought], and I approved this advertisement.''

(B) ''My name is [insert name of candidate]. I am running for [insert Federal office sought], and I approved this message.''

(4) *Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate.* In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication not authorized by a candidate or a candidate's authorized committee that is transmitted through radio or television or through any broadcast, cable, or

satellite transmission, must comply with the following:

(i) A communication transmitted through radio or television or through any broadcast, cable, or satellite transmission, must include the following audio statement, ''XXX is responsible for the content of this advertising,'' spoken clearly, with the blank to be filled in with the name of the political committee or other person paying for the communication, and the name of the connected organization, if any, of the payor unless the name of the connected organization is already provided in the ''XXX is responsible'' statement; and

(ii) A communication transmitted through television, or through any broadcast, cable, or satellite transmission, must include the audio statement required by paragraph (c)(4)(i) of this section. That statement must be conveyed by an unobscured full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the communication. To be clearly readable, the statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the disclaimer statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(4)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest type size used in the communication.

(d) *Coordinated party expenditures and independent expenditures by political party committees.*

(1)(i) For a communication paid for by a political party committee pursuant to 2 U.S.C. 441a(d), the disclaimer required by paragraph (a) of this section must identify the political party committee that makes the expenditure as the person who paid for the communication, regardless of whether the political party committee was acting in its own capacity or as the designated agent of another political party committee.

(ii) A communication made by a political party committee pursuant to 2 U.S.C. 441a(d) and distributed prior to the date the party's candidate is nominated shall satisfy the requirements of this section if it clearly states who paid for the communication.

(2) For purposes of this section, a communication paid for by a political party committee, other than a communication covered by paragraph (d)(1)(ii) of this section, that is being treated as a coordinated expenditure under 2 U.S.C. 441a(d) and that was made with the approval of a candidate, a candidate's authorized committee, or the agent of either shall identify the political party that paid for the communication and shall state that the communication is authorized by the candidate or candidate's authorized committee.

(3) For a communication paid for by a political party committee that constitutes an independent expenditure under 11 CFR 100.16, the disclaimer required by this section must identify the political party committee that paid for the communication, and must state that the communication is not authorized by any candidate or candidate's authorized committee.

(e) *Exempt activities.* A public communication authorized by a candidate, authorized committee, or political party committee, that qualifies as an exempt activity under 11 CFR 100.140, 100.147, 100.148, or 100.149, must comply with the disclaimer requirements of paragraphs (a), (b), (c)(1), and (c)(2) of this section, unless excepted under paragraph (f)(1) of this section, but the disclaimer does not need to state whether the communication is authorized by a candidate, or any authorized committee or agent of any candidate.

(f) *Exceptions.* (1) The requirements of paragraphs (a) through (e) of this section do not apply to the following:

(i) Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed;

(ii) Skywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable; or

(iii) Checks, receipts, and similar items of minimal value that are used for purely administrative purposes and do not contain a political message.

(2) For purposes of this section, whenever a separate segregated fund or its connected organization solicits contributions to the fund from those persons it may solicit under the applicable provisions of 11 CFR part 114, or makes a communication to those persons, such communication shall not be considered a type of public communication and need not contain the disclaimer required by paragraphs (a) through (c) of this section.

(g) *Comparable rate for campaign purposes.*

(1) No person who sells space in a newspaper or magazine to a candidate, an authorized committee of a candidate, or an agent of the candidate, for use in connection with the candidate's campaign for nomination or for election, shall charge an amount for the space which exceeds the comparable rate for the space for non-campaign purposes.

(2) For purposed of this section, comparable rate means the rate charged to a national or general rate advertiser, and shall include discount privileges usually and normally available to a national or general rate advertiser.

5. Section 110.16 is added to read as follows:

**§ 110.16 Prohibitions on fraudulent misrepresentations.**

(a) *In general.* No person who is a candidate for Federal office or an employee or agent of such a candidate shall—

(1) Fraudulently misrepresent the person or any committee or organization under the person's control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof in a matter which is damaging to such other candidate or political party or employee or agent thereof; or

(2) Willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (a)(1) of this section.

(b) *Fraudulent solicitation of funds.* No person shall—

(1) Fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or

(2) Willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (b)(1) of this section.

## PART 111—COMPLIANCE PROCEDURE (2 U.S.C. 437g, 437d(a))

6. The authority citation for part 111 continues to read as follows:

**Authority:** 2 U.S.C. 437g, 437d(a), 438(a)(8); 28 U.S.C. 2461 nt.

7. In § 111.24, paragraph (a) is revised as follows:

**§ 111.24 Civil penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.).**

(a) Except as provided in 11 CFR part 111, subpart B and in paragraph (b) of this section, a civil penalty negotiated by the Commission or imposed by a court for a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.) shall be as follows:

(1) Except as provided in paragraph (a)(2) of this section, in the case of a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of $5,500 or an amount equal to any contribution or expenditure involved in the violation.

(2) Knowing and willful violations.

(i) In the case of a knowing and willful violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of $11,000 or an amount equal to 200% of any contribution or expenditure involved in the violation.

(ii) Notwithstanding paragraph (a)(2)(i) of this section, in the case of a knowing and willful violation of 2 U.S.C. 441f, the civil penalty shall not be less than 300% of the amount of any contribution involved in the violation and shall not exceed the greater of $50,000 or 1,000% of the amount of any contribution involved in the violation.

* * * * *

## PART 113—USE OF CAMPAIGN ACCOUNTS FOR NON-CAMPAIGN PURPOSES (2 U.S.C. 439a)

8. The authority citation for part 113 continues to read as follows:

**Authority:** 2 U.S.C. 432(h), 438(a)(8), 439a, and 441a.

9. In § 113.1, paragraphs (b) and (g) are revised to read as follows, and paragraph (e) is removed and reserved:

**§ 113.1 Definitions (2 U.S.C. 439a).**

* * * * *

(b) *Office account.* Office account means an account established for the purposes of supporting the activities of a Federal or State officeholder which contains campaign funds and funds donated, but does not include an account used exclusively for funds appropriated by Congress, a State legislature, or another similar public appropriating body, or an account of the officeholder which contains only the personal funds of the officeholder.

* * * * *

(e) [Removed and reserved]

* * * * *

(g) *Personal use. Personal use* means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder.

(1)(i) Personal use includes but is not limited to the use of funds in a campaign account for any item listed in paragraphs (g)(1)(i)(A) through (J) of this section:

(A) Household food items or supplies.

(B) Funeral, cremation or burial expenses except those incurred for a candidate (as defined in 11 CFR 100.3) or an employee or volunteer of an authorized committee whose death arises out of, or in the course of, campaign activity.

(C) Clothing, other than items of *de minimis* value that are used in the campaign, such as campaign ''T-shirts'' or caps with campaign slogans.

(D) Tuition payments, other than those associated with training campaign staff.

(E) Mortgage, rent or utility payments—

(*1*) For any part of any personal residence of the candidate or a member of the candidate's family; or

(*2*) For real or personal property that is owned by the candidate or a member of the candidate's family and used for campaign purposes, to the extent the payments exceed the fair market value of the property usage.

(F) Admission to a sporting event, concert, theater or other form of entertainment, unless part of a specific campaign or officeholder activity.

(G) Dues, fees or gratuities at a country club, health club, recreational facility or other nonpolitical organization, unless they are part of the costs of a specific fundraising event that takes place on the organization's premises.

(H) Salary payments to a member of the candidate's family, unless the family member is providing *bona fide* services to the campaign. If a family member provides *bona fide* services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use.

(I) Salary payments by a candidate's principal campaign to a candidate in excess of the lesser of: the minimum salary paid to a Federal officeholder holding the Federal office that the candidate seeks; or the earned income that the candidate received during the year prior to becoming a candidate. Any earned income that a candidate receives from salaries or wages from any other source shall count against the foregoing limit of the minimum salary paid to a Federal officeholder holding the Federal office that the candidate seeks. The candidate must provide income tax records from the relevant years and other evidence of earned income upon the request of the Commission. Salary shall not be paid to a candidate before the filing deadline for access to the primary election ballot for the Federal office that the candidate seeks, as determined by State law, or in those states that do not conduct primaries, on January 1 of each even-numbered year. *See* 11 CFR 100.24(a)(1)(i). If the candidate wins the primary election, his or her principal campaign committee may pay him or her a salary from campaign funds through the date of the general election, up to and including the date of any general election runoff. If the candidate loses the primary, withdraws from the race, or otherwise ceases to be a candidate, no salary payments may be paid beyond the date he or she is no longer a candidate. In odd-numbered years in which a special election for a Federal office occurs, the principal campaign committee of a candidate for that office may pay him or her a salary from campaign funds starting on the date the special election is set and ending on the day of the special election. *See* 11 CFR 100.24(a)(1)(ii). During the time period in which a principal campaign committee may pay a salary to a candidate under this paragraph, such payment must be computed on a pro-rata basis. A Federal officeholder, as defined in 11 CFR 100.5(f)(1), must not receive salary payments as a candidate from campaign funds.

(J) A vacation.

(ii) The Commission will determine, on a case-by-case basis, whether other uses of funds in a campaign account fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder, and therefore are personal use. Examples of such other uses include:

(A) Legal expenses;

(B) Meal expenses;

(C) Travel expenses, including subsistence expenses incurred during travel. If a committee uses campaign funds to pay expenses associated with travel that involves both personal activities and campaign or officeholder-related activities, the incremental expenses that result from the personal activities are personal use, unless the person(s) benefiting from this use reimburse(s) the campaign account within thirty days for the amount of the incremental expenses, and

(D) Vehicle expenses, unless they are a *de minimis* amount. If a committee uses campaign funds to pay expenses associated with a vehicle that is used for both personal activities beyond a *de minimis* amount and campaign or

officeholder-related activities, the portion of the vehicle expenses associated with the personal activities is personal use, unless the person(s) using the vehicle for personal activities reimburse(s) the campaign account within thirty days for the expenses associated with the personal activities.

(2) *Charitable donations.* Donations of campaign funds or assets to an organization described in section 170(c) of Title 26 of the United States Code are not personal use, unless the candidate receives compensation from the organization before the organization has expended the entire amount donated for purposes unrelated to his or her personal benefit.

(3) *Transfers of campaign assets.* The transfer of a campaign committee asset is not personal use so long as the transfer is for fair market value. Any depreciation that takes place before the transfer must be allocated between the committee and the purchaser based on the useful life of the asset.

(4) *Gifts.* Gifts of nominal value and donations of a nominal amount made on a special occasion such as a holiday, graduation, marriage, retirement, or death are not personal use, unless made to a member of the candidate's family.

(5) *Political or officially connected expenses.* The use of campaign funds for an expense that would be a political expense under the rules of the United States House of Representatives or an officially connected expense under the rules of the United States Senate is not personal use to the extent that the expense is an expenditure under subpart D of part 100 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office. Any use of funds that would be personal use under paragraph (g)(1) of this section will not be considered an expenditure under subpart D of part 100 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office.

(6) *Third party payments.* Notwithstanding that the use of funds for a particular expense would be a personal use under this section, payment of that expense by any person other than the candidate or the campaign committee shall be a contribution under subpart B of part 100 to the candidate unless the payment would have been made irrespective of the candidacy. Examples of payments considered to be irrespective of the candidacy include, but are not limited to, situations where—

(i) The payment is a donation to a legal expense trust fund established in accordance with the rules of the United States Senate or the United States House of Representatives;

(ii) The payment is made from funds that are the candidate's personal funds as defined in 11 CFR 110.10(b), including an account jointly held by the candidate and a member of the candidate's family;

(iii) Payments for that expense were made by the person making the payment before the candidate became a candidate. Payments that are compensation shall be considered contributions unless—

(A) The compensation results from *bona fide* employment that is genuinely independent of the candidacy;

(B) The compensation is exclusively in consideration of services provided by the employee as part of this employment; and

(C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

(7) *Members of the candidate's family.* For the purposes of paragraph (g) of this section, the candidate's family includes:

(i) The spouse of the candidate;

(ii) Any child, step-child, parent, grandparent, sibling, half-sibling or step-sibling of the candidate or the candidate's spouse;

(iii) The spouse of any child, step-child, parent, grandparent, sibling, half-sibling or step-sibling of the candidate; and

(iv) A person who shares a residence with the candidate.

(8) *Recordkeeping.* For those uses of campaign funds described in proposed paragraphs (g)(1)(i) and (g)(1)(ii) of this section that involve both personal use and either campaign or office-holder use, a contemporaneous log or other record must be kept to document the dates and expenses related to the personal use of the campaign funds. The log must be updated whenever campaign funds are used for personal expenses, as described in paragraph (g)(1) of this section, rather than for campaign or office-holder expenses. The log or other record must also be maintained and preserved for 3 years after the report disclosing the disbursement is filed, pursuant to 11 CFR 102.9 and 104.14(b).

10. In § 113.2, the section heading, the introductory language, and paragraphs (e)(1)(i), (e)(5), and (f) are revised to read as follows, and paragraph (d) is removed and reserved:

**§ 113.2 Permissible non-campaign uses of funds (2 U.S.C. 439a).**

In addition to defraying expenses in connection with a campaign for federal office, funds in a campaign account or an account described in 11 CFR 113.3:

* * * * *

(d) [Removed and reserved]

(e) * * *

(1) * * *

(i) Cash assets the Member may convert any excess campaign or donated funds in an amount up to the Member's authorized committee(s)' cash on hand, determined under 11 CFR 104.3(a)(1), as of November 30, 1989, less the committee(s)' total outstanding debts as of that date.

* * * * *

(5) 103d Congress or later Congress: A qualified Member who serves in the 103d Congress or a later Congress may not convert to personal use any campaign or donated funds, as of the first day of such service.

(f) Nothing in this section modifies or supersedes other Federal statutory restrictions or relevant State laws that may apply to the use of campaign or donated funds by candidates or Federal officeholders.

Dated: December 10, 2002.

**David M. Mason,**

*Chairman, Federal Election Commission.*

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## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.nara.gov/fedreg/plawcurr.html*.

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**S. 1240/P.L. 107–329**

To provide for the acquisition of land and construction of an interagency administrative and visitor facility at the entrance to American Fork Canyon, Utah, and for other purposes. (Dec. 6, 2002; 116 Stat. 2815)

**S. 2237/P.L. 107–330**

Veterans Benefits Act of 2002 (Dec. 6, 2002; 116 Stat. 2820)

**Last List December 9, 2002**

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