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Thursday
September 21, 1995

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[Two Sessions]

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Presidential Documents

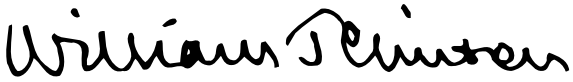
Title 3—

The President

Executive Order 12972 of September 18, 1995

Amendment to Executive Order No. 12958

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to amend Executive Order No. 12958, it is hereby ordered that the definition of ''agency'' in section 1.1(i) of such order is hereby amended to read as follows: ''(i) ''Agency'' means any ''Executive agency'' as defined in 5 U.S.C. 105; any ''Military department'' as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into the possession of classified information.''



THE WHITE HOUSE,
September 18, 1995.

[FR Doc. 95–23581
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Federal Register

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Thursday, September 21, 1995

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

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

DEPARTMENT OF AGRICULTURE

Food and Consumer Service

7 CFR Parts 271, 272, and 273

[Amendment No. 370]

Food Stamp Program: Student Eligibility

AGENCY: Food and Consumer Service, USDA.

ACTION: Final rule.

SUMMARY: On November 1, 1993, the Department published a proposed rule regarding the eligibility of students for the Food Stamp Program and the treatment of educational and training assistance for food stamp purposes. Public comments were solicited and considered. This rule finalizes the student eligibility provisions with the changes specified herein and makes a technical change to the resource section. The provisions regarding the handling of educational and training assistance will be finalized in a separate rule.

DATES: Sections 273.5 (b)(1), (b)(4), and (b)(9) are effective February 1, 1992. The introductory paragraph of § 273.5(b)(6) is effective February 1, 1992. The introductory paragraph of § 273.5(b)(10) is effective February 1, 1992. Sections 273.5(b)(11)(ii), (b)(11)(iii), and (b)(11)(iv) are effective February 1, 1992.

Sections 273.5 (b)(6)(i) and (b)(6)(ii) and sections 273.5 (b)(10)(i) and (b)(10)(ii) and the remaining provisions of this regulation are effective November 1, 1995 and must be implemented no later than February 1, 1996.

FOR FURTHER INFORMATION CONTACT: Judith M. Seymour, Chief, Certification Policy Branch, Program Development Division, Food Stamp Program, Food and Consumer Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302; Telephone: (703) 305–2520.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be significant and was reviewed by the Office of Management and Budget under Executive Order 12866.

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the Final rule in 7 CFR part 3015, subpart V and related Notice (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This action has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). The Administrator of the Food and Consumer Service has certified that this action does not have a significant economic impact on a substantial number of small entities. State welfare agencies are affected to the extent that they must implement the provisions described in this action. Households are affected to the extent that some currently ineligible students will become eligible for program benefits.

Executive Order 12778

This proposed rulemaking has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This is not intended to have retroactive effective dates unless so specified in the **DATES** section of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions all applicable administrative procedures must be exhausted. In the Food Stamp Program the administrative procedures are as follows: (1) For program benefit recipients—state administrative procedures issued pursuant to 7 U.S.C. 2020(e)(1)) and 7 CFR 273.15; (2) for State agencies—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 276.7 (for rules related to nonquality control (QC) liabilities) or part 284 (for rules related to QC liabilities); (3) for program retailers and wholesalers—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 278.8.

Paperwork Reduction Act

Pursuant to 7 CFR 273.2(f), State welfare agencies must verify certain information which affects household eligibility and benefits. Applicant households are required to provide the necessary information to the State agency. The reporting and recordkeeping burden associated with the application, certification, and continued eligibility of food stamp applicants has been approved by the Office of Management and Budget under OMB No. 0584–0064. OMB approval includes the burden associated with verification of information provided on the food stamp application. OMB approval of the verification requirements in § 273.2(f)(xi) of this rule is not necessary because the statements do not add new or additional verification responsibilities on State agencies, but simply relocate existing verification requirements from § 273.5(a).

Background

On November 1, 1993, the Department proposed procedures to implement amendments to the Food Stamp Act of 1977, as amended (7 U.S.C. 2011 *et seq.*), as set forth in sections 1715 and 1727 of the Food, Agriculture, Conservation, and Trade Act of 1990, Public Law 101–624, enacted November 28, 1990, and section 903 of Title IX of the Food, Agriculture, Conservation, and Trade Act Amendments of 1991, Public Law 102–237, enacted December 13, 1991. section 1715 of Public Law 101–624, as amended by Section 903 of Public Law 102–237, established procedures for determining an income exclusion for certain educational and training assistance received by eligible students. Section 1727 of Public Law 101–624 amended the Food Stamp Act to grant eligibility for participation in the Food Stamp Program (''Program'') to certain students currently considered ineligible to participate.

Procedures were also proposed for implementing amendments to the Higher Education Act of 1965 as set forth in sections 471 and 1345 of the Higher Education Amendments of 1992,

Public Law 102–325, enacted July 23, 1992. Those sections prohibit certain Federal educational assistance from being considered as income and resources for food stamp purposes.

Lastly, procedures were proposed for implementing a provision of the Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990, Pub. L. 101–392, enacted September 25, 1990, which prohibits counting certain educational assistance received by students from a program funded by the Perkins Act as income or resources when determining the eligibility and benefits of households containing students.

The Department accepted comments on this rulemaking through January 2, 1994. Comments were received from eight State agencies, one public interest group, and one advocate.

The proposed rule contained provisions on both student eligibility and the treatment of educational and training assistance. This rule finalizes only the provisions concerning student eligibility. The comments pertaining to the student eligibility provisions are discussed below. The provisions regarding the treatment of educational and training assistance contain issues which are, as yet, unresolved, and the Department has decided to finalize those provisions in a separate rulemaking so as not to further delay publication of the student eligibility provisions.

A full explanation of the rule was contained in the preamble of the proposed rule published November 1, 1993 (''November 1 rule'') (58 FR 58463). The reader should refer to the preamble of that rule for a full understanding of the provisions of this final rule.

In the proposed rule under Supplementary Information, Executive Order 12778, the Department stated that prior to any judicial challenge to the provisions of this rule or the application of its provisions all applicable administrative procedures must be exhausted. One commenter said that administrative procedures do not have to be exhausted before judicial challenge and that the Department should correct this misstatement and avoid making such statements in future rulemakings. While we believe that it would have been fully within the Secretary's discretionary authority, as granted in section 4(c) of the Food Stamp Act (7 U.S.C. 2013(c)), to establish an exhaustion requirement, this matter has now been specifically addressed by statute. Section 212(e) of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Public Law 103–354, requires persons to exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against the Secretary, the Department or an agency, office, officer, or employee of the Department.

Institution of Higher Education—§ 271.2 and § 273.5(a)

An institution of higher education is currently defined in 7 CFR 271.2 of the regulations as any institution which normally requires a high school diploma or equivalency certificate for enrollment, including, but not limited to, colleges, universities and vocational or technical schools at the post-high school level. The November 1 rule did not propose to change this definition.

One commenter requested that the regulations be changed to specify that community colleges that do not routinely require high school diplomas are not institutions of higher education.

The Department has become aware that some colleges no longer require a high school diploma due to declining enrollment. It is the Department's intent that persons enrolled in a regular curriculum at a college be considered enrolled in an institution of higher education even if a diploma is no longer required. The Department has also become aware that some colleges that normally require a high school diploma or equivalency certificate may not require them for special programs such as courses for English as a second language or for courses which are not part of the regular curriculum. The Department does not intend that such persons be considered enrolled in an institution of higher education. Therefore, the Department has decided to revise the language so that a student will be considered enrolled in an institution of higher education if the person is enrolled in a regular curriculum at a college or university that offers degree programs regardless of whether a diploma is required. A college includes a junior, community, two-year, or four-year college or a university. A person who is attending a business, technical, trade, or vocational school that normally requires a high school diploma or equivalency certification for enrollment in the curriculum would also be considered enrolled in an institution of higher education.

The Department is also taking this opportunity to move the provision regarding enrollment in an institution of higher education from the definition section to the student eligibility section to facilitate a better understanding of the student provisions. Accordingly, the Department has removed the definition of an institution of higher education from 7 CFR 271.2 and has added a new sentence to 7 CFR 273.5(a).

Student Eligibility—§ 273.5

Age Limit

Current regulations provide that students age 60 or over do not have to meet one of the student eligibility criteria to qualify for the program. In accordance with section 1727 of the Food, Agriculture, Conservation, and Trade Act of 1990, the proposed rule lowered the age exemption from 60 to 50. Two commenters supported this change. Because this is a nondiscretionary change, it is being adopted as proposed at 7 CFR 273.5(a).

The Department is taking this opportunity to move the student exemptions contained in 7 CFR 273.5(a) to 7 CFR 273.5(b) to consolidate them at one place.

On-the-Job Training

The Department proposed to incorporate current policy that a person is exempt from the student ineligibility provisions during the period of time the person is being trained by an employer under an on-the-job training program. However, during the period of time that the person is only attending classes, he or she would be considered a student subject to the provisions of 7 CFR 273.5.

One commenter supported the provision. Another commenter suggested that student status should coincide with the period of time educational income is prorated. A third commenter said all participants in on-the-job training should be exempt if their employer requires class attendance; alternatively they should be exempt if they are enrolled in non-degree programs or for periods too short, e.g., one semester or quarter, to obtain a degree.

There is no basis in the Food Stamp Act for extending the exemption to other participants in on-the-job training programs. Therefore, the Department is adopting the proposal without change at 7 CFR 273.5(a). A student would have to meet one of the other student exemptions to qualify when enrolled and only attending classes in an institution of higher education at least half time.

Work Study

The proposed regulations expanded the list of eligible students to include students participating in a State (as well as a Federal) work study program during the regular school year.

One commenter suggested that any needs-based subsidized employment program that a State supports be defined as a work study program.

Section 6(e) of the Food Stamp Act, as amended, specifically provides that the program must be a work study program. Since many employment programs do not have a study component, the Department is not adopting this suggestion. The Department is adopting the proposal without change at 7 CFR 273.5(b)(1)(ii).

The Department further proposed that a student who was approved for work study at the time of application for food stamps, and anticipated starting a job within two months after the date of application for food stamps, would qualify for this exemption until the student stopped working. However, if a student stopped working because work study funding had run out, the student would continue to qualify for this exemption for no more than two months. The Department specifically asked for comments on whether or not the two-month grace periods would result in making affluent students eligible.

Three of the commenters indicated that affluent students would not become eligible. One commenter thought that the student should actually be participating in work study to be eligible. Another commenter supported the provision but suggested that students remain on the program when work study runs out for two months or until the end of the school term, whichever is later. Five commenters were opposed to the two-month provisions—four of them thought the procedures would be too administratively complex and error prone. (The following are some examples of administrative problems foreseen by commenters. The first two-month period would be tied to the date of application whereas eligibility for the food stamp program is determined for full months. A person could quit work study and reapply for food stamps during the two-month period. ''No more than two additional months'' could have been interpreted as giving the State agency an option. It may be difficult to anticipate when a student will actually begin work. Numerous contacts with the institutions could be required to keep track of when a student qualifies for the food stamp exemption.) Another commenter suggested that student eligibility status based on work study should continue through the term over which the work study is prorated. The only exception should be for students who refuse to participate in a work study assignment. Two commenters advised that most work study is approved for a given term or semester and the proposed procedure is unfair to students who receive the same amount of work study but whose work assignments can be completed in a shorter period of time.

After carefully reviewing the comments, the Department has decided to make some changes to the provisions as proposed. The Department has decided to provide an exemption for the school term if a student has been approved for work study during the school term and anticipates actually working during that time. The student must be approved for work study at the time she or he applies for food stamps. The student exemption will begin with the month in which the school term begins or the month work study is approved, whichever is later. Once begun, the exemption will continue until the end of the month in which the school term ends, or it becomes known that the student has refused an assignment. The Department believes that this will simplify the procedure and be in compliance with the Act which requires participation in work study during the regular school year. The Department has incorporated this change in the final regulations at 7 CFR 273.5(b)(1)(ii).

One commenter suggested that anyone accepted for work study by a school should be considered participating in a work study program. The Department has not adopted this suggestion because students may be determined eligible for work study based on need but frequently funding or work is not available.

One commenter suggested that the regulations mandate use of the verified amount of work study approved by the school. While this would simplify administration of the provision, the Department has not adopted this suggestion because the actual anticipated amount may be less than the approved amount.

One commenter asked if a claim would be required if a student intended to begin work within two months but does not actually work. Another commenter suggested that recoupment be pursued if a student refuses to participate in a work study assignment.

Under the Department's revised procedure, the two-month time frame is not an issue, but a student could anticipate work study during the school term and it may not materialize. If the work study is questionable, the school could be contacted to determine if funding and a job will be available. A claim would not be required unless a determination is made that the student deliberately gave wrong or misleading information.

One commenter asked if student eligibility based on work study would be retained through scheduled breaks and vacations. In accordance with the Department's changes to the final regulation, the student work study exemption will not continue between terms when there are breaks of a full month or longer for which work study has not been approved. The exemption only applies to months in which the student is approved for work study.

Assigned Students

The proposed regulation expanded the list of eligible students to include students who are assigned to, or placed in, an institution of higher education through, or in compliance with, an employment and training (E&T) program operated by a State or local government which contains components which are at least equivalent to the acceptable components of the food stamp E&T program.

One commenter supported this provision. A second commenter opposed requiring standards comparable to food stamp E&T components; stated that the Department does not have the authority to and should not regulate the content of E&T programs; persons attending community colleges should be considered participating in a State or local government's E&T program, and E&T programs should not serve exclusively food stamp recipients.

Section 6(e)(3)(D) of the Food Stamp Act, as amended by section 1727 of the Food, Agriculture, Conservation, and Trade Act of 1990, clearly provides the Department with the authority for determining which State and local E&T programs are appropriate. All persons attending community colleges cannot be considered participating in a state or local government's E&T program because attendance at a community college does not necessarily indicate participation in an employment program. The Department agrees that E&T programs need not serve food stamp recipients exclusively in order to qualify, but they must be for low-income households. Consequently, the Department is revising the final regulations at 7 CFR 273.5(b)(11)(iv) to this effect.

A third commenter on this provision suggested that the Department clarify that an appropriate program does not have to have all the components, or any combination of components, required in the food stamp E&T program and that State agencies should make the general equivalency determinations but that

students should be permitted to provide evidence of the appropriateness of a program.

The Department agrees that the E&T program should have to meet only one of the acceptable food stamp E&T components. Since the guidelines for the food stamp E&T components are specified in the regulations, the Department also agrees that State agencies may make the equivalency determinations. The Department has changed the final regulations at 7 CFR 273.5(b)(11)(iv) accordingly. The Department does not believe that it would be administratively feasible to require eligibility workers to make a determination on the appropriateness of a program based on information submitted by an individual student.

One commenter thought that self-placements in connection with any of the E&T programs listed should exempt the student. The Department agrees that placements that are initiated by a person while the person is enrolled in an approved E&T program should be considered to be in compliance with the requirements of that program provided that the E&T program the person is enrolled in has a component for enrollment in an institution of higher education and that program accepts the placement. Other self-placements would not qualify. The Department has changed the final regulations at 7 CFR 273.5(b)(11) accordingly.

One commenter thought that participants who voluntarily participate in one of the listed E&T programs should be entitled to an exemption. Section 6(e)(3) of the Food Stamp Act does not limit the exclusion to persons who are required to participate in an approved E&T program. Therefore, the Department agrees that all persons, regardless of whether they are volunteers, who are placed in an institution of higher education by or in accordance with the requirements of an approved program, qualify for the student exemption. The Department has made this change in the final regulations at 7 CFR 273.5(b)(11).

Job Opportunities and Basic Skills (JOBS) Program

The proposed regulations expanded the list of eligible students to include students participating in the work incentive program under part A of title IV of the Social Security Act or its successor program (currently the JOBS program). One commenter supported this change. Since this is a nondiscretionary provision that is required by the Food Stamp Act, as amended, the Department is adopting the proposed language without change at 7 CFR 273.5(b)(1)(vii).

Single Parents

The proposed regulations provided that a single parent enrolled full time in an institution of higher education who is responsible for the care of a child under age 12 is exempt from the student provisions. This provision would apply where only one natural, adoptive, or stepparent, regardless of martial status, is in the same food stamp household as the child. For example, if one natural parent and a stepparent are living with the child, neither the natural parent nor the stepparent could qualify for the student exemption. If no natural, adoptive, or stepparent is in the same food stamp household as the child, another full-time student in the same food stamp household as the child could qualify for eligible student status if he or she has parental control over the child and is not living with his or her spouse.

One commenter requested that the definition used for the Aid to Families with Dependent Children (AFDC) program be used instead. The commenter stated that the definition is a parent who is singly responsible for a child because of the death, absence, or incapacity of the child's other parent.

AFDC does not have a definition of a single parent. It appears that the commenter is referring to the AFDC definition of deprivation. For AFDC purposes, one category of needy children is those deprived of parental support or of care by reason of the death, continued absence from the home, or physical or mental incapacity of the parent, or unemployment of a principal earner. There is no basis in the Food Stamp Act for limiting the exclusion to cases of deprivation. Therefore, the Department is not adopting this recommendation.

The Department would, however, like to clarify that ''regardless of marital status'' means that the parent could be single (meaning never married), a widow or widower, separated, divorced, or married and living in a separate household from the other parent. For example, if the natural parents are still legally married but only one parent is living with the child, that parent would be considered a single parent for purposes of this provision.

Resource Exclusions—§ 273.8(e)(11)

In the proposed regulations under the list of resources required to be excluded by other Federal laws, the Department listed payments received under the Job Training Partnership Act (Pub. L. 97–300). It has come to the Department's attention that Public Law 97–300 only requires that the payments be excluded from income for food stamp purposes. Educational assistance is excluded from resources for the period of time for which it is provided. Allowing an indefinite resource exclusion would create an unnecessary administrative burden to keep track of the payments in subsequent months. For these reasons, the Department is not adopting the proposed change.

Technical Changes

The Department is taking this opportunity to make the following two technical changes.

Verification—§ 273.2(f)

In order to consolidate the verification requirements, the Department is moving the verification requirement for a determination that a person is unfit from the student eligibility section at 7 CFR 273.5(a) to the verification section at 7 CFR 273.2(f)(1).

Resource Exclusions—§ 273.8(e)(11)(vi)

The Job Training Partnership Act of 1982 replaced the Comprehensive Employment and Training Act (CETA) (Pub. L. 97–300, section 183). Because CETA payments have not been made for over ten years, the Department is deleting the reference to CETA payments in the resource section at 7 CFR 273.8(e)(11)(vi).

Implementation—§ 272.1(g)

As stated in the preamble to the proposed regulations, State welfare agencies were instructed through agency directive to implement on February 1, 1992, the provisions of section 1727 of the Food, Agriculture, Conservation, and Trade Act of 1990, which extended eligibility to students attending institutions of higher education on at least a half-time basis if the student is between 50 and 60 years of age; a student with responsibility for a child between the ages of 5 and 12 if adequate child care is not available to enable the individual to attend class and work a minimum of 20 hours per week or participate in a work study program during the regular school year; a student participating in a State financed work study program during the regular school year; enrolled as a result of participation in the Job Opportunities and Basic Skills (JOBS) program; assigned to an institution of higher education by the food stamp employment and training program, a program under section 236 of the Trade Act of 1974, or certain State or local employment and training programs; or a full-time student who is a single parent responsible for the care

of a child under 12. The corresponding provisions in this regulation are effective on that date.

The remaining provisions are effective November 1, 1995 and must be implemented no later than February 1, 1996.

The provisions of the final rule must be implemented no later than the dates specified for all affected households that newly apply for Food Stamp Program benefits on or after the implementation dates. If for any reason a State agency fails to implement, restored benefits must be provided, as appropriate, back to the effective date of the provision, or the date of application, whichever is later.

The current caseload must be converted to the requirements of the final regulations at a household's request, at the time of recertification, or when the case is next reviewed, whichever occurs first, and the State agency is required to provide restored benefits back to the effective date of the provision or the date of application, whichever is later.

The preamble to the proposed rule provided that any variance resulting from implementation of the provisions of the subsequent final rule would be excluded from error analysis for 90 days from the specified implementation dates of such final rule.

One commenter pointed out that the grace period should be 120 days. Section 13951 of the Mickey Leland Childhood Hunger Relief Act, enacted August 10, 1993, excludes from the payment error rate any errors resulting in the application of new procedures for 120 days from the required implementation dates. Accordingly, the Department has provided for a 120-day grace period at 7 CFR 272.1(g).

List of Subjects

7 CFR Part 271

Administrative practice and procedure, Food stamps, Grant programs-social programs.

7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedures, Aliens, Claims, Food Stamps, Fraud, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Social Security, Students.

Accordingly, 7 CFR parts 271, 272, and 273 are amended as follows:

1. The authority citation for parts 271, 272, and 273 continues to read as follows:

Authority: 7 U.S.C. 2011–2032

PART 271—GENERAL INFORMATION AND DEFINITIONS

§ 271.2 [Amended]

2. In § 271.2, the definition of an ''Institution of higher education'' is removed.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

3. In § 272.1, a new paragraph (g)(144) is added to read as follows:

§ 272.1 General terms and conditions.

* * * * *

(g) *Implementation.* * * *

(144) *Amendment No. (370).* The provisions of Amendment No. (370) are effective and must be implemented as follows:

(i) Sections 273.5(b)(1), (b)(4), and (b)(9) are effective February 1, 1992. The introductory paragraph of 273.5(b)(6) is effective February 1, 1992. The introductory paragraph of 273.5(b)(10) is effective February 1, 1992. Sections 273.5(b)(11)(ii), (b)(11)(iii), and (b)(11)(iv) are effective February 1, 1992.

(ii) Sections 273.5(b)(6)(i) and (b)(6)(ii) and sections 273.5(b)(10)(i) and (b)(10)(ii) and the remaining provisions of this regulation are effective November 1, 1995 and shall be implemented no later than February 1, 1996.

(iii) The current caseload shall be converted to these provisions at the household's request, at the time of recertification, or when the case is next reviewed, whichever occurs first. The State agency shall provide restored benefits back to the effective date.

(iv) Any variance resulting from implementation of a provision in this rule shall be excluded from error analysis for 120 days from the required implementation date of that provision.

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

4. In § 273.2, a new paragraph (f)(1)(xii) is added to read as follows:

§ 273.2 Application processing.

* * * * *

(f) *Verification.* * * *

(1) *Mandatory verification.* * * *

(xii) *Students.* If a person claims to be physically or mentally unfit for purposes of the student exemption contained in § 273.5(b)(2) and the unfitness is not evident to the State agency, verification may be required. Appropriate verification may consist of receipt of temporary or permanent disability benefits issued by governmental or private sources, or of a statement from a physician or licensed or certified psychologist.

* * * * *

5. In § 273.5:

a. paragraph (a) is revised;

b. paragraphs (b)(2) and (b)(3) are redesignated as paragraphs (c) and (d); and

c. the heading of paragraph (b) and paragraph (b)(1) are redesignated as paragraph (b) and revised. The revisions read as follows:

§ 273.5 Students.

(a) *Applicability.* An individual who is enrolled at least half-time in an institution of higher education shall be ineligible to participate in the Food Stamp Program unless the individual qualifies for one of the exemptions contained in paragraph (b) of this section. An individual is considered to be enrolled in an institution of higher education if the individual is enrolled in a business, technical, trade, or vocational school that normally requires a high school diploma or equivalency certificate for enrollment in the curriculum or if the individual is enrolled in a regular curriculum at a college or university that offers degree programs regardless of whether a high school diploma is required.

(b) *Student Exemptions.* To be eligible for the program, a student as defined in paragraph (a) of the section must meet at least one of the following criteria.

(1) Be age 17 or younger or age 50 or older;

(2) Be physically or mentally unfit;

(3) Be receiving Aid to Families with Dependent Children under Title IV of the Social Security Act;

(4) Be enrolled as a result of participation in the Job Opportunities and Basic Skills program under Title IV of the Social Security Act or its successor program;

(5) Be employed for a minimum of 20 hours per week and be paid for such employment or, if self-employed, be employed for a minimum of 20 hours per week and receiving weekly earnings at least equal to the Federal minimum wage multiplied by 20 hours;

(6) Be participating in a State or federally financed work study program during the regular school year.

(i) To qualify under this provision, the student must be approved for work study at the time of application for food stamps, the work study must be approved for the school term, and the student must anticipate actually working during that time. The exemption shall begin with the month

in which the school term begins or the month work study is approved, whichever is later. Once begun, the exemption shall continue until the end of the month in which the school term ends, or it becomes known that the student has refused an assignment.

(ii) The exemption shall not continue between terms when there is a break of a full month or longer unless the student is participating in work study during the break.

(7) Be participating in an on-the-job training program. A person is considered to be participating in an on-the-job training program only during the period of time the person is being trained by the employer;

(8) Be responsible for the care of a dependent household member under the age of 6;

(9) Be responsible for the care of a dependent household member who has reached the age of 6 but is under age 12 when the State agency has determined that adequate child care is not available to enable the student to attend class and comply with the work requirements of paragraph (b)(5) or (b)(6) of this section;

(10) Be a single parent enrolled in an institution of higher education on a full-time basis (as determined by the institution) and be responsible for the care of a dependent child under age 12.

(i) This provision applies in those situations where only one natural, adoptive or stepparent (regardless of marital status) is in the same food stamp household as the child.

(ii) If no natural, adoptive or stepparent is in the same food stamp household as the child, another full-time student in the same food stamp household as the child may qualify for eligible student status under this provision if he or she has parental control over the child and is not living with his or her spouse.

(11) Be assigned to or placed in an institution of higher education through or in compliance with the requirements of one of the programs identified in paragraphs (b)(11)(i) through (b)(11)(iv) of this section. Self-initiated placements during the period of time the person is enrolled in one of these employment and training programs shall be considered to be in compliance with the requirements of the employment and training program in which the person is enrolled provided that the program has a component for enrollment in an institution of higher education and that program accepts the placement. Persons who voluntarily participate in one of these employment and training programs and are placed in an institution of higher education through or in compliance with the requirements of the program shall also qualify for the exemption. The programs are:

(i) a program under the Job Training Partnership Act of 1974 (29 U.S.C. 1501, et seq.);

(ii) an employment and training program under § 273.7;

(iii) a program under section 236 of the Trade Act of 1974 (19 U.S.C. 2296); or

(iv) an employment and training program for low-income households that is operated by a State or local government where one or more of the components of such program is at least equivalent to an acceptable food stamp employment and training program component as specified in § 273.7(f)(1). Using the criteria in § 273.7(f)(1), State agencies shall make the determinations as to whether or not the programs qualify.

§ 273.8 [Amended]

6. In § 273.8, paragraph (e)(11)(vi) is removed, and paragraphs (e)(11)(vii) through (e)(11)(xi) are redesignated as paragraphs (e)(11)(vi) through (e)(11)(x).

Dated: September 15, 1995.

Ellen Haas,

Under Secretary for Food, Nutrition, and Consumer Services.

[FR Doc. 95–23404 Filed 9–21–95; 8:45 am]

BILLING CODE 3410–30–P

Rural Utilities Service

7 CFR Part 1717

Investments, Loans, and Guarantees by Electric Borrowers

AGENCY: Rural Utilities Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Utilities Service (RUS) hereby revises its policies and requirements governing restrictions on investments, loans and guarantees made by electric borrowers. This rule is intended to clarify RUS's policies and requirements, reduce uncertainty by borrowers, and improve compliance.

EFFECTIVE DATE: This rule is effective October 23, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Alex M. Cockey, Jr., Deputy Assistant Administrator—Electric, U.S. Department of Agriculture, Rural Utilities Service, room 4037–S, Ag Box 1560, 14th Street & Independence Avenue, SW., Washington, DC 20250–1500. Telephone: 202–720–9547.

SUPPLEMENTARY INFORMATION: This rule has been determined to be not significant for the purposes of Executive Order 12866, and therefore has not been reviewed by the Office of Management and Budget (OMB). The Administrator of RUS has determined that the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) does not apply to this rule. The Administrator of RUS has determined that this rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). Therefore, this action does not require an environmental impact statement or assessment. This rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require consultation with State and local officials. A Notice of Final Rule titled Department Programs and Activities Excluded from Executive Order 12372 (50 FR 47034) exempts RUS electric loans and loan guarantees from coverage under this Order. This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule; (2) Will not have any retroactive effect; and (3) Will not require administrative proceedings before any parties may file suit challenging the provisions of this rule.

The program described by this rule is listed in the Catalog of Federal Domestic Assistance Programs under number 10.850 Rural Electrification Loans and Loan Guarantees. This catalog is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402–9325.

Information Collection and Recordkeeping Requirements

The existing recordkeeping and reporting burdens contained in this rule were approved by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), under control number 0572–0032.

Send questions or comments regarding these burdens or any other aspect of these collections of information, including suggestions for reducing the burden, to the Office of Information and Regulatory Affairs, Office of Management and Budget, room 10102, NEOB, Washington, DC 20503. Attention: Desk Officer for USDA.

Background

On December 22, 1987, section 312 was added to the Rural Electrification Act of 1936. This section allows electric borrowers to invest their own funds or make loans or guarantees, not in excess

of 15 percent of their total utility plant, without restriction or prior approval of the Administrator of the Rural Utilities Service (RUS). On June 29, 1989, RUS issued a final rule codifying this provision in 7 CFR part 1717, subpart N (at 54 FR 27325). Mortgages executed prior to that date contained a provision granting the Administrator the right to approve investments, loans and guarantees by the borrower once the aggregate of such investments, loans and guarantees reached 3 percent of total utility plant.

On February 16, 1995, at 60 FR 8981, RUS published a proposed rule to clarify RUS's policies and requirements regarding restrictions on borrower investments, loans and guarantees. Over the years borrowers had raised a number of questions about such issues as: which investments, loans or guarantees are subject to RUS approval and which are excluded; the criteria used by RUS in approving an investment, loan or guarantee; whether RUS approval of an investment, loan or guarantee means that it is no longer counted in determining the ratio to total utility plant; whether RUS will approve an investment, loan or guarantee if the borrower is under the 15 percent limit; whether a borrower will be in default under its mortgage because net profits earned on its investments pushed its total above the 15 percent limit. This final rule resolves such questions.

RUS is also in the process of updating its mortgage and loan contract used with electric borrowers. RUS published a proposed mortgage for electric distribution borrowers on September 29, 1994 at 59 FR 49594. In that rule it was proposed that RUS controls over borrower investments, loans and guarantees be moved from the mortgage to the RUS loan contract. Such a move would have no effect on RUS's controls or their enforceability under the RUS mortgage. On July 18, 1995 RUS published the final rule for the distribution mortgage and a proposed rule for the distribution loan contract, at FR 36882 and FR 36904, respectively.

Comments on the proposed changes to RUS investment controls contained in 7 CFR part 1717, subpart N were received from 26 commenters, including the National Rural Electric Cooperative Association, the National Rural Utilities Cooperative Finance Corporation (CFC), the Saint Paul Bank for Cooperatives, and 23 borrowers or regional borrower associations. All comments were considered in preparing this final rule. The more significant or more frequently made comments are discussed below.

Section 1717.651 Policy

Questions were raised about the second part of the statement: ''RUS electric borrowers are encouraged to utilize their own funds to participate in the economic development of rural areas, provided that such activity does not in any way put government funds at risk or impair a borrower's ability to repay its indebtedness to RUS and other lenders.'' RUS did not propose any change in this statement, which is contained in the existing rule.

It was suggested that this policy is unworkable since any investment involves some risk. RUS recognizes that most investments involve some risk, but continues to believe that it is only prudent that borrowers avoid those investments having risks of a magnitude that would in any way put government funds at risk or impair loan repayment. We continue to believe that this is the correct interpretation of the intent of section 312.

Section 1717.652 Definitions

The term ''own funds'' was defined as ''money belonging to the borrower other than the proceeds of loans made or guaranteed by RUS.'' Such proceeds include, but are not limited to, all funds on deposit in the cash-construction fund-trustee account. A commenter pointed out that requests for loan advances commonly occur after general funds have already been expended for loan purposes, and that it would be difficult to separate general funds into cash generated by operations and that derived from loan advances. This was not the agency's intent, nor is such separation required under the existing rule. To make this clear, the definition has been revised as follows: ''Own funds means money belonging to the borrower other than funds on deposit in the cash-construction fund-trustee account.''

One commenter stated that Operating TIER and Operating DSC, used as part of the criteria in proposed § 1717.655 to determine eligibility for an exemption from controls, appeared to be the same as standard TIER and DSC. They are not, since they measure interest and debt coverage only for the borrower's electric utility operations. Margins used in the calculation are operating margins rather than total margins. A few technical changes have been made to the definitions in this final rule to make it clearer that Operating TIER and Operating DSC apply only to the borrower's electric system and do not apply to any other utility operations of the borrower, such as a water and waste disposal system owned by the borrower.

One commenter asked whether margins earned by subsidiaries controlled by a borrower would be included in operating margins used in calculating Operating TIER and DSC. Since such subsidiaries are separate business entities outside the borrower's core electric utility business, as indicated above their profits or losses will not be included in calculating Operating TIER and DSC. They are, however, included in the calculation of standard TIER and DSC contained in the rate covenant of the typical mortgage or loan contract.

A question was asked about whether ''telecommunication and other electronic communication system'' includes satellite and direct broadcast television service. The answer is yes, provided that ''the service'' includes providing a continuing service to customers, such as television programming, rather than just a one-time sale of equipment, and as set forth in the definition, such services ''are available by design to all or a substantial portion of the members of the community.''

Section 1717.653 Borrowers in Default

This section has been added to clarify the point that if a borrower in not in compliance with all provisions of its mortgage, loan contract, or any other agreements with RUS, the borrower must obtain prior written approval from the Administrator to invest its own funds or to make loans or guarantees, unless such loan document or other agreement specifically provides otherwise. This was implicit in proposed section 1717.653(a) (renumbered 1717.654(a)), and is now spelled out for greater clarity.

Section 1717.654 (Proposed 1717.653) Transactions Below the 15 Percent Level

Clarification was requested of the statement that ''funds necessary to make timely payments of principal and interest on loans secured by the RUS mortgage remain subject to RUS controls. * * *'' The purpose of this statement is to make it clear that while RUS controls on investments, loans and guarantees by the borrower do not ordinarily apply below the 15 percent level, RUS may impose such controls case-by-case in those circumstances where they are necessary to ensure reasonably adequate loan security or to ensure the repayment of loans secured under the mortgage. Such instances presumably would be relatively rare, and the borrower would be notified in advance that the controls were being imposed.

One commenter stated that the apparent effect of paragraph (b) of this section is to restrict the limitations on investments contained in the rule to loan contracts or mortgages executed after the effect date of the final rule. That is not correct. Proposed paragraph (b) described language to be included in the loan contract or mortgage regarding investment controls, and proposed certain changes in the prescribed language for these documents contained in § 1717.654(b) of the existing rule. In the final rule, this prescribed language has been further revised to conform with the approach used in the new mortgage and proposed loan contract for distribution borrowers: namely, the provision is expressed in more general terms, relying on RUS regulations to flesh out the interpretation and specific requirements of the provision. Revised paragraph (b) has been moved to § 1717.659.

The provisions of existing subpart N have applied to all borrowers since the date it became effective, July 31, 1989, regardless of when their loan contracts or mortgages were executed. Changes to subpart N contained in this final rule will also apply to all borrowers regardless of when their loan documents were executed. This has been clarified in § 1717.650. RUS believes that borrowers who qualify for an outright exemption from investment controls should not have to wait until new loan documents are executed before becoming eligible. Nor should other reforms be delayed, such as excluding rural community infrastructure from the 15 percent calculation.

Section 1717.655 (Proposed 1717.654) Exclusion of Certain Investments, Loans, and Guarantees

The Saint Paul Bank for Cooperatives recommended that investments in it be excluded, as are investments in CFC and CoBank. This has been done.

A commenter pointed out that investments made in a trust fund dedicated to pay the decommissioning costs of nuclear generating facilities was not listed in this section as an excluded investment, but is excluded under RUS Bulletin 1717B–3. Failure to list such investments as excluded under this section was inadvertent, and this has been corrected.

One commenter noted that several generation and transmission borrowers (G&Ts) have invested in fuel supply subsidiaries in an effort to control fuel costs, and argued that such investments should be excluded. This recommendation has not been adopted.

Such subsidiaries often have other lines of business and often provide services to other utilities or other companies, making it difficult to determine to what extent the subsidiary is involved in providing services in direct support of the borrower's electric utility business. If fuel supply subsidiaries were excluded, then there would be pressure to exclude other subsidiaries that might provide some services to the borrower, such as warehousing, barge service, railroad or truck service, insurance, engineering services, etc. Moreover, the property of a subsidiary generally is not subject to the lien of the government's mortgage, and the property and operations of the subsidiary are not subject to RUS operational controls and approval rights. This often can present serious problems with respect to the agency's programmatic and security interests.

A commenter recommended that patronage capital allocated to a G&T by its distribution members be excluded. Such allocations often occur when a G&T buys power from its members for headquarters, warehouses, and metering points located in the members' territory. This recommendation has been adopted.

Another commenter stated that the exclusion of community infrastructure in paragraph (c)(3) should not be based on whether the infrastructure is located within the borrower's service territory, but whether the infrastructure serves consumers located in rural areas. RUS agrees with the recommendation for the purposes of this rule, and has so revised the paragraph.

Proposed paragraph (c)(1) excluded investments or loans made by a borrower derived from funds obtained from grants or loans received from a USDA agency. Such grants and loans from a USDA agency normally would be for purposes supporting rural economic development. A commenter recommended that the source of the grant or loan be expanded to include any Federal, State or local government agency. RUS agrees with this recommendation provided that such loan funds are designated to promote rural economic development and the borrower uses the funds for that purpose. Grant funds that the borrower is not obligated to repay may be for any purpose since there would be little or no risk to RUS loan security. In reality, most such grants likely would be for rural economic development.

A co-mortgagee suggested that it be granted what it described as the same preapproval of credit enhancement in paragraph (d) as granted USDA agencies in cases where a borrower is required to make an investment, loan, or guarantee, for example, as a condition of obtaining financial assistance from the agency. The intent of this provision is to support rural economic development, for example, in instances where a borrower is required to invest some of its own funds in order to qualify for a rural development grant or loan, which usually will be on subsidized terms. Investments in the co-mortgagee in question are excluded under paragraph (b) of this section.

Section 1717.656 (Proposed 1717.655) Exemption of Certain Borrowers From Controls

A number of comments were received about the criteria for qualifying for an exemption from investment controls set forth in paragraph (a).

One borrower asked whether patronage capital earned or refunded would be subtracted from the average residential rate of borrowers in making the comparison with the average residential rate for all utilities serving a state. The answer is, no. This adjustment would not be significant enough to make a difference among borrowers or to justify the additional complexity. Borrowers are reminded that if they fail to qualify for an exemption based solely on the rate disparity criterion, upon request the Administrator may grant the exemption if he or she determines that the borrowers' strengths in the other criteria outweigh their weakness on rate disparity.

Several borrowers suggested that it would be more ''prudent'' to use a standard TIER of 1.05 for G&Ts rather than the proposed Operating TIER and Operating DSC of 1.0. RUS disagrees that that would be more ''prudent'' from the standpoint of loan security. In addition to Operating TIER and DSC, a borrower would have to meet the TIER and DSC requirements in its mortgage (the first criterion under paragraph (a)), which for most G&Ts is a standard DSC of 1.0 and standard TIER of 1.0 or 1.05. The advantage of requiring a minimum Operating TIER and DSC of 1.0 is that it will ensure that a borrower is at least breaking even on its main business, its electric operations, and does not need to rely on income from investments and other non-core activities to meet its debt service and other expenses of its core business.

Several G&Ts argued that the minimum equity required to qualify for an exemption should be set lower for G&Ts than for distribution systems. RUS disagrees since it is not apparent that giving G&T's wider latitude to make investments without RUS approval would involve less risk to loan security than in the case of distribution borrowers.

Several borrowers opposed the netting out of regulatory created assets when calculating equity as a percent of total assets. RUS disagrees since these assets represent current period expenses that should have been expensed, rather than capitalized, in order to reflect the true operating performance of the borrower. Deferring these expenses overstates both equity and total assets. RUS has followed this practice for the past several years, codifying it in the lien accommodation rule (7 CFR part 1717, subparts R and S), the 110 percent rule (7 CFR 1710.7 and 7 CFR 1717.860), and the distribution mortgage (7 CFR part 1718, subpart B).

Under paragraph (c), a borrower that has lost its exemption may regain it if it once again meets the exemption criteria. One commenter recommended that restoration of the exemption ought to be automatic, rather than contingent upon written notice from RUS. RUS believes that notice is required in order for the borrower and RUS to have the same understanding about the exemption status of the borrower. Without requiring notification, disputes and associated administrative costs and delays would likely occur. Requiring written notice to restore an exemption is consistent with the written notice required to terminate an exemption.

Under paragraph (d), a borrower that has lost its exemption and has exceeded the 15 percent limit would be required to reduce or restructure its investment portfolio to come within the 15 percent limit. If the borrower failed to come within the 15 percent limit within a reasonable period of time determined by the Administrator, the borrower could be given notice of default.

The proposed paragraph implicitly assumed the borrower was in compliance with all other provisions of its mortgage, loan contract, and any other agreements with RUS. This has now been made explicit, and it has been reiterated that if the borrower is not in compliance with such provisions it may be required to reduce its investment portfolio below the 15 percent level, if not prohibited by the explicit terms of the borrower's mortgage, loan contract, or other agreement with RUS.

One commenter argued that RUS should not be able to call a default if the investments that exceeded the 15 percent limit were made while the borrower was exempt. RUS disagrees, since without the right to call a default there would be less leverage to reduce loan security risks in cases where a borrower had a high-risk investment portfolio that substantially exceeded the 15 percent limit. There would also be less incentive for borrowers to maintain the performance levels required for an exemption if there were no penalty for failing to maintain these levels.

However, it may not be necessary in all cases to require a formerly exempt borrower to reduce its investment portfolio to the 15 percent limit. Paragraph (d) has therefore been revised to give the Administrator the flexibility to allow a formerly exempt borrower not in default to remain above the 15 percent limit if the Administrator determines that reducing or restructuring the investment portfolio to come within the limit would not be in the financial interest of the government from the standpoint of loan security and/or repayment.

Section 1717.657 (Proposed 1717.656) Investments Above the 15 Percent Level by Certain Borrowers not Exempt Under § 1717.656(a)

A commenter recommended that G&Ts not meeting the minimum criteria in paragraph (c) for requesting RUS approval of investments above the 15 percent level should nevertheless be given a chance to have their requests considered. RUS disagrees. The criteria are very minimal: no default, no financial workout or restructured debt, and a minimum equity of 5 percent. G&Ts (as well as distribution borrowers) that are in default do not in the first place qualify under § 1717.654(a) to make investments, loans and guarantees up to the 15 percent level without RUS approval. Section 1717.657 does not apply to them. Other G&Ts that are not in default but have equity of less than 5 percent, or are in financial workout, or have had their debt restructured, ought to confine investments above the 15 percent level to excluded investments.

Another commenter recommended that distribution borrowers not meeting the criteria for an outright exemption from investment controls (§ 1717.656(a)) ought to be able to seek approval from RUS for investments above the 15 percent level. RUS believes such borrowers should restrict their investments above the 15 percent level to excluded investments. Some 84 percent of distribution borrowers qualify for an outright exemption. Many of the remaining borrowers could make changes in their operations and qualify for an exemption.

A co-mortgagee argued that it would be more prudent to relate the maximum limit on investments by G&Ts to equity, rather than 20 percent of total utility plant (see § 1717.657(c)). RUS agrees that it would be more logical to use equity, one of the criteria used to determine eligibility for an exemption from investment controls. However, setting the maximum investment limit at even 100 percent of equity would result in a limit for most G&Ts lower than the 15 percent of total utility plant mandated by section 312 of the RE Act.

A commenter asked whether the 10-year look-back on net profits on investments in paragraph (d) is a rolling or one-time calculation. It is a rolling calculation done at the time RUS is asked by a borrower to exclude all or a portion of net profits that have resulted in investments exceeding the 15 percent limit.

Section 1717.658 (Proposed 1717.657) Records, Reports and Audits

One commenter recommended changing current practice which requires guarantees and lines of credit to be counted in full against the 15 percent limit whether or not there is a loan outstanding or any likelihood the guarantee will be called upon. RUS does not believe current practice should be changed. A line of credit could be drawn upon at any time and RUS would have no way of anticipating when that time might come. Presumably borrowers would not want their ability to make good on a line of credit commitment to another party to be subject to subsequent approval by RUS. As to excluding guarantee obligations of the borrower that are unlikely to be called upon, in most cases it would be very difficult and time-consuming for RUS to assess the probability that the borrower will be required to perform under the guarantee.

One commenter stated that the balance sheet method used by RUS to count investments is not consistent with section 312. RUS disagrees with that view, and notes that § 1717.657(d) of the rule addresses the main concern that has been raised over the years: namely, that net profits on investments may cause a borrower to exceed the 15 percent limit and possibly be in default. Section 1717.657(d) provides that such circumstances would not necessarily result in a default, and at a borrower's request, the Administrator could exclude up to the amount of net profit earned over the past 10 years if such exclusion would not increase loan security risks.

Section 1717.659 (Proposed 1717.658) Effect on RUS Loan Contract and Mortgage

Section 1717.656(c) of the existing regulation explicitly states that, ''Nothing in this subpart authorizes a borrower to make extensions or improvements to its electric system without prior approval of RUS.'' That

provision was subsumed under a more comprehensive provision in proposed § 1717.658(a), which in the final rule has been clarified by adding the specific reference to RUS approval rights over system extensions and additions. Similar changes have been made to sections 1717.654 and 1717.656.

Borrowers Exempt From Investment Controls

The distribution and power supply borrowers listed below meet the criteria in § 1717.656(a) and are exempt from RUS approval of any investment, loan, or guarantee made on or after September 21, 1995. Borrowers are reminded that, under § 1717.656(c), if they subsequently cease to meet the exemption criteria, upon written notice from RUS they will no longer be exempt from RUS investment controls.

Borrowers that do not meet the criteria for exemption will be notified individually in writing by RUS and will be advised of the reasons they fail to qualify.

Borrowers Exempt From RUS Investment Controls

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List of Subjects in 7 CFR Part 1717

Administrative practice and procedure, Electric power, Electric power rates, Electric utilities, Intergovernmental relations, Investments, Loan programs-energy, Reporting and recordkeeping requirements, Rural areas.

For the reasons stated, subpart N of 7 CFR part 1717 is revised to read as follows:

PART 1717—POST-LOAN POLICIES AND PROCEDURES COMMON TO INSURED AND GUARANTEED ELECTRIC LOANS

Subpart N—Investments, Loans, and Guarantees by Electric Borrowers

Sec.
1717.650 Purpose.
1717.651 General.
1717.652 Definitions.
1717.653 Borrowers in default.
1717.654 Transactions below the 15 percent level.
1717.655 Exclusion of certain investments, loans, and guarantees.
1717.656 Exemption of certain borrowers from controls.
1717.657 Investments above the 15 percent level by certain borrowers not exempt under § 1717.656(a).
1717.658 Records, reports and audits.
1717.659 Effect of this subpart on RUS loan contract and mortgage.

Subpart N—Investments, Loans, and Guarantees by Electric Borrowers

Authority: 7 U.S.C. 901–950b; Pub.L. 103–354, 108 Stat. 3178 (7 U.S.C. 6941 *et seq.*); Title I, Subtitle D, Pub.L. 100–203, 101 Stat. 1330.

§ 1717.650 Purpose.

This subpart sets forth general regulations for implementing and interpreting provisions of the RUS mortgage and loan contract regarding investments, loans, and guarantees made by electric borrowers, as well as the provisions of the Rural Electrification Act of 1936, as amended, including section 312 (7 U.S.C. 901 et seq.) (RE Act), permitting, in certain circumstances, that electric borrowers under the RE Act may, without restriction or prior approval of the Administrator of the Rural Utilities Service (RUS), invest their own funds and make loans or guarantees.

§ 1717.651 General.

(a) *Policy*. RUS electric borrowers are encouraged to utilize their own funds to participate in the economic development of rural areas, provided that such activity does not in any way put government funds at risk or impair a borrower's ability to repay its indebtedness to RUS and other lenders. In considering whether to make loans, investments, or guarantees, borrowers are expected to act in accordance with prudent business practices and in conformity with the laws of the jurisdictions in which they serve. RUS assumes that borrowers will use the latitude afforded them by section 312 of the RE Act primarily to make needed investments in rural community infrastructure projects (such as water and waste systems, garbage collection services, etc.) and in job creation activities (such as providing technical, financial, and managerial assistance) and other activities to promote business development and economic diversification in rural communities. Nonetheless, RUS believes that borrowers should continue to give primary consideration to safety and

liquidity in the management of their funds.

(b) *Applicability of this subpart.* This subpart applies to all distribution and power supply borrowers regardless of when their loan contract or mortgage was executed.

§ 1717.652 Definitions.

As used in this subpart:

Borrower means any organization that has an outstanding loan made or guaranteed by RUS for rural electrification.

Cash-construction fund-trustee account means the account described in the Uniform System of Accounts as one to which funds are deposited for financing the construction or purchase of electric facilities.

Distribution borrower means a Distribution Borrower as defined in 7 CFR 1710.2.

Electric system means all of the borrower's interests in all electric production, transmission, distribution, conservation, load management, general plant and other related facilities, equipment or property and in any mine, well, pipeline, plant, structure or other facility for the development, production, manufacture, storage, fabrication or processing of fossil, nuclear, or other fuel or in any facility or rights with respect to the supply of water, in each case for use, in whole or in major part, in any of the borrower's generating plants, including any interest or participation of the borrower in any such facilities or any rights to the output or capacity thereof, together with all lands, easements, rights-of-way, other works, property, structures, contract rights and other tangible and intangible assets of the borrower in each case used or useful in such electric system.

Equity means the Margins and Equities of the borrower as defined in the Uniform System of Accounts, less regulatory created assets.

Guarantee means to undertake collaterally to answer for the payment of another's debt or the performance of another's duty, liability, or obligation, including, without limitation, the obligations of subsidiaries. Some examples of such guarantees include guarantees of payment or collection on a note or other debt instrument (assuring returns on investments); issuing performance bonds or completion bonds; or cosigning leases or other obligations of third parties.

Invest means to commit money in order to earn a financial return on assets, including, without limitation, all investments properly recorded on the borrower's books and records in investment accounts as those accounts are used in the Uniform System of Accounts for RUS Borrowers. Borrowers may submit any proposed transaction to RUS for an interpretation of whether the action is an investment for the purposes of this definition.

Make loans means to lend out money for temporary use on condition of repayment, usually with interest.

Mortgaged property means any asset of the borrower which is pledged in the RUS mortgage.

Natural gas distribution system means any system of community infrastructure that distributes natural gas and whose services are available by design to all or a substantial portion of the members of the community.

Operating DSC means Operating Debt Service Coverage (ODSC) of the borrower's electric system calculated as:

$$\text{ODSC} = \frac{A + B + C}{D}$$

where:

All amounts are for the same year and are based on the RUS system of accounts;

A=Depreciation and Amortization Expense of the electric system;

B=Interest on Long-term Debt of the electric system, except that Interest on Long-term Debt shall be increased by ⅓ of the amount, if any, by which the rentals of Restricted Property of the electric system exceed 2 percent of Total Margins and Equities;

C=Patronage Capital & Operating Margins of the electric system (distribution borrowers) or Operating Margins of the electric system (power supply borrowers); and

D=Debt Service Billed (RUS + other) which equals all interest and principal billed or billable during the calendar year for long-term debt of the electric system plus ⅓ of the amount, if any, by which the rentals of Restricted Property of the electric system exceed 2 percent of Total Margins and Equities. Unless otherwise indicated, all terms used in defining ODSC and OTIER are as defined in RUS Bulletin 1717B–2 Instructions for the Preparation of the Financial and Statistical Report for Electric Distribution Borrowers, and RUS Bulletin 1717B–3 Instructions for the Preparation of the Operating Report for Power Supply Borrowers and for Distribution Borrowers with Generating Facilities, or the successors to these bulletins.

Operating TIER means Operating Times Interest Earned Ratio (OTIER) of the borrower's electric system calculated as:

$$\text{OTIER} = \frac{A + B}{A}$$

where:

All amounts are for the same year and are based on the RUS system of accounts;

A=Interest on Long-term Debt of the electric system, except that Interest on Long-term Debt shall be increased by 1/3 of the amount, if any, by which the rentals of Restricted Property of the electric system exceed 2 percent of Total Margins and Equities; and

B=Patronage Capital & Operating Margins of the electric system (distribution borrowers) or Operating Margins of the electric system (power supply borrowers).

Own funds means money belonging to the borrower other than funds on deposit in the cash-construction fund-trustee account.

Power supply borrower means a Power Supply Borrower as defined in 7 CFR 1710.2.

Regulatory created assets means the sum of the amounts properly recordable in Account 182.2 Unrecovered Plant and Regulatory Study Costs, and Account 182.3 Other Regulatory Assets of the Uniform System of Accounts.

RUS means the Rural Utilities Service, an agency of the U.S. Department of Agriculture established pursuant to Section 232 of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Pub. L. 103–354, 108 Stat. 3178, 7 U.S.C. 6941 et seq.) and, for purposes of this subpart, includes its predecessor, the Rural Electrification Administration.

RUS loan contract means the loan contract between the borrower and RUS.

RUS mortgage means any and all instruments creating a lien on or security interest in the borrower's assets in connection with loans or guarantees under the RE Act.

Solid waste disposal system means any system of community infrastructure that provides collection and/or disposal of solid waste and whose services are available by design to all or a substantial portion of the members of the community.

Subsidiary means a company which is controlled by the borrower through ownership of voting stock, and is further defined in 7 CFR 1767.10.

Supplemental lender means a lender that has provided a supplemental source of financing that is secured by the RUS mortgage.

Telecommunication and other electronic communication system means any community infrastructure that provides telecommunication or other electronic communication services and whose services are available by design to all or a substantial portion of the members of the community.

Total assets means the total assets of the borrower as calculated according to

the Uniform System of Accounts, less regulatory created assets.

Total utility plant means the sum of the borrower's Electric Plant Accounts and Construction Work in Progress—Electric Accounts, as such terms are used in the Uniform System of Accounts.

Uniform System of Accounts means the system of accounts prescribed for RUS borrowers in 7 CFR part 1767.

Water and waste disposal system means any system of community infrastructure that supplies water and/or collects and treats waste water and whose services are available by design to all or a substantial portion of the members of the community.

§ 1717.653 Borrowers in default.

Any borrower not in compliance with all provisions of its mortgage, loan contract, or any other agreements with RUS must, unless the borrower's mortgage, loan contract, or other agreement with RUS specifically provides otherwise with respect to such a borrower:

(a) Obtain prior written approval from the Administrator to invest its own funds or to make loans or guarantees regardless of the aggregate amount of such investments, loans, or guarantees; and

(b) If requested by the Administrator, restructure or reduce the amount of its investments, loans, and guarantees to a level determined by the Administrator, in his or her sole discretion, to be in the financial interest of the government with respect to loan security and/or repayment. If the borrower does not so restructure or reduce its portfolio within a reasonable period of time determined by the Administrator, which shall not exceed 12 months from the date the borrower was notified of the required action, then, upon written notice from RUS, the borrower shall be in default of its RUS loan contract and mortgage.

§ 1717.654 Transactions below the 15 percent level.

(a) A borrower in compliance with all provisions of its RUS mortgage, RUS loan contract, and any other agreements with RUS may, without prior written approval of the Administrator, invest its own funds or make loans or guarantees not in excess of 15 percent of its total utility plant without regard to any provision contained in any RUS mortgage or RUS loan contract to the effect that the borrower must obtain prior approval from RUS, provided, however, that the borrower may not, without the prior written approval of the Administrator, make such investments, loans, and guarantees to extend, add to, or modify its electric system. Moreover, funds necessary to make timely payments of principal and interest on loans secured by the RUS mortgage remain subject to RUS controls on borrower investments, loans and guarantees.

(b) RUS will not consider requests from borrowers to exclude investments, loans, or guarantees made below the 15 percent level. (Categorical exclusions are set forth in § 1717.655.)

§ 1717.655 Exclusion of certain investments, loans, and guarantees.

(a) In calculating the amount of investments, loans and guarantees permitted under this subpart, there is excluded from the computation any investment, loan or guarantee of the type which by the terms of the borrower's RUS mortgage or RUS loan contract the borrower may make in unlimited amounts without RUS approval.

(b) Furthermore, the borrower may make unlimited investments, without prior approval of the Administrator, in:

(1) Securities or deposits issued, guaranteed or fully insured as to payment by the United States Government or any agency thereof;

(2) Capital term certificates, bank stock, or other similar securities of the supplemental lender which have been purchased as a condition of membership in the supplemental lender, or as a condition of receiving financial assistance from such lender, as well as any other investment made in, or loans made to, the National Rural Utilities Cooperative Finance Corporation, the Saint Paul Bank for Cooperatives, and CoBank, ACB;

(3) Patronage capital allocated from an electric power supply cooperative of which the borrower is a member; and

(4) Patronage capital allocated from an electric distribution cooperative to a power supply borrower.

(c) Without prior approval of the Administrator, the borrower may also:

(1) Invest or lend funds derived directly from:

(i) Grants which the borrower in not obligated to repay, regardless of the source or purpose of the grant; and

(ii) Loans received from or guaranteed by any Federal, State or local government program designed to promote rural economic development, provided that the borrower uses the loan proceeds for such purpose;

(2) Make loans guaranteed by an agency of USDA, up to the amount of principal whose repayment, with interest, is fully guaranteed; and

(3) (i) Make unlimited investments in and unlimited loans to finance the following community infrastructure that serves primarily consumers located in rural areas as defined in 7 CFR 1710.2, and guarantee debt issued for the construction or acquisition of such infrastructure, up to an aggregate amount of such guarantees not to exceed 20 percent of the borrower's equity:

(A) Water and waste disposal systems;

(B) Solid waste disposal systems;

(C) Telecommunication and other electronic communication systems; and

(D) Natural gas distribution systems.

(ii) In each of the four cases in paragraph (c)(3)(i) of this section, if the system is a component of a larger organization other than the borrower itself (e.g., if it is a component of a subsidiary of the borrower or a corporation independent of the borrower), to be eligible for the exemption the borrower must certify annually that a majority of the gross revenues of the larger organization during the most recent fiscal year came from customers of said system who were located in a rural area.

(d) Also excluded from the calculation of investments, loans and guarantees made by the borrower are:

(1) Amounts properly recordable in Account 142 Customer Accounts Receivable, and Account 143 Other Accounts Receivable;

(2) Any investment, loan, or guarantee that the borrower is required to make by an agency of USDA, for example, as a condition of obtaining financial assistance for itself or any other person or organization;

(3) Investments included in an irrevocable trust for the purpose of funding post-retirement benefits of the borrower's employees;

(4) Reserves required by a reserve bond agreement or other agreement legally binding on the borrower, that are dedicated to making required payments on debt secured under the RUS mortgage, not to exceed the amount of reserves specifically required by such agreements; and

(5) Investments included in an irrevocable trust approved by RUS and dedicated to the payment of decommissioning costs of nuclear facilities of the borrower.

(e) Grandfathered exclusions. All amounts of individual investments, loans, and guarantees excluded by RUS as of February 16, 1995 shall remain excluded. Such exclusions must have been based on the RUS mortgage, RUS loan contract, regulations, bulletins, memoranda, or other written notice from RUS. Profits, interest, and other returns earned (regardless of whether or not they are reinvested) on such investments, loans and guarantees after

February 16, 1995 shall be excluded only if they are eligible for exclusion under paragraphs (a) through (d) of this section. Any new commitments of money to such investments, loans and guarantees shall likewise be excluded only if they are eligible under paragraphs (a) through (d) of this section.

(f) Any investment, loan or guarantee made by a borrower that is not excluded under this section or under § 1717.657(d) shall be included in the aggregate amount of investments, loans and guarantees made by the borrower, regardless of whether RUS has specifically approved the investment, loan or guarantee under § 1717.657(c), or has approved a related transaction (e.g., a lien accommodation).

§ 1717.656 Exemption of certain borrowers from controls.

(a) Any distribution or power supply borrower that meets all of the following criteria is exempted from the provisions of the RUS mortgage and loan contract that require RUS approval of investments, loans, and guarantees, except investments, loans, and guarantees made to extend, add to, or modify the borrower's electric system:

(1) The borrower is in compliance with all provisions of its RUS mortgage, RUS loan contract, and any other agreements with RUS;

(2) The average revenue per kWh for residential service received by the borrower during the two most recent calendar years does not exceed 130 percent of the average revenue per kWh for residential service during the same period for all residential consumers located in the state or states served by the borrower. This criterion applies only to distribution borrowers and does not apply to power supply borrowers. If a borrower serves customers in more than one state, the state average revenue per kWh will be based on a weighted average using the kWh sales by the borrower in each state as the weight. The calculation will be based on the two most recent calendar years for which both borrower and state-wide data are available. If a borrower fails to qualify for an exemption based solely on its failure to meet this criterion on rate disparity, at the borrower's request the Administrator may, at his or her sole discretion, exempt the borrower if he or she finds that the borrower's strengths with respect to the other criteria are sufficient to offset any weakness due to rate disparity;

(3) In the most recent calendar year for which data are available, the borrower achieved an operating TIER of at least 1.0 and an operating DSC of at least 1.0, in each case based on the average of the two highest ratios achieved in the three most recent calendar years;

(4) The borrower's ratio of net utility plant to long-term debt is at least 1.1, based on year-end data for the most recent calendar year for which data are available; and

(5) The borrower's equity is equal to at least 27 percent of its total assets, based on year-end data for the most recent calendar year for which data are available.

(b) While borrowers meeting the criteria in paragraph (a) of this section are exempt from RUS approval of investments, loans and guarantees, they are nevertheless subject to the record-keeping, reporting, and other requirements of § 1717.658.

(c) Any borrower exempt under paragraph (a) of this section that ceases to meet the criteria for exemption shall, upon written notice from RUS, no longer be exempt and shall be subject to the provisions of this subpart applicable to non-exempt borrowers. A borrower may regain its exemption if it subsequently meets the criteria in paragraph (a) of this section, and is so notified in writing by RUS.

(d)(1) A borrower that loses its exemption and is not in compliance with all provisions of its mortgage, loan contract, or any other agreement with RUS may be required to restructure or reduce its portfolio of investments, loans and guarantees as provided in § 1717.653(b). If the borrower's portfolio exceeds the 15 percent level, the borrower will be required to restructure or reduce its portfolio to the 15 percent level or below. For example, if the borrower's mortgage or loan contract has an approval threshold, the borrower may be required to reduce its portfolio to that level, which in many cases is 3 percent of total utility plant.

(2) A borrower that loses its exemption but is in compliance with all provisions of its mortgage, loan contract, and any other agreements with RUS will be required, if its investments, loans and guarantees exceed the 15 percent level, to restructure or reduce its portfolio to the 15 percent level, unless the Administrator, in his or her sole discretion, determines that such action would not be in the financial interest of the government with respect to loan security and/or repayment. (Such borrower is eligible to ask RUS to exclude a portion of its investments under the conditions set forth in § 1717.657(d).)

(3) If a borrower required to reduce or restructure its portfolio does not fully comply within a reasonable period of time determined by the Administrator, which shall not exceed 12 months from the date the borrower was notified of its loss of exemption, then, upon written notice from RUS, the borrower shall be in default of its RUS loan contract and/or RUS mortgage.

(e) By no later than July 1 of each year, RUS will provide written notice to any borrowers whose exemption status has changed as a result of more recent data being available for the qualification criteria set forth in paragraph (a) of this section, or as a result of other reasons, such as corrections in the available data. An explanation of the reasons for any changes in exemption status will also be provided to the borrowers affected.

§ 1717.657 Investments above the 15 percent level by certain borrowers not exempt under § 1717.656(a).

(a) *General.* (1) This section applies only to borrowers that are in compliance with all provisions of their mortgage, loan contract, and any other agreements with RUS and that do not qualify for an exemption from RUS investment controls under § 1717.656(a).

(2) Nothing in this section shall in any way affect the Administrator's authority to exercise approval rights over investments, loans, and guarantees made by a borrower that is not in compliance with all provisions of its mortgage, loan contract and any other agreements with RUS.

(b) *Distribution borrowers.* Distribution borrowers not exempt from RUS investment controls under § 1717.656(a) may not make investments, loans and guarantees in an aggregate amount in excess of 15 percent of total utility plant. Above the 15 percent level, such borrowers will be restricted to excluded investments, loans and guarantees as defined in § 1717.655. (However, they are eligible to ask RUS to exclude a portion of their investments under the conditions set forth in paragraph (d) of this section.)

(c) *Power supply borrowers.* (1) Power supply borrowers not exempt from RUS investment controls under § 1717.656(a) may request approval to exceed the 15 percent level if all of the following criteria are met:

(i) Satisfactory evidence has been provided that the borrower is in compliance with all provisions of its RUS mortgage, RUS loan contract, and any other agreements with RUS;

(ii) The borrower is not in financial workout and has not had its government debt restructured;

(iii) The borrower has equity equal to at least 5 percent of its total assets; and

(iv) After approval of the investment, loan or guarantee, the aggregate of the

borrower's investments, loans and guarantees will not exceed 20 percent of the borrower's total utility plant.

(2) Borrower requests for approval to exceed the 15 percent level will be considered on a case by case basis. The requests must be made in writing.

(3) In considering borrower requests, the Administrator will take the following factors into consideration:

(i) The repayment of all loans secured under the RUS mortgage will continue to be assured, and loan security must continue to be reasonably adequate, even if the entire investment or loan is lost or the borrower is required to perform for the entire amount of the guarantee. These risks will be considered along with all other risks facing the borrower, whether or not related to the investment, loan or guarantee;

(ii) In the case of investments, the investment must be made in an entity separate from the borrower, such as a subsidiary, whereby the borrower is protected from any liabilities incurred by the separate entity, unless the borrower demonstrates to the satisfaction of the Administrator that making the investment directly rather than through a separate entity will present no substantial risk to the borrower in addition to the possibility of losing all or part of the original investment;

(iii) The borrower must be economically and financially sound as indicated by its costs of operation, competitiveness, operating TIER and operating DSC, physical condition of the plant, ratio of equity to total assets, ratio of net utility plant to long-term debt, and other factors; and

(iv) Other factors affecting the security and repayment of government debt, as determined by the Administrator on a case by case basis.

(4) If the Administrator approves an investment, loan or guarantee, such investment, loan or guarantee will continue to be included when calculating the borrower's ratio of aggregate investments, loans and guarantees to total utility plant.

(d) *Distribution and power supply borrowers.* If the aggregate of the investments, loans and guarantees of a distribution or power supply borrower exceeds 15 percent of the borrower's total utility plant as a result of the cumulative profits or margins, net of losses, earned on said transactions over the past 10 calendar years (i.e., the sum of all profits earned during the 10 years on all transactions—including interest earned on cash accounts, loans, and similar transactions—less the sum of all losses experienced on all transactions during the 10 years) then:

(1) The borrower will not be in default of the RUS loan contract or RUS mortgage with respect to required approval of investments, loans and guarantees, provided that the borrower had not made additional net investments, loans or guarantees without approval after reaching the 15 percent level; and

(2) At the request of the borrower, the Administrator in his or her sole discretion may decide to exclude up to the amount of net profits or margins earned on the borrower's investments, loans and guarantees during the past 10 calendar years, if the Administrator determines that such exclusion will not increase loan security risks. The borrower must provide documentation satisfactory to the Administrator as to the current status of its investments, loans and guarantees and the net profits earned during the past 10 years. Any exclusion approved by the Administrator may or may not reduce the level of investments, loans and guarantees to or below the 15 percent level. If such exclusion does not reduce the level to or below the 15 percent level, RUS will notify the borrower in writing that it must reduce or restructure its investments, loans and guarantees to a level of not more than 15 percent of total utility plant. If the borrower does not come within the 15 percent level within a reasonable period of time determined by the Administrator, which shall not exceed 12 months from the date the borrower was notified of the required action, then, upon written notice from RUS, the borrower shall be in default of its RUS loan contract and mortgage.

§ 1717.658 Records, reports and audits.

(a) Every borrower shall maintain accurate records concerning all investments, loans and guarantees made by it. Such records shall be kept in a manner that will enable RUS to readily determine:

(1) The nature and source of all income, expenses and losses generated from the borrower's loans, guarantees and investments;

(2) The location, identity and lien priority of any loan collateral resulting from activities permitted by this subpart; and

(3) The effects, if any, which such activities may have on the feasibility of loans made, guaranteed or lien accommodated by RUS.

(b) In determining the aggregate amount of investments, loans and guarantees made by a borrower, the borrower shall use the recorded value of each investment, loan or guarantee as reflected on its books and records for the next preceding end-of-month, except for the end-of-year report which shall be based on December 31 information. Every borrower shall also report annually to RUS, in the manner and on the form specified by the Administrator, the current status of each investment, outstanding loan and outstanding guarantee which it has made pursuant to this subpart.

(c) The records of borrowers shall be subject to the auditing procedures prescribed in part 1773 of this chapter. RUS reserves the right to review the financial records of any subsidiaries of the borrower to determine if the borrower is in compliance with this subpart, and to ascertain if the debts, guarantees (as defined in this subpart), or other obligations of the subsidiaries could adversely affect the ability of the borrower to repay its debts to the Government.

(d) RUS will monitor borrower compliance with this subpart based primarily on the annual financial and statistical report submitted by the borrower to RUS and the annual auditor's report on the borrower's operations. However, RUS may inspect the borrower's records at any time during the year to determine borrower compliance. If a borrower's most recent annual financial and statistical report shows the aggregate of the borrower's investments, loans and guarantees to be below the 15 percent level, that in no way relieves the borrower of its obligation to comply with its RUS mortgage, RUS loan contract, and this subpart with respect to Administrator approval of any additional investment, loan or guarantee that would cause the aggregate to exceed the 15 percent level.

§ 1717.659 Effect of this subpart on RUS loan contract and mortgage.

(a) Nothing in this subpart shall affect any provision, covenant, or requirement in the RUS mortgage, RUS loan contract, or any other agreement between a borrower and RUS with respect to any matter other than the prior approval by RUS of investments, loans, and guarantees by the borrower, such matters including, without limitation, extensions, additions, and modifications of the borrower's electric system. Also, nothing in this subpart shall affect any rights which supplemental lenders have under the RUS mortgage, or under their loan contracts or other agreements with their borrowers, to limit investments, loans and guarantees by their borrowers to levels below 15 percent of total utility plant.

(b) RUS will require that any electric loan made or guaranteed by RUS after October 23, 1995 shall be subject to a provision in the loan contract or mortgage restricting investments, loans and guarantees by the borrower substantially as follows: The borrower shall not make any loan or advance to, or make any investment in, or purchase or make any commitment to purchase any stock, bonds, notes or other securities of, or guaranty, assume or otherwise become obligated or liable with respect to the obligations of, any other person, firm or corporation, except as permitted by the RE Act and RUS regulations.

(c) RUS reserves the right to change the provisions of the RUS mortgage and loan contract relating to RUS approval of investments, loans and guarantees made by the borrower, on a case-by-case basis, in connection with providing additional financial assistance to a borrower after October 23, 1995.

Dated: September 15, 1995.

Jill Long Thompson,

Under Secretary, Rural Economic and Community Development.

[FR Doc. 95–23380 Filed 9–20–95; 8:45 am]

BILLING CODE 3410–15–P

Animal and Plant Health Inspection Service

9 CFR Part 77

[Docket No. 93–058–2]

Tuberculosis in Cattle and Bison; State Designation

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the tuberculosis regulations concerning the interstate movement of cattle and bison by raising the designation of Kansas from a modified accredited State to an accredited-free State. We have determined that Kansas meets the criteria for designation as an accredited-free State.

EFFECTIVE DATE: October 23, 1995.

FOR FURTHER INFORMATION CONTACT: Dr. Mitchell A. Essey, Senior Staff Veterinarian, Cattle Diseases and Surveillance, VS, APHIS, 4700 River Road Unit 36, Riverdale, MD 20737–1231, (301) 734–7727.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule effective and published in the Federal Register on June 27, 1995 (60 FR 33100–33101, Docket No. 93–058–1), we amended the tuberculosis regulations in 9 CFR part 77 by removing Kansas from the list of modified accredited States in § 77.1 and adding it to the list of accredited-free States in that section.

Comments on the interim rule were required to be received on or before August 28, 1995. We did not receive any comments. The facts presented in the interim rule still provide a basis for the rule.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12778, and the Paperwork Reduction Act.

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

List of Subjects in 9 CFR Part 77

Animal diseases, Bison, Cattle, Reporting and recordkeeping requirements, Transportation, Tuberculosis.

PART 77—TUBERCULOSIS

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 9 CFR 77.1 and that was published at 60 FR 33100–33101 on June 27, 1995.

Authority: 21 U.S.C. 111, 114, 114a, 115–117, 120, 121, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

Done in Washington, DC, this 15th day of September 1995.

Terry L. Medley,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 95–23478 Filed 9–20–95; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95–CE–20–AD; Amendment 39–9379; AD 95–19–18]

Airworthiness Directives; Twin Commander Aircraft Corporation 680, 681, 690, and 695 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain Twin Commander Aircraft Corporation (Twin Commander) 680, 681, 690, and 695 series airplanes. This action requires installing a placard warning the pilot to observe turbulent air penetration speeds. Two accidents involving Model 690 airplanes where the affected airplanes encountered turbulence while descending at high speeds prompted this action. The actions specified by this AD are intended to prevent structural damage to the airplane caused by excessive turbulence, which could result in loss of control of the airplane.

EFFECTIVE DATE: October 25, 1995.

ADDRESSES: Service information that applies to this AD may be obtained from the Twin Commander Aircraft Corporation, 19010 59th Drive, N.E., Arlington, Washington 98223. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket 95–CE–20–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. David D. Swartz, Aerospace Engineer, FAA, Northwest Mountain Region, 1601 Lind Avenue S.W., Renton, Washington 98055–4056; telephone (206) 227–2624; facsimile (206) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to Twin Commander 680, 681, 690, and 695 series airplanes was published in the Federal Register on April 11, 1995 (60 FR 18374). The action proposed to require incorporating a placard and Airplane Flight Manual/Pilot's Operating Handbook (AFM/POH) revisions that warn the airplane operator of the importance of observing the Turbulent Air Penetration and Maneuvering speeds. The following kits include the placard and AFM/POH revisions:

Kit No.	Model affected
SB220–1	680T.
SB220–2	680V.
SB220–3	680W.
SB220–4	681.
SB220–5	690.
SB220–6	690A.
SB220–7	690B.
SB220–8	690C.
SB220–9	690D.
SB220–10	695.

Kit No.	Model affected
SB220–11	695A.
SB220–12	695B.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

The FAA estimates that 566 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 1 workhour per airplane to accomplish the required action, and that the average labor rate is approximately $60 an hour. Parts cost approximately $38 per airplane. Based on these figures, the total cost impact of this AD on U.S. operators is estimated to be $55,468. This figure is based on the assumption that no affected airplane owner/operator has incorporated the placard and AFM/POH revisions included with the applicable SB220 kit. Twin Commander has informed the FAA that no kits have been distributed to the owners/operators of the affected airplanes.

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

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 USC 106(g), 40101, 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive (AD) to read as follows:

95–19–18 Twin Commander Aircraft Corporation: Amendment 39–9379; Docket No. 95–CE–20–AD.

Applicability: The following airplane models and serial numbers, certificated in any category.

Models	Serial No.
680T and 680V	1473 through 1720.
680W	1721 through 1850.
681	6001 through 6072.
690	11001 through 11079.
690A	11100 through 11344.
690B	11350 through 11566.
690C	11600 through 11735.
690D	15001 through 15042.
695	95000 through 95084.
695A	96000 through 96100.
695B	96201 through 96208.

Note 1: This AD applies to each airplane identified in the preceding applicability revision, 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 within the next 50 hours time-in-service after the effective date of this AD, unless already accomplished.

To prevent structural damage to the airplane caused by excessive turbulence, which could result in loss of the airplane, accomplish the following:

(a) Install the placard (to the windshield centerpost) and incorporate the airplane flight manual/pilot operating handbook (AFM/POH) revisions that are included with the kits presented below. The placard and AFM/POH revisions provide warnings to the airplane operator of the importance of observing the Turbulent Air Penetration and Maneuvering speeds:

Kit No.	Model affected
SB220–1	680T.
SB220–2	680V.
SB220–3	680W.
SB220–4	681.
SB220–5	690.
SB220–6	690A.
SB220–7	690B.
SB220–8	690C.
SB220–9	690D.
SB220–10	695.
SB220–11	695A.
SB220–12	695B.

Note 2: Twin Commander Service Bulletin No. 220, dated February 1, 1995, relates to the subject of this AD, and references the SB220 service kits specified above.

(b) 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.

(c) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Northwest Mountain Region, 1601 Lind Avenue S.W., Renton, Washington 98055–4056. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

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

(d) All persons affected by this directive may obtain copies of the kits referenced above that include the placard and the AFM revisions upon request to the Twin Commander Aircraft Corporation, 19010 59th Drive, NE., Arlington, Washington 98223; or may examine this document at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(e) This amendment (39–9379) becomes effective on October 25, 1995.

Issued in Kansas City, Missouri, on September 13, 1995.

Gerald W. Pierce,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 95–23355 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–13–U

14 CFR Part 71

[Airspace Docket No. 95–AWA–3]

Establishment of Class C Airspace and Revocation of Class D Airspace, Cyril E. King Airport, VI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes a Class C airspace area and revokes the Class D airspace area at the Cyril E. King Airport, Charlotte Amalie St. Thomas, VI. Cyril E. King Airport is a public-use facility with a Level II control tower served by Limited Radar Approach Control. The establishment of this Class C airspace area requires pilots to maintain two-way radio communications with the air traffic control (ATC) while in Class C airspace. Implementation of the Class C airspace, at this location, promotes the efficient control of air traffic and reduces the risk of midair collision in the terminal area.

EFFECTIVE DATE: 0901 UTC, November 9, 1995.

FOR FURTHER INFORMATION CONTACT: Patricia P. Crawford, Airspace and Obstruction Evaluation Branch (ATP–240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–9255.

SUPPLEMENTARY INFORMATION:

History

On April 22, 1982, the National Airspace Review (NAR) plan was published in the Federal Register (47 FR 17448). The plan encompassed a review of airspace use and procedural aspects of the ATC system. Among the main objectives of the NAR was the improvement of the ATC system by increasing efficiency and reducing complexity. In its review of terminal airspace, NAR Task Group 1–2 concluded that Terminal Radar Service Areas (TRSA's) should be replaced. Four types of airspace configurations were considered as replacement candidates, of which Model B, since redesignated Airport Radar Service Area (ARSA), was recommended by a consensus of the task group.

The FAA published NAR Recommendation 1–2.2.1, ''Replace Terminal Radar Service Areas with Model B Airspace and Service'' in Notice 83–9 (July 28, 1983; 48 FR 34286) proposing the establishment of ARSA's at the Robert Mueller Municipal Airport, Austin, TX, and the Port of Columbus International Airport, Columbus, OH. ARSA's were designated at these airports on a temporary basis by SFAR No. 45 (October 28, 1983; 48 FR 50038) to provide an operational confirmation of the ARSA concept for potential application on a national basis.

Following a confirmation period of more than a year, the FAA adopted the NAR recommendation and, on February 27, 1985, issued a final rule (50 FR 9252; March 6, 1985) defining ARSA airspace and establishing air traffic rules for operation within such an area.

Concurrently, by separate rulemaking action, ARSA's were permanently established at the Austin, TX, Columbus, OH, and the Baltimore/Washington International Airports (50 FR 9250; March 6, 1985). The FAA stated that future notices would propose ARSA's for other airports at which TRSA procedures were in effect.

Additionally, the NAR Task Group recommended that the FAA develop quantitative criteria for proposing to establish ARSA's at locations other than those which were included in the TRSA replacement program. The task group recommended that these criteria include, among other things, traffic mix, flow and density, airport configuration, geographical features, collision risk assessment, and ATC capabilities to provide service to users. These criteria have been developed and are being published via the FAA directives system.

The FAA has established ARSA's at 121 locations under a paced implementation plan to replace TRSA's with ARSA's. This is one of a series of notices to implement ARSA's at locations with TRSA's or locations without TRSA's that warrant implementation of an ARSA. Airspace Reclassification, effective September 16, 1993, reclassified ARSA's as Class C airspace areas. This change in terminology is reflected in the remainder of this rule.

This amendment establishes a Class C airspace area at a location which was not identified as a candidate for Class C in the preamble to Amendment No. 71–10 (50 FR 9252). Other candidate locations will be proposed in future notices published in the Federal Register.

The Cyril E. King Airport is a public-use airport with an operating Level II control tower served by Limited Radar Approach Control. Passenger enplanements reported at Cyril E. King Airport were 640,642, 583,817, and 602,373, respectively, for calendar years 1993, 1992, and 1991. This volume of passenger enplanements and aircraft operations meets the FAA criteria for establishing Class C airspace to enhance safety.

On June 27, 1995, the FAA proposed to designate a Class C airspace area at the Cyril E. King Airport, Charlotte Amalie St. Thomas, VI (60 FR 33152). Interested parties were invited to participate in this rulemaking proceeding by submitting comments on the proposal to the FAA. No comments were received.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) establishes a Class C airspace area and revokes the Class D airspace area at the Cyril E. King Airport, Charlotte Amalie St. Thomas, VI. Cyril E. King Airport is a public airport with a Level II operating control tower served by Limited Radar Approach Control. In addition, this action removes the existing Class D airspace area at Cyril E. King Airport, Charlotte Amalie St. Thomas, VI. The establishment of this Class C airspace area will require pilots to establish two-way radio communications with the ATC facility providing air traffic services prior to entering the airspace and thereafter maintain those communications while within the Class C airspace area. Implementation of the Class C airspace area will promote the efficient control of air traffic and reduce the risk of midair collision in the terminal area. The Class D airspace area is being revoked because Class C airspace is more restrictive (i.e., carries higher operational requirements) than Class D airspace. Therefore, the FAA is revoking the Cyril E. King Airport, Charlotte Amalie St. Thomas, VI, Class D airspace area.

This action supports a goal of airspace reclassification to simplify the airspace by eliminating overlapping airspace designations. The coordinates in this document are based on North American Datum 83. Except for editorial changes and minor changes to the coordinates from ''lat. 18°20′19″N., long. 64°58′11″W.'' to ''lat. 18°20′14″N., long. 64°58′24″W,'' this amendment is the same as that proposed in the notice. Class C and Class D airspace designations are published in paragraphs 4000 and 5000, respectively, of FAA Order 7400.9C dated August 17, 1995, and effective September 16, 1995, which is incorporated by reference in 14 CFR 71.1. The Class C airspace area listed in this document will be published subsequently in the Order and the Class D airspace area listed in this document will be removed subsequently from the Order.

Regulatory Evaluation Summary

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic effect of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effect of regulatory changes on international trade. In conducting these analyses, the FAA has determined that this final rule (1) Will generate benefits that justify its costs and is not ''a significant regulatory action'' as defined in the Executive Order; (2) is not significant as defined in Department of Transportation's Regulatory Policies and Procedures; (3) will not have a significant impact on a substantial number of small entities; and (4) will not constitute a barrier to international trade. These analyses, available in the docket, are summarized below.

Costs

The establishment of the St. Thomas Class C airspace area will impose a one-time FAA administrative cost of $600. For the aviation community (namely, aircraft operators and fixed based operators), this final rule will impose little, if any, operating or equipment cost. The potential costs are presented below.

The FAA does not expect to incur any additional costs for ATC staffing, training, or facility equipment. The FAA is confident that it can handle any additional traffic that will participate in radar services through more efficient use of personnel at the current staffing level.

The FAA holds an informal public meeting at each proposed Class C airspace area location. These meetings provide pilots with the best opportunity to learn both how a Class C airspace area works and how it will affect their local operations. The expenses associated with these public meetings are incurred regardless of whether a Class C airspace area is ultimately established. Thus, they are more appropriately considered routine FAA costs. When this Class C airspace area becomes effective, any subsequent public information costs will be strictly attributed to the final rule. For instance, the FAA will distribute a Letter To Airmen to all pilots residing within 50 miles of the Class C airspace area site that will explain the operation and airspace configuration of the Class C airspace area. The Letter to Airmen cost will be approximately $600. This one-time negligible cost will be incurred upon the initial establishment of this Class C airspace area.

The FAA anticipates that some pilots who currently transit the terminal area without establishing radio communications may choose to navigate around the airspace. However, the FAA contends that these operators can navigate around, over, or under the airspace without significantly deviating from their regular flight paths.

The FAA recognizes that delays might develop at St. Thomas following the initial establishment of the Class C airspace area. The additional traffic that ATC will be handling due to the mandatory pilot participation requirement may result in minor delays to aircraft operations. However, those delays that do occur are typically transitional in nature. The FAA contends that any potential delays will eventually be more than offset by the increased flexibility afforded controllers in handling traffic as a result of Class C separation standards. This has been the experience at other Class C airspace areas.

The FAA assumes that aircraft operating in the vicinity of St. Thomas already have two-way radio communications capability and, therefore, will not incur any additional costs.

Once this Class C airspace area goes into place, aircraft operators will be subject to the Mode C Rule. That rule requires all aircraft to be equipped with an operable transponder with Mode C capability when operating in and above a Class C airspace area (up to 10,000 feet MSL). Some aircraft operators may have to acquire (or upgrade to) a Mode C transponder as a result of the establishment of the Class C airspace area. However, the cost of acquiring a Mode C transponder for all aircraft in the U.S. was previously accounted for as a cost of the Mode C Rule.

The FAA has also adopted regulations requiring certain aircraft operators to install Traffic Collision Avoidance System (TCAS), which allows pilots to determine the position of other aircraft from the signal emitted by Mode C transponders. TCAS issues conflict resolution advisories as to what evasive actions are most appropriate for avoiding potential midair collisions. The TCAS Rule will not contribute to the potential costs associated with establishing the Class C airspace area, but it will contribute to the potential safety benefits. The benefits of establishing the St. Thomas Class C airspace area are discussed below.

Benefits

The primary benefit of establishing the St. Thomas Class C airspace area will be enhanced aviation safety for the increasing number of passengers transiting through airspace. The volume of passenger enplanements at St. Thomas has risen dramatically. Enplanements in 1995 are projected to be 648,000, up from 491,000 in 1990; by 2000, enplanements are projected to be 810,000. This high volume of passenger enplanements has made St. Thomas eligible to become a Class C airspace area.

To study the effect that Class C airspace areas have on reducing the risk of midair collisions, the FAA looked at the occurrences of near-midair collisions (NMAC). In a study of NMAC data, the FAA's Office of Aviation Safety found that approximately 15 percent of reported NMACs occur in airspace similar to that at St. Thomas. This study found that about half of all NMACs occur in the 1,000 to 5,000 feet altitude range, which is closely comparable to the altitudes where aircraft operate around airports that qualify for Class C airspace areas. This study also found that over 85 percent of NMACs occur in visual flight rules (VFR) conditions when visibility is five miles or greater. Finally, the study found that the largest number of NMAC reports are associated with instrument flight rules (IFR) operators under radar control conflicting with VFR traffic during VFR flight conditions below 12,500 feet. The mandatory participation requirements of the Class C airspace area and the radar services provided by ATC to VFR as well as IFR pilots will help alleviate such conflicts.

A NAR Task Group study conducted by Engineering & Economics Research, Inc. reviewed NMAC data for Austin and Columbus during the 1978 to 1984 period. This study found that the presence of Class C airspace reduced the probability of NMAC occurrence by 38 percent at Austin and 33 percent at Columbus. Another FAA study estimated that the potential for NMACs could be reduced by about 44 percent. Since near midair and actual midair collisions result from similar causal factors, a reduction in the risk of NMACs suggests a reduction in the risk of actual midair collisions.

Ordinarily, the benefit of a reduction in the risk of midair collisions from establishing a Class C airspace area will be attributed entirely to establishing the Class C airspace area. However, an indeterminate amount of the benefits

have to be credited to the interaction of the Class C airspace area program with the Mode C Rule, which in turn interacts with the TCAS Rule. The benefits of establishing a Class C airspace area, as well as other designated airspace actions that require Mode C transponders, cannot be separated from the benefits of the Mode C and TCAS Rules. These airspace actions will share potential benefits totaling $4.4 billion.

Comparison of Costs and Benefits

The rule to establish a Class C airspace area at St. Thomas, VI, will impose a negligible cost of $600 on the agency. When this cost estimate of $600 is added to the total cost of establishing the other Mode-C-dependent airspace classes and the Mode C Rule and TCAS Rule, the costs will still be less than their total potential safety benefits. The rule will also generate some benefits in the form of enhanced operational efficiency while imposing little, if any, additional operating costs on pilots who choose to remain clear of the airspace. Thus, the FAA believes that the rule will be cost-beneficial.

International Trade Impact Assessment

The rule will only affect U.S. terminal airspace operating procedures at and in the vicinity of St. Thomas, VI. The rule will not impose a competitive trade disadvantage on foreign firms in the sale of either foreign aviation products or services in the United States. In addition, domestic firms will not incur a competitive trade disadvantage in either the sale of United States aviation products or services in foreign countries. Since all operators will be affected, the final rule will not give a competitive trade advantage or disadvantage to U.S. or foreign air carriers, fixed-base operators, or airports in the vicinity of St. Thomas.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. Small entities are independently owned and operated small businesses and small not-for-profit organizations. The RFA requires agencies to review rules that may have ''a significant economic impact on a substantial number of small entities.''

Under FAA Order 2100.14A entitled Regulatory Flexibility Criteria and Guidance, a significant economic impact means annualized net compliance cost to an entity, which when adjusted for inflation, is greater than or equal to the threshold cost level for that entity. A substantial number of small entities means a number that is eleven or more and is more than one-third the number of the small entities subject to a proposed or existing rule.

For the purpose of this evaluation, the small entities that will be potentially affected by the final rule are fixed-base operators, flight schools, banner towing, seaplane shuttle bases, and other small aviation businesses located at and around St. Thomas. By using cutouts, special procedures, and Letters of Agreement between ATC and the affected parties, the FAA will make any practicable effort to eliminate the adverse affects on the operations of small entities in the vicinity of St. Thomas. The FAA has utilized such arrangements extensively in implementing other Class C airspace areas in the past. In addition, any delay problems that may initially develop following implementation will be transitory. This has been the experience at other Class C airspace areas. Thus, the final rule will not result in a significant economic impact on a substantial number of small entities.

Federalism Implications

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

Conclusion

For the reasons discussed above, the FAA has determined that this rule (1) is not a ''significant regulatory action'' under Executive Order 12866; and (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). It is also certified that this rule does not require preparation of a Regulatory Flexibility Analysis under the RFA.

List of Subjects 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

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

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

§ 71.1 [Amended]

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

Paragraph 4000—Subpart C-Class C Airspace

* * * * *

ASO VI C Charlotte Amalie St. Thomas, VI [New]

Cyril E. King Airport
(lat. 18°20′14″N., long. 64°58′24″W.)

That airspace extending upward from the surface to and including 4,000 feet MSL within a 5-mile radius of the Cyril E. King Airport; and that airspace extending upward from 1,900 feet to and including 4,000 feet MSL within a 10-mile radius of the airport from the 075° bearing from the airport clockwise to the 020° bearing from the airport. This Class C airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

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Paragraph 5000—Subpart D-Class D Airspace

* * * * *

ASO VI D Charlotte Amalie Cyril E. King Airport, St. Thomas, VI [Removed]

* * * * *

Issued in Washington, DC, on September 6, 1995.

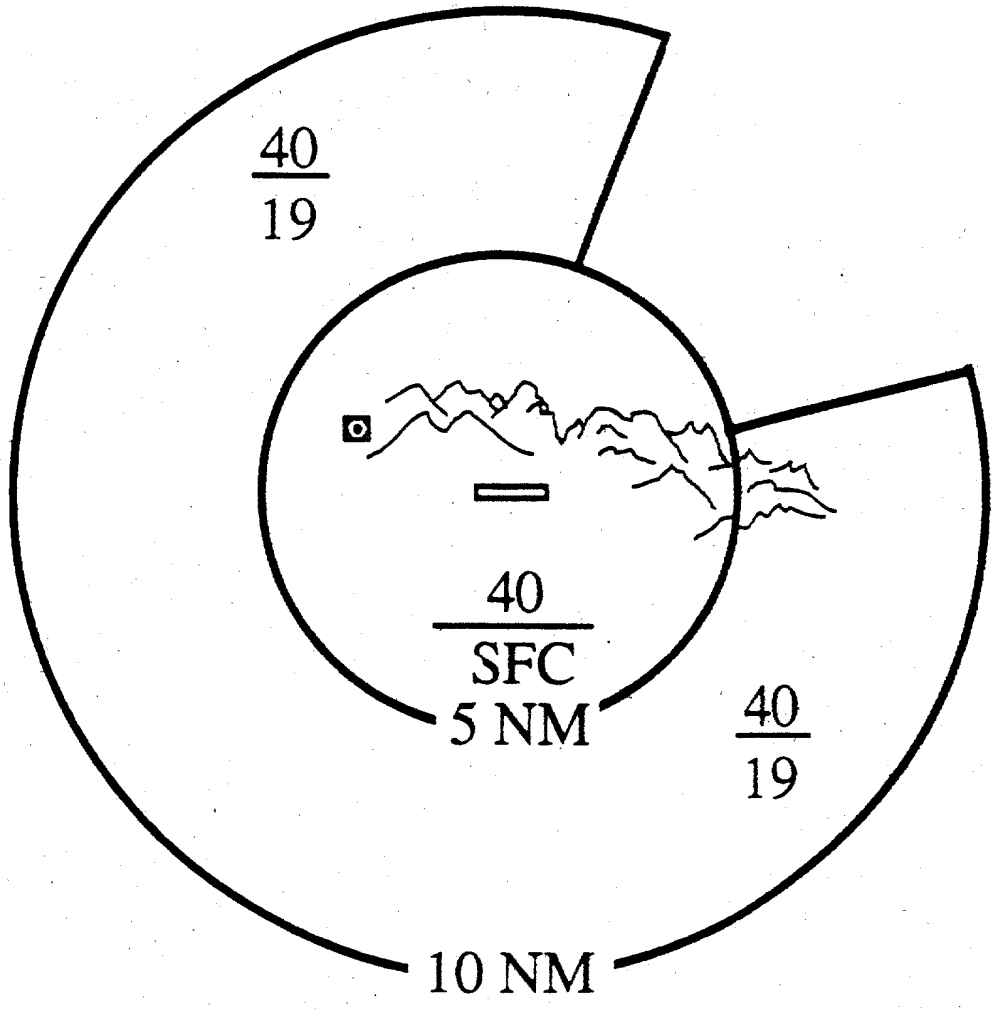
Harold W. Becker,

Manager, Airspace—Rules and Aeronautical Information Division.

BILLING CODE: 4910–13–P

ST. THOMAS
CLASS C AIRSPACE AREA

(Not to be used for navigation)



Prepared by the
FEDERAL AVIATION ADMINISTRATION
Publications Branch
ATP-210

[FR Doc. 95–23459 Filed 9–20–95; 8:45 am]
BILLING CODE 4910–13–C

14 CFR Part 71

[Airspace Docket No. 94–ASO–21]

Modification Jet Routes; Florida

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment modifies several existing jet routes in the Miami, FL, area. This action is necessary because of the decommissioning of the Miami, FL, Very High Frequency Omnidirectional Range and Tactical Air Navigation (VORTAC) and the commissioning of the Dolphin, FL, VORTAC.

EFFECTIVE DATE: 0901 UTC, November 9, 1995.

FOR FURTHER INFORMATION CONTACT: Patricia P. Crawford, Airspace and Obstruction Evaluation Branch (ATP–240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–9255.

SUPPLEMENTARY INFORMATION:

History

On May 11, 1995, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to modify several existing jet routes in the Miami, FL, area (60 FR 25175). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, this amendment is the same as that proposed in the notice. Jet routes are published in paragraph 2004 of FAA Order 7400.9C dated August 17, 1995, and effective September 16, 1995, which is incorporated by reference in 14 CFR 71.1. The jet routes listed in this document will be published subsequently in the Order.

The Rule

This amendment to part 71 of the Federal Aviation Regulations modifies existing jet routes in the Miami, FL, area. This action is necessary because of the decommissioning of the Miami, FL, VORTAC and the commissioning of the new Dolphin, FL, VORTAC.

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

Because these amendments involve, in part, the designation of navigable airspace outside the United States, the Administrator has consulted with the Secretary of State and the Secretary of Defense in accordance with the provisions of Executive Order 10854.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71, as follows:

PART 71—[AMENDED]

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

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

§ 71.1 [Amended]

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

Paragraph 2004—Jet Routes

* * * * *

J–43 (Revised)

From Dolphin, FL; LaBelle, FL; St. Petersburg, FL; Tallahassee, FL; Atlanta, GA; Volunteer, TN; Falmouth, KY; Rosewood, OH; Carleton, MI; to Sault Ste. Marie, MI.

* * * * *

J–53 (Revised)

From Dolphin, FL; INT Dolphin 354° and Pahokee, FL, 157° radials; Pahokee; INT Pahokee 342° and Orlando, FL, 162° radials; Orlando; Craig, FL; INT Craig 347° and Colliers, SC, 174° radials; Colliers; Spartanburg, SC; Pulaski, VA; INT of Pulaski 015° and Ellwood City, PA, 177° radials; to Ellwood City.

* * * * *

J–55 (Revised)

From Dolphin, FL; INT Dolphin 331° and Gainesville, FL, 157°, radials; INT Gainesville 157° and Craig, FL, 192°, radials; Craig; INT Craig 004° and Savannah, GA, 197° radials; Savannah; Charleston, SC; Florence, SC; INT Florence 003° and Raleigh-Durham, NC, 224° radials; Raleigh-Durham; INT Raleigh-Durham 035° and Hopewell, VA, 234° radials; Hopewell; to INT Hopewell 030° and Nottingham, MD, 174° radials. From Sea Isle, NJ; INT Sea Isle 050° and Hampton, NY, 223° radials; Hampton; Providence, RI; Boston, MA; Kennebunk, ME; Presque Isle, ME; to Mont Joli, PQ, Canada, excluding the portion within Canada.

* * * * *

J–58 (Revised)

From Oakland, CA, via Manteca, CA; Coaldale, NV; Wilson Creek, NV; Milford, UT; Farmington, NM; Las Vegas, NM; Amarillo, TX; Wichita Falls, TX; Dallas-Fort Worth, TX; Alexandria, LA; Harvey, LA; INT of Grand Isle, LA, 105° and Crestview, FL, 201° radials; INT of Grand Isle 105° and Sarasota, FL, 286° radials; Sarasota; Lee County, FL; to the INT Lee County 120° and Dolphin, FL, 293° radials; Dolphin.

* * * * *

J–73 (Revised)

From Dolphin, FL; LaBelle, FL; Lakeland, FL; Tallahassee, FL; La Grange, GA; Nashville, TN; Pocket City, IN; to Northbrook, IL.

* * * * *

J–75 (Revised)

From Dolphin, FL; INT Dolphin 293° and Lee County, FL, 120° radials; Lee County; INT Lee County 340° and Taylor, FL, 176° radials; Taylor; INT Taylor 019° and Columbia, SC, 203° radials; Columbia; Greensboro, NC; Gordonsville, VA; INT Gordonsville 040° and Modena, PA, 231° radials; Modena; Solberg, NJ; Carmel, NY; INT Carmel 045° and Boston, MA, 252° radials; to Boston.

* * * * *

J–79 (Revised)

From Key West, FL; INT Key West 038° and Dolphin, FL, 244° radials; Dolphin; Palm Beach, FL; Vero Beach, FL; Ormond Beach, FL; INT Ormond Beach 356° and Savannah, GA, 184° radials; INT Savannah 184° and Charleston, SC, 212° radials; Charleston; Tar River, NC; Franklin, VA; Salisbury, MD; INT Salisbury 018° and Kennedy, NY, 218° radials; Kennedy; INT Kennedy 080° and Nantucket, MA, 254° radials; INT Nantucket 254° and Marconi, MA, 205° radials; Marconi; INT Marconi 006° and Bangor, ME, 206° radials; Bangor.

* * * * *

J–81 (Revised)

From Dolphin, FL; INT Dolphin 354° and Pahokee, FL, 157° radials; Pahokee; INT Pahokee 342° and Orlando, FL, 162° radials; Orlando; Cecil; INT Cecil 007° and Craig, FL,

347° radials; INT Craig 347° and Colliers, SC, 174°, radials; Colliers.

* * * * *

J–85 (Revised)

From Dolphin, FL; INT Dolphin 331° and Gainesville, FL, 157° radials; Gainesville; Taylor, FL; Alma, GA; Colliers, SC; Spartanburg, SC; Charleston, WV; INT of the Charleston 357° and the DRYER, OH, 172° radials; DRYER. The portion within Canada is excluded.

J–86 (Revised)

From Boulder City, NV, via Peach Springs, AZ; Winslow, AZ; El Paso, TX; Fort Stockton, TX; Junction, TX; Austin, TX; Humble, TX; Leeville, LA; INT of Leeville 104° and Sarasota, FL, 286° radials; Sarasota; INT of Sarasota 103° and La Belle, FL, 313° radials; La Belle; Dolphin, FL.

* * * * *

Issued in Washington, DC, on September 12, 1995.

Reginald C. Matthews,

Acting Manager, Airspace—Rules and Aeronautical Information Division.

[FR Doc. 95–23428 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–13–P

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14 CFR Part 73

[Airspace Docket No. 95–ASO–12]

Amendment of Restricted Area R–3004, Fort Gordon, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action lowers the upper limit of Restricted Area R–3004, Fort Gordon, GA, from 17,000 feet mean sea level (MSL) to 16,000 feet MSL. The using agency has determined that there is no longer a requirement for restricted airspace above 16,000 feet MSL at this location.

EFFECTIVE DATE: 0901 UTC, November 9, 1995.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Military Operations Program Office (ATM–420), Office of Air Traffic System Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–9361.

SUPPLEMENTARY INFORMATION:

The Rule

This amendment to part 73 of the Federal Aviation Regulations reduces the size of Restricted Area R–3004 at Fort Gordon, GA, by lowering the upper limit of the restricted area from 17,000 feet above MSL to 16,000 feet MSL. Based on a review of area utilization and projected requirements, the using agency determined that there is no longer a need for restricted airspace above 16,000 feet MSL in R–3004. This action will not change the current lateral boundaries, time of designation, or activities conducted in R–3004. I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary because this action is a minor amendment in which the public would not be particularly interested. Section 73.30 of part 73 of the Federal Aviation Regulations was republished in FAA Order 7400.8C dated June 29, 1995.

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

Environmental Review

This action amends the internal subdivision of existing restricted airspace and does not affect the lateral boundaries, times of use, or activities conducted within the restricted airspace. As a result, there are no changes to air traffic control procedures or routes. Therefore, this action is not subject to environmental assessments and procedures under FAA Order 1050.1D, ''Policies and Procedures for Considering Environmental Impacts,'' and the National Environmental Policy Act.

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—[AMENDED]

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

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

§ 73.30 [Amended]

2. R–3004 Fort Gordon, GA [Amended].

By removing the current ''Designated altitudes. Surface to 17,000 feet MSL'' and substituting the following:

''Designated altitudes. Surface to 16,000 feet MSL.''

Issued in Washington, DC, on September 8, 1995.

Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 95–23430 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–13–P

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14 CFR Part 73

[Airspace Docket No. 95–ASO–6]

Amendment of Restricted Areas R–3702A and R–3702B, Fort Campbell, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action changes the altitude that defines the internal vertical subdivision between Restricted Areas R–3702A and R–3702B, Fort Campbell, KY, in order to efficiently utilize the airspace.

Restricted Area R–3702C is not affected by this action.

EFFECTIVE DATE: 0901 UTC, November 9, 1995.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Military Operations Program Office (ATM–420), Office of Air Traffic System Management, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–9361.

SUPPLEMENTARY INFORMATION:

The Rule

This amendment to part 73 of the Federal Aviation Regulations changes the designated altitudes that divide Restricted Areas R–3702A and R–3702B, Fort Campbell, KY. Currently, R–3702A extends from the surface to 16,000 feet above mean sea level (MSL). R–3702B overlies R–3702A and extends from 16,000 feet MSL to Flight Level 220 (FL 220). The using agency frequently conducts activities within R–3702A that require restricted airspace only up to 6,000 feet MSL. However, due to the current configuration of the areas, airspace is actually restricted up to 16,000 feet MSL whenever R–3702A is activated. This amendment lowers the dividing line between R–3702A and R–3702B from 16,000 feet MSL to 6,000 feet MSL. This change enables the using agency to accomplish its mission while improving the capability to activate only the minimum amount of restricted

airspace necessary for that mission. There is no change to the lateral boundaries, times of use, or activities conducted in R–3702A and R–3702B. R–3702C, which overlies R–3702B, is unaffected by this amendment. This amendment affects only the internal subdivision of existing restricted areas and enhances efficient airspace utilization. Therefore, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary because this action is a minor amendment in which the public would not be particularly interested. Section 73.37 of part 73 of the Federal Aviation Regulations was republished in FAA Order 7400.8C dated June 29, 1995.

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

Environmental Review

This action amends the internal subdivision of existing restricted airspace and does not affect the lateral boundaries, times of use, or activities conducted within the restricted airspace. As a result, there are no changes to air traffic control procedures or routes. Therefore, this action is not subject to environmental assessments and procedures under FAA Order 1050.1D, ''Policies and Procedures for Considering Environmental Impacts,'' and the National Environmental Policy Act.

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—[AMENDED]

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

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

§ 73.37 [Amended]

2. R–3702A Fort Campbell, KY [Amended].

By removing the current ''Designated altitudes. Surface to 16,000 feet MSL'' and substituting the following:

''Designated altitudes. Surface to 6,000 feet MSL.''

3. R–3702B Fort Campbell, KY [Amended].

By removing the current ''Designated altitudes. 16,000 feet MSL and including FL 220'' and substituting the following:

''Designated altitudes. 6,000 feet MSL to FL 220.''

Issued in Washington, DC, on September 8, 1995.

Harold W. Becker,

Manager, Airspace—Rules and Aeronautical Information Division.

[FR Doc. 95–23429 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1700

Requirements for the Special Packaging of Household Substances; Correction

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule; correction.

SUMMARY: The CPSC corrects the amendments to its requirements under the Poison Prevention Packaging Act of 1970 (''PPPA'') for child-resistant packaging which appeared in the Federal Register on July 21, 1995 (60 FR 37710). The correction specifies the effective date for the amendment to 16 CFR 1700.14 (see 60 FR at 37739, col. 2).

DATES: The amendment to 16 CFR 1700.14 will become effective July 22, 1996.

FOR FURTHER INFORMATION CONTACT: Michael Bogumill, Division of Regulatory Management, Directorate for Compliance, Consumer Product Safety Commission, Washington, DC 20207; telephone (301)504–0400, ext. 1368.

Dated: September 15, 1995.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 95–23351 Filed 9–20–95; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 184

[Docket No. 89G–0316]

Maltodextrin Derived From Potato Starch; Affirmation of GRAS Status as Direct Human Food Ingredient

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is affirming that maltodextrin derived from potato starch is generally recognized as safe (GRAS) for use as a direct human food ingedient. This action is in response to a petition filed by AVEBE America, Inc.

DATES: Effective September 21, 1995. The Director of the Office of the Federal Register approves the incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51 of a certain publication listed in 21 CFR 184.1444, effective September 21, 1995.

FOR FURTHER INFORMATION CONTACT: Andrew D. Laumbach, Center for Food Safety and Applied Nutrition (HFS–217), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3071.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the procedures described in § 170.35 (21 CFR 170.35), AVEBE America, Inc., Princeton Corporate Center, 4 Independence Way, Princeton, NJ 08450, submitted a petition (GRASP 9G0353) proposing that maltodextrin derived from potato starch be affirmed as GRAS for use as a direct food ingredient.

FDA published a notice of filing of this petition in the Federal Register of August 31, 1989 (54 FR 36053), and gave interested parties an opportunity to submit comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857. FDA received no comments in response to that notice.

II. Standards for GRAS Affirmation

Pursuant to § 170.30 (21 CFR 170.30), general recognition of safety of food ingredients may be based only on the views of experts qualified by scientific training and experience to evaluate the safety of food substances. The basis of such views may be either: (1) Scientific procedures, or (2) in the case of a substance used in food prior to January

1, 1958, through experience based on common use in food. General recognition of safety based upon scientific procedures requires the same quantity and quality of scientific evidence as is required to obtain approval of a food additive regulation, and ordinarily is to be based upon published studies, which may be corroborated by unpublished studies and other data and information (§ 170.30(b)). General recognition of safety through experience based on common use of a substance in food prior to January 1, 1958, may be determined without the quantity or quality of scientific evidence required for approval of a food additive regulation, and ordinarily is to be based upon generally available data and information (§ 170.30(c)(1)).

III. Safety Evaluation

The petition by AVEBE America, Inc., argues that experience based on common use in food prior to 1958 establishes that maltodextrin derived from potato starch is GRAS. The petition contains documentation that maltodextrin derived from potato starch was used in infant formula prior to 1958. However, based upon an evaluation of the evidence presented, the agency does not agree that the information in the petition establishes that maltodextrin derived from potato starch was in common use in food as defined in § 170.3(f) (21 CFR 170.3(f)), before 1958. However, the agency does conclude that the information presented in the petition, together with other available information, supports a determination that use of maltodextrin derived from potato starch is GRAS based upon scientific procedures. Data in the petition, along with other information in the agency's files, demonstrate that potato starch is chemically equivalent to corn starch. Additionally, the hydrolysis products made from these starch sources, including maltodextrins, are essentially equivalent. Thus, maltodextrin derived from potato starch is equivalent in all material respects to maltodextrin derived from corn starch, which has been affirmed as GRAS (§ 184.1444 (21 CFR 184.1444)).

1. Evidence of Uses in Food Prior to 1958

The agency has reviewed the information submitted by the petitioner to support its assertion that maltodextrin derived from potato starch was in common use in food prior to 1958 in Europe. ''Common use in food'' means a substantial history of consumption of a substance for food use by a significant number of consumers (§ 170.3(f)).

Information included in the petition documents that maltodextrin derived from potato starch was first sold for use by infants and children in Europe in 1935 (Ref. 1). One such product was produced by enzyme hydrolysis of potato starch as described by a 1951 brochure (Ref. 2), which is included in the petition. Additionally, in 1935, a British patent specification was issued entitled ''Improved Process for the Production of a Sugar Preparation from Starch, and for Manufacturing a Milk Suitable for Infants'' (Ref. 3). The patent specifically mentions potato starch as one of the alternate starting materials (the others being starch from wheat, oats, or other cereals). The benefits of maltodextrin and its uses as an ingredient in milk fed to infants were also described in an article printed in Holland in 1942 (Ref. 4). In 1947, Campagne (Ref. 5) published a scientific explanation of the function of maltodextrin-based products in the infant diet. The diet described contained maltodextrin derived from potato starch.

The agency concludes that information presented in the petition demonstrates that maltodextrin derived from potato starch was used in infant formula prior to 1958. The agency does not agree, however, that the evidence supports a finding of ''common'' use in food because the totality of information shows that maltodextrin was used solely as an ingredient in infant formulas. No evidence was presented to show that the population at large used maltodextrin derived from potato starch in the food supply. While the agency does not believe that maltodextrin derived from potato starch was commonly used in food prior to 1958, its historical use in infant formulas is evidence of general recognition of safety because it represents documented experience in a particularly sensitive segment of the population, namely, human infants.

2. Evidence of Chemical Equivalency of Potato Starch to Corn Starch

Starch is the reserve carbohydrate in tubers, such as potatoes; in grains, such as rice, corn, or barley; in seeds; and in many fruits. As early as 1811, scientists had determined that food starches from various plant sources were essentially equivalent (Ref. 6). All food starches, regardless of the plant source, are composed of chemically equivalent polymeric forms of alpha-bond-linked glucose units (Ref. 7). Starch consists of polymers of amylose and amylopectin polysaccharides (Refs. 6 and 8). The relative proportions of amylose and amylopectin are characteristic of the plant species from which the starch is derived. Corn starch, for example, typically contains about 27 percent by weight of amylose and 73 percent by weight of amylopectin, whereas potato starch typically contains 22 percent amylose by weight and 78 percent amylopectin by weight (Refs. 8 and 9).

Because food starches derived from different plant sources are equivalent in all material respects, FDA's food additive regulation for modified food starch (21 CFR 172.892) does not specify that any particular source of food starch be used to manufacture the additive. (According to the petitioner, potato starch is being used to make modified food starch.) In the Federal Register of April 1, 1985 (50 FR 12821) (Ref. 10), FDA published a proposal to find that the use of potato starch (as well as several other starches) in food is GRAS. FDA has not issued a final rule in that rulemaking. In addition, the Committee on Food Chemicals Codex of the National Academy of Sciences has published a monograph on maltodextrin stating that it may be obtained from any edible starch (Ref. 11). Like FDA's food additive regulation for modified food starch, the monograph does not require that the starch be derived from any particular plant source.

Producing maltodextrin by the degradation of starch requires the formation of intermediate breakdown products called dextrins, which result from the partial hydrolysis of starch with mineral acids or amylase. Further hydrolysis of the starch dextrins yields maltodextrins.

Dextrins are affirmed as GRAS under 21 CFR 184.1277 and can be prepared by partially hydrolyzing the starch in corn, potato, arrowroot, wheat, rice, or other starch sources. It has been common industrial practice to use a wide variety of starch sources in manufacturing commercial dextrin products (Refs. 7 and 12). During digestion, acid and enzymatic processes in the stomach convert the starch macromolecules to smaller molecules such as maltodextrin, and eventually to glucose. This digestion process is similar to the commercial process used to produce glucose and fructose, which are GRAS starch-based sweeteners presently used in foods (Ref. 7). (See corn sugar, 21 CFR 184.1857; corn syrup, 21 CFR 184.1865; and high fructose corn syrup, 21 CFR 182.1866.)

Starch hydrolysates below 20 dextrose equivalents (D.E.) are classified as maltodextrins (Refs. 13 and 14). Specifications for maltodextrins are listed in the Food Chemicals Codex, 3d ed., 3d supp. (1992) (Ref. 11).

Equivalent maltodextrin products result from equivalent hydrolysis of edible starch sources (Ref. 15). Since corn starch and potato starch are essentially equivalent, the products of hydrolysis, from simple glucose molecules to more complex starch hydrolysates, such as dextrins and maltodextrins, are essentially equivalent in terms of chemical, physical, and organoleptic properties.

3. Corroborative Evidence of Chemical Equivalency

The petitioner has submitted data to demonstrate the equivalency of maltodextrin derived from corn and potato starches, based upon their dextrose equivalents (D.E.) (Refs. 16, 17, and 18). Hydrolysis of corn starch or potato starch under similar conditions produces a maltodextrin product with a D.E. of less than 20. The range of carbohydrate composition (glucose, maltose, maltotriose, and polysaccharides larger than maltotriose) in maltodextrins derived from potato starch (Ref. 16) is virtually identical to that for maltodextrins derived from corn starch (Refs. 15, and 16) at a D.E. of less than 20. Also, based upon information submitted by the petitioner and on information available in current scientific literature, FDA believes that potato starch may be considered chemically similar to corn starch in regard to amylose and amylopectin content (Refs. 6, 8, 9, 19, and 20).

4. Proposed Use in Food

Information supplied by the petitioner evidences that maltodextrin derived from potato starch will be used as a replacement for maltodextrin derived from corn starch in the same foods, at essentially the same levels, and for the same technical effects that maltodextrin derived from corn starch is now used (Ref. 21). The petitioner states that maltodextrins are currently used in a wide range of processed and convenience foods, principally as a filler or carrier for flavorings and intensive sweeteners and as a sweetness reducer or texture modifier. Because maltodextrin derived from potato starch will be used as a replacement for maltodextrin derived from corn starch, the consumer exposure to maltodextrin is not expected to increase.

5. General Recognition of Safety

The agency has determined, based on the published literature, that the safety of maltodextrin derived from potato starch is generally recognized by food safety experts. Foremost in the support of safety is published information that shows that corn starch and potato starch are essentially equivalent, and therefore maltodextrin derived from potato starch is equivalent to the maltodextrin derived from corn starch. Thus, maltodextrin derived from potato starch presents no more of a safety concern than maltodextrin derived from corn starch, which has been affirmed as GRAS.

Additionally, based on published information in the petition, maltodextrin derived from potato starch was extensively used in infant formulas for over 20 years prior to 1958 (Refs. 1, 2, 3, 4, and 5), and the agency is not aware of any reports of injuries or health risks resulting from such use.

As a consequence of conclusions regarding safety, many countries, including those represented by the European Starch Association (Ref. 14), recognize ''food starches,'' including potato starch, as a suitable raw material for maltodextrin production. Furthermore, the Joint Food and Agriculture Organization/World Health Organization (FAO/WHO) Expert Committee on Food Additives (JECFA) (Refs. 22 and 23) recognizes maltodextrin as an intermediate product in the production of enzyme-treated starches, a process that JECFA has stated results in the production of normal (meaning safe) food constituents. JECFA does not restrict the sources of food starches used in the production of products such as maltodextrins. JECFA also does not require toxicological testing of products such as maltodextrins that are produced from enzyme-treated starches. Finally, as noted previously, the agency has proposed to find that potato starch is GRAS.

The agency concurs that maltodextrin derived from potato starch is chemically and functionally equivalent to maltodextrin derived from corn starch (Ref. 15). No increase in exposure to maltodextrin would be expected due to the substitution of one source for the other. Because potato starch is already a significant constituent of the typical diet (Ref. 24), the agency does not believe that there will be any impurities in potato-derived maltodextrin that would cause a safety concern (Refs. 15 and 25).

6. Specifications

The agency has reviewed the specifications for maltodextrin published in the Food Chemicals Codex, 3d ed., 3d supp., p. 125, and finds that they are acceptable for maltodextrin derived from edible starches. Therefore, the agency is adopting the specifications for maltodextrin derived from edible starches for maltodextrin derived from potato starch. Published elsewhere in this issue of the Federal Register is a notice of proposed rulemaking to adopt these specifications for maltodextrin derived from corn starch.

IV. Conclusions

The agency has evaluated the information in the petition, along with other available data, and has reached the following conclusions:

(1) Potato starch is chemically equivalent to corn starch.

(2) Maltodextrin derived from potato starch is chemically equivalent to maltodextrin derived from corn starch, which is currently affirmed as GRAS for food use without restriction under § 184.1444.

(3) Maltodextrin derived from potato starch has been used in infant formula prior to 1958 with no reported adverse effects.

(4) When maltodextrin derived from potato starch is manufactured as specified in § 184.1444, there is general recognition among qualified experts that its use in food is safe.

Based upon the evaluation of published information, corroborated by unpublished data and information, i.e., based upon scientific procedures (§ 170.30(b)), the agency also concludes that maltodextrin derived from potato starch is GRAS for use as a replacement for maltodextrin derived from corn starch. Therefore, the agency is affirming that maltodextrin derived from potato starch is GRAS when used in accordance with good manufacturing practice (21 CFR 184.1(b)(1)).

V. Environmental Impact

The agency has determined under 21 CFR 25.24(b)(7) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (Pub. L. 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health 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, because the final rule is not a significant regulatory action as defined by the Executive Order and therefore 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. Because this rule requires no change in the current industry practice concerning the manufacture and use of this ingredient, the cost of compliance with this regulation is zero, and the potential benefits of the rule include the wider use of this substance to achieve the intended technical effects, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required.

VII. References

The following references have been placed on display at the Dockets Management Branch (address above) and may be seen between 9 a.m. and 4 p.m., Monday through Friday.

1. ''Potato-Derived Maltodextrins for Infants and Toddlers,'' W. A. Scholten's Chemical Factories' Brochure, Avebe Foxhol, 1941.

2. ''The Double Triangle,'' 3d Annual, no. 36, W. A. Scholten's Chemical and Potato Starch Factories and Meihuizen Boon's Factories, Holland, pp. 1–10, June 21, 1951.

3. Patent Specification no. 435,034, ''Improved Process for the Production of a Sugar Preparation from Starch, and for Manufacturing a Milk Suitable for Infants,'' United Kingdom, 1935.

4. Kuyk, P. G., and K. Schots, ''For Infant and Toddler,'' in ''The Book of Foods and Allied Products and of Substitutes During Wartime,'' 1942.

5. Campagne, J. vL., ''Feeding and Nutritional Derangements of Infants,'' Scientific Publisher of the Amsterdam Book and Newspaper Society, pp. 33, and 126–127, 1947.

6. Wolfram, M. L., and H. El Khadem, ''Chemical Evidence for the Structure of Starch'' in ''Starch: Chemistry and Technology,'' R. L. Whistler, and E. F. Paschall, eds. Academic Press, Inc., New York, pp. 251–278, 1965.

7. Schenck, F. W., and R. E. Hebeda, ''Starch Hydrolysis Products: An Introduction and History'' in *Starch Hydrolysis Products, Worldwide Technology, Production, and Applications*, F. W. Schenk, and R. E. Hebeda, eds., VCH Publishers, Inc., New York, pp. 1–21, 1992.

8. ''Evaluation of the Health Aspects of Starches and Modified Starches as Food Ingredients,'' Life Sciences Research Office, Federation of American Societies for Experimental Biology, 1979.

9. Young, A. H., ''Fractionation of Starch'' in ''Starch,'' 2d ed., R. L. Whistler, and E. F. Paschall, eds., Academic Press, Inc., New York, pp. 249–283, 1984.

10. ''Unmodified Food Starches and Acid-Modified Starches; Proposed Affirmation of GRAS Status as Direct and Indirect Human Food Ingredients,'' 50 FR 12821, April 1, 1985.

11. Food Chemicals Codex, 3d ed., 3d supp., p. 125, 1992.

12. Evans, R. B., and O. B. Wurzburg, ''Production and Use of Starch Dextrins'' in Starch: Chemistry and Technology, vol. 2, R. L. Whistler and E. F. Paschall, eds., Academic Press, Inc., New York, pp. 253-278, 1967.

13. ''Food Additives and Contaminants Committee Report on Modified Starches,'' United Kingdom Ministry of Agriculture, Fisheries and Food, FAC/REP/31, Her Majesty's Stationery Office, London, p. 5, 1980.

14. ''Definition of Maltodextrin,'' European Starch Associations, Circular Letter Stex 4/88, February 1988.

15. Memorandum dated September 11, 1989, from the Food and Color Additives Review Section, FDA to the Direct Additives Branch, FDA, ''Maltodextrin from Potatoes.''

16. ''Maltodextrins,'' Technical Bulletin No. 5.10.20.119EF, AVEBE Veenddam-Holland, April 1987.

17. Letter plus attachments, in response to a letter of July 13, 1978, from George W. Irving of the Select Committee on GRAS Substances, Federation of American Societies for Experimental Biology, Bethesda, MD, to Corbin Miles, Food and Drug Administration, Washington, DC, pp. 1-4, 1978.

18. ''Maltodextrins and Corn Syrup Solids,'' Technical Bulletin, A. E. Staley Manufacturing Co., Decatur, IL, Bulletin, July 1987.

19. Zuber, M. S., ''Genic Control of Starch Development'' in ''Starch: Chemistry and Technology,'' R. L. Whistler, and E. F. Paschall, eds., Academic Press, Inc., New York, pp. 43–62, 1965.

20. Whistler, R. L., and J. R. Daniel, ''Starch,'' in *Kirk-Othmer's Encyclopedia of Chemical Technology*, 3d ed., vol. 21, J. Brown, C. I. Eastman, C. Galojuch, A. Klingsberg, and M. Wainwright, eds., pp. 492–496, 1983.

21. ''Maltodextrin; Proposed Affirmation of GRAS Status as Direct Human Food Ingredient,'' 47 FR 36443, August 20, 1982.

22. ''Specifications for the Identity and Purity of Food Additives and Their Toxicological Evaluation,'' FAO Nutrition Meetings Report Series, no. 46 and WHO Technical Report Series, no. 445, pp. 13–14, 1970.

23. ''Toxicological Evaluation of Some Food Colours, Emulsifiers, Stabilizers, Anti-Caking Agents, and Certain Other Substances,'' FAO Nutrition Meetings Report Series, no. 46A, p. 62 and WHO/FOOD ADD./70.36, 1970.

24. ''Potato Facts,'' Economics Research Service, U.S. Department of Agriculture, Fall/Winter, 1988/89.

25. Memorandum dated October 17, 1989, from the Additives Evaluation Branch, FDA, to the Direct Additives Branch, FDA, ''Maltodextrin derived from potatoes.''

List of Subjects in 21 CFR Part 184

Food ingredients, Incorporation by reference.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director of the Center for Food Safety and Applied Nutrition, 21 CFR part 184 is amended as follows:

PART 184—DIRECT FOOD SUBSTANCES AFFIRMED AS GENERALLY RECOGNIZED AS SAFE

1. The authority citation for 21 CFR part 184 continues to read as follows:

Authority: Secs. 201, 402, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 371).

2. Section 184.1444 is amended by revising the second sentence in paragraph (a) and by revising paragraph (b) to read as follows:

§ 184.1444 Maltodextrin.

(a) * * *. It is prepared as a white powder or concentrated solution by partial hydrolysis of corn starch or potato starch with safe and suitable acids and enzymes.

(b)(1) Maltodextrin derived from corn starch must be of a purity suitable for its intended use.

(2) Maltodextrin derived from potato starch meets the specifications of the Food Chemicals Codex, 3d ed., 3d supp. (1992), p. 125, which are incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, 2101 Constitution Ave., NW., Washington, DC 20418, or may be examined at the Office of the Federal Register, 800 North Capital St. NW., suite 700, Washington, DC 20408, or at the Division of Petition Control (HFS–217), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 200 C St. SW., Washington, DC 20204.

* * * * *

Dated: September 6, 1995.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 95–23352 Filed 9–20–95; 8:45 am]

BILLING CODE 4160–01–F

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21 CFR Part 529

Certain Other Dosage Form New Animal Drugs; Gentamicin Sulfate Intrauterine Solution

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the

animal drug regulations to reflect approval of an abbreviated new animal drug application (ANADA) filed by Fermenta Animal Health Co. The ANADA provides for the use of a generic gentamicin solution for control of bacterial infections of the uterus (metritis) of horses and as an aid in improving conception in mares with uterine infections caused by bacteria sensitive to gentamicin.

EFFECTIVE DATE: (September 21,1995.)

FOR FURTHER INFORMATION CONTACT: Sandra K. Woods, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1612.

SUPPLEMENTARY INFORMATION: Fermenta Animal Health Co., 10150 North Executive Hills Blvd., Kansas City, MO 64153, is the sponsor of ANADA 200–023, which provides for the use of a generic gentamicin solution (100 milligrams/milliter (mg/mL)) for control of bacterial infections of the uterus (metritis) in horses and as an aid in improving conception in mares with uterine infections caused by bacteria sensitive to gentamicin.

ANADA 200–023 for Fermenta Animal Health Co.'s gentamicin sulfate solution (100 mg/mL gentamicin) is approved as a generic copy of Schering's Gentocin® Solution (100mg/mL gentamicin) in NADA 046–724. The ANADA is approved as of August 4, 1995, and the regulations are amended in 21 CFR 529.1044a to reflect the approval. The basis for approval is discussed in the freedom of information summary.

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

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 529

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 529 is amended to read as follows:

PART 529—CERTAIN OTHER DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 529 continues to read as follows:

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

§ 529.1044a [Amended]

2. Section 529.1044a *Gentamicin sulfate intrauterine solution* is amended in paragraph (b) by removing ''000061, 000856, 057561, and 058711'' and adding in its place ''000061, 000856, 054273, 057561, and 058711''.

Dated: September 5, 1995.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 95–23353 Filed 9–20–95; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 151

RIN 1076–AC51

Land Acquisitions (Nongaming)

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule: correction.

SUMMARY: This document contains corrections to the final rule 25 CFR Part 151, which was published Friday, June 23, 1995, (Vol. 60, No. 121, FR 32874–32879). The regulations related to land acquisitions for nongaming purposes by an Indian individual or tribe.

EFFECTIVE DATE: September 21, 1995.

FOR FURTHER INFORMATION CONTACT: Alice A. Harwood, Chief, Branch of Technical Services, Division of Real Estate Services, Bureau of Indian Affairs, Room 4522, Main Interior Building, 1849 C Street, NW, Washington, DC 20240, Telephone No. (202) 208–3604.

SUPPLEMENTARY INFORMATION:

Background

The final rule that is the subject of these corrections modified three existing sections within Part 151 (Land Acquisitions) and created a new section which contained additional criteria and requirements used by the Secretary in evaluating requests for the acquisition of lands by the Untied States in trust for federally recognized Indian tribes when lands are outside and noncontiguous to the tribe's existing reservation boundaries.

Need for Correction

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

Correction of Publication

Accordingly, the publication on June 23, 1995, of the final rule (25 CFR 151), FR Doc. 95–15215, is corrected as follows:

Part 151—LAND ACQUISITIONS (NONGAMING)

On page 32878, third column, in the title, delete ''(Nongaming)''.

§ 151.11 [Amended]

On page 32879, in the second column, in § 151.11, add ''(Nongaming)'' after ''acquisitions'' in the title.

On page 32879, in the second column, in § 151.11, line four of paragraph (b), insert ''as follows:'' after the word ''considered.''

On page 32879, in the second column, in § 151.11, line three of paragraph (d), insert ''as follows:'' after the word ''completed.''

Dated: September 7, 1995.

Ada E. Deer,

Assistant Secretary—Indian Affairs.

[FR Doc. 95–23010 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–02–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD13–95–039]

Safety Zone Regulation; Trojan Nuclear Plant, Rainier, OR, to Port of Benton, WA

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a moving safety zone around the barge ZB–1801 and accompanying towboats as the vessels complete five separate transits through U.S. navigable waters between Rainier, Oregon, and Benton, Washington. A safety zone is needed to protect the barge ZB–1801 and accompanying

towboats, persons, facilities, and other vessels from safety hazards associated with onlookers and others who may wish to view the barge at close range. Entry into the safety zone is prohibited unless authorized by the Captain of the Port.

EFFECTIVE DATE: This regulation becomes effective on September 20, 1995 at 12 a.m. (PDT) and will terminate on November 19, 1995 at 12 p.m. (PST), unless sooner terminated by the Captain of the Port.

FOR FURTHER INFORMATION CONTACT: LTJG C. A. Roskam, c/o U.S. Coast Guard Captain of the Port, 6767 N. Basin Ave., Portland, Oregon 97217–3992, Ph: (503) 240–9338.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a Notice of Proposed Rulemaking was not published for this regulation and good cause exists for making it effective in less than 30 days after Federal Register publication. Specific final details regarding the schedule of the barge movements were not available in sufficient time to allow for the publication of a Notice of Proposed Rulemaking. Publishing a Notice of Proposed Rulemaking and delaying this regulation's effective date would be contrary to the public interest since immediate action is needed to prevent potential hazards to the barge ZB–1801 and other vessels that may transit the area. For these reasons, normal rulemaking procedures would have been impracticable.

Drafting Information

The drafters of this regulation are LTJG C. A. Roskam, Project Officer for the Captain of the Port, and LCDR John C. Odell, Project Attorney, Thirteenth Coast Guard District Legal Office.

Discussion of Regulation

The event requiring this regulation will begin on September 20, 1995 at 2 p.m. (PDT). Upon request of the Portland General Electric Company, the Coast Guard is establishing a moving safety zone consisting of all navigable waters within 100 yards of the barge ZB–1801 and accompanying towboats. While this safety zone is in effect, these vessels are expected to complete five separate round-trip transits on the Columbia River from the Trojan Nuclear Plant in Rainier, Oregon, to the Port of Benton, Washington. The safety zone will be in effect at all times while the barge is being loaded at the Trojan Nuclear Plant, while the barge and accompanying towboats transit from the Trojan Nuclear Plant to the Port of Benton, while the barge is unloaded at the Port of Benton, and during the barge's return transits to the Trojan Nuclear Plant. Thus, the safety zone remains in effect for the duration of the five transits, each of which may result in a large number of vessels congregating near, or in the path of the barge and towboats. This safety zone is needed due to the limited maneuverability of the barge and towboats, as well as the need to ensure the safety of mariners who may attempt to approach the barge and towboats during loading, unloading, and transiting. This moving safety zone will be enforced by representatives of the Captain of the Port, Portland, Oregon. The Captain of the Port may be assisted by other federal agencies.

Regulatory Evaluation

This temporary final rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential cost and benefits under section 6(a)(3) of that order. It has been exempted from review by the Office of Management and Budget under that order. It is not significant under regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. This expectation is based on the relatively short duration of the safety zone and the small geographic area affected.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard was required to consider whether this action would have a significant economic impact on a substantial number of small entities. ''Small entities'' may include (1) small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and (2) governmental jurisdictions with populations of less than 50,000. Because it expects the impact of this action to be minimal, the Coast Guard certifies under 5 U.S.C. 605(b) that this action will not have a significant economic impact on a substantial number of small entities.

Collection of Information

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

Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this action and concluded that, under paragraph 2.B.2.c. of Commandant Instruction M16475.1B, this action is categorically excluded from further environmental documentation. A Categorical Exclusion Determination statement has been prepared and placed in the rulemaking docket.

List of Subjects in 33 CFR Part 165

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

Temporary Regulation

For the reasons set out in the preamble, the Coast Guard amends subpart C of part 165 of title 33, Code of Federal Regulations, as follows:

PART 165—[AMENDED]

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

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

2. A new section 165.T13–036 is added to read as follows:

§ 165.T13–036 Safety zone: COTP Portland, Oregon.

(a) *Location.* The following area is a safety zone: All waters within 100 yards of the barge ZB–1801 and accompanying towboats during the loading of the barge ZB–1801 at the Trojan Nuclear Plant, and while in transit from the Trojan Nuclear Plant, Rainier, Oregon, to the Port of Benton, Washington. The safety zone continues while the barge is unloaded at the Port of Benton, and remains in effect during the barge's return transits to the Trojan Nuclear Plant. The barge and accompanying towboats will make approximately five round-trip transits between the Trojan Nuclear Plant and the Port of Benton during the time this safety zone is in effect.

(b) *Definitions.* A designated representative of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Portland, to act on his behalf. The

following officers have or will be designated by the Captain of the Port: the Coast Guard Patrol Commander, the senior boarding officer on each vessel enforcing the safety zone, and the Duty Officer at Coast Guard Group Portland, Oregon.

(c) *Regulations.* In accordance with the general regulations in Section 165.23 of this part, entry into this zone is prohibited, unless authorized by the Captain of the Port or his designated representatives.

(d) *Effective Dates.* This section is effective on September 20, 1995 at 12 a.m. (PDT), and remains in effect until November 19, 1995 at 12 p.m. (PST), unless sooner terminated by the Captain of the Port.

Dated: August 29, 1995.

C.E. Bills,

Captain, U.S. Coast Guard, Captain of the Port.

[FR Doc. 95–23354 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–14–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[IL98–2–6840; FRL–5299–3]

Approval and Promulgation of an Implementation Plan for Vehicle Miles Traveled; Illinois

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The United States Environmental Protection Agency (USEPA) is approving a request from Illinois, for a State Implementation Plan (SIP) revision for the Chicago ozone nonattainment area, which demonstrates how mobile source emissions will continue to decline over the years and not increase. In addition, Illinois has implemented 127 transportation control measures (TCMs) for a total reduction of more than two tons per day of volatile organic compounds. Two public comment letters were received which are addressed in this rulemaking. This rulemaking action approves, in final, the first two requirements of the vehicle miles traveled (VMT) Offset SIP revision request and the associated TCMs for Chicago, Illinois as requested by Illinois.

EFFECTIVE DATE: This final rule is effective on October 23, 1995.

ADDRESSES: Copies of the documents relevant to this action are available for inspection during normal business hours at the following location: Regulation Development Section, Regulation Development Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois, 60604.

Please contact Patricia Morris at (312) 353–8656 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Patricia Morris, Regulation Development Section, Regulation Development Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8656.

SUPPLEMENTARY INFORMATION:

I. Background

Section 182(d)(1)(A) of the Clean Air Act, as amended in 1990 (Act), requires States containing ozone nonattainment areas classified as ''severe'' pursuant to section 181(a) of the Act to adopt TCMs and transportation control strategies to offset any growth in emissions from growth in VMT or number of vehicle trips, and to attain reductions in motor vehicle emissions (in combination with other emission reduction requirements) as necessary to comply with the Act's RFP milestones and attainment requirements. The requirements for establishing a VMT Offset program are discussed in the April 16, 1992, General Preamble to Title I of the Act (57 FR 13498), in addition to section 182(d)(1)(A) of the Act.

The VMT Offset provision requires that States submit by November 15, 1992, specific enforceable TCMs and strategies to offset any growth in emissions from growth in VMT or number of vehicle trips sufficient to allow total area emissions to comply with the RFP and attainment requirements of the Act.

As described in the November 2, 1994, proposed rule (see 59 FR 54866, 54867), the USEPA has observed that these three elements (i.e., offsetting growth in mobile source emissions, attainment of the RFP reduction, and attainment of the ozone National Ambient Air Quality Standards (NAAQS)) can be divided into three separate submissions that could be submitted on different dates.

Under this approach, the first element, the emissions offset element, was due on November 15, 1992. The USEPA believes this element is not necessarily dependent on the development of the other elements. The State could submit the emissions growth offset element independent of an analysis of that element's consistency with the periodic reduction and attainment requirements of the Act. Emissions trends from other sources need not be considered to show compliance with this offset requirement. As submitting this element in isolation does not implicate the timing problem of advancing deadlines for RFP and attainment demonstrations, USEPA does not believe it is necessary to extend the statutory deadline for submittal of the emissions growth offset element.

The second element, which requires the VMT Offset SIP to comply with the 15 percent RFP requirement of the Act, was due on November 15, 1993, which is the same date on which the 15 percent RFP SIP itself was due under section 182(b)(1) of the Act. The USEPA believes it is reasonable to extend the deadline for this element to the date on which the entire 15 percent SIP was due, as this allows States to develop the comprehensive strategy to address the 15 percent reduction requirement and assure that the TCM elements required under section 182(d)(1)(A) are consistent with the remainder of the 15 percent demonstration. Indeed, USEPA believes that only upon submittal of the broader 15 percent plan can a State have had the necessary opportunity to coordinate its VMT strategy with its 15 percent plan.

The third element, which requires the VMT Offset SIP to comply with the post-1996 RFP and attainment requirements of the Act, was due on November 15, 1994, the statutory deadline for those broader submissions. The USEPA believes it is reasonable to extend the deadline for this element to the date on which the post-1996 RFP and attainment SIPs are due for the same reasons it is reasonable to extend the deadline for the second element. First, it is arguably impossible for a State to make the showing required by Section 182(d)(1)(A) for the third element until the broader demonstrations have been developed by the State. Moreover, allowing States to develop the comprehensive strategy to address post-1996 RFP and attainment by providing a fuller opportunity to assure that the TCM elements comply with the broader RFP and attainment demonstrations, will result in a better program for reducing emissions in the long term.

On July 14, 1994, Illinois submitted to USEPA documentation to fulfill the VMT-Offset SIP. A public hearing was held on June 22, 1994, and documentation on the public hearing was submitted to complete the SIP revision request. The SIP revision was found to be complete by the USEPA in a letter dated August 4, 1994. The USEPA proposed to approve the first and second element on December 4,

1994. The public comment period ended on January 5, 1995, and two public comment letters were received.

II. Evaluation of the State Submittal

Section 182(d)(1)(A) of the Act requires the State to offset any growth in emissions from growth in VMT. As discussed in the General Preamble, the purpose is to prevent a growth in motor vehicle emissions from canceling out the emission reduction benefits of the federally mandated programs in the Act. The USEPA interprets this provision to require that sufficient measures be adopted so that projected motor vehicle volatile organic compound (VOC) emissions will never be higher during the ozone season in one year than during the ozone season in the year before. When growth in VMT and vehicle trips would otherwise cause a motor vehicle emissions upturn, this upturn must be prevented. The emissions level at the point of upturn becomes a ceiling on motor vehicle emissions. This requirement applies to projected emissions in the years between the submission of the SIP revision and the attainment deadline, and is above and beyond the separate requirements for the RFP and the attainment demonstrations. The ceiling level is defined, therefore, up to the point of upturn, as motor vehicle emissions that would occur in the ozone season of that year, with VMT growth, if all measures for that area in that year were implemented as required by the Act. When this curve begins to turn up due to growth in VMT or vehicle trips, the ceiling becomes a fixed value. The ceiling line would include the effects of Federal measures such as new motor vehicle standards, phase II RVP controls, and reformulated gasoline, as well as the Act-mandated SIP requirements.

The State of Illinois has demonstrated in its submittal of July 14, 1994, that the predicted growth in VMT in Chicago, Illinois, is not expected to result in a growth in motor vehicle emissions that will negate the effects of the reductions mandated by the Act. For this analysis, Illinois used an average summer weekday VMT growth rate of 2.7 percent per year between 1990 and 1996. This growth rate is supported by the ground counts in the Illinois road file and confirmed by the Illinois Department of Transportation. Further, Illinois has projected motor vehicle emissions to the year 2007 using a 2.7 percent per year growth rate not withstanding that the most current socioeconomic data in combination with the transportation network model predicts a lower VMT growth rate. The 2.7 percent per year projection does not predict an upturn in motor vehicle emissions through the year 2007. In the event that the projected socioeconomic data and associated VMT grow more rapidly than currently predicted, Illinois is required by Section 182(c)(5) to track actual VMT starting with 1996 and every three years thereafter to demonstrate that the actual VMT is equal to or less than the projected VMT. TCMs will be required to offset VMT that is above the projected levels (section 182(c)(5)).

Illinois has evaluated the effectiveness and predicted impact of a number of TCMs. The TCM evaluation is documented in the December 9, 1993, Chicago Area Transportation Study (CATS) document ''Transportation Control Measures Contribution to the 15 percent Rate of Progress State Implementation Plan''. CATS is the metropolitan planning organization for the Chicago metropolitan area. The December 9, 1993, document (which is part of the docket for this notice) lists the TCMs and the emission reduction calculation methodology. Illinois has implemented TCMs in the Chicago area and has included TCMs in the 15 percent RFP SIP. Today's SIP revision approval incorporates these TCMs into the Illinois SIP and requires Illinois to construct and operate the specified TCMs that are identified and credited to meet the 15 percent RFP and post 1996 RFP. These TCMs are listed in Table 1. On March 9, 1995 the Policy Committee of the Chicago Area Transportation Study, as metropolitan planning organization for northeastern Illinois, approved these TCMs for submittal to the Illinois Environmental Protection Agency as part of the control strategy SIP for the Chicago ozone nonattainment area. There are 127 TCMs that are being incorporated into the Illinois SIP, for an estimated reduction in volatile organic compounds of 2.78 tons per day (tpd). Illinois is using 2.0 tpd to meet the required 15 percent, and the additional 0.78 tpd will be credited toward the post 1996 RFP. Most of the TCMs (111) have already been completed and the remaining TCMs are scheduled to be completed by the end of 1996. The vanpool incentive program has been implemented and the Pace Board (the project implementor) has committed to this project for future years.

Illinois has taken credit for conventional TCMs such as signal interconnects, additional commuter parking, vanpool programs and transit improvements which include station improvements and new rapid transit service to Midway Airport. The specific projects are listed in Table 1. In addition, Illinois has implemented a number of TCMs that are expected to benefit air quality such as bicycle and pedestrian projects that will help eliminate trips. At this time, however, Illinois is not taking a reduction credit for these projects since a methodology for determining the emission reduction credit is not firmly established and additional studies of the effectiveness of these projects are being conducted. Illinois may take credit for these projects at a later date. Because Illinois is not taking credit at this time, these projects are not currently being approved as part of this SIP revision request.

Illinois submitted a 15 percent RFP SIP for the Chicago area to the USEPA in November 1993, but the submittal was found incomplete in a letter dated January 21, 1994. The RFP SIP lacked enforceable regulations.

On May 23, 1995, Illinois submitted materials to supplement the 15 percent RFP plan. This submittal finalized Illinois' 15 percent SIP. The USEPA found Illinois' submitted 15 percent SIP complete on June 15, 1995. The SIP submission contains a menu of adopted emissions reductions measures that the State believes will achieve the 15 percent reduction requirement by November 15, 1996. In the submission, Illinois uses TCMs for a reduction credit of 2 tpd.

For the attainment demonstration and post-1996 RFP SIPs, which Illinois submitted on November 22, 1994 and May 23, 1995, USEPA is still in the process of evaluating these SIP submission.

Illinois has met the first and second elements of the VMT offset SIP requirements of section 182(d)(1)(A). Regarding the first element, Illinois has identified and evaluated TCMs to reduce VMT, and has shown that VMT growth will not result in a growth of motor vehicle emissions that will negate the effects of the reductions required under the Act and that there will not be an upturn of motor vehicle emissions. Regarding the second element, Illinois has submitted a complete 15 percent SIP that relies upon TCMs for 2 tpd to make its proffered showing that the 15 percent reduction will be achieved. These TCMs will be approved into the Illinois SIP effective with this final rule. Consequently, USEPA does not believe it is necessary to delay taking action on this second element of the VMT SIP, and that the Agency can at this point rely upon Illinois's submitted 15 percent SIP to satisfy the second VMT SIP element. However, if in evaluating the 15 percent SIP for approval it is

determined that Illinois will in fact need to implement additional measures to meet the 15 percent RFP requirement, and a subsequent submission of a revised 15 percent SIP is required, EPA would have to reevaluate its approval of the second element of the VMT SIP.

The third requirement is for Illinois to use TCMs as necessary to attain the standard. This third requirement will be applicable if Illinois incorporates TCMs into its attainment plan through any future SIP revisions.

III. Public Comments

On December 6, 1994, the USEPA proposed to approve the first and second elements of the Illinois VMT Offset SIP and requested public comment. The public comment period closed on January 5, 1995, and 2 sets of comments were received. The Natural Resources Defense Council (NRDC) submitted comments and the Environmental Law and Policy Center submitted comments for themselves and the following groups: the American Lung Association of Metropolitan Chicago; Business and Professional People for the Public Interest; the Center for Neighborhood Technology; the Chicagoland Bicycle Federation; and the Sierra Club, Illinois Chapter. The following summarizes the comments and USEPA's response to these comments:

Comment: Commenters argue that the Act requires TCMs to offset emissions resulting from all growth in VMT above 1990 levels, and USEPA is required by the Act to ensure emission reductions despite an increase in VMT. The legislative history states that ''[t]he baseline for determining whether there has been a growth in emissions due to increased VMT is the level of vehicle emissions that would occur if VMT held constant in the year.'' See H. Rep. No. 101–490 Part I, 101st Cong., 2nd session at 242, and S. Rep. No. 101–228, 101st Cong., 1st Sess. at 44.

Response: As discussed in the General Preamble, USEPA believes that section 182(d)(1)(A) of the Act requires the State to ''offset any growth in emissions'' from growth in VMT but not, as suggested by the comment, all emissions resulting from VMT growth (see 57 FR 13498, 13522–13523, April 16, 1992). The purpose is to prevent a growth in motor vehicle emissions from canceling out the emission reduction benefits of the federally mandated programs in the Act. The baseline for emissions is the 1990 level of vehicle emissions and the subsequent reductions in emission levels required to reach attainment. Thus, the anticipated benefits from the mandated measures such as the Federal motor vehicle pollution control program, lower reid vapor pressure, enhanced inspection and maintenance and all other motor vehicle emission control programs are included in the ceiling line calculation used by Illinois in the VMT Offset SIP. Table 2 in the Illinois submittal shows how emissions will decline substantially from 491.2 tons per day (tpd) in 1990 to 151.4 tpd in 2007 (assuming a 2.7 percent per year VMT growth rate) and will not begin to turn up. Emission reductions are expected every year through the year 2007.

The ceiling line approach does not ''tolerate increases in traffic of a magnitude that would wipe out the air quality gains'' as suggested by the comment. In fact, the ceiling line level decreases from year to year as the State implements various control measures and the decreasing ceiling line prevents an upturn in mobile source emissions. Dramatic increases in VMT that could wipe out the benefits of motor vehicle emission reduction measures will not be allowed and will trigger the implementation of TCMs. This prevents mere preservation of the status quo, and ensures emissions reductions despite an increase in VMT such that the rate of emissions decline is not slowed by increases in VMT or number of trips. To prevent future growth changes from adversely impacting emissions from motor vehicles, Illinois is required by section 182(c)(5) to track actual VMT starting with 1996 and every three years thereafter to demonstrate that the actual VMT is equal to or less than the projected VMT. TCMs will be required to offset VMT that is above the projected levels (section 182(c)(5)).

Under the commenter's approach to section 182(d)(1)(A), Illinois would have to offset VMT growth even while vehicle emissions are declining. Although the statutory language could be read to require offsetting any VMT growth, USEPA believes that the language can also be read so that only actual emissions increases resulting from VMT growth need to be offset. The statute by its own terms requires offsetting of ''any growth in emissions from growth in VMT.'' It is reasonable to interpret this language as requiring that VMT growth must be offset only where such growth results in emissions increases from the motor vehicle fleet in the area.

While it is true that the language of the legislative history appears to support the commenter's interpretation of the statutory language, such an interpretation would have drastic implications for Illinois if the State were forced to ignore the beneficial impacts of all vehicle tailpipe and alternative fuel controls. Although the original authors of the provision and the legislative history may in fact have intended this result, USEPA does not believe that the Congress as a whole, or even the full House of Representatives, believed at the time it voted to pass the 1990 Amendments to the Act that the words of this provision would impose such severe restrictions.

Given the susceptibility of the statutory language to these two alternative interpretations, USEPA believes it is the Agency's role in administering the statute to take the interpretation most reasonable in light of the practical implications of such interpretation and the purposes and intent of the statutory scheme as a whole. In the context of the intricate planning requirements Congress established in title I to bring areas towards attainment of the ozone NAAQS, and in light of the absence of any discussion of this aspect of the VMT offset provision by the Congress as a whole (either in floor debate or in the Conference Report), USEPA concludes that the appropriate interpretation of section 182(d)(1)(A) requires offsetting VMT growth only when such growth would result in actual emissions increases.

Comment: Section 182(d)(1)(A) of the Act requires that emissions of oxides of nitrogen (NO_X) as well as VOCs resulting from VMT growth must be offset.

Response: USEPA disagrees with the commenter's interpretation that section 182(d)(1)(A) requires NO_X emissions from VMT growth to be offset. While that section provides that ''any growth in emissions'' from growth in VMT must be offset, USEPA believes that Congress clearly intended that the offset requirement be limited to VOC emissions. First, section 182(d)(1)(A)'s requirement that a State's VMT TCMs comply with the ''periodic emissions reduction requirements'' of sections 182(b) and (c) the Act indicates that the VMT offset SIP requirement is VOC-specific. Section 182(c)(2)(B), which requires reasonable further progress demonstrations for serious ozone nonattainment areas, provides that such demonstrations will result in VOC emissions reductions; thus, the only ''periodic emissions reduction requirement'' of section 182(c)(2)(B) is VOC-specific. In fact, it is only in section 182(c)(2)(C)—a provision not referenced in section 182(d)(1)(A)—that Congress provided States the authority to submit demonstrations providing for reductions of emissions of VOCs and

NO_X in lieu of the SIP otherwise required by section 182(c)(2)(B).

Moreover, the 15 percent periodic reduction requirement of section 182(b)(1)(A)(i) applies only to VOC emissions, while only the separate ''annual'' reduction requirement applies to both VOC and NO_X emissions. USEPA believes that Congress did not intend the terms ''periodic emissions reductions'' and ''annual emissions reductions'' to be synonymous, and that the former does not include the latter. In section 176(c)(3)(A)(iii) of the Act, Congress required that conformity SIPs ''contribute to annual emissions reductions'' consistent with section 182(b)(1) (and thus achieve NO_X emissions reductions), but does not refer to the 15 percent periodic reduction requirement. Conversely, section 182(d)(1)(A) refers to the periodic emissions reduction requirements of the Act, but does not refer to annual emissions reduction requirements that require NO_X reductions. Consequently, USEPA interprets the requirement that VMT SIPs comply with periodic emissions reduction requirements of the Act to mean that only VOC emissions are subject to section 182(d)(1)(A) in severe ozone nonattainment areas.

Finally, USEPA notes that where Congress intended section 182 ozone SIP requirements to apply to NO_X as well as VOC emissions, it specifically extended applicability to NO_X. Thus, references to ozone or emissions in general in section 182 do not on their own implicate NO_X. For example, in section 182(a)(2)(C), the Act requires States to require preconstruction permits for new or modified stationary sources ''with respect to ozone''; Congress clearly did not believe this reference to ozone alone was sufficient to subject NO_X emissions to the permitting requirement, since it was necessary to enact section 182(f)(1) of the Act, which specifically extends the permitting requirement to major stationary sources of NO_X. Since section 182(d)(1)(A) does not specifically identify NO_X emissions requirements in addition to the VOC emissions requirements identified in the provision, USEPA does not believe States are required to offset NO_X emissions from VMT growth in their section 182(d)(1)(A) SIPs.

IV. Final Rulemaking Action

Based on the State's submittal request and in consideration of the public comments received in response to the proposed rule, USEPA is approving the SIP revision submitted by the State of Illinois as satisfying the first two of the three VMT offset plan requirements. The USEPA is also approving into the Illinois SIP 127 TCMs creditable to the 15 percent and post 1996 RFP.

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

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

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

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

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

The USEPA has determined that the approval action promulgated today does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector.

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

Under Section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 20, 1995. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (see Section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Ozone, Transportation control measures, Vehicle miles traveled offset.

Dated: August 31, 1995.

Valdas V. Adamkus,

Regional Administrator.

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

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart O—Illinois

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

§ 52.726 Control Strategy: Ozone

* * * * *

(j) Approval—On July 14, 1994, Illinois submitted two of three elements required by section 182(d)(1)(A) of the Clean Air Amendments of 1990 to be incorporated as part of the vehicle miles

traveled (VMT) State Implementation Plan intended to offset any growth in emissions from a growth in vehicle miles traveled. These elements are the offsetting of growth in emissions attributable to growth in VMT which was due November 15, 1992, and, transportation control measures (TCMs) required as part of Illinois' 15 percent reasonable further progress (RFP) plan which was due November 15, 1993. Illinois satisfied the first requirement by projecting emissions from mobile sources and demonstrating that no increase in emissions would take place. Illinois satisfied the second requirement by submitting the TCMs listed in Table 1 which are now approved into the Illinois SIP.

TABLE 1

Project type	Location description	Completion status	SIP credit VOC tpd
RS/SIG MOD	Madison Street (Western Ave. to Halsted Street)	Done	0.015400
SIG COORD	Willow Road (Landwer Road to Shermer)	Awarded	0.052000
SIG COORD	Rand Road (Baldwin Road to Kennicott)	Awarded	0.052000
SIG COORD	Northwest Hwy (Potter Road to Cumberland Avenue)	Awarded	0.030000
SIGS/SIG COORD	159th Street (US 45 to 76th Ave & at 91st Avenue)	Awarded	0.030000
SIG COORD	Harlem Ave. (71st St. to 92nd)	Awarded	0.052000
SIG COORD	Harlem Ave. (99th Street to 135th St.)	Awarded	0.052000
RECONST/SIGS/LTS	Archer Ave. (88th Ave to 65th St.)	Awarded	0.030000
SIG COORD	Ogden Ave. (N. Aurora Road to Naper Boulevard)	Awarded	0.030000
SIG COORD	North Ave. (Tyler to Kautz)	Awarded	0.030000
SIG COORD	Higgens Road (Il 72 at Il 31)	Awarded	0.030000
SIG COORD	Sheridan Road (Il 173 to Wadsworth)	Awarded	0.030000
SIG COORD	Lagrange Road (Belmont to Lake St.)	Awarded	0.030000
SIG COORD	Dundee Road (Sanders Road to Skokie Valley Road)	Awarded	0.052000
SIG COORD	Dundee Road (Buffalo Grove Road to Il 21)	Awarded	0.030000
INT IMP/SIG COORD	Golf Road (E. River Road to Washington Ave.)	Awarded	0.052000
SIG COORD	Golf Road (Barrington to Roselle Road)	Awarded	0.030000
SIG COORD	Higgins Road (Barrington to Roselle Road)	Awarded	0.030000
SIG COORD	Joe Orr Road (Vincennes Ave. to Il 1)	Awarded	0.030000

TABLE 1

Project type	Location description	Completion status	SIP credit
SIG COORD/RS	Crawford Ave. (93rd Street to 127th Street)	Awarded	0.052000
SIG COORD	IL 53 (Briarcliff to South of I–55)	Done	0.030000
SIG COORD	Ogden Ave. (Oakwood Avenue to Fairview Avenue)	Awarded	0.019000
SIG COORD	US 14 (Rohlwing Road to Wilke Road)	Awarded	0.030000
SIG COORD	US 30 (At Cottage Grove, Ellis St)	Awarded	0.030000
SIG COORD	IL 53 (Modonough to Mills)	Done	0.030000
SIG CONN	Ogden Ave. (IL 43 to 31st Street)	Awarded	0.013000
SIG CONN	US 12 (Long Grove—Hicks Road)	Awarded	0.055200
SIG CONN	North Ave. (Oak Park to Ridgeland)	Awarded	0.007000
SIG CONN	Roosevelt Road (Westchester Bl—IL 43)	Awarded	0.137000
SIG CONN	Depster St (Keeler to Crawford Ave.)	Awarded	0.010000
SIG CONN	Arlington Hgts Rd. (Thomas to Central)	Awarded	0.044000
SIG CONN	Palatine Rd. (Shoenbeck to Wolf Roads)	Awarded	0.042500
SIG CONN	Western Ave. (US 30—Lakewood)	Awarded	0.018900
RS/INT IMP	North Ave. (I–290 to IL 43)	Awarded	0.056100
INT IMP	Plum Grove Rd. (At Higgins Road)	Awarded	0.010700
INT IMP	St Street (At Illinois)	Awarded	0.002700
RS/SIG MOD/INT IMP	Illinois/Grand (Kingsbury to Lake Shore Drive)	Done	0.004200
ADD TURN LANES	York Rd. (Industrial to Grand Ave.)	Done	0.003800
SERVICE IMP	SW Route Lane Service	Scheduled	0.005516
SIG INTCONN	Washington Street	Scheduled	0.030370
SIG INTCONN	IL 59	Scheduled	0.068650
ENGR	Citywide—Naperville		0.086230
SIG INTCONN	Washington Street	Scheduled	0.008230
SIG INTCONN	Lewis Ave. (Yorkhousse to ILL 173)	Scheduled	0.034600
SIG INTCONN	Schaumberg Rd. (Barrington to Martingale)	Scheduled	0.078080
Vanpool Program (94 vehicles)	Region-Wide Suburban	Done	0.134000
Transp. Center	North West Cook County	Done	0.032835
Transp. Center	Sears T.F.	Done	0.005805
Station	Clark/Lake	Done	0.010000
Station Recon	18 Th Douglas Line	Done	0.001500
Station Recon	Linden	Done	0.001500
Station Recon	Cottage Grove	Done	0.001300
Com. Pkg	Lisle	Done	0.010177
Com. Pkg	Jefferson Park	Done	0.000110
Com. Pkg	Edison Park	Done	0.003614
Com. Pkg	Palatine	Done	0.004336

TABLE 1—Continued

Project type	Location description	Completion status	SIP credit
Com. Pkg	Central Street	Done	0.000519
Com. Pkg	Palatine	Done	0.004890
Com. Pkg	Crystal Lake	Done	0.034948
Com. Pkg	137Th/Riverdale	Done	0.004565
Com. Pkg	River Forest	Done	0.000289
Com. Pkg	115Th/Kensington	Done	0.002795
Com. Pkg	119Th St	Done	0.004483
Com. Pkg	Wilmette	Done	0.001587
Com. Pkg	111Th St	Done	0.000507
Com. Pkg	Edison Park	Done	0.002371
Com. Pkg	Joliet	Done	0.003967
Com. Pkg	Hanover Park	Done	0.021799
Com. Pkg	Bartlett	Done	0.008911
Com. Pkg	Chicago Ridge	Done	0.002159
Com. Pkg	103 Rd St	Done	0.000675
Com. Pkg	Elmhurst	Done	0.003857
Com. Pkg	Bartlett	Done	0.009326
Com. Pkg	Morton Grove	Done	0.001444
Com. Pkg	Palatine	Done	0.003598
Com. Pkg	Harvard	Done	0.006299
Com. Pkg	Willow Springs	Done	0.001200
Com. Pkg	Edgebrook	Done	0.002240
Com. Pkg	Bensenville	Done	0.002010
Com. Pkg	Hanover Park	Done	0.015020
Com. Pkg	Midlothian	Done	0.002570
Com. Pkg	Route 59	Done	0.025020
Com. Pkg	Lake Forest (West)	Done	0.013780
Com. Pkg	Lombard	Done	.....
Com. Pkg	Elmhurst	Done	0.001010
Com. Pkg	Woodstock	Done	0.019000
Com. Pkg	University Park	Done	0.019950
Com. Pkg	Grayslake	Done	0.006210
Com. Pkg	Oak Forest	Done	0.004260
Com. Pkg	91 St St.	Done	0.003380
Com. Pkg	Lockport	Done	0.007360
Com. Pkg	Ravenswood	Done	0.000130
Com. Pkg	Hickory Creek	Done	0.060140
Com. Pkg	Cary	Done	0.005980
Com. Pkg	Blue Island	Done	0.019430
Com. Pkg	Lemont	Done	0.016200
Com. Pkg	Itasca	Done	0.003860
Com. Pkg	Maywood	Done	0.000600
Com. Pkg	Ivanhoe	Done	0.001960
Com. Pkg	Ravinia	Done	0.003210
Com. Pkg	Fox River Grove	Done	0.025170
Com. Pkg	Medinah	Done	0.012250
Com. Pkg	Hanover Park	Done	0.011840
Com. Pkg	Worth	Done	0.003530
Com. Pkg	Roselle	Done	0.007710
Com. Pkg	Crystal Lake	Done	0.015050
Com. Pkg	Gresham	Done	0.000300
Com. Pkg	Barrington	Done	0.002420
Rideshare Prog.	Regionwide	Scheduled	0.040000
Rapid Transit Service	Midway Airport	Done	0.220000
Transp. Center	Deerfield Lake-Cook	Done	0.004160
Station Recon	Davis St.	Done	0.004000
Station Recon	Addison	Done	0.004000
Station Recon	King Drive	Done	0.003000
Station Recon	Washington/Wells	Done	0.003000
Com. Pkg	Cary	Done	0.027910
Com. Pkg	Morton Grove	Done	0.002460
Com. Pkg	80th Ave.	Scheduled	0.043200
Com. Pkg	Round Lake	Done	0.015150
Com. Pkg	Grayslake	Done	0.009170
Com. Pkg	Ingleside	Scheduled	0.005430
Com. Pkg	Schamburg	Scheduled	0.042090
Com. Pkg	Oak Forest	Scheduled	0.004680
Com. Pkg	Lake Cook	Scheduled	0.026390
Com. Pkg	Grayslake	Scheduled	0.035290

[FR Doc. 95–23472 Filed 9–20–95; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 300

[FRL–5300–9]

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

AGENCY: Environmental Protection Agency.

ACTION: Notice of deletion of a site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) announces the deletion of NAS Whidbey Seaplane Base, located on Whidbey Island, Washington from the National Priorities List (NPL). The NPL is Appendix B of 40 CFR part 300 which is the National Oil and Hazardous Substances Pollution 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 Washington have determined that no further cleanup under CERCLA is appropriate and that the selected remedy has been protective of public health, welfare and the environment.

EFFECTIVE DATE: September 21, 1995.

FOR FURTHER INFORMATION CONTACT:

R. Matthew Wilkening, Site Manager, U.S. Environmental Protection Agency, Region 10, 1200 6th Avenue, HW–124, Seattle, WA 98101, (206) 553–1284.

Engineering Field Activity, NW (primary Admin. Record location) Naval Facilities Engineering Command, 19917 7th Ave. Poulsbo, Washington

SUPPLEMENTARY INFORMATION: The site to be deleted from the NPL is NAS Whidbey Seaplane, Whidbey Island, Washington.

A Notice of Intent to Delete for this site was published July 17, 1995 in Federal Register [60 FR 36770]. The closing date for comments on the Notice of Intent to Delete was August 31, 1995. EPA received no comments.

EPA identifies sites which appear to present a significant risk to public health, welfare, or the environment and it maintains the NPL as the list of those sites. Any site deleted from the NPL remains eligible for remedial actions in the unlikely event that conditions at the site warrant such action in the future. Deletion of a site from the NPL does not affect responsible party liability or impede Agency efforts to recover costs associated with response efforts.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and record keeping requirements, Superfund, Water pollution control, Water supply.

Dated: September 12, 1995.

Chuck Clarke,

Regional Administrator, USEPA Region 10.

For the reasons set out in the preamble, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

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

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

Appendix B—[Amended]

2. Table 2 of Appendix B to part 300 is amended by removing the site NAS Whidbey Seaplane Base, Whidbey Island, Washington.

[FR Doc. 95–23438 Filed 9–20–95; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 799

[OPPTS–42111F, FRL 4927–8]

RIN NO. 2070–AB94

Withdrawal of Certain Testing Requirements for Office of Water Chemicals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is amending the final test rule for the Office of Water Chemicals by rescinding the 90–day subchronic testing requirement for 1,1,2,2-tetrachloroethane and the 90–day and 14–day testing requirements for 1,1-dichloroethane. The testing requirements are being rescinded because the Agency has received data adequate to meet the data needs for which the test rule was promulgated.

DATES: This amendment shall become effective on November 6, 1995. In accordance with 40 CFR 23.5, this rule shall be promulgated for purposes of judicial review at 1 p.m. eastern (daylight or standard as appropriate) time on October 5, 1995.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD (202) 554–0551, Internet address: TSCA-Hotline@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA is amending the final test rule for the Office of Water Chemicals in 40 CFR 799.5075 by rescinding; (1) the 90–day subchronic testing requirement for 1,1,2,2-tetrachloroethane, (2) the 90–day testing requirements for 1,1-dichloroethane, and (3) the 14–day testing requirements for 1,1-dichloroethane.

I. Background

In the Federal Register of April 10, 1995 (60 FR 18079), EPA proposed rescinding the 90–day subchronic testing requirement for 1,1,2,2-tetrachloroethane and the 90–day and 14–day testing requirements for 1,1-dichloroethane. The rule establishing these testing requirements was promulgated pursuant to TSCA section 4(a), and published in the Federal Register on November 10, 1993 (58 FR 59667).

The reasons for the proposal were that data had become available for these substances which, after review by EPA, were adjudged to be adequate to meet the data needs for which the test rule for these substances was promulgated, the establishment of Health Advisories for the Office of Water. The final test rule for Drinking Water Contaminants Subject to Testing (''the Office of Water Chemicals test rule'') which EPA is now amending, is codified in 40 CFR 799.5075.

II. Public Comments

EPA received only one public comment during the public comment period. This comment, from the ODW Chemicals Task Force of Washington, D.C., agreed with the Agency proposal.

III. Amended Testing Requirements

The Office of Water Chemicals test rule at 40 CFR 799.5075 is amended to delete the 90–day subchronic testing requirement for 1,1,2,2-tetrachloroethane and the 14–day and 90–day testing requirements for 1,1-dichloroethane. Specifically, parties subject to the test rule will no longer have to comply with 40 CFR 799.5075(a)(1), (c)(1)(i)(A) and (c)(2)(i)(A).

IV. Economic Analysis

Eliminating these testing requirements will reduce testing costs. Therefore, this amendment should not cause adverse economic impact.

V. Rulemaking Record

EPA has established a docket for this rulemaking (docket number OPPTS–42111F).This docket contains the basic information considered by EPA in developing this rule, appropriate Federal Register notices, and the comment received on the proposal. The rulemaking record includes the following:

(1) Halogenated Solvents Industry Alliance (HSIA). Letter from Peter Voytek, Ph.D. to Connie Musgrove, USEPA entitled; Request for Modification of Study Requirements (June 28, 1994).

(2) National Institute of Environmental Health Sciences (NIEHS). Letter from William Eastin, Ph.D. to Roger Nelson, USEPA (July 7, 1994) with two attachments:

(a) Pathco. ''Chairperson's Report Structure Activity Relationship Studies of Halogenated Ethane-Induced Accumulation of Alpha-2U-Globulin in the Male Rat Kidney: Part A, B, C, - Studies Conducted in F344 Rats at Microbiological Associates.''

(b) Microbiological Associates, Inc. Final Report -Study Nos. 03554.11 – 03554.12. 1,1,2,2-Tetrachloroethane (TCE).

(3) USEPA. Memorandum from Bruce Mintz to Roger Nelson ''Request for Office of Water Recommendation for Approval/Disapproval of June 28, 1994 HSIA Request for Modification of Test Standards for 1,1-Dichloroethane and 1,1,2,2-Tetrachloroethane.'' (Office of Water Test Rule).

(4) Voytek, P. Note (Fax) to Roger Nelson entitled ''Preliminary Testing of 1,1-Dichloroethane in Drinking Water.'' (Aug 3, 1994).

(5) Unpublished. ''Original Draft of Report to EPA HERL, Cincinnati in 1986'' - James V. Bruckner, Ph.D. (Undated).

(6) Muralidhara, S., R. Ramanathan, C.E. Dallas and J.V. Bruckner. ''Acute, Subacute and Subchronic Oral Toxicity Studies of 1,1-Dichloroethane (DCE) in Rats.'' *Society of Toxicology Abstract* (1986).

(7) USEPA. Memorandum from Krishan Khanna to Roger Nelson ''Review of 1,1-Dichloroethane (DCE) Data (TSCA Test Rule for Office of Water Chemicals).'' November 15, 1994.

(8) ODW Chemicals Task Force. Letter to TSCA Documents Receipt Office, Re: OPPTS–42111E. May 10, 1995.

(9) USEPA. Office of Water Chemicals; Final Test Rule. 58 FR 59667, November 10, 1993.

(10) USEPA. Test Rule; Office of Water Chemicals Proposed Withdrawal of Certain Testing Requirements. 60 FR 18079, April 10, 1995.

VI. Public Docket

The docket for this rulemaking is available for inspection from 12 noon to 4 p.m., Monday through Friday, except legal holidays. The TSCA Public Docket Office, is located in Room B–607 Northeast Mall, 401 M St., SW., Washington, D.C. 20460.

VII. Regulatory Assessment Requirements

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. Under section 3(f), the order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Pursuant to the terms of this Executive Order, it has been determined that this rule is not ''significant'' and is therefore not subject to OMB review.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), I certify that this test rule would not have a significant impact on a substantial number of small businesses because the amendment would relieve a regulatory obligation to conduct certain chemical tests.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. This rule reduces enforceable duties on any of these governmental entities or the private sector by revoking rules requiring testing.

D. Paperwork Reduction Act

OMB has approved the information collection requirements contained in this proposed test rule under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq., and has assigned OMB Control number 2070–0033. This rule would reduce the public reporting burden associated with the testing requirement under the final test rule. A complete discussion of the reporting burden is contained at 58 FR 59680, November 10, 1993.

List of Subjects in 40 CFR Part 799

Chemicals, Chemical export, Environmental protection, Hazardous substances, Health effects, Laboratories, Provisional testing, Reporting and recordkeeping requirements, Testing, Incorporation by reference.

Authority: 15 U.S.C. 2603.

Dated: September 12, 1995.

Lynn R. Goldman,

Assistant Administrator for Prevention, Pesticides and Toxic Substances.

Therefore, 40 CFR chapter I, subchapter R, part 799 is amended as follows:

PART 799 — [AMENDED]

1. The authority citation for part 799 continues to read as follows:

Authority: 15 U.S.C. 2603, 2611, 2625.

2. In § 799.5075 by revising paragraphs (a)(1), (c)(1)(i)(A), (c)(2)(i)(A) and (d)(1) to read as follows:

§ 799.5075 Drinking water contaminants subject to testing.

(a) * * *

(1) Chloroethane (CAS No. 75–00–3), 1,1,2,2-tetrachloroethane (CAS No. 79–34–5), and 1,3,5-trimethylbenzene (CAS No. 108–67–8) shall be tested as appropriate in accordance with this section.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(A) An oral 14–day repeated dose toxicity test shall be conducted with chloroethane, 1,1,2,2-tetrachloroethane, and 1,3,5-trimethylbenzene in accordance with § 798.2650 of this chapter except for the provisions in § 798.2650(a); (b)(1); (c); (e)(3), (4)(i), (5), (6), (7)(i), (iv), (v), (8)(vii), (9)(i)(A), (B), (11)(v); and (f)(2)(i). Each substance shall be tested in one mammalian species, preferably a rodent, but a non-rodent may be used. The species and strain of animals used in this test should be the same as those used in the 90–day subchronic test required in paragraph (c)(2)(i) of this section. The tests shall be performed using drinking water. However, if, due to poor stability or palatability, a drinking water test is not feasible for a given substance, that substance shall be administered either by oral gavage, in the diet, or in capsules.

* * * * *

(2) * * *

(i) * * *

(A) An oral 90–day subchronic toxicity test shall be conducted with chloroethane and 1,3,5-trimethylbenzene in accordance with § 798.2650 of this chapter except for the provisions in § 798.2650(e)(3), (7)(i), and (11)(v). The tests shall be performed using drinking water. However, if, due to poor stability or palatability, a drinking water test is not feasible for a given substance, that substance shall be administered either by oral gavage, in the diet, or in capsules.

* * * * *

(d) *Effective date.* (1) This section is effective on December 27, 1993, except for paragraphs (a)(1), (c)(1)(i)(A), and (c)(2)(i)(A). Paragraphs (a)(1), (c)(1)(i)(A), and (c)(2)(i)(A) are effective on November 6, 1995.

* * * * *

[FR Doc. 95–23461 Filed 9–20–95; 8:45 am]

BILLING CODE 6560–50–F

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43–CFR Public Land Order 7160

[CO–935–1430–01; COC–55991]

Withdrawal of National Forest System Lands for Telluride Ski Area; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order withdraws approximately 4,000 acres of National Forest System lands from mining for 50 years to protect recreational resources and facilities at the Telluride Ski Area. These lands have been and will remain open to such forms of disposition as may by law be made of National Forest System lands and to mineral leasing.

EFFECTIVE DATE: September 21, 1995.

FOR FURTHER INFORMATION CONTACT: Doris Chelius, BLM Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215–7076, 303–239–3706.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Subject to valid existing rights, the following described National Forest System lands are hereby withdrawn from location and entry under the United States mining laws (30 U.S.C. Ch. 2 (1988)), for protection of facilities and resources at the Telluride Ski Area:

Uncompahgre National Forest

New Mexico Principal Meridian

T. 42 N., R. 9 W.,
Sec. 1, lots 2, 3, 4, 6, 7, and 8, S½NW¼, and SW¼;
Sec. 2, lots 1, 2, 3, and 4, S½NE¼, S½SW¼, and SE¼;
Sec. 4, lot 2;
Sec. 9, S½S½NE¼, S½NW¼, and S½;
Sec. 10, W½NE¼SE¼NE¼, S½SW¼NW¼, W½SW¼, and E½SE¼;
Sec. 11;
Sec, 12, W½;
Sec. 13, W½;
Sec. 14;
Sec. 15, E½ and NW¼;
Sec. 22, NE¼NE¼;
Sec. 23, N½;
Sec. 24, NW¼.

T. 43 N., R. 9 W.,
Sec. 33, lots 18, 19, and 20;
Sec. 34, lots 17, 18, 22, 23, and 24;
Sec. 35, lots 28, 29, 30, 31, and 32.

The areas described aggregate approximately 4,000 acres of National Forest System lands in San Miguel County. This withdrawal includes all National Forest System lands and excludes any privately owned lands within the described areas.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of National Forest System lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

3. This withdrawal will expire 50 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (1988), the Secretary determines that the withdrawal shall be extended.

Dated: September 5, 1995.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 95–23365 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–JB–P

43 CFR Part 1820

[WO–420–4191–02–24 1A]

RIN 1004–AC41

Application Procedures, Execution and Filing of Forms: Correction of State Office Addresses for Filings and Recordings, Proper Offices for Recording of Mining Claims

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: This administrative final rule amends the regulations pertaining to execution and filing of forms in order to reflect the new address of the Wyoming State Office of the Bureau of Land Management (BLM), which moved in September 1995. All filings and other documents relating to public lands in Wyoming and Nebraska must be filed at the new address of the State Office.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT: Ted Hudson, (202) 208–4256.

SUPPLEMENTARY INFORMATION: This administrative final rule reflects the administrative action of changing the address of the Wyoming State Office of BLM. It changes the street address for the personal filing of documents relating to public lands in Wyoming and Nebraska, but makes no other changes in filing requirements.

Specifically, it does not change the mailing address of the Wyoming State Office, but only the street address. Therefore, this amendment is published as a final rule with the effective date shown above.

Because this final rule is an administrative action to change the address for one BLM State Office, BLM has determined that it has no substantive impact on the public. It imposes no costs, and merely updates a list of addresses included in the Code of Federal Regulations for the convenience of the public. The Department of the Interior, therefore, for good cause finds under 5 U.S.C. 553(b)(B) and 553(d)(3) that notice and public procedure thereon are unnecessary and that this rule may take effect upon publication.

Because this final rule is a purely administrative regulatory action having no effects upon the public or the environment, it has been determined that the rule is categorically excluded from review under Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

This rule was not subject to review by the Office of Management and Budget under Executive Order 12866.

As required by Executive Order 12630, the Department of the Interior has determined that the rule would not cause a taking of private property. No private property rights would be affected by private property. No private property rights would be affected by a rule that merely reports address changes for BLM State Offices. The Department therefore certifies that this proposed rule does not represent a governmental action capable of interference with constitutionally protected property rights.

Further, the Department has determined under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) that it will not have a significant economic impact on a substantial number of small entities. Reporting address changes for BLM State Offices will not have any economic impact whatsoever.

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

The Department hereby certifies that this proposed rule meets the applicable standards provided in Sections 2(a) and 2(b)(2) of Executive Order 12778.

List of Subjects in 43 CFR Part 1820

Administrative practice and procedure, Application procedures, Execution and filing of forms, Bureau offices of record.

Under the authority of section 2478 of the Revised Statutes (43 U.S.C. 1201), and 43 U.S.C. 1740, subpart 1821, part 1820, group 1800, subchapter A, chapter II of title 43 of the Code of Federal Regulations is amended as set forth below:

PART 1820—APPLICATION PROCEDURES

Subpart 1821—Execution and Filing of Forms

1. The authority citation for part 1820 is revised to read as follows:

Authority: R.S. 2478, 43 U.S.C. 1201; 43 U.S.C. 1740, unless otherwise noted.

2. Section 1821.2–1 is amended by revising in paragraph (d) the location and address of the Bureau of Land Management State Office in Wyoming to read:

§ 1821.2–1 Office hours; place for filing.

* * * * *

(d) * * *

STATE OFFICE AND AREA OF JURISDICTION

* * * * *

Wyoming State Office, 5353 Yellowstone Rd, Cheyenne WY 82009; Mail: P.O. Box 1828, Cheyenne, WY 82003—Wyoming and Nebraska

* * * * *

Dated: September 14, 1995.

Sylvia V. Baca,

Deputy Assistant Secretary of the Interior.

[FR Doc. 95–23408 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–84–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 2

[FCC 95–316]

Fixed-Satellite Service; Correction

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: On August 3, 1995 (60 FR 39657), the Commission published a final rule amending its Table of Frequency Allocations by adding a footnote and revising a footnote to permit use of the 17.8–20.2 GHz band for military space-to-Earth (''downlink'') fixed-satellite transmissions. The Commission is correcting the amendatory language and table amendments to ensure that the amendments are properly incorporated into the 1995 revision of the Code of Federal Regulations volume.

EFFECTIVE DATE: August 3, 1995.

FOR FURTHER INFORMATION CONTACT: Tom Mooring, Office of Engineering and Technology, (202) 776–1620.

SUPPLEMENTARY INFORMATION: The Commission is correcting the amendatory language and display of the Table of Frequency Allocations in the summary of the Memorandum Opinion and Order published in the Federal Register August 3, 1995, (60 FR 39657) at the request of the Office of the Federal Register to ensure that the October 1, 1995, revision of 47 CFR Parts 0 to 19 accurately reflects those amendments to the Table and is in the correct editorial format.

Federal Communications Commission

William F. Caton,

Acting Secretary.

Amendatory Text Correction

Accordingly, in FR Doc. 95–19164, published in the Federal Register on August 3, 1995, beginning on page 39657, make the following corrections:

§ 2.106 [Corrected]

Beginning on page 39657, in the third column, amendatory instruction 2 and the amendments to § 2.106 Table of Frequency Allocations are corrected to read as follows:

2. Section 2.106, the Table of Frequency Allocations, is amended as follows:

a. Remove the existing entries for 17.7–18.1 GHz and 18.1–18.6 GHz in columns (1) through (3) and for 17.7–17.8 GHz and 17.8–18.6 GHz in columns (4) through (7);

b. Add entries in numerical order for 17.7–17.8 GHz, 17.8–18.1 GHz and 18.1–18.6 GHz in columns (1) through (7);

c. Revise entries for 18.6–18.8 GHz through 20.1–20.2 GHz;

d. Add United States footnote US334; and

e. Revise Government footnote G117.

The additions and revisions read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

International table			United States table		FCC use designators	
Region 1—allocation GHz	Region 2—allocation GHz	Region 3—allocation GHz	Government Allocation GHz	Non-Government Allocation GHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	*
17.7–17.8	17.7–17.8	17.7–17.8	17.7–17.8	17.7–17.8		
FIXED	FIXED	FIXED		FIXED	AUXILIARY BROADCASTING (74)	
FIXED-SATELLITE (space-to-Earth) (Earth-to-space) 869	FIXED-SATELLITE (space-to-Earth) (Earth-to-space) 869	FIXED-SATELLITE (space-to-Earth) (Earth-to-space) 869		FIXED-SATELLITE (space-to-Earth) (Earth-to-space)	CABLE TELEVISION RELAY (78) DOMESTIC PUBLIC FIXED (21)	
MOBILE	MOBILE	MOBILE		MOBILE	PRIVATE OPERATIONAL-FIXED MICROWAVE (94)	
			US271	US271 NG140 NG144		
17.8–18.1	17.8–18.1	17.8–18.1	17.8–18.1	17.8–18.1		
FIXED	FIXED	FIXED		FIXED	AUXILIARY BROADCASTING (74)	
FIXED-SATELLITE (space-to-Earth) (Earth-to-space) 869	FIXED-SATELLITE (space-to-Earth) (Earth-to-space) 869	FIXED-SATELLITE (space-to-Earth) (Earth-to-space) 869		FIXED-SATELLITE (space-to-Earth)	CABLE TELEVISION RELAY (78) DOMESTIC PUBLIC FIXED (21)	
MOBILE	MOBILE	MOBILE		MOBILE	PRIVATE OPERATIONAL-FIXED MICROWAVE (94)	
			US334 G117	US334 NG144		
18.1–18.6	18.1–18.6	18.1–18.6	18.1–18.6	18.1–18.6		
FIXED	FIXED	FIXED		FIXED	AUXILIARY BROADCASTING (74)	
FIXED-SATELLITE (space-to-Earth)	FIXED-SATELLITE (space-to-Earth)	FIXED-SATELLITE (space-to-Earth)		FIXED-SATELLITE (space-to-Earth)	CABLE TELEVISION RELAY (78) DOMESTIC PUBLIC FIXED (21)	
MOBILE	MOBILE	MOBILE		MOBILE	PRIVATE OPERATIONAL-FIXED MICROWAVE (94)	
870	870	870	870 US334 G117	870 US334 NG144		
18.6–18.8	18.6–18.8	18.6–18.8	18.6–18.8	18.6–18.8		
FIXED	EARTH EXPLORATION-SATELLITE (passive)	FIXED	EARTH EXPLORATION-SATELLITE (passive)	EARTH EXPLORATION-SATELLITE (passive)	AUXILIARY BROADCASTING (74) CABLE TELEVISION RELAY (78)	
FIXED-SATELLITE (space-to-Earth) 872	FIXED	FIXED-SATELLITE (space-to-Earth) 872	SPACE RESEARCH (passive)	FIXED	DOMESTIC PUBLIC FIXED (21)	
MOBILE except aeronautical mobile	FIXED-SATELLITE (space-to-Earth) 872	MOBILE except aeronautical mobile		FIXED-SATELLITE (space-to-Earth)	PRIVATE OPERATIONAL-FIXED MICROWAVE (94)	
Earth Exploration-Satellite (passive)	MOBILE except aeronautical mobile	Earth Exploration-Satellite (passive)		MOBILE except aeronautical mobile		

International table			United States table		FCC use designators	
			Government	Non-Government		
Region 1—allocation GHz	Region 2—allocation GHz	Region 3—allocation GHz	Allocation GHz	Allocation GHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Space Research (passive) 871	SPACE RESEARCH (passive) 871	Space Research (passive) 871	US254 US255 US334 G117	SPACE RESEARCH (passive) US254 US255 US334 NG144		
18.8–19.7 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE	18.8–19.7 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE	18.8–19.7 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE	18.8–19.7 US334 G117	18.8–19.7 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE US334 NG144	AUXILIARY BROADCASTING (74) CABLE TELEVISION RELAY (78) DOMESTIC PUBLIC FIXED (21) PRIVATE OPERATIONAL-FIXED MICROWAVE (94)	
19.7–20.1 FIXED-SATELLITE (space-to-Earth) Mobile-Satellite (space-to-Earth) 873	19.7–20.1 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 873 873A 873B 873C 873D 873E	19.7–20.1 FIXED-SATELLITE (space-to-Earth) Mobile-Satellite (space-to-Earth). 873	19.7–20.1 US334 G117	19.7–20.1 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 873A 873B 873C 873D 873E US334		
20.1–20.2 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 873 873A 873B 873C 873D	20.1–20.2 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 873 873A 873B 873C 873D	20.1–20.2 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 873 873A 873B 873C 873D	20.1–20.2 US334 G117	20.1–20.2 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 873A 873B 873C 873D US334		
*	*	*	*	*	*	*

United States (US) Footnotes

* * * * *

US334 In the band 17.8–20.2 GHz, Government space stations and associated earth stations in the fixed satellite (space-to-Earth) service may be authorized on a primary basis. For a Government geostationary satellite network to operate on a primary basis, the space station shall be located outside the arc measured from East to West, 70°W to 120°W. Coordination between Government fixed-satellite systems and non-Government systems operating in accordance with the United States Table of Frequency Allocations is required.

Government (G) Footnotes

* * * * *

G117 In the bands 7.25–7.75 GHz, 7.9–8.4 GHz, 17.8–21.2 GHz, 30–31 GHz, 39.5–40.5 GHz, 43.5–45.5 GHz and 50.4–51.4 GHz the Government fixed-satellite and mobile-satellite services are limited to military systems.

* * * * *

[FR Doc. 95–23168 Filed 9–20–95; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 95–39; FCC 95–382]

Network Financial Interest and Syndication Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission repealed significant portions of its financial interest and syndication (''fin/syn'') rules, scheduled the remaining rules for expiration, and committed itself to conducting a proceeding six months prior to the scheduled expiration date. On April 5, 1995, the Commission adopted a Notice of Proposed Rule Making initiating the instant review of these rules. It also sought comment in the Notice of Proposed Rule Making on whether to accelerate the expiration date for the remaining rules in the event it determined that no basis had been shown for retaining them. Having

considered the record before it, the Commission finds that those parties favoring retention of the remaining fin/syn rules have failed to meet their burden of proof, and that continuation of the rules therefore is not justified. The intended effect of this action is to eliminate the fin/syn rules in their entirety without delay.

EFFECTIVE DATES: Sections 73.659, 73.660, 73.661, and 73.663 are removed effective September 21, 1995. Section 73.662 is amended effective September 21, 1995, and removed effective August 30, 1996.

FOR FURTHER INFORMATION CONTACT: Robert Kieschnick, (202) 739–0770, or David E. Horowitz, (202) 776–1653, Mass Media Bureau, Policy and Rules Division.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order in MM Docket No. 95–39, FCC 95–382, adopted August 29, 1995, and released September 6, 1995. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (room 239), 1919 M Street NW., Washington, DC 20554, and may be purchased from the Commission's copy contractor, International Transcription Service (202) 857–3800, 2100 M Street NW., Washington, DC 20037.

Synopsis of the Report and Order

1. The fin/syn rules, which were adopted in 1970 to limit network control over television programming and thereby foster diversity of programming through the development of diverse and antagonistic programming sources, restricted the ability of the three established networks (ABC, CBS, and NBC) to own and syndicate television programming. As stated above, we initiated the instant proceeding pursuant to our Second R&O in MM Docket No. 90–162, in which we determined that, given competitive conditions in the television programming marketplace, the fin/syn rules should be repealed in their entirety. While we concluded in the Second R&O that market conditions did not justify retention of the fin/syn restrictions, we also determined that several critical non-market factors warranted a staggered repeal rather than immediate elimination of all of the rules. First, we developed a scheme to allow us to observe the operation of a partially deregulated market for a period of time to see whether our assessment that the networks would not act in ways detrimental to diversity and competition following deregulation was valid. Second, a gradual phase-out of our restrictions on active syndication in particular appeared warranted because we considered that lifting the restraints on such syndication posed a more significant risk of damage to outlet diversity than that posed by lifting the other restraints, in the event our conclusions about the reactions of the marketplace proved wrong. Finally, we recognized that immediate elimination of all the rules could be disruptive and have unintended and unforeseen negative effects.

2. The rules that we retained, and which we consider here, relate to active syndication on the part of the networks, their involvement in the first-run non-network market, warehousing of programs, and reporting requirements. Under these rules, the networks have been prohibited from actively syndicating prime time entertainment network programming or first-run non-network programs to television stations within the United States. Any such program for which a network holds a passive syndication right must have been syndicated domestically through an independent syndicator. Further, networks have been prohibited from holding or acquiring a continuing financial interest or syndication right in any first-run, non-network program distributed in the United States unless the network had solely produced that program. The anti-warehousing safeguards we adopted were designed to prevent a network from withholding prime time programs from the syndication market for an unreasonable period of time. Finally, sem-annual reporting requirements were imposed on the networks.

3. Both the Second R&O and the Notice were explicit that parties who oppose the scheduled expiration of the remaining fin/syn restrictions would bear the burden of proof in this proceeding. In the Notice, we further explained that commenters opposing the expiration of the rules would ''need to convince us that, based on the current status of the program production and distribution markets and the activities of the networks since 1993, the Commission should continue regulation in this area. Parties arguing for retention of fin/syn restrictions should support their positions with empirical data and economic analysis.'' Notice at para. 12. Thus, because we determined that, as of 1993, market conditions did not justify retention of the fin/syn rules, we made clear that those favoring retention of the rules would have to present evidence of the networks' behavior and the status of program production and distribution markets since that time.

4. In both the Second R&O and the Notice, we also set forth a list of fourteen factors that we deemed relevant to our review of the remaining rules. See Second R&O at para. 118; Notice at para. 12.

5. We find that commenters favoring retention of the remaining fin/syn rules have failed to carry their burden of demonstrating that, based on empirical data and economic analysis of the television program production and distribution markets and network activities since 1993, the rules are necessary to ensure competitive market conditions or source and outlet diversity.

6. Certain arguments made by these commenters suggest that the Commission must prove that repeal of the rules is justified. The Association of Independent Television Stations, Inc. (''INTV''), for example, argues that there is no rational basis for sunsetting the rules, that the FCC has found that the networks have the incentive and ability to deprive independent stations of access to syndicated programming, and that the Commission must make contrary findings based on substantial evidence in order to sunset the rules. We disagree. Based on a thorough review of extensive record evidence, the Commission concluded in the Second R&O that the development of competitive conditions in program production and distribution markets and the decline of network dominance warranted the total repeal of the rules. This decision was affirmed by the Seventh Circuit. *Capital Cities/ABC, Inc.* v. *FCC*, 29 F.3d 309 (7th Cir. 1994). Moreover, the Court warned the FCC that only a compelling reason could justify retention of the rules after their scheduled expiration. Id. at 316. Thus, absent such a compelling showing on the part of those seeking to retain the rules, there are no grounds for suggesting, as INTV does, that the Commission must reexamine its conclusions regarding the lack of need for fin/syn regulation.

7. The Coalition to Preserve the Financial Interest and Syndication Rule (''Coalition'') acknowledges in its reply comments that it must carry the burden of proof. Nonetheless, its discussion at times suggests that the burden of proof has shifted to those favoring expiration of the rules, i.e., the networks. Thus, the Coalition asserts that the networks have failed to show that certain arguments submitted and findings made in proceedings conducted prior to 1993 are no longer valid. However, absent a showing based on post-1993 evidence that such earlier arguments and findings

are valid now, the networks are not required to disprove them.

8. Proponents of retention of the rules also argue that repeal of the rules will yield no benefits. The Coalition, for example, states that the purpose of the instant proceeding is to test the Commission's 1993 predictions regarding the beneficial effects of repealing the rules, and argues that, since 1993, our relaxation of the rules has not resulted in predicted public welfare benefits. Similarly, King World Productions, Inc. (''King World''), which focuses its comments on first-run syndicated programming, argues that allowing the networks to syndicate first-run programming would produce no public benefit and a probability of harm to source diversity.

9. The purpose of this proceeding, however, is not to determine whether any particular benefits have been realized as a result of the partial elimination of our fin/syn rules. Rather, we provided for the instant review of our remaining rules because we wanted to be certain that their removal would not cause harm. Among our concerns was the possibility that we may have erred in predicting that the networks would not be able to abuse their position if we removed all restrictions on syndication. However, we have already concluded, and the Seventh Circuit has agreed, that the syndication rules are no longer justified by the conditions of the program distribution market, and we are concerned here only with preventing any harm that could result if we were wrong. We anticipate that the repeal of our fin/syn rules will have benefits over time, but our focus here is on whether or not there is evidence that repeal will threaten diversity in the program production and distribution markets.

10. Generally speaking, many of the pro-fin/syn arguments presented in this proceeding are unconvincing because they rely on conclusions reached by the Commission or others prior to 1993, or on analysis of network behavior before that time. Proponents of retaining the rules also rely in part on arguments that were rejected in the Second R&O. Our Notice stated that commenters opposing the scheduled expiration of our rules would need to present information about and analysis of network activities and the operation of program markets since 1993. Thus, arguments based on earlier analyses or data are irrelevant to the instant review (unless the data are used as a comparative benchmark), as are arguments rejected in our Second R&O.

11. We turn now to an examination of the arguments made in this proceeding that provide data and/or economic analysis relevant to the period from 1993 to the present. In the discussion set forth below, we consider these arguments as they relate to the fourteen factors set forth in the Second R&O and the Notice.

12. *The extent to which a network-owned program is syndicated primarily to that network's affiliates.* The only relevant data on this issue were submitted by those favoring elimination of the remaining fin/syn rules. Thus, for example, the National Broadcasting Company, Inc. (''NBC'') provides figures for its single in-house production that has been in active first-run syndication by a third-party syndicator since 1993, a series entitled ''News 4 Kids.'' As of May 1995, this program was being carried on 210 stations, of which only 49—or 23%—are either owned by or affiliated with NBC. In contrast, the proponents of retention of the rules did not provide evidence showing that network-owned programs are syndicated primarily to network-owned or -affiliated stations. King World states in its comments that NBC launched a weekly series entitled ''Memories Then and Now'' which, in its initial season, was carried on 44 stations, 31 of which were either owned by or affiliated with NBC. According to King World, this program illustrates how the networks exploit their affiliates to exercise power over the distribution system. However, the figures King World cites are for February 1992, a period of time that is not relevant to this proceeding except insofar as it is used to place post-1993 network behavior into context. Moreover, even if we consider these figures as relevant here, we note that NBC points out that ''Memories Then and Now'' was syndicated by an independent distributor, and that King World does not claim that NBC had any influence over the syndicator's sales practices. According to NBC, the fact that the program was a failure in syndication shows that NBC does not have the power over the distribution system that King World claims. If it had such power, NBC states, it would have been able to force sufficient clearances to make the show a success. ABC also points out that the clearance of a program by only 31 NBC affiliates does not show that the networks have used their affiliates to exercise undue control over the distribution system. Finally, we observe that no evidence was presented showing that Fox Broadcasting Company (''Fox''), which is permitted under our rules to engage in active syndication, has favored its affiliates in syndicating Fox programming. We find that evaluation of fin/syn repeal under this factor fails to support a conclusion that the networks favor affiliates in syndicating their programs.

13. *The percentage of network programming in which a network has obtained a financial interest or syndication right.* According to the Coalition, the established networks have taken financial interests, through either co-productions or in-house productions, ''in approximately 40 percent of new shows picked up since the Commission eliminated the financial interest rule in 1993.'' Coalition Comments at 17. The Coalition asserts that this figure is evidence of the exercise of the established networks' market power in the purchase of programming. However, the Coalition does not explain how it arrived at this figure. Moreover, as both Capital Cities/ABC, Inc. (''ABC'') and NBC point out, the Coalition's figure, even if valid, merely shows that the established networks have not had a financial interest in the majority of new shows picked up since the Commission eliminated the financial interest rule, a circumstance that is inconsistent with the contention that the networks have exercised undue market power. In sum, no evidence has been presented that demonstrates that the established networks have exercised undue market power in acquiring a financial interest in prime time entertainment programming.

14. Further, no party has presented any evidence indicating that the established networks have allowed their financial interests in or syndication rights to programming aired during prime time to influence their decisions to either retain or cancel that programming. Under our current rules, the established networks may have both a financial interest in and syndication rights to programming produced in-house. NBC states that every network in-house program that premiered in the fall of 1994 was canceled by its respective network by the end of the broadcast season, and asserts that this fact refutes any suggestion that the networks accord favored treatment to their in-house productions. We find that proponents of retaining the remaining fin/syn restrictions have not demonstrated network favoritism toward programming in which they have a financial interest, or to which they have syndication rights, in any way that would adversely affect diversity within the program production market.

15. *The relative change in the number of independent producers creating and selling television shows to the networks.* In its reply comments, the Coalition suggests that data from a study

submitted by Economists Incorporated in comments filed in MM Docket No. 94–123, the Prime Time Access Rule (''PTAR'') proceeding, demonstrate that ''source diversity has declined dramatically since the financial interest rule was repealed.'' Coalition Reply Comments at 25. Specifically, the Coalition relies on Appendix E of the study to show that there has been a reduction in the number of suppliers of prime time entertainment series since the 1993–94 season. This appendix lists the packagers of programming included in the prime time schedules of ABC, NBC, and CBS Inc. (''CBS'') from the 1969–70 season to the 1994–95 season and the percentage of prime time network programming supplied by these packagers. Figures for the 1995–96 season are projected based on one week of the announced fall line-up on the three networks. Economists Incorporated defines ''packager'' for purposes of this calculation as the entity that assumed contractual responsibility to a network for production or delivery of a series.

16. While we agree with the Coalition that the Economists Incorporated study indicates a decline in the number of packagers of programming included in the prime time schedules of ABC, NBC, and CBS from 29 in 1993–94 to 17 in the fall of 1995, we do not agree that these figures necessarily demonstrate a reduction in source diversity due to either the relaxation of our fin/syn rules or anticompetitive behavior on the part of the three networks. We note that Appendix E also shows that the number of packagers declined from 31 to 26 from 1990–91 to 1991–92, which was prior to the relaxation of our rules. We believe that this decline, which cannot be attributed to elimination of the financial interest rule, is instead attributable to the inherent riskiness of prime time programming, which may also explain the change in the number of packagers on which the Coalition comments. In addition, we observe that the identity of the packagers listed in Appendix E varies from year to year. This suggest that the list for any given year does not represent all program suppliers selling to the networks, nor can the variations in the lists be used to support a finding that suppliers are being excluded from the market. We also observe that Warner Brothers, which is developing a new broadcast television network to compete with ABC, CBS, and NBC, is providing 23.33% of the prime time entertainment schedule of the three major networks for the fall of 1995. This figure tends to discount any claim that ABC, CBS, and NBC are trying to restrict the supply of programming provided by competitors. In short, the information cited by the Coalition does not demonstrate that relaxation of our fin/syn rules has led to any reduction in the number of independent producers actively competing to create and sell television shows to the networks. Finally, to the extent that there has been any decline in the number of suppliers of prime time programming, it may be due at least in part, as CBS claims, to the major studios supplying an increased percentage of prime time programming.

17. *Concentration of ownership in the program production industry.* In connection with this factor, commenters favoring retention of the fin/syn rules focused on levels of network ownership of prime time entertainment programming. The Coalition asserts that the networks' share of copyrights in such programming has increased from 29% to 35% since repeal of the financial interest rule but does not provide documentation for these figures. INTV contends that the percentage of prime time entertainment series produced in-house by the networks increased from less than 1% in 1984–85 to 7.6% in the 1993–94 season. (We note that Economists Incorporated, upon which INTV relies, has revised its figures of 7.6% for 1993–94 to 6.3%.) However, neither the Coalition nor INTV establishes a clear trend toward increased network ownership of such programming that is attributable to the relaxation of our fin/syn rules or that constitutes a cause for concern from a public interest standpoint. Moreover, looking at the percentages of hours of prime time entertainment series accounted for by in-house network production since 1993, we observe that these percentages have fluctuated from year to year. Accordingly to NBC, in-house productions accounted for 20.2% of the established networks' prime time entertainment series hours in 1992–93, 19.0% of these hours in 1993–94, 25.8% of these hours in 1994–95, and 22.2% of these hours in the Fall 1995 schedule. (We note that the wide difference between the figures cited by INTV and those cited by NBC is due to the fact that INTV's figures refer to the percentage of the number of prime time entertainment series produced in-house, whereas NBC's figures document the number of hours of such programming.) Thus, we cannot say, based on the showings made in this proceeding, that the networks have acted to preclude the prime time programs of other producers from reaching the market, or that program production has been concentrated in the hands of the networks as a result of the relaxation of the fin/syn rules to the detriment of the viewing public. Indeed, the fact that independently owned ''packagers'' provided 80.97% of the prime time programming hours included in the schedules of ABC, CBS, and NBC during the 1993–94 season, provided 74.2% of these hours during the 1994–95 season, and are scheduled to provide 77.7% of these hours in the upcoming 1995–96 season clearly demonstrates that the three established networks are not precluding independent product from their schedules and thereby concentrating ownership of prime time programming in their hands.

18. *Audience shares of first-run syndicated programming carried by non-network affiliated stations during prime time.* According to INTV, expiration of the fin/syn rules will limit the ability of independent stations to acquire first-run prime time syndicated programs. INTV states that first-run programming accounts for only 39% of the prime time programming of independent stations, and that this programming ''rarely achieves'' ratings comparable to the ratings of programming shown on the networks. However, the Economists Incorporated data cited by INTV reflect only programming aired in the top 50 markets in November 1994, and do not include ratings information. Thus, the data cited do not support INTV's claims. ABC notes that first-run productions such as ''Star Trek/Deep Space Nine,'' ''Kung Fu,'' and ''The Legendary Journeys of Hercules'' have been syndicated successfully in prime time without reliance on the networks' affiliates. In sum, it has not been shown that competitive first-run prime time programming is unavailable to independent stations, nor has it been demonstrated that the repeal of our remaining fin/syn restrictions would diminish the amount of first-run programming available to independent stations or otherwise be detrimental to the diversity of programs and program sources.

19. *The overall business practices of emerging networks, such as Fox, in the network television and syndication business.* Although it does not directly discuss its business practices, Fox provides information in its reply comments about its production of prime time programming. Fox states that it currently produces only 3½ of its own 15 hours of prime time network programming, and that it produces a substantial amount of programming for other networks, including ''Chicago Hope'' and ''Picket Fences'' for CBS.

Fox offers itself as a ''perfect laboratory model'' of a broadcast network that has not been subject to regulatory constraints as a producer. We believe that the fact that most of the prime time programming aired on the Fox network is produced by outside suppliers is evidence that permitting a network to own and syndicate programming does not result in foreclosing independent suppliers from the market.

20. *Network negotiating patterns, particularly the manner in which networks obtain financial interests and syndication rights and the extent to which successful negotiations over back-end rights influence network buying decisions.* While not directly addressing this issue, the Coalition does assert that the established networks have uniformly lowered the license fees they pay for prime time entertainment programming. However, the Coalition cites figures without providing any documentation. Moreover, as NBC points out, the Coalition does not indicate in citing its figures what type of programming is involved or the track record of the producer. As a result, we cannot assess the significance of the Coalition's numbers. We note, too, that CBS cites independent industry analysts as reporting that the average license fees paid by the three major networks, as estimated on a per-hour basis, remained virtually unchanged from the 1992–93 season through the 1994–95 season. Thus, we find that proponents of retaining the fin/syn rules have provided no probative evidence that the established networks have exercised undue market power since 1993 in their negotiations for financial interests and syndication rights in television programming.

21. *Mergers or acquisitions involving networks, studios, cable systems and other program providers since our 1993 fin/syn decision took place.* CBS cites a number of mergers that have occurred since 1993 that have resulted in the formation of large new competitors in the video production and distribution markets. Among these are the merger of Viacom Inc., Blockbuster Entertainment Corp., and Paramount Communications, Inc., which has resulted in a company with both production and distribution capabilities. To the extent that such mergers have strengthened the production and distribution capabilities of the merging parties, the three original networks are facing more effective competitors in the video production and distribution markets. We note as well the recent announcements that the Walt Disney Company plans to acquire ABC and that Westinghouse Electric Corp. plans to purchase CBS. The Commission will, or course, be reviewing these acquisitions in the normal course of its regulatory business to ensure that they do not undermine the competiveness of the production and distribution markets.

22. *The growth of additional networks, including the development of Fox and its position vis-a-vis the three major networks.* In their comments, NBC, CBS, and ABC point to the growing audience share of Fox, and to their own declining audience share, as evidence of the competition Fox provides to the established broadcast networks. CBS notes that the aggregate prime time viewing share of the three original networks, which had already fallen to 59% in 1992, dropped further to 57% in the 1993–94 season. NBC, CBS, and ABC also point to the emergence of the United Paramount and Warner Brothers networks as evidence of both the forward integration of existing television programming producers into the distribution of programming through broadcast television outlets and the increased number of potential purchasers of television programming. INTV argues that these new networks cannot compete effectively with the established networks because of the structural advantages enjoyed by the latter—primarily the number of VHF stations owned by or affiliated with the established networks. INTV also suggests that the two newest networks have not had a significant competitive impact because they supply only 2 to 4 hours of weeknight prime time programming. We have, however, already decided in our Second R&O that any structural advantages of the established networks are no longer sufficient to allow them to dominate the program production and distribution markets. Moreover, Fox has competed effectively for a number of VHF affiliates and initiated a series of affiliate switches, which have resulted in some of the established networks having fewer, rather than more, VHF affiliates than they did in 1993. Thus, any structural advantage that the established networks may have had based on ownership of an affiliation with VHF stations has been diminished rather than increased since our Second R&O. Even if the impact of the United Paramount and Warner Brothers networks is currently relatively small, they nonetheless appear to be viable new competitors for the established networks and may increase their market share as Fox has done. Given Fox's growth in audience share, as documented by Economists Incorporated in our PTAR proceeding, and the emergence of two additional broadcast networks, we find that the established broadcast television networks have faced more, rather than less, competition from broadcast television purchasers and distributors since 1993. In keeping with this finding, we disagree with King World's claim that the established networks have bottleneck power over the broadcast television distribution system.

23. *The growth in the number and types of alternative outlets for sale of programming (e.g. the development of the Direct Broadcast Satellite (''DBS'') service; cable penetration; wireless cable development).* We determined in our Second R&O that cable networks were competitors to the established broadcast television networks in the purchase of television programming. CBS and ABC point out in this proceeding that there has been continued growth in the number and audience share of not only cable networks but also other networks using alternative distribution technologies (e.g., DBS, wireless cable), and they cite data provided in Economists Incorporated's PTAR comments that demonstrate the increased market share of cable networks. The Coalition argues that cable and other services are not effective competitors to broadcast television, and that cable and other non-broadcast networks therefore are not effective competitors to broadcast networks. However, we have already decided in our Second R&O that these alternative video delivery systems provide sufficient competition with the broadcast networks to obviate the need for fin/syn restrictions and, absent evidence of new developments, this conclusion need not be revisited. Moreover, based on the evidence in the record before us, we find that the established broadcast television networks have faced more, rather than less, competition for the acquisition of television programming from non-broadcast television purchasers since 1993.

24. Proponents of retaining our remaining fin/syn rules have failed to carry their burden of proof that earlier relaxation of these rules has threatened diversity in the television program production and distribution markets, or enabled the established networks to engage in anticompetitive activities to the detriment of the public interest; or that the current conditions of the production and distribution markets warrant retention of the rules. Proponents of retaining the rules have not provided persuasive evidence that the established networks engage in, or

threaten to engage in, affiliate favoritism to the detriment of non-network stations; that the established networks place or retain programming in their schedules because of their financial interests in or syndication rights to that programming, or for other than legitimate competitive reasons; or that the established networks have reduced the pool of suppliers of television programming through anticompetitive practices.

25. In addition, proponents of retaining the remaining fin/syn rules have provided no evidence unrelated to our fourteen factors that would cause us to question whether the conclusions we reached in 1993 remain valid today. Nor have they shown that the semi-annual reports submitted by the networks reveal ownership patterns that pose a threat to programming diversity. Moreover, there is persuasive evidence that the established broadcast television networks have faced increased competition for the acquisition of television programming from broadcast and non-broadcast television distributors since 1993, and there is evidence which suggests that the market power of the established networks, as determined by their prime time audience share, has decreased since 1993. We therefore decline to alter our 1993 decision to sunset the remaining fin/syn rules. In light of the fact that the commenters have not shown a need to retrain these rules, we also conclude that there is no justification for strengthening any of the rules, as the Coalition urges.

26. Finally, we note that both the Coalition and INTV urge us to retain, and indeed strengthen, our reporting requirements for the networks even if we allow the rest of the fin/syn rules to expire. These parties argue that it is important for the Commission to monitor the network's conduct following repeal of the remaining rules in order to assess the impact of such repeal. However, neither of these commenters has demonstrated the need to continue reporting requirements, and we decline to do so.

27. In our Notice, we sought comment on whether, in the event proponents of retention of the fin/syn rules failed to meet their burden of proving that retaining the rules is warranted, we should amend our rules to allow for an expiration date earlier than November 10, 1995. Commenters in this proceeding have failed to demonstrate that market conditions and networks behavior since 1993 justify retraining the rules. In addition, no evidence or argument has been submitted showing that repeal of the remaining rules before November 10, 1995, would disrupt the conduct of business by parties relying on the rules, although we sought comment on this point. We also note, as discussed above, that the networks now face more competition than in 1993 for the acquisition of television programming from broadcast and non-broadcast television distributors. Moreover, we have described at length the negative effects of the fin/syn rules on production and distribution markets in our earlier decisions. Under these circumstances, we conclude that no public interest purpose would be served by allowing the rules to remain in effect until November 10, 1995. We thus conclude that all of the remaining fin/syn rules will be repealed immediately upon publication of this Order in the Federal Register.

Final Regulatory Flexibility Analysis

28. Pursuant to the Regulatory Flexibility Act of 1980, the Commission has set forth the following Final Regulatory Flexibility Analysis. The Secretary shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act, 4 U.S.C. § 601 et seq.

29. Need for and Purpose of this Action: This action is taken to accelerate the expiration of the Commission's remaining fin/syn rules—previously scheduled for November 10, 1995—so that the rules will expire upon publication of this Order in the Federal Register.

30. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: None.

31. Significant Alternatives Considered and Rejected: The Commission considered retaining the remaining fin/syn rules. However, after reviewing the comments submitted in this proceeding, the Commission concluded that the proponents of retaining the rules had not met their burden of proving that the rules are still needed to achieve the FCC's goals of source and outlet diversity in the television programming marketplace. One commenter in this proceeding argued that the fin/syn rules should be strengthened. The Commission considered this argument but concluded that it was without merit in light of the fact that no need for retaining the rules at all had been demonstrated. The Commission also considered leaving the remaining fin/syn rules in place until their previously scheduled expiration date of November 10, 1995, but concluded that no evidence had been presented showing that earlier repeal would disrupt the conduct of business by parties relying on the rules. Given the increased competition facing the networks and the negative effects of the fin/syn rules on production and distribution markets, the Commission concluded that no public interest purpose would be served by waiting until November 10, 1995, to sunset the rules.

Ordering Clauses

32. Accordingly, It Is Ordered that pursuant to the authority contained in Sections 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314, Sections 73.659 through 73.663 of Part 73 of the Commission's Rules, 47 CFR Part 73, Are Amended as set forth below, effective upon publication of this Order in the Federal Register.

33. In keeping with our recent decision in our PTAR proceeding, It Is Further Ordered that section 73.662 of Part 73 of the Commission's Rules, 47 CFR Part 73, Is Further Amended as set forth below, effective August 30, 1996.

34. It Is Further Ordered that MM Docket No. 95–39 Is Terminated.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

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

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334.

2. Sections 73.659 through 73.661, and 73.663, are removed and reserved.

3. Sections 73.662 is amended by revising the heading and introductory text to read as follows:

73.662 Definitions for television prime time access rules.

For purposes of § 73.658(k):

* * * * *

4. Effective August 30, 1996, § 73.662 is removed and reserved.

[FR Doc. 95–23366 Filed 9–20–95; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 90

[PR Docket No. 89–553, PP Docket No. 93–253, GN Docket No. 93–252; FCC 95–395]

SMR Systems in the 900 MHz Frequency Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission adopted a Second Order on Reconsideration and Seventh Report and Order, implementing final auction rules for the 900 MHz Specialized Mobile Radio (SMR) service. The Second Order on Reconsideration addresses reconsideration petitions concerning the service rule adopted in the Second Report and Order and Second Further Notice of Proposed Rule Making. The Seventh Report and Order sets forth the rules and procedures governing the 900 MHz SMR auction, including reduced down payments, bidding credits and installment payment plans for small businesses and partitioning for rural telephone companies. The intended effect of this action is to facilitate the development of SMR services and to promote competition in the wireless marketplace.

EFFECTIVE DATE: October 23, 1995.

FOR FURTHER INFORMATION CONTACT: Amy Zoslov (202) 418–0660. Wireless Telecommunications Bureau or Diane Law (202) 418–0660. Wireless Telecommunications Bureau.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Second Order on Reconsideration and the Seventh Report and Order, released September 14, 1995. The complete text of this Second Order on Reconsideration and Seventh Report and Order is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 239, 1919 M Street, N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, at (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Synopsis of the Second Order on Reconsideration and Seventh Report and Order

Adopted: September 14, 1995
Released: September 14, 1995

I. Background

When the Commission established the 900 MHz SMR service in 1986, it elected to use a two-phase licensing process. In Phase I, licenses were assigned in 46 ''Designated Filing Areas'' (DFAs) comprised of the top 50 markets. Phase II licensing, for facilities outside the DFAs, was frozen after 1986, when the Commission opened its filing window for the DFAs. In 1989, the Commission adopted a Notice of Proposed Rule Making in PR Docket 89–533, 55 FR 744 (Jan. 9, 1990), proposing to begin Phase II licensing of 900 MHz SMR facilities nationwide. In 1993, the Commission adopted a First Report & Order and Further Notice of Proposed Rule Making in PR Docket 89–553, 58 FR 12176 (March 3, 1993), modifying its Phase II proposal and seeking comment on whether to license the 900 MHz SMR band to a combination of nationwide, regional, and local systems. Shortly thereafter, Congress amended the Communications Act to reclassify most SMR licensees as Commercial Mobile Radio Service (CMRS) providers and establish the authority to use competitive bidding to select from among mutually exclusive applicants for certain licensed services. The Commission deferred further consideration of Phase II and incorporated the 900 MHz docket into its CMRS proceeding.

In the CMRS Third Report & Order, PR Docket 89–553, 59 FR 59945 (Nov. 21, 1994), the Commission further revised its Phase II proposals and established the broad outlines for the completion of licensing in the 900 MHz SMR band. The Commission left the adoption of specific auction and service rules for the Phase II Order which the Commission adopted in the Second Report and Order and Second Further Notice, PR Docket 89–553, GN Docket No. 93–252, PP Docket No. 93–253, FCC 95–159, 60 FR 21987 and 60 FR 22023 (May 4, 1995), (Second R&O & Second Further Notice). In that proceeding, the Commission adopted final service rules, established technical and operational rules for the new MTA licensees, defined the rights of incumbent SMR licensees already operating in the 900 MHz band, and requested comment on proposed auction rules. The 900 MHz SMR band will be divided into 20 ten-channel blocks in each of 51 service areas based on Major Trading Areas (MTAs), which match the blocks previously licensed for the DFAs. Each MTA license will give the licensee the right to operate throughout the MTA on the designated channels except where a co-channel incumbent licensee already is operating. MTA licensees will be allowed to aggregate multiple blocks within an MTA and to aggregate blocks geographically in multiple MTAs. The Commission also addressed issues raised on reconsideration of the CMRS Third Report & Order pertaining specifically to the 900 MHz SMR service. The Commission set forth proposals for new licensing rules and auction procedures for the service, including provisions for designated entities. The Commission later issued a Public Notice requesting further comment on the impact of the Supreme Court's subsequent decision in *Adarand Constructors, Inc* v. *Peña,* 115 S.Ct. 2097 (1995), on the proposed treatment of designed entities.

In this Second Order on Reconsideration & Seventh Report & Order the Commission affirms the coverage requirements for MTA licensees and the interference protections and loading requirements for incumbents, and clarifies secondary site licensing, finders' preference and foreign ownership waiver policies. The Order also adopts auction rules, including a tiered bidding credit and enhanced installment payment plans for small businesses and partitioning for rural telephone companies.

II. Second Order on Reconsideration

A. Service Rules

Coverage Requirements

As decided in the Second R&O & Second Further Notice, MTA licensees in this service will be required to meet coverage requirements of ⅓ of the population in the service area within three years of the initial license grant and ⅔ of the population within five years. Alternatively, a licensee may make a showing at five years that it is providing ''substantial service.'' The Commission denies reconsideration of these benchmarks, and reiterates that MTA licensees must satisfy these requirements regardless of the area or percentage of the MTA population that is served by incumbent licensees. MTA licensees may consider options such as resale or management agreements to fulfill the coverage requirements.

Treatment of Incumbents

To ensure that incumbent licensees receive protection from interference by MTA licensees, Second R&O & Second Further Notice provides that MTA licensees either must maintain a minimum 113 kilometer (70 mile) geographic separation or comply with the Commission's short-spacing rules with respect to all incumbent facilities in their service area or in adjacent MTAs. The Commission affirms its intention to allow MTA licensees to use short-spacing rules to comply with interference protection standards, and does not believe it will result in a plethora of interference disputes at the Commission. The Commission also

affirms its adoption of the 40 dBu signal strength contour as the protected service area in which incumbents may modify or add facilities, and reject petitioners' requests to use the 22 dBu contour instead.

The Commission will allow incumbents to have their licenses reissued if they are not the successful bidder for the MTA in which they are currently operating. This procedure, which would be granted post-auction upon the request of the incumbent, would essentially convert their current site licenses to a single ''partitioned'' license, authorizing operations throughout the contiguous and overlapping 40 dBu signal strength contours of the multiple sites. All incumbents with reissued ''partitioned'' licenses will have to make a one-time filing of specific information for each of their external base sites that will assist the staff in updating the Commission's database after the close of the 900 MHz SMR auction. Incumbents cannot expand their 40 dBu signal strength contour, so they may make additions or modifications to their facilities without notifying the Commission. If incumbents seek to gain additional geographic coverage beyond the 40 dBu protected contour, they must apply for the MTA license.

Secondary Site Licensing/Finders' Preference

As decided in the Second R&O & Second Further Notice, no secondary site licenses will be granted once an MTA licensee has been selected. The Commission states that it is important to assure potential MTA bidders that the spectrum upon which they are bidding will not become subsequently encumbered with secondary sites. The Commission clarifies that all pending finders' preference requests for 900 MHz SMR licenses will be processed, but eliminates future finders' preferences for the 900 MHz SMR service. As provided by the rules, any stations licensed to incumbents that are not constructed or placed in operation will revert automatically to the MTA licensee for that channel block.

Loading Requirements

The Commission denies further reconsideration of its decisions in the CMRS Third Report & Order and the Second R&O & Second Further Notice with respect to loading requirements in the 900 MHz service, as petitioners have raised no new arguments that would merit reconsideration. Consequently, incumbent 900 MHz SMR licensees will continue to be subject to loading requirements, although they are eliminated for MTA licensees. However, temporary relief of the loading rules may be available if the incumbent's unique circumstances warrant a waiver of the rules.

Discontinuance of Operation

The Commission clarifies that the amended rule regarding discontinuance of operation (Section 90.631(f)), which provides that stations taken out of service for 90 consecutive days are considered permanently discontinued, applies only to stations that were taken out of service after June 5, 1995 (the effective date of the rule). The former rule provided that stations taken out of service for 12 months were considered permanently discontinued. Consequently, stations that were taken out of service prior to June 5, 1995, are entitled to stay out of service for the remainder of the original 12 months provided in the former rule, before they will be considered permanently discontinued. Those stations taken out of service on or after June 5, 1995, will be considered permanently discontinued after 90 days. With regard to wide-area SMR licensees that are replacing high power analog sites with low power digital sites, however, the Commission will deem all the base stations ''in operation'' if the system meets the standards and conditions set out in Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 1533 (1991), *recon. dismissed*, 6 FCC Rcd 6989 (1991). In Fleet Call, the Commission found that conversion from Fleet Call's existing base stations with aggregate loading from single high-power sites to multiple low-power sites on an integrated basis in six major markets would increase spectrum efficiency without posing a risk of spectrum warehousing.

Foreign Ownership Waivers

In Section 332(c)(6) of the Communications Act, Congress reclassified certain categories of private land mobile radio providers (PLMRS) as commercial mobile radio service (CMRS) providers, and provided for their treatment as common carriers. As a result, reclassified providers are subject to the Section 310(b) foreign ownership restrictions. Congress provided for limited grandfathering of existing foreign interests in such licensees through a waiver petition process whereby any reclassified PLMRS licensee could petition the Commission by February 10, 1994 for waiver of the application of Section 310(b) to any foreign ownership that lawfully existed as of May 24, 1993. In the Second R&O & Second Further Notice, the Commission decided to grandfather any timely-filed petitions for waiver of the foreign ownership restrictions filed by an incumbent in the event the incumbent wins the MTA license. In the Foreign Ownership Order, GN Docket 93–252, 60 FR 40177 (Aug. 7, 1995), the Wireless Telecommunications Bureau noted that the waivers apply to additional licenses granted to petitioners in the same service after May 24, 1993 and prior to August 10, 1996, provided the same ownership structure is maintained. Thus, such entities may acquire other SMR licenses, including MTA licenses in which it is not the incumbent.

III. Seventh Report and Order

A. Auction Rules

A total of 1,020 MTA licenses (51 MTAs times 20 licenses in each MTA) will be awarded in the 900 MHz SMR service. The Commission will use a single simultaneous multiple round auction to award these licenses, because the licenses are interdependent, and licensees likely will aggregate and/or substitute across spectrum blocks and geographic areas. Both incumbents and new entrants are eligible to bid for all MTA licenses, but winning bidders will be subject to the CMRS spectrum cap in 47 CFR 20.6. All applicants for MTA licenses are treated as initial applicants for Public Notice, application processing, and auction purposes. The Wireless Telecommunications Bureau will announce the time and place of the auction and provide additional information to bidders by future Public Notice.

Applicants will apply for the 900 MHz SMR auction by filing a short-form application (FCC Form 175 and paying an upfront payment. The Commission adopts the standard upfront payment formula of $0.02 per pop-MHz, based on the number of 10-channel blocks in each MTA identified on the applicant's Form 175 and the total MTA population. The Wireless Telecommunications Bureau will announce, by Public Notice, the population calculation of each MTA, using a formula that takes into account incumbents within the MTA, and the upfront payment amount of each MTA. The Commission also adopts the Milgrom-Wilson activity rule used in previous multiple-round simultaneous auctions, which requires bidders to declare their maximum eligibility in terms of MHz-pops and limits them to bidding on licenses encompassing no more than the MHz-pops covered by their upfront payment. Failure to maintain the requisite activity level will result in a reduction in the amount of

MHz-pops upon which a bidder will be eligible to bid in the next round of bidding, unless an activity rule waiver is used. The Commission will provide bidders with five activity rule waivers which may be used in any round, but retains the discretion to issue additional waivers during the course of the auction.

Each applicant will be required to specify on its Form 175 its classification, status as a designated entity (if applicable), markets and frequency blocks applied for, and persons authorized to place or withdraw bids. In the Order, the Commission modified the tables in 47 CFR 90.617 and 90.619 to assign block letters to the former frequency block numbers. Applicants must identify any arrangements or agreements with other parties relating to the licenses that are being auctioned, and certify that there are no arrangements other than those specified. Applicants may correct minor defects in their short-form applications, prior to the auction, but may not make any major modifications to their applications, including license area changes, cognizable ownership changes or changes in the identification of parties to bidding consortia, until after the auction. Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. In instances where only a single applicant has applied for a particular MTA channel block, the Commission will cancel the auction for that block and establish a deadline for filing of the applicant's long-form application. In all instances where mutually exclusive applications are filed, the MTA channel block will be included in the auction.

Bidding Issues

Bidders will be able to submit bids on site, via personal computers using remote bidding software, or via telephone, but the Commission reserves the right to have only remote bidding—by personal computers and by telephone—for the 900 MHz SMR auction. The timing and duration of auction rounds would be determined by the Wireless Telecommunications Bureau and announced by Public Notice. As in prior auctions, the Commission expects to start the auction with relatively large bid increments and reduce increments as bidding activity falls. The Commission will use a simultaneous stopping rule for this auction to afford bidders flexibility to pursue back-up strategies to ensure that bidders will not hold back bids until the final round. During the auction, the Commission retains the discretion to declare that the auction will end after a specified number of additional rounds.

The Commission will specify bid increments, i.e., the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment helps to ensure that the auction closes within a reasonable period of time and is expressed in both a percentage and fixed dollar amount. The Commission may impose a minimum bid increment of five percent or $0.02 per pop-MHz, whichever is greater, but also retains the discretion to set, and by announcement before or during the auction, vary the minimum bid increments for licenses over the course of an auction. Where a tie bid occurs, the Commission will determine the high bidder by the order in which the Commission receives the bids.

Withdrawal and Default

The Commission will use the bid withdrawal and default rules for this auction similar to those used in prior auctions. Under these rules, any bidder that withdraws a high bid during an auction before the Commission declares bidding closed must reimburse the Commission for the difference between the amount of the ultimate winning bid and the withdrawn bid if the winning bid is lower than the withdrawn bid. An auction winner defaulting after the close of the auction will also have to pay the lesser of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid. In the event that an auction winner defaults, is disqualified, or if the license is revoked or terminated, the Commission will re-auction the license, except that the Commission may offer the license to the second highest bidder if the default occurs within five days after the auction closes.

Down Payment and Final Payment

At the conclusion of the auction, winning bidders must supplement their upfront payments and file their long-form applications (FCC Form 600). The upfront payment must be supplemented in an amount sufficient to bring the winning bidder's deposit up to 20 percent of its winning bid within five days after the close of the auction. Small businesses eligible for installment payments, however, must bring their deposits up to five percent of the winning bid within five days after the close of the auction. Once each applicant has filed its long form and submitted its down payment, the Wireless Telecommunications Bureau will issue a Public Notice announcing the application's acceptance for filing and open a 30-day window for filing petitions to deny. Excluding designated entities eligible for installment payments, payment of the remaining balance due on the license must be paid within five business days following a Pubic Notice announcing that the Commission is prepared to award the license.

Rules Prohibiting Collusion and Transfer Requirements

The 900 MHz SMR auction will be subject to the same regulatory safeguards as prior auctions to prevent applicants from colluding during the auction or obtaining unjust enrichment from subsequent transfer of the license. To prevent collusion, bidders who have applied for licenses in the same MTA on their short-form applications may not cooperate, collaborate, discuss, or disclose the substance of their bids or strategies with other bidders during the auction except pursuant to a consortium or arrangement identified in the short-form application. Bidders must also attach an exhibit to the Form 600 explaining the terms, conditions, and parties involved in any bidding arrangement. With respect to transfers, licensees transferring their licenses within three years of the initial license grant must disclose to the Commission all contracts and other documentation associated with the transfer.

B. Designated Entities

Background

Section 309(j)(3)(B) of the Communications Act provides that in establishing eligibility criteria and bidding methodologies the Commission shall ''promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,'' collectively referred to as ''designated entities.'' For broadband PCS, the Commission adopted special provisions for businesses owned by members of minority groups or women—bidding credits, installment

payments and a separate entrepreneur's block—and analyzed their constitutionality using the ''intermediate scrutiny'' standard of review articulated in *Metro Broadcasting* v. *FCC,* 497 U.S. 547, 564–65 (1990), because, as in *Metro*, the proposed provisions involved Congressionally-mandated benign race- and gender-conscious measures.

After the release of the broadband PCS rules, the Supreme Court decided *Adarand Constructors* v. *Peña,* 115 S. Ct. 2097 (1995), which overruled *Metro Broadcasting* ''to the extent that *Metro Broadcasting* is inconsistent with the holding in *Adarand* that all racial classifications must be analyzed under strict scrutiny. In the *Competitive Bidding Further Notice of Proposed Rulemaking,* PP Docket No. 93–253, 60 FR 37786 (July 21, 1995), the Commission modified the designated entities provisions in the entrepreneur's block auction so as to render them race- and gender-neutral, because of the substantial delay that would be incurred in supplementing the record to meet a ''strict scrutiny'' standard, and to avoid the substantial likelihood that the auction would be stayed based on the holding in *Adarand.*

Eligibility

In the 900 MHz SMR service, as in other auctionable services, the Commission remains committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Because of the large number of available licenses and the presence of incumbents throughout the 900 MHz SMR band, the Commission will not create an entrepreneur's block in this service. Nevertheless, the Commission adopts several provisions for bidding in the 900 MHz auction by small businesses which will foster the Commission's statutory goals. Taking commenters' suggestions into account, the Commission defines two categories of small businesses: (1) An entity that, together with affiliates, has average gross revenues for the three preceding years of $3 million or less; and (2) an entity that, together with affiliates, has average gross revenues for the three preceding years of $15 million or less. The Commission will define any investor in the applicant with a 20 percent or greater interest to be attributable for purposes of determining small business status. The 20 percent attribution threshold is derived from the measure of SMR attribution for purposes of applying the CMRS spectrum cap. The Commission also adopts the multiplier governing the CMRS spectrum cap, set out in 47 CFR 20.6(d)(6).

Bidding Credits, Installment Payments and Reduced Down Payments

Under this ''tiered'' approach, small businesses falling under the $3 million benchmark are eligible for a 15 percent bidding credit on any MTA license; those falling under the $15 million benchmark are eligible for a 10 percent bidding credit. Bidding credits for small businesses are not cumulative. Thus a $3 million small business will be eligible for only a 15 percent bidding credit, not a 25 percent credit. All small businesses may make a reduced down payment (five percent of the winning bid following the close of the auction, with the balance of the down payment paid five days after a Public Notice announcing that the Commission is prepared to grant the license), and are entitled to pay the bid balance in quarterly installments over the remaining license term. Small businesses falling under the $3 million benchmark will be able to make interest-only payments (U.S. Treasury note rate) for the first five years of the license term; small businesses falling under the $15 million benchmark will be able to make interest-only payments (U.S. Treasury note rate plus 2.5 percent) for the first two years of the license term. The Commission believes that broadening the scope of opportunities for small businesses, particularly on a tiered basis, will result in substantial participation by women and minorities, and that the expected capital outlay for the 900 MHz service will not present the same type of obstacles for those entities as a more costly spectrum-based service like PCS. For this reason, the Commission does not adopt reduced upfront payments for small businesses in the 900 MHz service.

Transfer Restrictions and Unjust Enrichment Provisions

Small businesses entitled to special provisions in the 900 MHz SMR service seeking to transfer their licenses, as a condition to approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Thus, a small business that received bidding credits seeking transfer or assignment of a license to an entity that is not a small business or does not qualify as a smaller business under the definitions in 47 CFR § 90.814(b)(1), will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this payment will be reduced over time as follows: a transfer in the first two years of the license term will result in a reimbursement of 100 percent of the value of the bidding credit: in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no payment. If a small business under the $3 million definition seeks to transfer or assign a license to a small business under the $15 million definition, for the purposes of determining the amount of payment, the value of the bidding credit is five percent, the difference between the 10 and 15 percent bidding credits. The five percent difference will be subject to the same percentage reductions over time as specified above. These payments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer.

If a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity that does not meet either of the definitions set forth in Section 90.814(b)(1) during the term of the license, the Commission will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer. Moreover, if a small business under the $3 million definition seeks to assign or transfer control of a license to a small business under the $15 million definition (that does not qualify for as favorable an installment payment plan), the installment payment plan for which the acquiring entity qualifies will become effective immediately upon transfer. A licensee may not switch to a more favorable payment plan. If an investor subsequently purchases an ''attributable'' interest in the business during the first five years of the license term and, as a result, the gross revenues or total assets of the business exceed the applicable financial cap, thereby requiring the applicant to forfeit eligibility for an installment payment scheme, unjust enrichment provisions also will apply.

Partitioning for Rural Telcos

Rural telephone companies (rural telcos) are permitted to acquire partitioned 900 MHz SMR licenses in

either of two ways: (1) They may form bidding consortia to participate in auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned 900 MHz SMR licenses from other licensees through private negotiation and agreement either before or after the auction. Each member of a consortium will be required to file a long-form application, following the auction, for its respective mutually agreed-upon geographic area. Partitioned areas must conform to established geopolitical boundaries (such as county lines). With respect to rural telcos, each area must include all portions of the wireline service area of the rural telco applicant that lies within the MTA service area. Rural telcos are defined as local exchange carriers having 100,000 or fewer access lines, including all affiliates. If a rural telco receives a partitioned license post-auction from another MTA licensee, the partitioned area must be reasonably related to the rural telco's wireline service area that lies within the MTA service area. The Commission will presume as ''reasonably related'' a partitioned area that contains no more than twice the population of that portion of a rural telco's wireline service area that lies within the MTA service area.

C. Other Matters

Although the Commission did not request comment on this issue, the National Paging and Personal Communications Association (NPPCA) suggests that the Commission establish a Telecommunications Development Fund (TDF) to assist small businesses in accessing capital for build-out purposes. While the Commission fully supports the goal of ensuring the participation of small businesses in the provision of SMR services, the proposal raised by NPPCA is beyond the scope of this proceeding. As such, it is not addressed in this proceeding.

IV. Procedural Matters and Ordering Clauses

Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 603, the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) into the Further Notice of Proposed Rule Making. Written public comments on the IRFA were requested. The Commission's final regulatory flexibility analysis for this Seventh Report and Order in PP Docket No. 93–253 is as follows:

A. *Need for and purpose of the action.* This rule making proceeding was initiated to secure comment on proposals for establishing a flexible regulatory scheme for the 900 MHz Specialized Mobile Radio (SMR) service that would promote efficient licensing and enhance the service's competitive potential in the commercial mobile radio marketplace. The proposals adopted herein are also designed to implement Congress's goal of giving small businesses, rural telephone companies, and businesses owned by members of minority groups and women the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. 309(j)(4)(D).

B. *Issues raised in by the public in response to the initial analysis.* No comments were submitted specifically in response to the Initial Regulatory Flexibility Analysis.

C. *Significant alternatives considered.* The Second Further Notice of Proposed Rule Making in this proceeding offered numerous proposals. All significant alternatives have been addressed in the Seventh Report and Order. The majority of commenters supported the major tenets of the proposed rules and some commenters suggested changes to some of the Commission's proposals. Any regulatory burdens we have adopted for applicants (for example, small businesses) in the 900 MHz SMR applicants are necessary to carry out the Commission's duties under the Communications Act of 1934, as amended, and the Omnibus Budget Reconciliation Act of 1993. The Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act is set forth in Appendix B.

Ordering Clauses

Accordingly, *it is ordered* That, pursuant to the authority of Sections 4(i) 303(r), 309(j), and 332 of the Communications Act of 2934, as amended, 47 U.S.C. 154(i), 303(r), 309(j), and 332, this Second Order on Reconsideration and Seventh Report and Order is adopted and Part 90 of the Commission's Rules is amended as set forth below.

It is further ordered that the rule amendments set forth below will become effective October 23, 1995.

It is further ordered, that the Petitions for Reconsideration filed by Advanced Mobilecomm, Inc., American Mobile Telecommunications Association, Celsmer, DW Communications, Inc., Geotek Communications, Inc., Nextel, Personal Communications Industry Association, RAM Mobile Data Limited Partnership, and Southern California Edison Company are granted to the extent discussed herein, and denied in all other respects.

List of Subjects in 47 CFR Part 90

Radio.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Amendatory Text

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 is revised as follows:

Authority: Sections 4, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, 309 and 332, unless otherwise noted.

2. Section 90.7 is amended by adding a definition for ''*900 MHz SMR MTA-based license or MTA license*'' in alphabetical order to read as follows:

§ 90.7 Definitions.

* * * * *

900 MHz SMR MTA-based license or *MTA license.* A license authorizing the right to use a specified block of 900 MHz SMR spectrum within one of the 47 Major Trading Areas (''MTAs''), as embodied in Rand McNally's Trading Areas System MTA Diskette and geographically represented in the map contained in Rand McNally's Commercial Atlas & Marketing Guide (the ''MTA Map''), with the following exceptions and additions:

(1) Alaska is separated from the Seattle MTA and is licensed separately.

(2) Guam and the Northern Mariana Islands are licensed as a single MTA-like area.

(3) Puerto Rico and the United States Virgin Islands are licensed as a single MTA-like area.

(4) American Samoa is licensed as a single MTA-like area.

The MTA map is available for public inspection in the Office of Engineering and Technology's Technical Information Center, room 7317, 2025 M Street NW., Washington, DC.

* * * * *

2. Section 90.173 is amended by revising paragraph (k) to read as follows:

§ 90.173 Policies governing the assignment of frequencies.

* * * * *

(k) Notwithstanding any other provisions of this part, any eligible person may seek a dispositive preference for a channel assignment on an exclusive basis in the 220–222 MHz,

470–512 MHz, and 800 MHz bands by submitting information that leads to the recovery of channels in these bands. Recovery of such channels must result from information provided regarding the failure of existing licensees to comply with the provisions of §§ 90.155, 90.157, 90.629, 90.631 (e) or (f), or 90.633 (c) or (d). Any recovered channels in the 900 MHz SMR service will revert automatically to the MTA licensee.

* * * * *

3. Section 90.617(d) is amended by revising Table 4B to read as follows:

§ 90.617 Frequencies in the 809.750–824/854.750–869 MHz, and 896–901/935–940 MHz bands available for trunked or conventional system use in non-border areas.

* * * * *

(d) * * *

TABLE 4B—SMR CATEGORY 896–901/935–940 MHz Band-Channels (200 CHANNELS)

Block	Channel Nos.
A	1–2–3–4–5–6–7–8–9–10
B	21–22–23–24–25–26–27–28–29–30
C	41–42–43–44–45–46–47–48–49–50
D	61–62–63–64–65–66–67–68–69–70
E	81–82–83–84–85–86–87–88–89–90
F	101–102–103–104–105–106–107–108–109–110
G	121–122–123–124–125–126–127–128–129–130
H	141–142–143–144–145–146–147–148–149–150
I	161–162–163–164–165–166–167–168–169–170
J	181–182–183–184–185–186–187–188–189–190
K	201–202–203–204–205–206–207–208–209–210
L	221–222–223–224–225–226–227–228–229–230
M	241–242–243–244–245–246–247–248–249–250
N	261–262–263–264–265–266–267–268–269–270
O	281–282–283–284–285–286–287–288–289–290
P	301–302–303–304–305–306–307–308–309–310
Q	321–322–323–324–325–326–327–328–329–330
R	341–342–343–344–345–346–347–348–349–350
S	361–362–363–364–365–366–367–368–369–370
T	381–382–383–384–385–386–387–388–389–390

* * * * *

4. Section 90.619(a)(5) is amended by revising Table 4B to read as follows:

§ 90.619 Frequencies available for use in the U.S./Mexico and U.S./Canada border areas.

(a) * * *

(5) * * *

TABLE 4B—UNITED STATES-MEXICO BORDER AREA, SMR CATEGORY 896–901/935–940 MHZ BAND (200 CHANNELS)

Block	Channel Nos.
Channels numbered above 200 may be used only subject to the power flux density limits at or beyond the Mexican border stated in paragraph (a)(2) of this section.	
A	1–2–3–4–5–6–7–8–9–10
B	21–22–23–24–25–26–27–28–29–30
C	41–42–43–44–45–46–47–48–49–50
D	61–62–63–64–65–66–67–68–69–70
E	81–82–83–84–85–86–87–88–89–90
F	101–102–103–014–105–106–107–108–109–110
G	121–122–123–124–125–126–127–128–129–130
H	141–142–143–144–145–146–147–148–149–150
I	161–162–163–164–165–166–167–168–169–170
J	181–182–183–184–185–186–187–188–189–190
K	201–202–203–204–205–206–207–208–209–210
L	221–222–223–224–225–226–227–228–229–230
M	241–242–243–244–245–246–247–248–249–250
N	261–262–263–264–265–266–267–268–269–270
O	281–282–283–284–285–286–287–288–289–290
P	301–302–303–304–305–306–307–308–309–310
Q	321–322–323–324–325–326–327–328–329–330
R	341–342–343–344–345–346–347–348–349–350
S	361–362–363–364–635–366–367–368–369–370
T	381–382–383–384–385–386–387–388–389–390

* * * * *

5. Section 90.631 is amended by revising paragraph (f) to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

* * * * *

(f) If a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission. For purposes of this section, a base station is not considered to be placed in operation unless at least two associated mobile stations, or one control station and one mobile station, are also placed in operation. An SMR licensee with facilities that have discontinued operations for 90 continuous days after the effective date of this rule is presumed to have permanently discontinued operations, unless the licensee notifies the FCC otherwise prior to the end of the 90 day period and provides a date on which operation will resume, which date must not be in excess of 30 additional days.

* * * * *

6. Section 90.665 (c) and (d) are revised to read as follows:

§ 90.665 Authorization, construction and implementation of MTA licenses.

* * * * *

(c) Each MTA licensee in the 896–901/935–940 MHz band must, three years from the date of license grant, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA. Further, each MTA licensee must provide coverage to at least two-thirds of the population of the MTA five years from the date of license grant or, alternatively, demonstrate through a showing to the Commission that it is providing substantial service. The MTA licensee must meet the population coverage benchmarks regardless of the extent to which incumbent licensees are present within the MTA block.

(d) MTA licensees who fail to meet the coverage requirements imposed at either the third or fifth years of their license term, or to make a convincing showing of substantial service, will forfeit the portion of the MTA license that exceeds licensed facilities constructed and operating on the date of the MTA license grant.

7. Section 90.667 is revised to read as follows:

§ 90.667 Grandfathering provisions for incumbent licensees.

(a) These provisions apply to all 900 MHz SMR licensees who obtained licenses or filed applications for secondary sites on or before August 9, 1994 (''incumbent licensees''), as well as to all 900 MHz SMR licensees who obtained authorizations pursuant to § 90.173(k). An incumbent licensee's service area shall be defined by its originally-licensed 40 dBu field strength contour. Incumbent licensees are permitted to add new or modify transmit sites in this existing service area without prior notification to the Commission so long as their original 40

dBu field strength contour is not expanded.

(b) Incumbent licensees operating at multiple sites may, after grant of MTA licenses has been completed, exchange multiple site licenses for a single license, authorizing operations throughout the contiguous and overlapping 40 dBu field strength contours of the multiple sites. Incumbents exercising this license exchange option must submit specific information for each of their external base sites after the close of the 900 MHz SMR auction.

(c) Applications in the 900 MHz SMR service for secondary sites filed after August 9, 1994 shall be authorized on a secondary, non-interference basis to MTA licensee operations. No secondary sites shall be granted on this basis in an MTA once the MTA licensee has been selected.

6. A new subpart U consisting of §§ 90.801 through 90.815 is added to Part 90 to read as follows:

Subpart U—Competitive Bidding Procedures for 900 MHz Specialized Mobile Radio Service

Sec.

90.801 900 MHz SMR subject to competitive bidding.
90.802 Competitive bidding design for 900 MHz SMR licensing.
90.803 Competitive bidding mechanisms.
90.804 Aggregation of 900 MHz SMR licenses.
90.805 Withdrawal, default and disqualification payments.
90.806 Bidding application (FCC Form 175 and 175–S Short-form).
90.807 Submission of upfront payments and down payments.
90.808 Long-form applications.
90.809 License grant, denial, default, and disqualification.
90.810 Bidding credits for small businesses.
90.811 Reduced down payment for licenses won by small businesses.
90.812 Installment payments for licenses won by small businesses.
90.813 Procedures for partitioned licenses.
90.814 Definitions.
90.815 Eligibility for small business status.

§ 90.801 900 MHz SMR subject to competitive bidding.

Mutually exclusive initial applications to provide 900 MHz SMR service are subject to competitive bidding procedures. The general competitive bidding procedures found in Part 1, Subpart Q of this chapter will apply unless otherwise provided in this part.

§ 90.802 Competitive bidding design for 900 MHz SMR licensing.

The Commission will employ a simultaneous multiple round auction design when choosing from among mutually exclusive initial applications to provide 900 MHz SMR service, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

§ 90.803 Competitive bidding mechanisms.

(a) *Sequencing.* The Wireless Telecommunications Bureau will establish and may vary the sequence in which 900 MHz SMR licenses will be auctioned.

(b) *Grouping.* All 900 MHz SMR licenses for each of the MTAs will be auctioned simultaneously, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme.

(c) *Minimum bid increments.* The Wireless Telecommunications Bureau will, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(d) *Stopping rules.* The Wireless Telecommunications Bureau will establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(e) *Acitvity rules.* The Wireless Telecommunications Bureau will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

§ 90.804 Aggregation of 900 MHz SMR licenses.

The Commission will license each 10-channel block in the 900 MHz SMR spectrum separately. Applicants may aggregate across spectrum blocks within the limitation specified in § 20.6(b) of this chapter.

§ 90.805 Withdrawal, default and disqualification payments.

(a) During the course of an auction conducted pursuant to § 90.802, the Wireless Telecommunications Bureau will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction closes, or who are disqualified.

(b) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal payment would be assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(c) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (b) of this section plus an additional payment equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission. If the default occurs within five business days after the bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, of it that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels.

§ 90.806 Bidding application (FCC Form 175 and 175–S Short-form).

All applicants to participate in competitive bidding for 900 MHz SMR licenses must submit applications on FCC Forms 175 and 175–S pursuant to the provisions of § 1.2105 of this chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of 900 MHz SMR licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This Public Notice also will specify the date on or before which applicants intending to participate in a 900 MHz SMR auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the Forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed. In addition to identifying its status as a small business or rural telephone company, each applicant must indicate whether it is a minority-owned entity, as defined in § 90.814(g) and/or a women-owned entity.

§ 90.807 Submission of upfront payments and down payments.

(a) Each bidder in the 900 MHz SMR auction will be required to submit an upfront payment of $0.02 per MHz per pop, for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this chapter and procedures specified by Public Notice.

(b) Each winning bidder in the 900 MHz SMR auction shall make a down payment to the Commission in an amount sufficient to bring its total deposits up to 20 percent of its winning bid within five business days after the auction closes, and the remaining balance due on the license shall be paid within five business days after Public Notice announcing that the Commission is prepared to award the license. The grant of the application required by § 90.808 is conditional upon receipt of full payment, except for small businesses that are winning bidders, which are governed by § 90.811. The Commission generally will grant the license within ten (10) business days after the receipt of the remaining balance due on the license.

§ 90.808 Long-form applications.

Each winning bidder will be required to submit a long-form application on FCC Form 600 within ten (10) business days after being notified by Public Notice that it is the winning bidder. Applications on FCC Form 600 shall be submitted pursuant to the procedures set forth in 90.119 and any associated Public Notices. Only auction winners (and rural telephone companies and incumbent 900 MHz SMR licensees seeking partitioned licenses pursuant to agreements with auction winners under § 90.813) will be eligible to file applications on FCC Form 600 for initial 900 MHz SMR licenses in the event of mutual exclusivity between applicants filing Form 175.

§ 90.809 License grant, denial, default, and disqualification.

(a) A bidder who withdraws its bid subsequent to the close of bidding, defaults on a payment due, or is disqualified, will be subject to the payments specified in § 90.805 or § 1.2109 of this chapter, as applicable.

(b) MTA licenses pursued through competitive bidding procedures will be granted pursuant to the requirements specified in § 90.166.

§ 90.810 Bidding credits for small businesses.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses, (as defined in § 90.814(b)(1)(i) may use a bidding credit of 15 percent to lower the cost of its winning bid on any of the blocks identified in § 90.617(d), Table 4B. A winning bidder that qualifies as a small business or a consortium of small businesses, (as defined in § 90.814(b)(1)(ii) may use a bidding credit of 10 percent to lower the cost of its winning bid on any of the blocks identified in § 90.617(d), Table 4B.

(b) Unjust Enrichment. (1) A small business seeking transfer or assignment of a license to an entity that is not a small business under the definitions in § 90.814(b)(1) will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this payment will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit: in year three of the license term the payment will be 75 percent; in year four the payment will be 50 percent and in year five the payment will be 25 percent, after which there will be no assessment. If a small business as defined in § 90.814(b)(1)(i) seeks to transfer or assign a license to a small business as defined in § 90.814(b)(1)(ii), the value of the bidding credit to be repaid is five percent, the difference between the 10 and 15 percent bidding credits. The five percent difference will be subject to the percentage reductions over time specified above. These payments must be paid back to the U.S. Treasury as a condition of approval of the assignment or transfer.

(2) If a small business that utilizes a bidding credit under this section seeks to assign or transfer control of its license to a small business meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

§ 90.811 Reduced down payment for licenses won by small businesses.

Each winning bidder that qualifies as a small business shall make a down payment equal to ten percent of its winning bid (less applicable bidding credits); a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five (5) business days after the auction closes, and the remainder of the down payment (five percent) shall be paid within five (5) business days following Public Notice that the Commission is prepared to award the license. The Commission generally will grant the license within ten (10) business days after receipt of the remainder of the down payment.

§ 90.812 Installment payments for licenses won by small businesses.

(a) Each licensee that qualifies as a small business may pay the remaining 90 percent of the net auction price for the license in quarterly installment payments pursuant to § 1.2110(e) of this chapter. Licensees who qualify for installment payments are entitled to pay their winning bid amount in installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Payments shall include both principal and interest amortized over the term of the license. An MTA license issued to an eligible small business that elects installment payments will be conditioned on the full and timely performance of the license holder's quarterly payments. The additional following terms apply:

(1) An eligible licensee qualifying as a small business under § 90.814(b)(1)(i) may make interest-only payments for five years. Interest will accrue at the Treasury note rate. Payments of interest and principal shall be amortized over the remaining five years of the license term.

(2) An eligible licensee qualifying as a small business under § 90.814(b)(1)(ii) may make interest-only payments for the first two years of the license term. Interest will accrue at the Treasury note rate plus an additional 2.5 percent. Payments of interest and principal shall be amortized over the remaining eight years of the license term.

(b) Unjust Enrichment. (1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval.

(3) if a licensee that utilizes installment financing under this section seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan for which the acquiring entity qualifies will become effective immediately upon transfer.

§ 90.813 Procedures for partitioned licenses.

(a) Notwithstanding § 90.661, a rural telephone company, as defined in § 90.814, may be granted a 900 MHz SMR license that is geographically partitioned from a separately licensed MTA, so long as the MTA applicant or licensee has voluntarily agreed (in writing) to partition a portion of the license to the entity.

(b) If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive procedures—

(1) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this part and Part 1 of this chapter shall be followed by the applicant, who must disclose as part of its short-form application all parties to agreement(s) with or among other entities to partition the license pursuant to this section, if won at auction (see 47 CFR 1.2105(a)(2)(viii));

(2) Each rural telephone company that is a party to an agreement to partition the license shall file a long-form application for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MTA filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the MTA license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 90.153.

(d) Each application for a partitioned area (long-form initial application or partial assignment application) shall contain a partitioning plan that must propose to establish a partitioned area to be licensed that meets the following criteria:

(1) Conforms to established geopolitical boundaries (such as county lines);

(2) Includes the wireline service area of the rural telephone company applicant; and

(3) Is reasonably related to the rural telephone company's wireline service area.

Note to paragraph (d): A partitioned service area will be presumed to be reasonably related to the rural telephone company's wireline service area if the partitioned service area contains no more than twice the population overlap between the rural telephone company's wireline service area and the partitioned area.

(e) Each licensee in each partitioned area will be responsible for meeting the construction requirements in its area (*see* § 90.665).

§ 90.814 Definitions.

(a) Scope. The definitions in this section apply to §§ 90.810 through 90.813, unless otherwise specified in those sections.

(b) *Small Business: Consortium of Small Business:*

(1) A small business is an entity that either:

(i) together with its affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, has average gross revenues that are not more than $3 million for the preceding three years; or

(ii) together with its affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, has average gross revenues that are not more than $15 million for the preceding three years.

(2) For purposes of determining whether an entity meets either the $3 million or $15 million average annual gross revenues size standard set forth in paragraph (b)(1) of this section, the gross revenues of the entity, its affiliates, persons or entities holding interests in the entity and their affiliates shall be considered on a cumulative basis and aggregated, subject to the exceptions set forth in § 90.814(g).

(3) A small business consortium is a conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies either definition of a small business in paragraphs (b)(1) and (b)(2) of this section. In a consortium of small businesses, each individual member must establish its eligibility as a small business, as defined in this section.

(c) *Rural Telephone Company.* A *rural telephone company* is a local exchange carrier having 100,000 or fewer access lines, including all *affiliates.*

(d) *Gross Revenues.* For applications filed after December 31, 1994, *gross revenues* shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(e) *Businesses Owned by Members of Minority Groups and/or Women.* A business owned by members of minority groups and/or women in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis.

(f) *Members of Minority Groups. Members of minority groups* includes Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.

(g) *Attributable Interests.* Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a licensee or applicant will be attributable.

(1) *Multiplier.* Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and

application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any line in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(h) *Affiliate.* (1) *Basis for Affiliation.* An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant (both referred to herein as ''the applicant'') if such individual or entity:

(i) Directly or indirectly controls or has the power to control the applicant, or

(ii) Is directly or indirectly controlled by the applicant, or

(iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(iv) Has an ''identity of interest'' with the applicant.

(2) *Nature of control in determining affiliation.* (i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example for paragraph (h)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example for paragraph (h)(2)(iii). In a corporation where the officers and directors own various size blocks totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

Example 1 for paragraph (h)(3) introductory text. Two shareholders in Corporation Y each have attributable interests in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity or interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

Example 2 for paragraph (h)(3) introductory text. One shareholder in Corporation Y, shareholder A, has an attributable interest in a SMR application. Another shareholder in Corporation Y, shareholder B, has a nonattributable interest in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the SMR application, Corporation Y would still be deemed an affiliate of the applicant.

(i) *Spousal Affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship Affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context ''immediate family member'' means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father, or -mother, step-brother, or -sister, step-son, or -daughter, half brother or sister. This presumption may be rebutted by showing that

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

Example for paragraph (h)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in an SMR application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.*

(i) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (h)(5). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in an SMR application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of Company B must be taken into account in determining the size of the applicant.

*Example 2 for paragraph (h)(5).*If a large company, BigCo, holds 70% (70 to 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in an SMR application, and gives a

third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present in this case.

Example 3 for paragraph (h)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.*

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through theses sharing arrangements one concern has control, or potential control, of the other concern.

(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) *Affiliation under joint venture arrangements.*

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express of implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

§ 90.815 Eligibility for small business status.

(a) *Short-Form Applications: Certifications and Disclosure.* Each applicant for an MTA license which qualifies as a small business or consortium of small businesses shall append the following information as an exhibit to its short-form application (Form 175):

(1) The identity of the applicant's affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, and, if a consortium of small businesses, the members in the joint venture; and

(2) The applicant's gross revenues, computed in accordance with § 90.814.

(b) Long Form Applications: Certifications and Disclosure. In addition to the requirements in subpart U of this part, each applicant submitting a long-form application for license(s) and qualifying as a small business shall, in an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 90.814, for each of the following: the applicant; the applicant's affiliates, the applicant's attributable investors, affiliates of its attributable investors, and, if a consortium of small businesses, the members of the joint venture;

(2) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under §§ 90.810 through 90.812, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(c) *Records Maintenance.* All winning bidders qualifying as small businesses, shall maintain at their principal place of business an updated file of ownership, revenue and asset information, including any documents necessary to establish eligibility as a small business and/or consortium of small businesses under § 90.814. Licensees (and their successors in interest) shall maintain such files for the term of the license.

(d) *Audits.* (1) Applicants and licensees claiming eligibility as a small business or consortium of small businesses under §§ 90.810 through 90.812 shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed 900 MHz SMR service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(e) *Definitions.* The terms *affiliate, business owned by members of minority groups and/or women, consortium of small businesses, gross revenues, members of minority groups, nonattributable equity, small business* and *total assets* used in this section are defined in § 90.814.

[FR Doc. 95–23407 Filed 9–20–95; 8:45 am]

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Proposed Rules

Federal Register
Vol. 60, No. 183
Thursday, September 21, 1995

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1004

[Docket No. AO–160–A71; DA–93–30]

Milk in the Middle Atlantic Marketing Area; Decision on Proposed Amendments to Tentative Marketing Agreement and To Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document adopts changes in some provisions of the Middle Atlantic milk marketing order based on industry proposals considered at a public hearing. The changes will reduce the standards for regulating distributing plants and cooperative reserve processing plants and increase the amount of producer milk that can be diverted to nonpool plants. Additional changes will authorize the market administrator to adjust pool plant qualification standards and producer milk diversion limits to reflect changes in marketing conditions. Also, the decision provides that a pool distributing plant that meets the pooling standards of more than one Federal order should continue to be regulated under this order for two consecutive months before regulation can shift to the other order. A decision on a proposal that would utilize only a route disposition standard to determine under which Federal order a plant should be regulated cannot be made on the basis of the hearing record, and therefore is not adopted.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 690–1366.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this rule will not have a significant economic impact on a substantial number of small entities. The amended order will promote more orderly marketing of milk by producers and regulated handlers.

These proposed amendments have been reviewed under Executive Order 12778, Civil Justice Reform. This rule is not intended to have a retroactive effect. If adopted, this proposed rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Prior documents in this proceeding:

Notice of Hearing: Issued February 25, 1994; published March 4, 1994 (59 FR 10326).

Recommended Decision: Issued July 10, 1995; published July 14, 1995 (60 FR 36239).

Preliminary Statement

A public hearing was held upon proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Middle Atlantic marketing area. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), at the Holiday Inn-Independence Mall, 400 Arch Street, Philadelphia, Pennsylvania, on May 3, 1994. Notice of such hearing was issued on February 25, 1994, and published March 4, 1994 (59 FR 10326).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, on July 10, 1995, issued a recommended decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rulings, and general findings of the recommended decision are hereby approved and adopted and are set forth in full herein. No exceptions regarding the findings and conclusions of the recommended decision were received.

The material issues on the record of the hearing relate to:

1. Pool plant definitions and qualifications;
2. Diversions of milk to nonpool plants;
3. Regulation of distributing plants that meet the pooling standards of more than one Federal order.
4. Discretionary authority to revise pooling standards and producer milk diversion limits.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Pool Plant Definitions and Qualifications

Two proposals that would modify the pool plant definition of the order should be adopted. One proposal would exclude diversions of producer milk from a pool distributing plant's receipts in determining whether or not the plant satisfies the pool plant definition standard. Currently, the order's pool plant definition includes diverted producer milk as a receipt at a distributing plant in determining whether the plant has a sufficient proportion of its receipts in Class I use to qualify as a pool plant. The other proposal would reduce the percentage

of a cooperative association's member milk that must be transferred to pool distributing plants from 30 percent to 25 percent of receipts for a reserve processing plant to qualify as a pool plant.

Pennmarva, a federation of certain Middle Atlantic marketing area dairy cooperatives, and Atlantic Processing, Inc., an association of cooperatives, proposed the changes to the pool plant definition of the order which were published as Proposal No. 1 and Proposal No. 4 in the hearing notice. Pennmarva's members include Atlantic Dairy Cooperative; Dairymen Incorporated (Middle Atlantic Division); Maryland and Virginia Milk Producers' Cooperative Association; and Valley of Virginia Co-operative Milk Producers Association—associations that market more than 90 percent of the producer milk associated with the order. Atlantic Processing, Inc., members include Mount Joy Milk Producers Cooperative and Cumberland Valley Milk Producers Cooperative.

According to the Pennmarva witness, changing the distributing plant pooling standard (Proposal No. 1) is a more comprehensive solution to past informal rulemaking actions which suspended the requirement that 40 percent of a pool plant's receipts be disposed of as Class I milk during the months of September through February. These suspension actions were taken because of the decline of Class I use in the Order 4 marketplace and because of a shift in regulation of two plants that were regulated under the order.

Pennmarva testified that a more permanent change to the pool plant definition is warranted because: (1) The Order 4 market is primarily serviced by cooperatives in a system-wide fashion and that accounting for diversions at the individual plant level given this cooperatively-supplied nature of the Order 4 market is burdensome; (2) there is a lack of complete knowledge by the servicing cooperative of the total receipts and Class I sales of the pool distributing plants from which the cooperative diverts milk; and (3) continued association of diverted milk on the order would still be provided for because of the producer definition of the order.

Cooperatives in Order 4 attempt to market milk, said Pennmarva, in a manner that will minimize the overall transportation costs. Pennmarva said that accounting for diversions at the individual plant level places an unnecessary and costly burden on cooperatives. Pennmarva also noted that to a pool handler who buys his/her entire milk supply from a cooperative, there are no market-disruptive consequences if milk is over-diverted. According to Pennmarva, handlers continue to pay the appropriate class price for the milk when an excess amount of milk is diverted from the plant. However, the cooperative supplying milk must reduce the volume of milk from the pool when it over-diverts milk shipments so that the plant will continue to qualify as a pool plant.

Additionally, Pennmarva testified that the lack of complete knowledge of a pool distributing plant's other milk supplies makes it unnecessarily difficult to effectively operate under the current requirements of the pool plant definition. No supplier knows either the total receipts of the distributing plant or the Class I disposition of the plant, said Pennmarva. Similarly, Pennmarva testified, suppliers of a pool distributing plant have no knowledge of the plant's in-area Class I sales. This lack of knowledge by the supplying cooperative is especially important, according to Pennmarva, because the ''lock-in'' provisions of the pool plant definition do not apply to the requirement that 15 percent of the plant's sales must be within the marketing area.

Pennmarva testified that deleting diversions from a plant's receipts in determining its regulatory status would have limited effects given present marketing conditions within the order. According to Pennmarva, plants that meet the 15 percent in-area sales and 40 percent Class I disposition pooling standard in the months of September through February, and 30 percent Class I disposition during the remainder of the year, will continue to be pooled under the order. According to Pennmarva, diversions from such plants either by a cooperative or by a handler with a non-member supply will continue to be regulated through the producer definition of the order. Pennmarva also indicated that both the producer definition and the pool reserve processing plant definition will continue to encourage deliveries of cooperative and non-member milk supplies to Order 4 pool plants in meeting priority Class I needs of the market while decreasing the uneconomic movement of milk.

No opposition to excluding diverted milk as a receipt at a distributing plant for determining pool plant status (Proposal No. 1) was received.

Currently, a cooperative must ship a minimum of 30 percent of its member milk to an Order 4 pool distributing plant in order for its milk to be pooled. Pennmarva proposed to reduce the minimum percentage to 25 percent as published in the hearing notice as Proposal No. 4. Pennmarva testified that this reduction is needed to continue the pooling of Order 4 producers historically associated with the market and is preferable to suspension of such provisions.

Pennmarva testified that this change is warranted because of recent changes in the market. Pennmarva cited that between 1990 and 1992, the level of Class I sales has remained unchanged, while producer receipts expanded. The expansion of producer receipts caused a reduction of the Class I utilization for the market, according to published statistics. Class I use dropped from 53.1 percent in 1990, to 50.7 percent in 1991, and to 48.0 percent in 1992. Level Class I sales and expanding production in Order 4 between 1990 and 1992, said Pennmarva, reduced the proportion of Order 4 milk delivered to pool distributing plants by cooperatives operating reserve processing plants.

Pennmarva also testified that in 1993, both Class I and producer receipts declined. According to market administrator statistics, production decreased by 162.3 million pounds and Class I sales fell by 265.6 million pounds—resulting in a Class I utilization percentage of 45.1 percent.

According to Pennmarva, the reduction of Class I use in Order 4 during 1993 was partially attributable to a shifting of an Order 4-regulated distributing plant located in Lansdale, PA, in November 1992 and another distributing plant located in Reading, PA, in January 1993 to regulation under another Federal order. Pennmarva said this had the effect of reducing the Order 4 pool plant deliveries required by reserve processing plants to maintain pool status.

Pennmarva maintained that the shifting of regulation of these two plants has had a dramatic effect. In a one-year period from October 1992 to October 1993, Atlantic Dairy Cooperative, which operates a pool reserve processing plant, delivered 13.3 percent less milk to a Lansdale, PA, distributing plant. Between December 1992 and December 1993 Maryland and Virginia Milk Producers Cooperative Association, which also operates a pool reserve processing plant, experienced a 14 percent reduction in deliveries to a Reading, PA, distributing plant.

Pennmarva noted other changes in the Order 4 market, including the closing of a distributing plant in Harrisburg, PA, and a change in the product mix of two large Order 4 distributing plants that eliminated yogurt and cottage cheese production. Pennmarva said this loss of Class II business at distributing plants caused a reduction in the amount of

pool-qualifying milk deliveries for the cooperative supplying milk to these plants. Additionally, Pennmarva made note of previous suspension actions to extend the period of automatic pool plant status for supply and reserve processing plants.

No opposition to reducing the shipping standard (Proposal No. 4) was received.

Regarding Proposal No. 1, the record is clear that cooperatives play a dominant role in servicing the Middle Atlantic marketing area, accounting for some 90 percent of milk deliveries to pool distributing plants. While accounting for diversions on an individual plant basis has merit, good reason exists to conclude that in this market, retaining individual plant accounting for the purposes of diversions does place a burden and costs on cooperatives who seek to deliver milk to where it is needed in the most economic fashion. This is especially important and justified due to the changing marketing conditions of declining Class I use in the marketing area.

As indicated by the testimony and in a brief filed by Pennmarva, distributing plants generally have more than one supplier, and such suppliers generally do not know the plant's total receipts and Class I disposition. This makes it difficult to determine what milk can be diverted from any single pool plant in a given month. Inadvertent over-diversions of milk will result in milk not being eligible for pooling and the benefits that accrue from such pooling.

Part of the Order 4 pooling provisions rests on a 15 percent route disposition standard. Adoption of Proposal No. 1 would enable cooperatives supplying the market to more economically move milk without undermining this standard or other pool plant definition standards.

Regarding Proposal No. 4, changing marketing conditions, namely expanding producer receipts and a decline in the Class I utilization of the market, provide support for changing the pooling requirements for reserve processing plants operated by a cooperative, without negating the demands of the Class I market. Such prevailing marketing conditions have in the past resulted in the suspension of certain pooling provisions of reserve processing plants operated by cooperatives so that producer milk normally associated with the Order 4 market would remain pooled under the order. Proposal No. 4 offers a more permanent and reasonable solution to potentially repetitive requests by Order 4 producers for suspension of such pooling standards by easing the shipping standard by 5 percentage points.

2. Diversions of Milk to Nonpool Plants

Two proposals that would increase the permissible percentage of milk deliveries for both cooperative (or federation of cooperative associations) and non-cooperative (nonmember) milk that may be diverted under the producer definition of the order should be adopted. The proposal for increasing the permissible percentage of cooperative milk that can be diverted to nonpool plants was proposed by Pennmarva and was Proposal No. 7 as published in the hearing notice. The proposal for increasing the permissible percentage of nonmember milk that can be diverted to nonpool plants was proposed by Johanna Dairies, Inc. (Johanna), a handler regulated under both the Middle Atlantic and New York-New Jersey marketing orders and was Proposal No. 9 as published in the hearing notice.

Another proposal by Pennmarva—intended to more clearly define the pooling requirements for producer deliveries to pool plants and the status of producers whose marketing is interrupted by compliance with health regulations under the producer definition of the order—was abandoned and received no evidence or testimony at the hearing. This proposal was Proposal No. 6 as published in the hearing notice.

In Proposal No. 7, Pennmarva recommended increasing the permissible percentage of milk that can be diverted to nonpool plants to a maximum volume of 55 percent of receipts instead of the current 50 percent maximum. For nonmember milk, Johanna proposed increasing the maximum allowable deliveries from the current 40 percent to a new maximum of 45 percent.

Citing statistics prepared by the market administrator, the Pennmarva witness observed that over the three-year period of 1991 to 1993, producer receipts under Order 4 increased by 158.8 millions pounds, while Class I disposition fell by 277.3 million pounds. Similarly, over the same three-year period, the witness also noted the annual Class I utilization of the market fell from 50.7 percent in 1991, to 48 percent in 1992, and to 45.1 percent in 1993. This witness testified that because the market's Class I use decreased, diversions to nonpool plants increased. According to Pennmarva, such a situation makes it difficult to keep producers historically associated with the market pooled under the order.

Johanna provided similar testimony and indicated that there is no equitable basis why diversions of nonmember milk should not similarly be increased from the current 40 percent of receipts for nonmember milk to a maximum of 45 percent of receipts. Johanna testified that the producer definition historically has offered disparate treatment between member (cooperative) and nonmember milk in terms of the allowable percentage of milk that can be diverted to nonpool plants and still be priced under the order. Johanna noted that the incremental difference between the two has consistently been 10 percentage points, and that if the allowable percentage of member deliveries can be increased by 5 percentage points, nonmember milk should similarly be increased by the same amount.

Johanna also supported Pennmarva's observations of the market administrator statistics that show the steadily declining percentage of Class I milk receipts within the order's pool. The same statistics, Johanna said, support the adoption of their proposal.

No opposition to the adoption of Proposals Nos. 7 and 9 was received.

Regarding Proposal No. 7, changing marketing conditions, namely increasing producer receipts and declining Class I use, provide support for adoption of this proposal to increase the percentage of milk of cooperative members which may be diverted to non-pool plants during the months of September through February. This proposal offers a reasonable unopposed solution for more orderly marketing and to keep milk pooled under the order that has historically been associated with the market.

Regarding Proposal No. 9, the record does not reveal any reason to not similarly increase the permissible diversion limit by handlers with non-cooperative member milk supplies for the same reasons already indicated regarding Proposal No. 7.

3. Regulation of Distributing Plants That Meet the Pooling Standards of More Than One Federal Order

a. A proposal to leave the determination of which order regulates a plant with pool-qualifying disposition in more than one Federal order to the provisions of § 1004.7(f)(1) cannot be decided upon on the basis of the hearing record. The provisions of § 1004.7(f)(1) requires that if a pool plant qualifies as a pool plant in another order, the plant will be regulated under that order unless the plant has a greater volume of Class I dispositions in the Order 4 marketing area. Currently, this order provision is subordinated by an

additional provision in § 1004.7(f)(2) that yields a plant's pool status to another order whenever such plant qualifies as a pool plant under the other order. It is this subordinating provision that is proposed to be deleted from the order (Proposal No. 3 as published in the hearing notice). In other words, Proposal No. 3, offered by Pennmarva, would determine the regulation of a plant under the order on the basis of where the plant has its greatest Class I route disposition in the event that a plant qualifies as a pool plant under another order.

According to Pennmarva, the yield provision contained in § 1004.7(f)(2) unnecessarily subordinates the Middle Atlantic milk order to the provisions of another Federal order. Such subordination is not needed, said Pennmarva, because the provisions of § 1004.7(f)(1) defines a comprehensive and adequate standard for determining whether a pool plant should be regulated under Order 4.

Pennmarva testified that two pool plants, one located in Lansdale, PA (Lansdale), and the other located in Reading, PA (Reading), have changed from being regulated under Order 4 to Order 2. These changes, said Pennmarva, have had the effect of depressing the Order 4 blend price relative to the blend price of Order 2. According to Pennmarva, the New York-New Jersey 1992 average blend price was $0.68 per hundredweight less than the Order 4 blend price for the same time period. Similarly, Pennmarva indicated that for 1993, the Order 2 blend price was $0.50 per cwt. less than in Order 4.

Pennmarva testified that between 1992 and 1993 there also were changes in Class I receipts and utilization between Order 4 and Order 2. During this time period, Class I receipts of producer milk in Order 4 fell by 265,613,000 pounds while in Order 2 they rose by 170,765,660 pounds, said Pennmarva. During this same time period, the Class I utilization of Order 4 shrank by nearly 3 percentage points to a total of 45.1 percent, while the Order 2 Class I utilization grew by one percentage point to a total of 40.3 percent. Pennmarva attributed these changes partly to the change in regulation of the already-noted plants.

Pennmarva also testified that the exchange of milk between Orders 2 and 4 has historically been equal. However, according to Pennmarva, this relationship changed greatly in the past year. Citing Order 4 market administrator published statistics (the volume of packaged fluid sales from Order 2 into the Order 4 marketing area in 1993), Pennmarva indicated that 327.3 million pounds of pooled and priced Order 2 milk was disposed of in the Order 4 marketing area, up by 134.7 million pounds from 1992—an increase of 70 percent. However, Order 4 priced and pooled milk in the Order 2 marketing area over the same time period increased by only 12.1 percent to a total of 238.0 million pounds. This change of the historical balance was attributed by Pennmarva to the shifting of regulation of the Lansdale pool plant in November 1992 and the Reading pool plant in January 1993 to regulation under Order 2. Even though these plants became regulated under the New York-New Jersey milk order, Pennmarva said, these plants continued to have significant Class I route disposition in the Order 4 marketing area.

Pennmarva also justified using the measure of greatest Class I route sales as the basis for deciding where a plant should be pooled by citing the provisions of nearby orders that provide for this measurement; specifically, the Carolina (Order 5) and the Eastern Ohio-Western Pennsylvania (Order 36) milk orders. However, noted Pennmarva, the New York-New Jersey order provides a different measure.

Pennmarva noted differences between Order 4 and Order 2 pooling provisions. Order 2 allows for transfers of bulk fluid milk (classified as Class I–A) between plants, while Order 4 specifically excludes deliveries to a plant, said Pennmarva. This difference in order provisions may result in a situation where a plant may have a greater in-area packaged route disposition in Order 4, but, testified Pennmarva, because Order 2 allows for plant transfers of bulk fluid milk (milk classified as Class I–A), such bulk transfers may cause the plant to have greater total Class I assignments in Order 2 than in Order 4. In this event, said Pennmarva, the subordinating language of § 1004.7(f)(2) causes the plant to be regulated as an Order 2 pool plant, even though it may have more packaged Class I route distribution in the Order 4 marketing area.

Pennmarva said this proposal would not change the pool plant definition of the New York-New Jersey order. According to Pennmarva, a plant which qualifies as a pool plant in either order prior to the adoption of this proposal will continue to qualify as a pool plant.

Significant opposition testimony was received regarding Proposal No. 3. Johanna testified that Proposal No. 3 seems intended to prevent them from pooling the milk from its Lansdale plant under the New York-New Jersey milk order despite the fact that the greater percentage of such milk ultimately is distributed as Class I milk in that area. To the best of its knowledge, Johanna said, Proposal No. 3 would have no effect on any other handler. Moreover, the requirement that milk received at Johanna's Lansdale plant be pooled in Order 4 yields no material benefit to Order 4 producers.

According to Johanna, Proposal No. 3 fails to recognize the close relationship between the Order 2 and Order 4 markets and would be counterproductive to the goals of the Federal milk marketing scheme. Johanna contended that milk which is received and separated at one plant, and then shipped as bulk milk for subsequent packaging and Class I distribution by another plant, is most clearly associated with the market in which the milk ultimately is distributed on fluid routes. Johanna also asserted that if more than half of a plant's receipts from producers are regularly shipped to another plant for packaging and Class I disposition in another order, the plant initially receiving the milk, and those farmers who supply such milk, should be associated with and pooled under the order where those later fluid Class I sales are made.

Johanna testified that its Lansdale plant became pooled under Order 2 for legitimate business reasons and not for the purpose of circumventing where it is regulated. The reason for the switch in regulation from Order 4 to Order 2 was the cessation of milk processing at another Johanna plant located in Flemington, New Jersey (Flemington). Prior to this plant's closure, Johanna said, the Flemington plant had been distributing some 677 million pounds of Class I milk annually in the Order 2 market and had been an Order 2 pool plant for more than 15 years.

Upon closing the Flemington plant, Johanna indicated that the greatest majority of its milk business was relocated to its Lansdale operation, with the greatest majority of its Class I sales in Order 2. Johanna said there was no change in Class I disposition in either Order 2 or Order 4 by virtue of the movement of that milk. Johanna asserted again that the combining of operations of the two plants at Lansdale was a business decision and not an attempt at manipulating order provisions.

Johanna testified that producers in Pennsylvania's milkshed typically supply large quantities of milk to handlers in both Orders 2 and 4. Further, said Johanna, it is unrealistic to view the Pennsylvania milkshed as somehow geographically linked to the Order 4 market. The overlapping nature of this milkshed between the two

orders, said Johanna, supports Order 2 regulation of a Pennsylvania plant that distributes the majority of its fluid milk within the Order 2 marketing area.

Johanna emphasized that the Lansdale plant is a ''designated'' Order 2 pool plant, and therefore is relied upon by the performance standards of such designation to provide support for Class I sales within the marketing area. The presence of such plants, said Johanna, supports the blend price which accommodates the large amount of manufacturing milk pooled in the New York-New Jersey order.

No appreciable adverse effect on the Order 4 blend price would result from the inclusion of the Lansdale plant under Order 2, according to Johanna's analysis. The effect on the Order 4 blend price using 1993 averages, said Johanna, amounts to about a three-cent reduction. Johanna also indicated that pooling the milk under Order 4 would have had a slightly smaller reduction in the blend price received by Order 2 producers.

Johanna concluded that any justification for adopting Proposal No. 3 upon a supposed improvement in the blend price by pooling the Lansdale plant under Order 4 fails to account for the effect upon the blend price in Order 2. At most, said Johanna, classification of the plant's milk with one order or the other would represent an insignificant adjustment in the movement, up or down, of blend prices in either order.

Johanna also testified that Proposal No. 3 seems intended to eliminate the applicable location differential as an Order 2 plant. Because of the Lansdale's route distribution in Order 2, the existing location differential is fair, said Johanna. Adoption of Proposal No. 3, according to Johanna, would place them at a competitive disadvantage against other Order 2 handlers competing in the market for fluid sales. Johanna noted that there is a 24.5-cent difference in the location differential in Order 2 between the Lansdale plant's applicable zone (the 71–75 mile zone) and the next nearer zone (the 61–70 mile zone). If Proposal No. 3 is intended to alter the location differentials of Order 2 because of some perceived unfairness, such changes to the Order 2 pricing structure should be addressed through proposed amendments to the New York-New Jersey order and not this proceeding, said Johanna.

Johanna asserted that the 24.5-cent location adjustment between the two zones was properly factored into Order 2's location differential scheme based upon the historical mechanism of transporting distant milk to the urban market through the use of receiving stations. Johanna added that the 24.5-cent difference equalizes the price, for competitive purposes, of milk brought into the Order 2 market from more distant locations. The witness said that as milk had to be shipped from more distant locations, receiving stations collected the milk from dispersed producers. At the time the Order 2 location differential applicable to the Lansdale operation was adopted, said Johanna, the location adjustment difference was intended to allow handlers to recoup the fixed costs associated with the creation and maintenance of receiving stations. At the same time, Johanna added, the location adjustment difference between zones was intended to not affect any Order 2 plant then in existence.

A witness from Dairylea Cooperative, Inc. (Dairylea), of Syracuse, New York, also testified in opposition to Proposal No. 3. Dairylea is a dairy farmer cooperative comprised of some 2,200 members throughout the northeast of the United States who produce milk regulated under Federal Orders 1, 2, 4, and 36. This witness testified Order 4 provisions currently recognizes its interdependence with Order 2. When there is a dispute over which order a particular plant should be pooled under, Dairylea said, there is recognition by Order 4 provisions of the historical uniqueness of Order 2 in terms of its use of upcountry plants to separate farm milk into skim milk that is shipped hundreds of miles to city bottling plants, while leaving the cream fraction of the raw milk in the up-country plants for processing into Class II or Class III products. Dairylea said this is part of a sound economic system that has developed over many years.

According to Dairylea, adoption of Proposal No. 3 would set up a direct conflict between Order 4 and Order 2 pooling provisions because adopting it would tend to amend the application of Order 2's pooling provisions. Dairylea was of the opinion that Proposal No. 3 appeared to be based solely on the goal of enhancing a single group's economic interest without regard to the potential of injury to another order's system of milk sales that developed over many years.

Opposition testimony was also received from a witness on behalf of Clover Farms Dairy Company (Clover Farms), located in Reading, PA. Clover Farms testified that adoption of Proposal No. 3 would lead to irreconcilable conflict with the provisions of the New York-New Jersey order.

Clover Farms testified that the most basic provisions of any milk marketing order are those that determine which plants are to be regulated. These provisions, Clover Farms said, often differ from one order to another because they are designed to meet the varying characteristics of the marketing areas involved. According to Clover Farms, because an individual plant serving a diverse market may meet the pooling requirements of more than one Federal order, each order must specify how such a situation is to be resolved. Moreover, said Clover Farms, the resolution as determined by each order involved must lead to the same conclusion, otherwise no guidance will be given either to the Department of Agriculture or to the courts in resolving the conflict.

Clover Farms testified that Proposal No. 3 would eliminate the basis for deciding which order takes precedence when a plant would otherwise be subject to the classification and pricing provisions of both Order 4 and another Federal order. Leaving the determination on which order has the greater volume of Class I milk disposed of on routes in its marketing area from the plant might work, said Clover Farms, provided the other order has a provision that provides the same conclusion. This could not work in the case of Order 4 and Order 2, Clover Farms indicated, because the provisions of the New York-New Jersey order bases the decision on which order has the larger portion of disposition of Class I-A milk, which includes bulk shipments of milk assigned to Class I, in its marketing area. Since Order 4 does not recognize the role of bulk shipments in its calculation, said Clover Farms, adoption of Proposal No. 3 would provide no basis upon which to resolve the conflict between the two orders when a plant meets the pooling provisions of both.

The opposition testimony of the Clover Farms witness was supported in testimony by a witness who testified on behalf of Eastern Milk Producers Cooperative Association, a dairy farmer cooperative having some 2,400 members that ship milk to Orders 1,2,4, and 36.

A brief filed by Pennmarva noted that while Johanna agrees that a plant should be pooled under the order in which most Class I sales are made, Johanna provided no evidence to support the claim that fluid milk transfers from the Lansdale plant were in fact distributed on routes in the Order 2 marketing area, thereby meeting a defacto route disposition test. Pennmarva argues here that if, in fact, the Lansdale plant has greater route disposition in Order 2 than it has in Order 4, the adoption of Proposal No. 3 will have no effect on the plant. Pennmarva further argues that even if the plant did not now have

greater route disposition in Order 2, operators of the plant could implement the changes necessary to ensure greater route sales in Order 2.

To illustrate the need for adopting Proposal No. 3, the Pennmarva brief noted that in 1993, the Lansdale plant had 224 millions pounds of Class I disposition in Order 4 and 245 million pounds of Class I disposition in Order 2, for a total of 469 million pounds. Of that 469 million pounds, Pennmarva indicated that at least 10 percent (46.9 million pounds) of its milk was transferred in bulk or packaged form from Lansdale to other plants. According to Pennmarva, Lansdale consequently distributed on routes no more than 198.1 million pounds in the Order 2 marketing area. Thus, Pennmarva claims that the Lansdale plant distributed 198.1 million pounds of Class I milk on routes in Order 2 versus 224 million pounds of Class I milk in Order 4, clearly revealing that there is more route disposition under Order 4. However, because of the yield provision contained in § 1004.7(f)(2), according to Pennmarva, the Lansdale plant is regulated under Order 2.

The Pennmarva brief contends that Johanna's testimony that the Lansdale Class I–A milk transfers were ultimately distributed on routes in Order 2 is in error. Pennmarva noted that the definition of Class I–A milk under Order 2 is ''as route disposition in an other order marketing area'' as delineated in § 1002.41(a)(1)(ii) of the New York-New Jersey order. Thus, according to Pennmarva, a plant which otherwise qualifies as an Order 2 pool plant can dispose of milk on routes in the Order 4 marketing area, and such dispositions are classified under Order 2 as Class I–A. Pennmarva indicated that once classified as Class I–A, no further distinction is made regarding the ultimate destination of route sales.

The Pennmarva brief also challenged the Johanna witness' assertion that all of its transferred milk was ultimately distributed on routes in the Order 2 marketing area. Pennmarva noted that transfers were made between Lansdale, PA, and Reddington Farms (an Order 2 pool plant) and that market administrator statistics indicate that Reddington Farms enjoyed Class I route disposition in the Order 4 marketing area in every month between 1991 and 1994.

In response to the Clover Farms' testimony that adoption of Proposal No. 3 would lead to irreconcilable conflict with Order 2 and that such conflict would need to be addressed by the Dairy Division, Pennmarva cited an example of how, through administrative determination, a pooling issue such as this might be handled. The Pennmarva brief asserted that it is within the purview of the Act for proponent cooperatives, which represent volumes in excess of 90 percent of the Order 4 market, to delete provisions which subjugate the order to all other orders and to rely on a route disposition test in determining where a plant should be pooled when it also qualifies for pooling under another order.

According to the Pennmarva brief, orderly marketing within Order 4 should not be hinged on an accommodation to another order. Pennmarva does concede that the interplay of adjoining markets, such as Order 2 and 4, must be considered in maintaining orderly marketing but indicated there is nothing in the record which provides a reason why Order 4 should be subordinated to Order 2 or any other order. This is important, according to Pennmarva, because of the economic hardship brought about through depressed blend prices. Pennmarva indicates that there is no benefit to Order 4 producers from the application of the provisions of § 1004.7(f)(2) and that its elimination will not change the pooling standards of any other Federal order.

In defense of the adequacy of using a route disposition test, the Pennmarva brief cited a recommended decision applicable to another Federal order in which a plant that qualifies under more than one order is regulated under the order which it enjoys the greatest route disposition. This recommended decision indicated that such application normally assures that all handlers having principal sales in a market are subject to the same pricing and other regulatory requirements. Official Notice is taken of the Final Decision (59 FR 26603, published May 23, 1994) for the Southern Michigan marketing area in which no changes were made regarding this issue from the recommended decision. According to Pennmarva, such an example speaks to a fundamental intent of milk marketing orders—to regulate handlers that compete for sales within the specific geographic definition of the marketing area.

A brief filed by Johanna reiterated their opposition to the adoption of Proposal No. 3.

Reply briefs filed by both Pennmarva and Johanna similarly reiterated their positions given in testimony and in submitted briefs. However, Johanna's reply brief takes objection to Pennmarva's suggestion that Johanna should simply effectuate changes in its Lansdale operations so as to convert its bulk shipments of fluid milk to Order 2 into route disposition and thereby preserve the plant as an Order 2 plant under the strictures of § 1004.7(f)(1). According to Johanna, this suggestion does not take into account the impracticality and costs to Johanna of pooling the Lansdale plant to accommodate the packaging requirements of multiple wholesale customers who presently receive bulk shipments from the Lansdale plant for packaging and ultimate route disposition in Order 2.

Johanna also counters the Pennmarva's reference to another rulemaking proceeding and recommended decision involving a pooling issue of a Ultra High Temperature (UHT) plant in another Federal order. While Pennmarva cited this recommended decision as an example of how administrative intervention could be used to determine where a plant should be regulated, Johanna views this recommended decision as providing certainty and orderly conditions for the UHT plant and its producers on where it will be pooled. In this example, Johanna notes that the route disposition test, as a single criteria for pooling, is rejected because of the unique aspects of the marketing conditions faced by the UHT plant. Such uniqueness should also be recognized for the Lansdale plant, said Johanna, because it makes Class I bulk shipments to an order which does not rely solely on a route distribution pooling test.

At issue regarding Proposal No. 3 is where a plant should be pooled and regulated when it meets the pooling standards of more than one order. Both the proponent and opponents to Proposal No. 3 agree that the market in which fluid sales distributed on routes are greatest is where a plant should be regulated. Where a plant should be regulated is a most important feature of all Federal milk orders. The basis upon which a marketing area is determined is founded on the basis of where handlers compete with each other for fluid sales. An important determinant of handlers competing with each other for sales is generally made through a measurement of the route disposition of fluid milk. For the Middle Atlantic marketing area, the order clearly defines route disposition, and its measurement can be made with exacting precision every month. However, the New York-New Jersey marketing order differs from Order 4 in that it provides for the bulk transfers of fluid milk between plants that are classified as Class I–A milk. Order 4 specifically excludes such transfers between plants from meeting its route disposition test.

Opponents of Proposal No. 3 assert, in part, that bulk transfers of Class I–A between plants are an important feature of the Order 2 marketing area because of the market structure that evolved there over time. The basis of providing for bulk transfers of Class I–A milk between plants recognized the market structure and conditions in that order. Opponent witnesses describe ''up-country'' plants that assemble and separate the skim fraction of producer milk for subsequent transfer to ''city'' bottling plants for eventual distribution to retail outlets, while leaving the cream fraction in country plants to be further processed into Class II and Class III products, as a unique characteristic of the Order 2 marketplace.

On its face, it is difficult to conclude that adoption of Proposal No. 3 somehow threatens the above described market structure that Order 2 handlers have relied upon for a long period of time. Both the proponent and opponents of Proposal No. 3 recognize and describe similarly the close relationship between Order 2 and Order 4. The record reveals that both orders share, to a significant extent, a common milkshed. The record also reveals that milk movements between orders have been historically equal until the Lansdale plant switched regulation from Order 4 to Order 2. The change in the regulatory and pool status of the Lansdale plant was due to Order 2 allowing for bulk transfers of Class I–A milk as a fluid use which brought the total Class I disposition of the plant to have more milk associated with the New York-New Jersey marketing area than it had with the Middle Atlantic marketing area. This allowance for bulk transfers under the New York-New Jersey order, together with the subordinating language of Order 4, required the regulatory and pool status of the Lansdale plant to shift to Order 2 even if the Lansdale plant may have had more route sales in Order 4.

The Lansdale plant is physically located within the Order 4 marketing area and until recently had historically been pooled as an Order 4 pool distributing plant. Further, the Lansdale plant is clearly a fluid distributing plant that competes with other handlers for fluid sales in Order 4. In the New York-New Jersey order, it seems to enjoy, from the testimony of some opponent witnesses, the status of a distributing plant while at the same time was inferred to be a ''country'' plant. Nevertheless, Order 2 recognizes the Lansdale plant as a fluid milk distributing plant with the transferring of milk as a secondary operation. This distinction is made here because Order 2 also recognizes processing plants with manufacturing as a secondary operation. Simply put, the Lansdale plant's primary enterprise is as a fluid distributing plant.

The effect of the New York-New Jersey order provision of allowing for bulk transfers of Class I–A milk and its lack of a route disposition test makes it difficult to determine precisely where the majority of Landsdale's Class I sales take place that includes the bulk transferred milk. The record reveals, in testimony by Johanna, that bulk transfers of Class I–A milk end up eventually as route disposition, although the record does not reveal how much of such milk is distributed on routes within Order 2 or in another marketing area. Pennmarva makes a case from the record evidence that suggests that there is more route disposition in Order 4. In this regard, Johanna's claim that fluid milk transfers from the Lansdale plant were in fact distributed on routes in Order 2 might not be totally accurate on basis of the record evidence. This conclusion is further supported by examining the Order 2 provision of what constitutes Class I–A milk, namely, inclusion of milk distributed on routes in another marketing area. This decision agrees with Pennmarva that a plant which otherwise qualifies as an Order 2 pool plant can dispose of milk on routes in the Order 4 marketing area with such disposition classified as Class I–A, and then once so classified, no further distinction as to the ultimate route disposition is made through the transfer chain.

In summary, a conclusion on the basis of the record of where the greatest route sales of fluid milk are made by Johanna's Lansdale plant cannot be determined. This is problematic because both proponent and opponent witnesses indicate that a plant should be pooled where it enjoys the majority of its Class I disposition, but Order 2 and Order 4 each rely on different forms of measuring this outcome. Due recognition of the regulatory impact on a plant that meets the pooling standards of the New York-New Jersey order is warranted because the plant has met that order's standards. At the same time, Order 4 producers are required by their order to yield to the pricing provisions of another order on the terms of measurement that are not its own.

This decision agrees with an opponent witness' testimony that each marketing order should specify how to resolve differences and conflicts that arise in the regulation and pooling of plants. In this regard, opponents to Proposal No. 3 voiced concern that its adoption would lead to irreconcilable conflict with the provisions of the New York-New Jersey order. Such conflict probably would not be the case if an identical definition and standard of measurement, that is route disposition, existed for both orders.

In short, adoption of Proposal No. 3 would leave determination of the regulatory and pool status of the Lansdale plant solely to the Order 4 route disposition test. However, adoption of this proposal has the effect of causing a change to the New York-New Jersey order which was not open or noticed in this proceeding. Adoption of Proposal No. 3 provides neither clarity nor a basis, at least with respect to the relationship between Order 4 and Order 2, to determine in which order a plant should be pooled.

The apparent intent of Pennmarva's Proposal No. 3 seems clear and consistent with how milk is regulated and pooled throughout the Federal milk order system. In this regard, Pennmarva is asking that milk distributed on routes be the sole test for determining where a plant should be pooled. Proponents and opponents agree that where a plant has most of its sales is the most appropriate basis for making such a determination. Unfortunately, Proposal No. 3 falls short of being able to accomplish this without causing a change to the New York-New Jersey order.

The Johanna witness testified that, in part, the purpose of Proposal No. 3 appeared intended to eliminate the location differential as an Order 2 plant. This would obviously place Johanna at a competitive disadvantage against other Order 2 handlers competing in the market for fluid sales in the Order 2 marketing area. The witness observed correctly that there is a 24.5-cent difference in the location adjustment in Order 2 between the Lansdale plant's applicable zone (the 71–75 mile zone) and the nearer zone (the 61–70 mile zone). On this point, an examination of the Class I price at the Lansdale location reveals a disparate price difference between being regulated under Order 2 or Order 4. Under the provisions of the Middle Atlantic order, the Class I price applicable at Lansdale is $0.345 more than what the applicable Class I price would be if it were regulated under the New York-New Jersey order.

This disparate price difference suggests that the Class I price, at least at the Lansdale location, could be better aligned. To the extent that a $0.345 price difference between the pricing provisions of two adjoining orders may be sufficient to encourage bulk Class I–A milk transfers, that, together with other forms of milk disposition in the New York-New Jersey order, provides the Lansdale plant the economic

incentive to meet the pooling standards and pricing provisions of Order 2. If the Class I price at Lansdale were in better alignment, it is reasonable to suppose that Johanna would likely be indifferent on which order they sought pricing and regulatory status. On the one hand, Landsdale is able to attract an adequate supply of fluid milk at a price lower than what would be applicable if regulated under Order 4. Further, adoption of Proposal No. 3 would likely cause a shift in the regulatory status of the Lansdale plant back to Order 4, causing their cost of milk to increase when they meet the pooling standards of another order. On the other hand, if the Lansdale plant enjoys its greatest route disposition in the Order 4 marketing area, they enjoy a sales advantage against other Order 4 regulated handlers that pay more for their milk.

It is because of the above discussion of this issue that a recommendation for or denial of Proposal No. 3 cannot be made on the basis of this record. Adoption of Proposal No. 3 would have the effect of causing a change to another order which cannot be accomplished without a hearing that includes the other order. Further, the apparent disparate price difference between the pricing provisions of the Middle Atlantic and New York-Jersey orders suggests that the pooling question at issue is perhaps a pricing issue. As such, it is not appropriate to attempt correction of a pricing problem by changing pooling provisions.

Notice is given that the Department expects that interested parties will investigate and offer proposals that address the Class I price alignment structure between Order 2 and Order 4. Other features of marketing order differences, such as that exhibited on the issue regarding Proposal No. 3, should similarly be considered with the view to facilitating more orderly marketing conditions.

Written comments received on the recommended decision from Dairylea and Pennmarva support the conclusions discussed above regarding Proposal No. 3.

b. A second proposal that would eliminate the exemption of a pool plant's regulation under Order 4 when such a plant meets the pool plant definition of another order from the pool plant definition of the order should be adopted. This was proposed by Pennmarva (Proposal No. 2 as published in the hearing notice).

Currently, an Order 4 pool plant can continue to be regulated under the order as a pool plant for two succeeding months after it fails to meet certain pooling standards, unless it simultaneously meets the pooling provisions of another Federal order. This feature of the order is commonly referred to as the ''lock-in'' provision.

Pennmarva testified that in the recent past, two Order 4 pool distributing plants changed their status from being regulated under the Middle Atlantic marketing order to the New York-New Jersey marketing order (Order 2). In both cases, Pennmarva said, notice of the change of regulation was provided to cooperative suppliers in a timely fashion so that the appropriate logistical arrangements could be made. According to Pennmarva, an important logistical item attended to was the reassociation of the market's producers whose last shipment to a pool distributing plant was to one of these plants. Pennmarva said accomplishing this task was exacting and time consuming.

Pennmarva testified that there is no requirement or certainty for a handler to give adequate notice to its cooperative suppliers of milk. Further, said Pennmarva, cooperative suppliers have no independent knowledge that a plant may change from regulation under the order to another order. In a worst case scenario, Pennmarva said, a cooperative supplying milk to a handler changing regulation would not discover this change until ten days into the following month. Pennmarva indicated the intent of this proposed amendment is to enhance orderly marketing rather than keeping a plant pooled permanently under Order 4.

Opposition to Proposal No. 2 was voiced by Dairylea. According to Dairylea, Proposal No. 2 has no economic or substantive basis. This witness drew attention to the timely notification to suppliers by the two plants that shifted regulation to the New York-New Jersey order as an indicator of the well-functioning current provision of the order. Thus, Dairylea concluded that the order therefore does not require a modification to address the issue.

In the interest of promoting more orderly marketing conditions, Proposal No. 2 has merit because it mitigates a cooperative's lack of knowledge of a distributing plant's dispositions. Such knowledge is needed in order for the cooperative to know where a plant is pooled or when a plant's pool status may change in any given month. It is reasonable to expect that when a distributing plant does change its regulatory status under the order, producers supplying the plant should have the time to make the business changes and adjustments they deem necessary without the loss of the certainty of where their milk will be pooled. The record reveals that advance notification was provided to cooperative suppliers prior to changes of where certain plants would be regulated in some instances. This is commendable and speaks well to the interactions between cooperative suppliers of milk and handlers. However, such notification is clearly voluntary when requiring it would offer clear advantages without being burdensome. The merit in requiring advance notification stems from the very real and reasonable need of cooperatives to have such prior knowledge of where their milk will be pooled and priced. Finding out after-the-fact that a plant's regulatory status has changed is tantamount to denying producers access to an intended market. For this reason, the objections by the opposition witness from Dairylea have little merit. It also places an unreasonable economic burden on Order 4 producers because of the order's requirement to re-associate producer milk in the marketing area so that producers may enjoy the benefits from being pooled in Order 4.

Because a decision regarding Proposal No. 3 cannot be made on the basis of this record, the proposed deletion of § 1004.7(a)(4) as proposed by Pennmarva would not accomplish implementing the intent of this proposal (Proposal No. 2). Accordingly, this decision modifies the language of § 1004.7(a)(4) to ensure that the two month ''lock-in'' provisions (as contained in § 1004.7(a)(3)) will apply to plants that may, in the future, shift regulation to another Federal order or become a nonpool plant.

In written comments to the recommended decision, Pennmarva offered more specific order language that clarifies the terms of the ''lock-in'' provision. This clarifying language should be reflected in the provisions of § 1004.7(a)(4) so as to insure a two-month ''lock-in'' refers to consecutive months. Therefore the language of § 1004.7(a)(4) has been modified.

4. Discretionary Authority To Revise Pooling Requirements and Producer Milk Diversion Limits

Two proposals offered by Pennmarva that would provide discretionary authority for the market administrator to revise pooling requirements and producer milk diversion limits should be adopted. Proposal No. 5, as published in the hearing notice, would provide the market administrator the authority to raise or lower the applicable pooling standards for distributing plants, supply plants, and reserve processing plants. Proposal No. 8, as published in the Notice of Hearing,

would similarly provide the market administrator the authority to raise or lower the applicable diversion limits for cooperative associations, federations of cooperative associations, and handlers with non-member milk supplies. Adoption of these provisions will provide a procedure for the order to be modified in a more responsive manner to changes in marketing conditions than is currently the case. Modification can be made to encourage the shipment of additional supplies of milk for fluid use or to prevent the uneconomic shipments of milk that are in excess of fluid needs.

The order does not currently provide for such discretionary authority for the market administrator to change pooling requirements or diversion limitations. Typically, pooling standards may be temporarily revised or suspended administratively through informal rulemaking by the Department at a petitioner's request. The Department investigates the request and determines the need to temporarily revise or suspend pooling standards. Permanent changes or amendments to Federal order provisions, as in this proceeding, are accomplished through formal rulemaking procedures based on a public hearing.

The pool plant definition of Order 4 currently requires that in meeting pool plant qualification status, a plant must have a Class I disposition of at least 40 percent of its receipts in the months of September through February and 30 percent in the months of March through August. Additionally, at least 15 percent of receipts must be within the marketing area. Any plant that does not meet this criteria for pool plant status can still be a pool plant if at least a specified percentage of its milk receipts are moved during the month to a plant(s) that meets the Class I disposition requirements and volume of route disposition within the marketing area indicated above. The applicable percentage for the months of September through February is 50 percent of receipts; for the months of March through August, the applicable percentage is 40 percent. A reserve processing plant operated by a cooperative association or by a federation of cooperative associations is a pool plant provided, in part, that at least 30 percent of the total milk receipts of member producers during the month is moved to and physically received at a plant that meets the Class I disposition standards.

The producer definition of Order 4 currently provides that dairy farmers can be producers under the order even though their milk is moved from the farm to nonpool plants for manufacturing purposes rather than to plants for fluid use. Diversion limits apply to handlers marketing dairy farmer's milk such as cooperative associations, federations of cooperatives, and handlers marketing non-member milk. The diversion limit for a cooperative association or a federation of cooperatives is restricted to 50 percent of the volume of milk of all members of a cooperative association or federation delivered to, or diverted from, pool plants during the month. The diversion limit for handlers with non-member milk supplies is restricted to 40 percent of the total of non-member milk for which a pool plant operator is the handler during the month.

Pennmarva testified that granting the market administrator the authority to raise or lower pooling standards and diversion limits will enhance orderly marketing by either encouraging needed milk shipments or preventing the uneconomic movement of milk. Pennmarva indicated that such administrative authority is granted to market administrators in other markets, noting for example that the market administrator in the Upper Midwest marketing area (Order 68) has similar authority.

Before making any revision to the pooling standard or diversion limits established by the order, Pennmarva offered a specific procedure that would govern the conditions under which revisions might be warranted. The procedure offered specifies that the market administrator may increase or decrease the applicable percentages of either the pool plant definition section or the producer definition section of the order (Sections 1004.7 and 1004.12 respectively) if a revision is necessary to encourage needed shipments or to prevent uneconomic shipments of milk. Before making such a finding, the order procedure requires the market administrator to investigate the need for revision either on the market administrator's own initiative, or at the request of interested parties. If the investigation shows that a revision might be appropriate, the proposed order language requires the market administrator to issue a notice stating that a revision is being considered and invite data, views, and arguments on whether a revision is necessary. The procedure also specifies that any request for revisions be filed with the market administrator no later than the 15th day of the month prior to the month for which the requested revision is desired to be effective.

Pennmarva testified that this amendment would provide for more timely decisions on factors affecting the pool status of dairy farmers. It was Pennmarva's opinion that the market administrator and staff are fully appraised of the market conditions in the Middle Atlantic market. Such working knowledge, said Pennmarva, can decrease the time and expense needed to respond to a changing market and improve regulatory efficiency.

Pennmarva maintains that this process is superior to the process currently used to affect needed changes in pooling standards and diversion limitations. Pennmarva noted that the Department can effectuate suspension actions of order provisions that remove regulatory language, thus reducing the burden on handlers. However, the witness indicated that deletions of language by informal rulemaking procedures is too limiting to address changes in marketing conditions. Pennmarva said that providing the market administrator with a procedure to make specific percentage changes, either up or down, would be a more flexible way of changing shipping requirements or diversion limits.

Opposition testimony was received from Dairylea for granting such discretionary authority to the market administrator for revising shipping requirements (Proposal No. 5). Dairylea said that while they have significant faith in market administrators, they see no reason to abandon long-term practices of having a public hearing or meeting to discuss the merits of changing applicable shipping standards within an order. Dairylea is of the view that Proposal No. 5 does not provide for a public meeting forum but rather simply written arguments almost after the fact. Dairylea indicated that shipping standards can have a profound economic impact of farmers, cooperatives, processors and consumers, and, in fact, are the very essence of the market order structure. The witness said that changing these standards without public scrutiny in the form of a public meeting or hearing should not be allowed. The witness feared that a simple request for a written response would leave many people out of the discussion and decisionmaking process.

A witness for Clover Farms testified in opposition to both Proposal Nos. 5 and 8. Clover Farms opposes these two proposals unless provision is made for a public forum to aid in the decision making process of the market administrator.

A witness for Eastern Milk Producers Cooperative Association (Eastern) also testified in opposition to Proposal Nos. 5 and 8. Eastern indicated that it makes sense to provide a degree of administrative discretion to the market

administrator to resolve the problems that may arise as a result of changes in supply and demand conditions in the marketplace that would warrant adjustment of shipping percentages. Nevertheless, before such discretion is exercised, Eastern maintained that there be notice to the industry and preferably that there be an opportunity for a public meeting for interested parties to bring evidence in aiding the market administrator to make a proper decision. Eastern noted that the ''call'' provision of the New York-New Jersey marketing order, which requires the market administrator to conduct a public meeting in setting performance standards on handlers to ensure that the fluid market needs are adequately served, works well. Eastern indicated support for a proposal that would be similar in scope for the Middle Atlantic order.

At issue on the part of those who oppose granting administrative discretion to the market administrator in adjusting shipping requirements and diversion limitations is the lack of a public meeting. Opponents have firm opinions that the public and interested parties should have a greater degree of participation in the decisional process than the proposed administrative proceeding would require. However, opponents take no issue on the ability, impartiality or integrity of the market administrator to make appropriate administrative decisions regarding adjustments to shipping requirements and diversion limits. The issue here is one of procedure.

The informal rulemaking procedure is routinely used for making temporary suspensions or revisions to pool plant shipping requirements and diversion limitations. The procedure of public notice and comment before deciding on the appropriate course of action that is proposed in Proposals Nos. 5 and 8 follow in identical fashion the procedures followed by the Department. This informal rulemaking procedure does not include reliance on public hearings or meetings because of the need for urgent and expeditious action to address rapidly changing market conditions. Nevertheless, any interested party has the opportunity to have their views included in the decision making process.

As the record reveals, such a procedure has been used in the Upper Midwest Marketing Area since 1990. Since the record does not reveal any lack of confidence in the ability of market administrators (who are entrusted with great responsibility in administering the order) to effectively carry out this duty, it is reasonable to conclude that on the basis of the broad authorities already entrusted to the market administrator to provide for the effective administration of the order, such discretionary authority that would be granted with the adoption of Proposals Nos. 5 and 8 are consistent with those already given. Furthermore, these two proposals have the broad support of producers who represent some 90 percent of the milk associated with the market.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Middle Atlantic order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in a marketing agreement upon which a hearing has been held.

Rulings on Exceptions

No exceptions to the findings and conclusions of the recommended decision were received.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the order regulating the handling of milk in the Middle Atlantic marketing area, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the Federal Register.

Determination of Producer Approval and Representative Period

May 1995 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Middle Atlantic marketing area is approved or favored by producers, as defined under the terms of the order as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

List of Subjects in 7 CFR Part 1004

Milk marketing orders.

Dated: September 13, 1995.

Patricia Jensen,

Acting Assistant Secretary, Marketing and Regulatory Programs.

Order Amending the Order Regulating the Handling of Milk in the Middle Atlantic Marketing Area

(This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.)

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings. A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Middle

Atlantic marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect the market supply and demand for milk in the aforesaid marketing area. The minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order Relative To Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Middle Atlantic marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the recommended decision issued by the Administrator, Agricultural Marketing Service, on July 10, 1995, and published in the Federal Register on July 14, 1995 (60 CFR 36239), except for the clarifying change being made to § 1004.7(a)(4), shall be and are the terms and provisions of this order, amending the order, and are set forth in full herein.

PART 1004—MILK IN THE MIDDLE ATLANTIC MARKETING AREA

1. The authority citation for 7 CFR Part 1004 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 1004.7 is amended by revising paragraphs (a)(1) and (a)(4); revising paragraph (d)(1); and by adding a new paragraph (g), to read as follows:

§ 1004.7 Pool plant.

* * * * *

(a) * * *

(1) Milk received at such plant directly from dairy farmers (excluding milk diverted as producer milk pursuant to § 1004.12, by either the plant operator or by a cooperative association, and also excluding the milk of dairy farmers for other markets) and from a cooperative in its capacity as a handler pursuant to § 1004.9(c); or

* * * * *

(4) A plant's status as an other order plant pursuant to paragraph (f) of this section will become effective beginning the third consecutive month in which a plant is subject to the classification and pricing provisions of another order.

* * * * *

(d) * * *

(1) A reserve processing plant operated by a cooperative association at which milk from dairy farmers is received if the total of fluid milk products (except filled milk) transferred from such cooperative association plant(s) to, and the milk of member producers physically received at, pool plants pursuant to § 1004.7(a) is not less than 25 percent of the total milk of member producers during the month.

* * * * *

(g) The applicable shipping percentage of paragraphs (a) and (b) or (d) of this section may be increased or decreased by the market administrator if the market administrator finds that such revision is necessary to encourage needed shipments or to prevent uneconomic shipments. Before making such a finding, the market administrator shall investigate the need for revision either on the market administrator's own initiative or at the request of interested parties. If the investigation shows that a revision of the shipping percentages might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and invite data, views and arguments. Any request for revision of shipping percentages shall be filed with the market administrator no later than the 15th day of the month prior to the month for which the requested revision is desired effective.

3. Section 1004.12 is amended by revising paragraphs (d)(2)(i) and (d)(2)(ii); and by adding a new paragraph (g), to read as follows:

§ 1004.12 Producer.

* * * * *

(d) * * *

(2) * * *

(i) All of the diversions of milk of members of a cooperative association or a federation of cooperative associations to nonpool plants are for the account of such cooperative association or federation, and the amount of member milk so diverted does not exceed 55 percent of the volume of milk of all members of such cooperative association or federation delivered to or diverted from pool plants during the month.

(ii) All of the diversions of milk of dairy farmers who are not members of a cooperative association diverting milk for its own account during the month are diversions by a handler in his capacity as the operator of a pool plant from which the quantity of such nonmember milk so diverted does not exceed 45 percent of the total of such nonmember milk for which the pool plant operator is the handler during the month.

* * * * *

(g) The applicable percentages in paragraphs (d)(2)(i) and (d)(2)(ii) may be increased or decreased by the market administrator if the market administrator finds that such revision is necessary to encourage needed shipments or to prevent uneconomic shipments. Before making such a finding, the market administrator shall investigate the need for revision either on the market administrator's own initiative or at the request of interested parties. If the investigation shows that a revision of the diversion limit percentages might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and invite data, views and arguments. Any request for revision of the diversion limit percentages shall be filed with the market administrator no later than the 15th day of the month prior to the month for which the requested revision is desired effective.

Appendix to the Proposed Rule

Marketing Agreement Regulating the Handling of Milk in Middle Atlantic Marketing Area

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR Part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provision of §§ 1004.1 to 1004.95, all inclusive, of the order regulating the handling of milk in the Middle Atlantic marketing area (7 CFR Part 1004) which is annexed hereto; and

II. The following provisions:

§ 1004.96 Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled

during the month of May 1995, _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Director, or Acting Director, Dairy Division, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

§ 1004.97 Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature

By (Name) _____

(Title) _____

(Address) _____

(Seal)

Attest

[FR Doc. 95–23194 Filed 9–20–95; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 437

[Docket No. EE-RM–95–202]

RIN 1904–AA–74

Voluntary Home Energy Rating System Guidelines

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE).

ACTION: Rescheduling of public hearing.

SUMMARY: On July 25, 1995 the Department published a proposed rule on Voluntary Home Energy Rating System Guidelines and announced public hearing dates for that rule. Due to possible fiscal restraints, the facilities at the Department of Energy may not be available on October 2, 1995 to host the scheduled public hearing. The Department is rescheduling the public hearing by extending the date by fifteen (15) days. The Voluntary Home Energy Rating Systems Guidelines public hearing is rescheduled for October 17, 1995.

DATES: Oral views, data, and arguments may be presented at the public hearing to be held in Washington, DC, on October 17, 1995. Requests to speak at the hearing must be received by the Department no later than 4:00 p.m., Thursday, October 12, 1995. Ten copies of statements to be given at the public hearing must be received by the Department no later than 4:00 p.m., Thursday, October 12, 1995. The hearing will begin at 9:00 a.m. on October 17, 1995, and will be held at the U.S. Department of Energy, Forrestal Building, Room 6E–069, 1000 Independence Avenue, SW., Washington, DC 20585. The length of each presentation is limited to twenty (20) minutes or an equal time for all presenters.

ADDRESSES: Oral statements, requests to speak at the hearing and requests for speaker lists are to be submitted to: Voluntary Home Energy Rating System Guidelines (Docket No. EE-RM–95–202), U.S. Department of Energy, Office of Codes and Standards, Buildings Division, EE–432, 1000 Independence Avenue, SW, Rm 1J–018, Washington, DC 20585, (202) 586–7574.

Copies of the transcript of the public hearing and public comments received may be read at the DOE Freedom of Information Reading Room, U.S. Department of Energy, Forrestal Building, Room 1E–190, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–6020 between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Robert L. Mackie, PM., U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station EE–431, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–7892

Diane Dean, Esq., U.S. Department of Energy, Office of General Counsel, Mail Station GC–72, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9507

SUPPLEMENTARY INFORMATION: The Department published a Notice of Proposed Rulemaking (NOPR) on July 25, 1995, entitled ''Voluntary Home Energy Rating System Guidelines'' (10 CFR Part 437).

Issued in Washington, DC September 14, 1995.

Christine A. Ervin,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 95–23480 Filed 9–20–95; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

RIN 3064–AB69

Definition of Qualified Financial Contracts

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC or Corporation) is publishing for notice and public comment a proposed rule defining spot and other short-term foreign exchange agreements and repurchase agreements on qualified foreign government securities to be ''qualified financial contracts'' (QFCs) under the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.* (FDI Act). In the interest of providing a measure of protection to the financial markets, the FDI Act provides special rules for the treatment of QFCs held by an insured depository institution in default for which the FDIC is appointed conservator or receiver. The FDIC believes that the market's use of these agreements to obtain liquidity in order to manage financial risk indicates that they should be included as QFCs. Promulgation of the proposed regulation to include spot and other short-term foreign exchange contracts and repurchase agreements on qualified foreign government securities within the definition of QFC is not intended to exclude other agreements that may otherwise qualify to be QFCs.

DATES: Comments must be received by November 20, 1995.

ADDRESSES: Send comments to Jerry L. Langley, Executive Secretary, FDIC, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand-delivered to Room 400, 1776 F Street, N.W., Washington, D.C. 20429 on business days between 8:30 a.m. and 5 p.m. [FAX number: (202) 898–3838; Internet: comments@fdic.gov]. Comments will be available for inspection or photocopying at the FDIC's Reading Room, Room 7118, 550 17th Street, N.W., Washington, D.C. 20429, between 9:00 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Sharon Powers Sivertsen, Assistant General Counsel, Legal Division, (202) 736–0112; Keith A. Ligon, Senior Counsel, Legal Division, (202) 736–0160; or Christine M. Bradley, Attorney, Legal Division, (202) 736–0106, FDIC,

550 17th Street, N.W., Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

No collection of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) is contained in the proposed rule. Consequently, no information was submitted to the Office of Management and Budget for review.

II. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), it is certified that the proposed rule will not have a significant economic impact on a substantial number of small business entities.

III. Discussion

A. The QFC Provisions

Sections 11(e) (8) through (10) of the FDI Act, 12 U.S.C. 1821(e) (8) through (10), provide special rules for the treatment of QFCs in the event the FDIC is appointed receiver or conservator for an insured depository institution in default. The statute seeks, among other things, to protect parties to QFCs by allowing for the liquidation, termination, and netting of their agreements. The statute identifies securities contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements as QFCs.

Section 11(e)(8)(D) of the FDI Act identifies in some detail the types of contracts to be treated as QFCs, but additionally affords the FDIC express authority to adopt regulations extending the definition to any similar agreements. 12 U.S.C. 1821(e)(8)(D)(i). As discussed below, the Corporation is proposing rules that would extend the QFC definition to spot and other short-term foreign exchange agreements and to repurchase agreements on securities issued or guaranteed by the central governments belonging to the Organization for Economic Cooperation and Development (OECD). Promulgation of the proposed regulation to include spot and other short-term foreign exchange contracts and repurchase agreements on qualified foreign government securities within the definition of QFC is not intended to be interpreted so as to exclude other agreements that may otherwise qualify to be QFCs under the language of section 11(e)(8)(D) itself.

As the Board of Directors of the FDIC has previously recognized, QFCs occupy a unique and important position in the financial markets, allowing appropriate liquidity, hedging and financial intermediation operations in financial institutions, and are generally conducted within a highly supervised industry. FDIC Statement of Policy on Qualified Financial Contracts (Dec. 12, 1989). See 55 FR 7027 (1990). The Corporation believes that these goals would be well served by expressly extending QFC treatment to spot and other short-term foreign exchange agreements and repurchase agreements on foreign government securities issued or guaranteed by the central governments of the OECD-based group of countries.

B. Foreign Exchange Agreements

Although section 11(e)(8)(D)(vi) of the FDI Act, defining ''swap agreements'' which are to be included within the statutory definition of QFCs, refers to forward foreign exchange agreements, the statute does not explicitly mention spot or other short-term foreign exchange agreements. The statute, in relevant part, covers any agreement, including the terms and conditions incorporated by reference in any such agreement, which is a forward foreign exchange agreement or any other similar agreement. 12 U.S.C. 1821(e)(8)(D)(vi). While the FDIC believes that spot and other short-term foreign exchange agreements fall within the QFC definition of swap agreement even in the absence of FDIC regulatory action, the FDIC also believes that market participants would be best served by the certainty of an explicit rule providing that spot foreign exchange agreements are QFCs. ''Spot'' foreign exchange agreements, like forwards, do not settle immediately; spot agreements are typically outstanding for one or two days. As is the case with other QFCs, market participants tend to enter into multiple spot agreements for both long and short positions in many products with the same counterparty. As a result, market participants are also creating the same termination and netting agreements as are used with other QFCs.

The Corporation is proposing a rule to recognize the inclusion of spot and other short-term foreign exchange agreements as QFCs. The language of the proposed rule would extend QFC treatment to short-dated transactions such as spots, tomorrow/next day and same day/tomorrow transactions, thus eliminating any concern that spot and other short-term foreign exchange agreements are not included within the definition of QFC.

C. Repurchase Agreements on Qualified Foreign Government Securities

Although section 11(e)(8)(D)(v) of the FDI Act includes repurchase agreements within the definition of a QFC, the statute does not cover repurchase agreements on foreign government securities. Section 11(e)(8)(D)(v) incorporates the repurchase agreement definition under section 101(47) of the Bankruptcy Code, 11 U.S.C. 101(47), with certain additions not relevant here, and restricts the definition of qualified financial contract to repurchase agreements on securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States. Section 101(47) of the Bankruptcy Code defines a repurchase agreement as:

> an agreement, including related terms, which provides for the transfer of certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, or securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds;

11 U.S.C. 101(47).

In the years since the QFC provisions were added to the FDI Act by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law 101–73, 101 Stat. 183 (1989), the market for foreign government repurchase agreements appears to have developed to a point that such repurchase agreements have become a recognized source of liquidity. However, the FDIC also believes that it is appropriate to limit the kinds of foreign government securities which may be the subject of a repurchase agreement for QFC purposes. The FDIC proposes to extend QFC treatment only to repurchase agreements on securities issued or guaranteed by the central governments of countries that are either full members of the OECD or that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow.[1]

[1] The OECD is an international organization of countries which are committed to market-oriented economic policies, including the promotion of private enterprise and free-market prices, liberal trade policies, and the absence of exchange controls.

The FDIC believes that repurchase agreements on foreign government securities issued or guaranteed by the OECD-based group of countries are similar in nature to the repurchase agreements on securities issued or guaranteed by the United States, which are presently included within the statutory definition of QFC. The risk weightings recommended for such securities by the International Convergence of Capital Measurement and Capital Standards of July 1988 by the Basle Committee on Banking Supervision (Basle Accord)[2] reflects that the securities issued or guaranteed by the OECD-based group of countries present similar degrees of credit risk. Further, the FDIC's risk-based capital rules at 12 CFR part 325, appendix A, implementing the Basle Accord, consider the credit risk among the securities issued or guaranteed by the central governments of the OECD-based group of countries as being equal for purposes of determining capital requirements. And, pursuant to 12 CFR part 325, appendix A, section II.B.2, securities issued or guaranteed by the central governments of the OECD-based group of countries are among the limited forms of collateral which are formally recognized by the FDIC's risk-based capital framework. Accordingly, repurchase agreements on securities issued or guaranteed by the OECD-based group of countries are treated consistently under the risk-based capital rules. *See* 12 CFR part 325, appendix A, section II.C.

The FDIC is thus proposing a rule to include repurchase agreements on securities issued or guaranteed by the OECD-based group of countries within the definition of a QFC. In the interests of consistency and simplicity, the rule would incorporate by reference the definition of ''central government'' as set forth in 12 CFR part 325, appendix A, section II.C note 17[3] and ''OECD-based group of countries'' as set forth in 12 CFR part 325, appendix A, section II.B.2, note 12 (and incorporating any changes to these definitions that should occur by future amendment).[4]

List of Subjects in 12 CFR Part 360

Banks, Banking, Savings Associations.

For the reasons set out in the preamble, the FDIC Board of Directors proposes to amend 12 CFR part 360 as follows:

PART 360—RESOLUTION AND RECEIVERSHIP RULES

1. The authority citation for part 360 is revised to read as follows:

Authority: 12 U.S.C. 1821(d)(11), 1821(e)(8)(D)(i), 1823(c)(4); Sec. 401(h), Pub. L. 101–73, 103 Stat. 357.

2. Section 360.5 is added to Part 360 as follows:

§ 360.5 Definition of qualified financial contracts.

(a) *Authority and purpose.* Sections 11(e)(8) through (10) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(e)(8) through (10), provide special rules for the treatment of qualified financial contracts of an insured depository institution for which the FDIC is appointed conservator or receiver, including rules describing the manner in which qualified financial contracts may be transferred or closed out. Section 11(e)(8)(D)(i) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(e)(8)(D)(i), grants the Corporation authority to determine by regulation whether an agreement in addition to those identified by section 11(e)(8)(D) itself should be included in the definition of qualified financial contract. The purpose of this section is to identify additional agreements which the Corporation has determined to be qualified financial contracts.

(b) The following agreements shall be deemed ''qualified financial contracts'' under section 11(e)(8)(D)(i) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1821(e)(8)(D)(i)):

(1) *Spot foreign exchange agreements.* A spot foreign exchange agreement is any agreement or combination of agreements (including master agreements) providing for or effecting the purchase or sale of one currency in exchange for another currency (or a unit of account established by an intergovernmental organization such as the European Currency Unit) with a maturity date of two days or less after the agreement has been entered into, and includes short-dated transactions such as tomorrow/next day and same day/tomorrow transactions.

(2) *Repurchase agreements on qualified foreign government securities.* (i) A repurchase agreement on qualified foreign government securities is an agreement or combination of agreements (including master agreements) which provides for the transfer of securities that are direct obligations of, or that are fully guaranteed by, the central governments (as set forth at 12 CFR part 325, appendix A, section II.C, n. 17, as may be amended from time to time) of the OECD-based group of countries (as set forth at 12 CFR part 325, appendix A, section II.B.2., note 12 as may be amended from time to time) against the transfer of funds by the transferee of such securities with a simultaneous agreement by such transferee to transfer to the transferor thereof securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds.

(c) Nothing in this section shall be construed as limiting or changing a party's obligation to comply with all reasonable trading practices and requirements, non-insolvency law requirements and any other requirements imposed by other provisions of the FDI Act. This section in no way limits the authority of the Corporation to take supervisory or enforcement actions, or to otherwise manage the affairs of a financial institution for which the Corporation has been appointed conservator or receiver.

By Order of the Board of Directors.

Dated at Washington, D.C., this 6th day of September, 1995.

Jerry L. Langley,

Executive Secretary.

[FR Doc. 95–23479 Filed 9–20–95; 8:45 am]

BILLING CODE 6714–01–P

[2] The Basle Accord established a risk-based framework for measuring the capital adequacy of internationally active banks. The Basle Accord was originally proposed by the Basle Committee on Banking Supervision (Basle Supervisors' Committee) and endorsed by the central bank governors of the Group of Ten (G–10) countries in July 1988. See, Int'l Convergence of Capital Measurement & Capital Standards, Comm. on Banking Regulations & Supervisory Practices, reprinted in 30 I.L.M. 967, 989 (1991).

[3] The definition of central government includes departments and ministries of the central government, as well as central banks, but does not extend to state, provincial, or local governments or commercial enterprises owned by central governments. Nor does it extend to securities of local government entities or commercial enterprises guaranteed by the central government. 12 CFR part 325, section II.C., note 17 (1995).

[4] The Corporation has recently issued a Notice of Proposed Rulemaking proposing to amend the existing definition of ''OECD-based group of countries.'' 60 FR 8582 (Feb. 15, 1995).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 95–ANE–11]

Proposed Alteration of V–2 and V–14; New York

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would alter Federal Airways V–2 and V–14 between Albany, NY, and Gardner, MA.

This action would allow more flexibility in air traffic operations and enhance utilization of that airspace.

DATES: Comments must be received on or before November 9, 1995.

ADDRESSES: Send comments on the proposal in triplicate to: Manager, Air Traffic Division, ANE–500, Docket No. 95–ANE–11, Federal Aviation Administration, 12 New England Executive Park, Burlington, MA 01803.

The official docket may be examined in the Rules Docket, Office of the Chief Counsel, Room 916, 800 Independence Avenue, SW., Washington, DC, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

FOR FURTHER INFORMATION CONTACT: Patricia P. Crawford, Airspace and Obstruction Evaluation Branch (ATP–240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–9255.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 95–ANE–11.'' The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA–220, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–3485. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2A, which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to alter Federal Airways V–2 and V–14 from the Albany, NY, Very High Frequency Omnidirectional Range (VOR) to the Gardner, MA, VOR. These airways are the primary arrival routes to Boston, MA, from the west. At the present time, the segment of the airways between the Albany VOR and the Gardner VOR is limited to a 10,000-foot minimum en route altitude (MEA). Realigning these airways would allow for a lower MEA to be assigned along these routes and would provide more flexibility in air traffic operations in that area. Consequently, this proposed alteration would enhance utilization of that airspace. Domestic VOR Federal airways are published in paragraph 6010(a) of FAA Order 7400.9C dated August 17, 1995, and effective September 16, 1995, which is incorporated by reference in 14 CFR 71.1. The airways listed in this document would be published subsequently in the Order.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—[AMENDED]

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

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

§ 71.1 [Amended]

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

Paragraph 6010(a)—Domestic VOR Federal Airways

* * * * *

V–2 [Revised]

From Seattle, WA; Ellensburg, WA; Moses Lake, WA; Spokane, WA; Mullan Pass, ID; Missoula, MT; Drummond, MT; Helena, MT; INT Helena 119° and Livingston, MT, 322° radials; Livingston; Billings, MT; Miles City, MT; 24 miles, 90 miles, 55 MSL, Dickinson, ND; 10 miles, 60 miles, 38 MSL, Bismarck, ND; 14 miles, 62 miles, 34 MSL, Jamestown, ND; Fargo, ND; Alexandria, MN; Gopher, MN; Nodine, MN; Lone Rock, WI; Madison, WI; Badger, WI; Muskegon, MI; Lansing, MI; Salem, MI; INT Salem 093° and Aylmer, ON, Canada, 254° radials; Aylmer; INT Aylmer 086° and Buffalo, NY, 259° radials; Buffalo; Rochester, NY; Syracuse, NY; Utica, NY; Albany, NY; INT Albany 084°T(097°M) and Gardner, MA, 284° radials; to Gardner. The airspace within Canada is excluded.

* * * * *

V–14 [Revised]

From Chisum, NM, via Lubbock, TX; Childress, TX; Hobart, OK; Will Rogers, OK; INT Will Rogers 052° and Tulsa, OK, 246° radials; Tulsa; Neosho, MO; Springfield, MO; Vichy, MO; INT Vichy 067° and St. Louis, MO, 225° radials; Vandalia, IL; Terre Haute, IN; Indianapolis, IN; Muncie, IN; Findlay, OH; DRYER, OH; Jefferson, OH; Erie, PA; Dunkirk, NY; Buffalo, NY; Geneseo, NY; Georgetown, NY; INT Georgetown 093° and Albany, NY, 270° radials; Albany; INT Albany 084°T(097°M) and Gardner, MA, 284° radials; Gardner; to Norwich, CT. The

airspace within R–5207 and Canada is excluded.

* * * * *

Issued in Washington, DC, on September 14, 1995.

Reginald C. Matthews,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 95–23427 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 184

[Docket No. 95N–0189]

Maltodextrin; Food Chemicals Codex Specifications

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to adopt the Food Chemicals Codex specifications for maltodextrin derived from corn starch. The agency is proposing to amend its regulations by removing the requirement that maltodextrin be of a purity suitable for its intended use and by adding a requirement that the substance comply with the Food Chemicals Codex, 3d ed., 3d supp. (1992) specifications for maltodextrin. Elsewhere in this issue of the Federal Register, the agency is also publishing a final rule adopting the same specifications for maltodextrin derived from potato starch.

DATES: Written comments by November 20, 1995.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Andrew D. Laumbach, Center for Food Safety and Applied Nutrition (HFS–217), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3071.

SUPPLEMENTARY INFORMATION: In the Federal Register of November 15, 1983 (48 FR 51911), FDA published a final rule that affirmed the use in food of maltodextrin derived from corn starch as generally recognized as safe (GRAS) in § 184.1444 (21 CFR 184.1444). No food-grade specifications were available for maltodextrin at that time. Therefore, the regulation required that the maltodextrin be of a purity suitable for its intended use. The agency stated, however, that it was working with the Committee on Food Chemicals Codex of the National Academy of Sciences to develop food-grade specifications for maltodextrin, and that it would incorporate the specifications into the maltodextrin regulation upon completion.

In 1992, the Food Chemicals Codex Committee published its third supplement to the third edition of the Food Chemicals Codex. The supplement contains food-grade specifications for maltodextrin that is derived from any edible starch. FDA has reviewed these specifications and tentatively concludes that they are acceptable for maltodextrin derived from corn starch. Therefore, the agency is proposing in § 184.1444 to adopt these specifications for maltodextrin derived from corn starch. Elsewhere in this issue of the Federal Register, the agency is also publishing a final rule adopting the same specifications for maltodextrin derived from potato starch.

The agency has determined under 21 CFR 25.24(a)(9) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

FDA has examined the economic implications of removing the current requirement that maltodextrin be of a purity suitable for its intended use and of adding a requirement that the additive meet the Food Chemicals Codex specifications for maltodextrin, as required by Executive Order 12866 and the Regulatory Flexibility Act (Pub. L. 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health 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 minimize the impact of their regulation on small entities. Because the proposed rule requires no change in the current industry practice concerning the manufacture and use of this ingredient, the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required.

Interested persons may, on or before November 20,1995, submit to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 184

Food ingredients, Incorporation by reference.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, it is proposed that 21 CFR part 184 be amended as follows:

PART 184—DIRECT FOOD SUBSTANCES AFFIRMED AS GENERALLY RECOGNIZED AS SAFE

1. The authority citation for 21 CFR part 184 continues to read as follows:

Authority: Secs. 201, 402, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 371).

2. Section 184.1444 is amended by revising paragraph (b) to read as follows:

184.14444 Maltodextrin.

(a) * * *

(b) Maltodextrin derived from potato starch or corn starch meets the specifications of the Food Chemicals Codex, 3d ed., 3d supp. (1992), p. 125, which are incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, 2101 Constitution Ave. NW., Washington, DC 20418, or may be examined at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC 20408, or at the Division of Petition Control (HFS–217), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 200 C St. SW., Washington, DC 20204.

* * * * *

Dated: September 6, 1995.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 95–23241 Filed 9–20–95; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 240

RIN 1510–AA45

Indorsement and Payment of Checks Drawn on the United States Treasury

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Proposed rule.

SUMMARY: This rule revises 31 CFR Part 240, which governs the indorsement and payment of checks drawn on the United States Treasury. The changes are intended both to fix the time by which Treasury can decline payment on Treasury checks and to provide financial institutions with a date certain for final payment. These rules also provide greater clarity by defining previously undefined terms and by ensuring symmetry with current Treasury regulations governing Federal payments utilizing the automated clearing house method. This rule also provides that Treasury may instruct Federal Reserve Banks to intercept and return, unpaid, benefit payment checks issued to deceased payees. These proposed revisions are issued in response to concerns raised by financial institutions, Federal agencies, and other affected parties.

DATES: Comments must be submitted on or before November 6, 1995.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Ronald Brooks, Senior Program Analyst, Financial Processing Division, Financial Management Service, Prince Georges Center II Building, 3700 East-West Highway, Room 725–D, Hyattsville, Maryland 20782. Comments may be faxed to (202) 874–7534.

FOR FURTHER INFORMATION CONTACT: Ronald Brooks, (202) 874–7620 (Senior Program Analyst, Financial Processing Division); Paul M. Curran, (202) 874–6680 (Principal Attorney).

SUPPLEMENTARY INFORMATION:

Limitations on Payment

The current regulation provides that Treasury shall have the right to conduct first examination of Treasury checks presented for payment, and to refuse payment of any checks within a reasonable time. The current regulation also provides that such checks shall be deemed paid only upon Treasury's completion of first examination. The proposed rule clarifies this in two ways.

First, it defines first examination, and defines material defects or alterations as including counterfeit checks. These definitions are consistent with Treasury's longstanding interpretation of these terms.

Second, it fixes the time by which Treasury must complete first examination, and provides that if Treasury fails to do so within 150 days, the check will be deemed paid. This change narrows the time by which Treasury must complete first examination since Treasury interprets the current regulation as affording up to one year for first examination. This proposed change is intended to accommodate financial institutions which seek not only a more compressed time frame for first examination but also a date certain for final payment of Treasury checks.

While Treasury will, in most cases, complete first examination within 30 days of presentment of a Treasury check to a Federal Reserve Bank, the 150 day maximum period affords Treasury sufficient time to complete first examination in certain problem cases. For example, up to 150 days may be required in instances where there are delays in Treasury's obtaining from check certifying or authorizing agencies the payment issue tapes necessary to complete first examination.

Recovery by Bank From Depositors

The proposed rule clarifies that the regulations contained in this part neither authorize nor direct any financial institution to debit the account of any depositor. It further clarifies that any financial institution's right of recovery against depositors is derived from both the depository contracts with its customers and any self-help remedies authorized by State law governing the relationship between financial institutions and their customers. This provision mirrors the regulations codified in 31 CFR Part 210, which pertains to ''Federal Payments Through Financial Institutions By the Automated Clearing House Method.''

Deceased Payee Check Intercepts

Currently, where a benefit payment check has been issued and negotiated after a payee's death, Treasury generally recovers the funds from financial institutions through the reclamation process. Financial institutions have expressed dissatisfaction with these procedures because Treasury reclamation actions only occur after final payment and because in many instances the depositors have closed their accounts or withdrawn most or all of the funds. These financial institutions seek a process by which Treasury can intercept such checks upon presentment and return such checks unpaid before the financial institutions are required under Federal Reserve Regulation CC (12 C.F.R. Part 229) to make funds permanently available to their depositors. This proposed rule responds to those concerns, and should result in a lower volume of payments to nonentitled payees.

Specifically, it clarifies that benefit payment checks issued after a payee's death are not payable. It also sets forth procedures by which Treasury will instruct the Federal Reserve to intercept such checks upon presentment and return unpaid those checks which are successfully intercepted to the depositary banks.

Rulemaking Analysis

It has been determined that this regulation is not a significant regulatory action as defined in E.O. 12866. Therefore, a Regulatory Assessment is not required.

It is hereby certified pursuant to the Regulatory Flexibility Act that this revision will not have a significant economic impact on a substantial number of small business entities. Accordingly, a Regulatory Flexibility Act analysis is not required.

These regulations impose time frames within which final payment of Treasury checks must be accomplished, and establish consequences for the failure of Treasury to honor those time frames. Consequently, these regulations provide financial institutions with greater certainty regarding the entire payment process, and place higher standards of performance on Treasury in its processing of checks.

The other principal provision of these regulations will reduce the likelihood that final payment on Treasury checks will be made to nonentitled persons. Treasury's efficiency and its ability to serve the needs of legitimate payees of benefit programs will thereby be enhanced.

Notice and Comment

Public Comment is solicited on all aspects of this proposed regulation. Treasury will consider all comments made on the substance of this proposed regulation, but does not intend to hold hearings.

List of Subjects in 31 CFR Part 240

Checks, Counterfeit Checks, Forgery, Banks, Banking, Guarantees, Federal Reserve System.

For the reasons set out in the preamble, 31 CFR Part 240 is proposed to be amended as follows.

PART 240—INDORSEMENT AND PAYMENT OF CHECKS DRAWN ON THE UNITED STATES TREASURY

1. The authority citation for part 240 is revised to read as follows:

Authority: 5 U.S.C. 301; 12 U.S.C. 391; 31 U.S.C. 321; 31 U.S.C. 3328; 31 U.S.C. 3331; 31 U.S.C. 3334; 31 U.S.C. 3343; 31 U.S.C. 3711; 31 U.S.C. 3712; 31 U.S.C. 3716; 31 U.S.C. 3717.

2. Section 240.2 is revised to read as follows:

§ 240.2 Definitions.

(a) *Agency* means any department, instrumentality, office, commission, board, service, or other establishment of the United States authorized to issue Treasury checks or for which checks drawn on the Treasury of the United States are issued.

(b) *Bank* means any financial institution, including but not limited to, any savings bank, national bank, trust company, state bank, and credit union created under Federal or state law.

(c) *Benefit payment* includes but is not limited to a payment of money for any Federal Government entitlement program or annuity.

(d) *Certifying agency* means an agency authorizing the issuance of a Treasury payment by a Treasury disbursing officer or a non-Treasury disbursing officer in accordance with 31 U.S.C. 3325.

(e) *Check* means a draft or an order to pay drawn on the United States Treasury.

(f) *Check payment* means the amount paid to a presenting bank by a Federal Reserve Bank.

(g) *Commissioner* means the Commissioner of the Financial Management Service, Department of the Treasury.

(h) *Days* means calendar days.

(i) *Decline payment* means the process whereby Treasury refuses to make final payment on a check by instructing the Federal Reserve Bank to reverse its provisional credit to a presenting bank.

(j) *Federal Reserve Bank* means a Federal Reserve Bank and its branches.

(k) *Financial institution* means any bank, including but not limited to, any savings bank, national bank, trust company, state bank and credit union created under Federal or state law.

(l) *First examination* means Treasury's process of check reconciliation which involves comparing disbursing officer issue information on checks with Federal Reserve Bank payment information. Where the issue information is at odds with the payment information, first examination will include retrieval and inspection of the check, or the best available image thereof.

(m) *Material defect or alteration* means

(1) The counterfeiting of a check; or

(2) Any physical change on a check, including, but not limited to, the amount, date, payee name, or other identifying information printed on either the front or the back of the check; or

(3) Any forged or unauthorized indorsement appearing on the back of the check.

(n) *Person* or *persons* means an individual or individuals, or an institution or institutions, including all forms of financial institutions.

(o) *Presenting bank* means:

(1) A financial institution which, either directly or through a correspondent banking relationship, presents checks to and receives provisional credit from a Federal Reserve Bank; or

(2) A depositary, designated by statute, which is authorized to charge checks directly to the Treasury General Account and present them to Treasury for payment through a designated Federal Reserve Bank.

(p) *Protest* means a bank's written statement and any supporting documentation tendered for the purpose of establishing that the bank is not liable for refund of the reclamation balance.

(q) *Reclamation* means a demand by Treasury to a bank for refund of the amount of a check payment.

(r) *Reclamation date* means the date on which Treasury prepares a demand for refund. Normally, demands are sent to banks within 2 working days of the reclamation date.

(s) *Treasury* means the United States Department of the Treasury.

(t) *U.S. securities* means securities of the United States and securities of Federal agencies and wholly or partially Government-owned corporations for which Treasury acts as the transfer agent.

(u) *Unauthorized indorsement* means:

(1) An indorsement made by a person other than the payee, except as authorized by and in accordance with § 240.5 and §§ 240.11 through 240.15;

(2) An indorsement by a bank under circumstances in which the bank breaches the guaranty of indorsement required of it by 31 CFR 209.9(a);

(3) A missing indorsement where the depositary bank had no authority to supply the indorsement.

3. Section 240.3 is amended by revising paragraphs (c), (d) and (e) to read as follows:

§ 240.3 Limitations on payment.

* * * * *

(c)(1) Treasury shall have the right as drawee to examine checks presented for payment and reconcile or direct the Federal Reserve Bank to refuse payment of any checks.

(2) Receipt of credit by a bank from a Federal Reserve Bank shall be provisional until Treasury completes first examination of the check.

(3) When first examination by Treasury establishes that a check has a material defect or alteration, Treasury will decline payment on the check.

(d) Notwithstanding the provisions of paragraph (c) of this section, when issue information is not available within 150 days after the check is presented to the Federal Reserve Bank for payment, or when first examination is otherwise not completed within such time frame, Treasury will be deemed to have made final payment on the check.

(e) Notwithstanding the provisions of paragraph (d) of this section, if Treasury is on notice of a question of law or fact about whether a check is properly payable upon presentment for payment, and Treasury refers such question to the Comptroller General under 31 U.S.C. 3328(a)(2), the Commissioner may defer final payment on the check until the Comptroller General settles the question.

4. Section 240.4 is amended by redesignating paragraph (a)(3) as paragraph (c) and revising it to read as set forth below; removing paragraph (b) and redesignating paragraph (a)(2) as (b); and by redesignating paragraph (a)(1) as (a) and revising it to read as follows:

§ 240.4 Cancellation and distribution of proceeds of checks.

(a) Any check issued on or after October 1, 1989 that has not been paid and remains outstanding for more than 12 months shall be cancelled by the Commissioner.

(b) * * *

(c) On a monthly basis, the Commissioner shall provide to each agency that authorizes the issuance of Treasury checks a list of those checks issued for such agency which were cancelled during the preceding month pursuant to paragraph (a) of this section.

5. Section 240.6 is amended by revising paragraph (a) to read as follows:

§ 240.6 Reclamation of amounts of paid checks.

(a) If Treasury determines that a check has been paid over a forged or unauthorized indorsement, or that a check containing a material defect or alteration is deemed paid under § 240.3, the presenting bank or any other indorser shall be liable to the Treasury for the full amount of the check payment. The Commissioner may reclaim the amount of the check payment from the presenting bank, or from any other indorser that breached its guaranty of indorsement prior to:

(1) The end of the 1-year period beginning on the date of provisional payment; or

(2) The expiration of the 180-day period beginning on the close of the period described in paragraph (a)(1) of this section if a timely claim under 31 U.S.C. 3702 is presented to the certifying agency.

* * * * *

6. Section 240.9 is amended by revising paragraphs (a)(1) and (a)(3) (ii) and (iv) to read as follows:

§ 240.9 Processing of checks.

(a) *Federal Reserve Banks.* (1) Federal Reserve Banks shall cash checks for Government disbursing officers when such checks are drawn by the disbursing officers to their own order. Payment of such checks shall not be refused except for material defect or alteration of the check.

(2) * * *

(3) * * *

(ii) Give immediate provisional credit therefor in accordance with their current Time Schedules and charge the amount of the checks cashed or otherwise received to the account of the Treasury, subject to first examination and payment by Treasury.

(iii) * * *

(iv) Release the original checks to a designated Federal Records Center upon notification from Treasury. Treasury shall return to the forwarding Federal Reserve Bank a copy of any check the payment of which is declined upon the completion of first examination, together with notice of the declination. Federal Reserve Banks shall give immediate credit therefor in Treasury's account, thereby reversing the previous charge to the account for such check. Treasury authorizes each Federal Reserve Bank to release a copy of the check to the indorser when payment is declined.

* * * * *

7. Section 240.13 is amended by adding paragraph (c) to read as follows:

§ 240.13 Checks issued to deceased payees.

* * * * *

(c) *Deceased payee check intercepts.*

(1) A benefit payment check, issued after a payee's death, is not payable. When a certifying agency learns that a payee has died, the certifying agency shall give immediate notice to Treasury. Upon receipt of such notice, Treasury will instruct the Federal Reserve Bank to refuse payment on the check upon presentment. The Federal Reserve Bank will make every appropriate effort to intercept the check. Where a check is successfully intercepted, the Federal Reserve bank will refuse payment, and return the check unpaid to the bank with an annotation that the payee is deceased. Where a financial institution learns that a date of death triggering action under this section is erroneous, the appropriate certifying agency which authorized the issuance of the check should be contacted.

(2) Nothing in this section shall limit the right of Treasury to institute reclamation proceedings under the provisions of § 240.6 with respect to a deceased payee check paid over a forged or unauthorized indorsement.

8. Section 240.16 is added to read as follows:

§ 240.16 Lack of authority to shift liability.

(a) This part neither authorizes nor directs a bank to debit the account of any party or to deposit any funds from any account in a suspense account or escrow account or the equivalent. However, nothing in this part shall be construed to affect a bank's contract with its depositor(s) under authority of State law.

(b) A bank's liability under this part is not affected by any action taken by it to recover from any party the amount of the bank's liability to the Treasury.

9. Section 240.17 is added to read as follows:

§ 240.17 Implementing instructions.

Procedural instructions implementing the regulations in this part will be issued by the Commissioner of the Financial Management Service in volume I, part 4 and volume II, part 4 of the Treasury Financial Manual.

Dated: July 14, 1995.

Russell D. Morris,

Commissioner.

[FR Doc. 95–22647 Filed 9–20–95; 8:45 am]

BILLING CODE 4810–35–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[SD–001; FRL–5300–8]

Clean Air Act Proposed Full Approval of Operating Permits Program; State of South Dakota

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed full approval.

SUMMARY: The EPA proposes to change the existing interim approval of the Operating Permits Program submitted by the State of South Dakota to a full approval for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources.

DATES: Comments on this proposed action must be received in writing by October 23, 1995.

ADDRESSES: Comments should be addressed to the contact indicated below. Copies of the State's submittal and other supporting information used in developing this proposed approval are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 8, 999 18th Street, suite 500, Denver, Colorado 80202.

FOR FURTHER INFORMATION CONTACT: Laura Farris, 8ART–AP, U.S. Environmental Protection Agency, Region 8, Air Programs Branch, 999 18th Street, suite 500, Denver, Colorado 80202, (303) 294–7539.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

As required under title V of the 1990 Clean Air Act Amendments (sections 501–507 of the Clean Air Act (''the Act'')), EPA has promulgated rules which define the minimum elements of an approvable State operating permits program and the corresponding standards and procedures by which the EPA will approve, oversee, and withdraw approval of State operating permits programs (see 57 FR 32250 (July 21, 1992)). These rules are codified at 40 Code of Federal Regulations (CFR) part 70 (part 70). Title V requires States to develop, and submit to EPA, programs for issuing these operating permits to all major stationary sources and to certain other sources.

The Act requires that states develop and submit these programs to EPA by November 15, 1993, and that EPA act to

approve or disapprove each program within 1 year after receiving the submittal. The EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the end of an interim program, it must establish and implement a Federal program.

II. Proposed Action and Implications

A. Analysis of State Submission

The Governor of South Dakota's designee, Robert E. Roberts, Secretary of the Department of Environment and Natural Resources, submitted the State of South Dakota Title V Operating Permit Program (PROGRAM) to EPA on November 12, 1993. On March 22, 1995, EPA published a Federal Register notice promulgating final interim approval of the South Dakota PROGRAM. See 60 FR 15066. Full approval of the South Dakota PROGRAM was not possible at that time due to the following issue identified during EPA's PROGRAM review: The State's criminal enforcement statute only allowed for a maximum penalty of $1,000 for failure to obtain a permit and $500 for violation of a permit condition. The State was required to adopt legislation consistent with part 70.11, prior to receiving full PROGRAM approval, to allow for a maximum criminal fine of not less than $10,000 per day per violation for knowing violation of operating permit requirements, including making a false statement and tampering with a monitoring device. In a letter dated April 21, 1995, the State submitted evidence that this corrective action had been completed, which EPA has reviewed and has determined to be adequate to allow for full PROGRAM approval. This corrective action included the adoption of Senate Bill 36 by the South Dakota Legislature which contains the necessary language to allow for criminal penalties consistent with part 70.11.

Requirements for approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a program for delegation of the provisions of 40 CFR part 63, Subpart A, and section 112 standards promulgated by EPA. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. EPA granted approval of the State's PROGRAM, under section 112(l)(5) and 40 CFR part 63.91, for receiving delegation of section 112 standards that are unchanged from the Federal standards as promulgated for part 70 sources in the Federal Register notice promulgating final interim approval of the South Dakota PROGRAM. See 60 FR 15066. Based on a State request, EPA is proposing to expand this approval to include non-part 70 sources. EPA believes this is warranted because State law does not differentiate between part 70 and non-part 70 sources for purposes of implementation and enforcement of section 112 standards that the State adopts. This approval would not delegate authority to the State to enforce specific section 112 standards, but instead would establish a basis for the State to request and receive future delegation of authority to implement and enforce, for non-part 70 sources, section 112 standards that the State adopts without change.

The scope of the PROGRAM and all of the clarifications made in the Federal Register notice proposing interim approval of the South Dakota PROGRAM still apply. See 60 FR 2917.

B. Proposed Action

EPA is proposing to change the existing interim approval of the operating permits program submitted to EPA by the State of South Dakota on November 12, 1993 to a full approval. Among other things, South Dakota has demonstrated that the PROGRAM will be adequate to meet the minimum elements of a State operating permits program as specified in 40 CFR part 70. EPA is also proposing to expand approval of South Dakota's PROGRAM for receiving delegation of section 112 standards to include non-part 70 sources.

Today's proposal to give full approval to the State's part 70 PROGRAM does not extend to ''Indian Country,'' as defined in 18 U.S.C. 1151, including the following ''existing or former'' Indian reservations in the State: 1. Cheyenne River; 2. Crow Creek; 3. Flandreau; 4. Lower Brule; 5. Pine Ridge; 6. Rosebud; 7. Sisseton; 8. Standing Rock; and 9. Yankton.

The State has asserted it has jurisdiction to enforce a part 70 PROGRAM within some or all of these ''existing or former'' Indian reservations and has provided an analysis of such jurisdiction. EPA is in the process of evaluating the State's analysis and will issue a supplemental notice regarding this issue in the future. Before EPA would approve the State's part 70 PROGRAM for any portion of ''Indian Country,'' EPA would have to be satisfied that the State has authority, either pursuant to explicit Congressional authorization or applicable principles of Federal Indian law, to enforce its laws against existing and potential pollution sources within any geographical area for which it seeks program approval and that such approval would constitute sound administrative practice. This is a complex and controversial issue, and EPA does not wish to delay full approval of the State's part 70 PROGRAM with respect to undisputed sources while EPA resolves this question.

In deferring final action on program approval for sources located in ''Indian Country,'' EPA is not making a determination that the State either has adequate jurisdiction or lacks such jurisdiction. Instead, EPA is deferring judgment regarding this issue pending EPA's evaluation of the State's analysis.

III. Administrative Requirements

A. Request for Public Comments

The EPA is requesting comments on all aspects of this proposed full approval. Copies of the State's submittal and other information relied upon for this proposed approval are contained in a docket maintained at the EPA Regional Office. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of these proposed approvals. The principal purposes of the docket are:

(1) to allow interested parties a means to identify and locate documents so that they can effectively participate in the approval process, and

(2) to serve as the record in case of judicial review. The EPA will consider any comments received by October 23, 1995.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

D. Unfunded Mandates

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

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

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: September 11, 1995.

Jack W. McGraw,

Acting Regional Administrator.

[FR Doc. 95–23437 Filed 9–20–95; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Part 70

[AD–FRL–5300–5]

Title V Clean Air Act Proposed Interim Approval of Operating Permits Program; State of Delaware

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed Interim Approval.

SUMMARY: EPA is proposing interim approval of the operating permits program submitted by the State of Delaware. This program was submitted by the State for the purpose of complying with federal requirements which mandate that states develop, and submit to EPA, programs for issuing operating permits to all major stationary sources, and to certain other sources.

DATES: Comments on this proposed action must be received in writing by October 23, 1995.

ADDRESSES: Comments should be addressed to Robin M. Moran, (3AT23), Air, Radiation and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, PA 19107.

Copies of the State of Delaware's submittal and other supporting information used in developing the proposed interim approval are available for inspection during normal business hours at the following location: Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, PA 19107.

FOR FURTHER INFORMATION CONTACT: Robin M. Moran, (3AT23), Air, Radiation and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, PA 19107, (215) 597–3023.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

As required under Title V of the Clean Air Act (CAA) as amended (1990), EPA has promulgated rules which define the minimum elements of an approvable state operating permits program and the corresponding standards and procedures by which EPA will approve, oversee, and withdraw approval of state operating permits programs (see 57 FR 32250, July 21, 1992). These rules are codified at 40 Code of Federal Regulations (CFR) Part 70. Title V requires states to develop, and submit to EPA, programs for issuing these operating permits to all major stationary sources and to certain other sources. Due to pending litigation over several aspects of the Part 70 rule which was promulgated on July 21, 1992, Part 70 is in the process of being revised. When the final revisions to Part 70 are promulgated, the requirements of the revised Part 70 will define EPA's criteria for the minimum elements of an approvable state operating permits program and the corresponding standards and procedures by which EPA will approve, oversee, and withdraw approval of state operating permits program submittals. Until the date which the revisions to Part 70 are promulgated, the currently effective July 21, 1992 version of Part 70 shall be used as the basis for EPA review.

B. Federal Oversight and Sanctions

The CAA requires that states develop and submit these programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. EPA's program review occurs pursuant to section 502 of the CAA and Part 70, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of Part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the end of an interim program, EPA must establish and implement a federal operating permits program.

Following final interim approval, if the State fails to submit a complete corrective program for full approval by 6 months before the interim approval period expires, EPA would start an 18-month clock for mandatory sanctions. If the State then failed to submit a complete corrective program before the expiration of that 18-month period, EPA would be required to apply one of the sanctions in section 179(b) of the CAA. Such a sanction would remain in effect until EPA determined that the State had corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator found a lack of good faith on the part of the State, both sanctions under section 179(b) would apply after the expiration of the 18-month period until the Administrator determined that the State had come into compliance. In any case, if, six months after application of the first sanction, the State still had not submitted a corrective program that EPA found complete, a second sanction would be required.

If, following final interim approval, EPA were to disapprove the State's complete corrective program, EPA would be required to apply one of the section 179(b) sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date the State had submitted a revised program and EPA had determined that this program corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator found a lack of good faith on the part of the State, both sanctions under section 179(b) would apply after the expiration of the 18-month period until the Administrator determined that the State had come into compliance. In all cases, if, six months after EPA applied the first sanction, the State had not submitted a revised program that EPA had determined corrected the deficiencies that prompted

disapproval, a second sanction would be required.

In addition, discretionary sanctions may be applied where warranted any time after the end of an interim approval period if the State has not timely submitted a complete corrective program or EPA has disapproved a submitted corrective program. Moreover, if EPA has not granted full approval to a State program by the expiration of an interim approval period, EPA must promulgate, administer and enforce a federal operating permits program for the State upon the date the interim approval period expires.

C. State of Delaware's Submittal

On November 15, 1993, the State of Delaware submitted an operating permits program for review by EPA. The submittal was supplemented by additional materials on November 22, 1993, and was found to be administratively incomplete pursuant to 40 CFR 70.4(e)(1) on January 18, 1994. Additional materials were submitted on February 9, 1994, and May 15, 1995. Based on additional information received in the May 15, 1995, submittal, EPA found the submittal to be administratively complete on May 19, 1995. The State submitted supplemental information on September 5, 1995. The submittal includes a letter from the Secretary of the Department of Natural Resources and Environmental Control requesting approval of the State's Title V program, a description of the State's Title V program, permitting regulations, an Attorney General's legal opinion, permitting program documentation, a permit fee demonstration, a description of compliance tracking and enforcement program, and provisions implementing the requirements of other Titles of the CAA.

II. Summary and Analysis of the State of Delaware's Submittal

The analysis contained in this notice focuses on the major portions of the State's operating permits program submittal, including regulations and program implementation, variances, insignificant activities, permit fee demonstration, and provisions implementing the requirements of Titles III and IV of the CAA. Specifically, this notice addresses the deficiencies in the State's submittal which will need to be corrected prior to full approval by EPA. These deficiencies as well as other issues related to the State's operating permit program are discussed in detail in the Technical Support Document (TSD). The full program submittal and the TSD are available for review as part of the public docket. The docket may be viewed during regular business hours at the EPA Region III office listed in the **ADDRESSES** section of this notice.

A. Regulations and Program Implementation

The State of Delaware's operating permit program is primarily defined by Regulation No. 30, ''Title V State Operating Permit Program,'' which is part of the State of Delaware ''Regulations Governing the Control of Air Pollutants.'' Provisions for enforcement authority are located at 7 *Del. C.*, Chapter 60. The following analysis of the State's operating permit regulations corresponds directly with the format and structure of Part 70.

§§ 70.4 and 70.6 Permit Content. The State's regulations substantially meet the requirements of 40 CFR 70.4 and 40 CFR 70.6 for permit content. The following changes must be made to Regulation No. 30 in order to fully meet the requirements of 40 CFR 70.4 and 40 CFR 70.6:

1. Delaware must revise Regulation 30, Section 6(f) to address the scope of the permit shield provision, consistent with Part 70, as described below. The permit shield provision of 40 CFR 70.6(f)(1) provides that the permitting authority may expressly include in a permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance. Delaware's Regulation 30, Section 6(f) provides that a source may request that the Department include in the Part 70 permit a provision stating that compliance with the terms and conditions of the permit shall constitute compliance with ''7 *Del. C.*, Chapter 60, for the discharge of any air contaminant specifically identified in the permit application as of the day of permit issuance.'' The extent of the permit shield is inconsistent with Part 70 for the following reasons.

First, as written in Regulation 30, the permit shield would apply to any air contaminant specifically identified in the *permit application* as of the day of permit issuance, rather than any applicable requirement of the *final permit*. Thus, the extent of the permit shield is too broad, because a source may include provisions in its permit application that are removed or made more stringent by the permitting authority upon issuance of the final permit. Delaware must revise Regulation 30 to make it clear that the permit shield applies to any applicable requirement as of the date of permit issuance. Part 70.6(f)(1)(i) and (ii) also require, as a condition of granting a permit shield, that the applicable requirements must be included and specifically identified in the permit, or that the permitting authority determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes a determination or a concise summary thereof. Regulation 30 also must be revised to include these provisions.

Second, the reference to ''7 *Del. C.*, Chapter 60, for the discharge of any air contaminant'' appears to extend the permit shield to any requirement of the Delaware Water and Air Resources Act, which is broader than ''any applicable requirement'' as defined by Part 70. The definition of ''air contaminant'' in 7 *Del. C.*, Chapter 60, § 6002(2), means ''particulate matter, dust, fumes, gas, mist, smoke or vapor or any combination thereof, exclusive of uncombined water.'' For consistency with Part 70, Delaware must revise the reference to ''7 *Del. C.*, Chapter 60, for the discharge of any air contaminant'' to ''any applicable requirement'' consistent with § 70.6(f)(1).

§ 70.7 Permit Issuance, Renewal, Reopenings, and Revisions. The State's regulations substantially meet the requirements of 40 CFR 70.7. The following changes must be made to Regulation No. 30 in order to fully meet the requirements of 40 CFR 70.7:

1. Delaware must revise Regulation 30, Section 7(d)(1)(v) to ensure that any preconstruction review permit requirements that are incorporated into a Title V permit through the administrative permit amendment procedure have undergone the procedural requirements specified in 40 CFR 70.7(d)(1)(v). This section provides that the State may include as a change under an administrative permit amendment, the incorporation of requirements from preconstruction review permits under an EPA-approved program, provided that the program meets procedural requirements for permit issuance, including public, EPA, and affected State review, substantially equivalent to the Part 70 program requirements that would apply to permit modifications, and contains compliance requirements substantially equivalent to those contained in § 70.6. Delaware's Regulation 30, Section 7(d)(1)(v), allows that the requirements from preconstruction review permits issued by the Department under Parts C and D of the Act or permits issued under Regulation No. 2 may be incorporated into the permit as an administrative permit amendment, when such permits were issued ''meeting the public participation

provisions of Section 7(j)''. However, Delaware's regulations do not require that a preconstruction permit must meet other procedural requirements of permit issuance, including affected state and EPA review, or that the permit contain compliance requirements substantially equivalent to those contained in 40 CFR 70.6. The anticipated future revisions to Part 70 may provide additional flexibility for the process of incorporating preconstruction review permits into a Title V operating permit.

2. Delaware must revise Regulation 30, Section 7(f)(4) to require that permits for major sources with a remaining permit term of three years or more shall be reopened for cause within 18 months after a new applicable requirement is promulgated, consistent with 40 CFR 70.7(f). Delaware's Regulation 30, Section 7(f)(4) requires permit reopening within 18 months after promulgation of an applicable requirement, but applies this provision to paragraph (1)(iii) only, which pertains to new applicable requirements for affected sources under the acid rain program. Section 7(f)(4) should refer to paragraph (1)(*ii*), which pertains to major sources with a permit term of more than 3 years.

3. Delaware must revise Regulation 30, Section 7(j)(4) to require that the Department shall give notice of any public hearing at least 30 days in advance of the hearing, consistent with 40 CFR 70.7(h)(4). As currently written, Section 7(j)(4) provides that any public hearing shall be held no earlier than the 31st day following publication of the public notice. However, the public notice is not required to provide notice that a hearing is scheduled; according to Section 7(j)(2), the public notice must include the time and place of the hearing *or* a statement of procedures to request a hearing. Section 7(j)(3) provides that the Department shall hold a hearing if the Secretary receives a meritorious request for a hearing within a reasonable time as stated in the advertisement. Regulation 30 does not provide that the Department shall give the public 30 days notice that a hearing will be held.

§ 70.11 Requirements for Enforcement Authority. The State's statute substantially meets the requirements of 40 CFR 70.11 for enforcement authority. The following changes must be made in order to fully meet the requirements of 40 CFR 70.11:

1. Delaware must revise 7 *Del. C.*, Chapter 60, § 6013(b) to provide that each day of violation shall be considered as a separate violation. 40 CFR 70.11(a)(3)(iii) requires a penalty in a maximum amount of not less than $10,000 per day per violation for any person who knowingly makes a false material statement, representation or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any required monitoring device or method. 7 *Del. C.*, Chapter 60, § 6013(b) provides, for these types of violations, a criminal penalty of not less than $500 nor more than $10,000, or by imprisonment for not more than 6 months, or both. Section 6013(b) of the statute does not, however, provide that each day of violation shall be considered as a separate violation.

B. Variances

Section 3(f) of Regulation 30 states that ''any determination by the Secretary to not require a permit under 7 *Del. C.*, Chapter 60, Section 6003(e), or any variance granted by the Secretary under 7 *Del. C.*, Chapter 60, Section 6011, shall not apply to this rule until such time as the exemption or variance is approved by the Administrator.'' EPA has no authority to approve provisions of State law that are inconsistent with the CAA. EPA does not recognize the ability of a permitting authority to grant relief from the duty to comply with a federally enforceable Part 70 permit, except where such relief is granted through procedures allowed by Part 70. EPA reserves the right to enforce the terms of the Part 70 permit where the permitting authority purports to grant relief from the duty to comply with a Part 70 permit in a manner inconsistent with Part 70 procedures.

C. Insignificant Activities

Appendix A of Regulation No. 30 contains a list of 33 insignificant activities. Appendix A provides that any information required by the permit application need not be submitted for these insignificant activities; however, the source must provide a list of any activities that are excluded from the permit application because of size, emission rate, or production rate. Section 5(c) requires that an application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, including those that become applicable after the effective date of this regulation. Section 5(c) also requires that emissions from the insignificant activities shall be included when determining whether a source is subject to Regulation No. 30, or when determining the applicability of any applicable requirement.

D. Permit Fee Demonstration

7 *Del. C.*, Chapter 60, section 6097 requires owners or operators of sources subject to Title V to pay annual fees to be used solely to carry out Title V activities. The statute establishes 13 fee categories, each category is defined by progressively increasing emission ranges. As stated in a May 15, 1995 letter from the Secretary of DNREC, the State's fee calculation, based on 1990 emissions inventory data, demonstrates that approximately $2.15 million will be raised through the fee program. The State believes that revenues will be able to cover the estimated costs of the program. The State estimates that total emissions from Title V facilities applicable to the fees is 59,656 tons per year. Therefore, the average fee is estimated at $36.00 per ton for calendar year 1995, which is above the presumptive minimum of $25.00 per ton based on 1989 dollars.

E. Provisions Implementing the Requirements of Title III

Implementing Title III Standards through Title V Permits. Under 7 *Del. C.*, Chapter 60, § 6003, and Regulation No. 30, Section 3(a) and 6(a), the State of Delaware has demonstrated in its Title V program submittal broad legal authority to incorporate into permits and enforce all applicable requirements. In its November 15, 1993, submittal, Delaware agreed to ''expeditiously adopt any new authority needed to implement future applicable requirements. This will include requirements promulgated under Section 112 of [the Act].'' This commitment is stated in the narrative description of Delaware's program, Section VIII (Other Provisions of the Act - Toxics and Enhanced Monitoring). EPA has determined that this commitment, in conjunction with the State of Delaware's broad statutory authority, adequately assures compliance with all the CAA's section 112 requirements. EPA regards this commitment as an acknowledgement by the State of Delaware of its obligation to obtain further legal authority as needed to issue permits that assure compliance with the CAA's section 112 applicable requirements. This commitment does not substitute for compliance with Part 70 requirements that must be met at the time of program approval.

EPA interprets the above legal authority and commitment to mean that the State of Delaware will be able to carry out all of the CAA's section 112 activities. For further rationale on this interpretation, please refer to the TSD accompanying this rulemaking which is located in the public docket and the April 13, 1993 guidance memorandum titled ''Title V Program Approval Criteria for Section 112 Activities,''

signed by John Seitz, Director, Office of Air Quality Planning and Standards, Office of Air and Radiation, USEPA.

Implementation of 112(g) Upon Program Approval. EPA is proposing to approve the State of Delaware's operating permits program for the purpose of implementing section 112(g) during the transition period between federal promulgation of a section 112(g) rule and State adoption of 112(g) implementing regulations. EPA had until recently interpreted the CAA to require sources to comply with section 112(g) beginning on the date of approval of the Title V program regardless of whether EPA had completed its section 112(g) rulemaking. EPA has since revised this interpretation of the CAA as described in a February 14, 1995 Federal Register notice (see 60 FR 83333). The revised interpretation postpones the effective date of section 112(g) until after EPA has promulgated a rule addressing that provision. The rationale for the revised interpretation is set forth in detail in the February 14, 1995 interpretive notice.

The section 112(g) interpretive notice explains that EPA is still considering whether the effective date of section 112(g) should be delayed beyond the date of promulgation of the federal rule to allow states time to adopt rules implementing the federal rule, and that EPA will provide for any such additional delay in the final section 112(g) rulemaking. Unless and until EPA provides for such an additional postponement of section 112(g), the State must be able to implement section 112(g) during the transition period between promulgation of the federal section 112(g) rule and adoption of implementing State regulations.

EPA believes that, although the State currently lacks a program designed specifically to implement section 112(g), the State's Regulation No. 30 permit program will serve as an adequate implementation vehicle during a transition period because it will allow the State to select control measures that would meet Maximum Achievable Control Technology (MACT) on a case-by-case basis, as defined in section 112, and incorporate these measures into federally enforceable source-specific permits. Section 112(g) requirements for case-by-case MACT determinations are governed by the provisions of Section 5(a)(1)(iv) and the Section 2 definition of ''Applicable requirement'' (item 4). However, in accordance with the provisions of section 112(g), the Section 5(a)(1)(iv) requirement to obtain an operating permit or permit revision within twelve (12) months after commencing operation must instead be satisfied prior to construction during the transition period.

This proposed approval clarifies that the operating permits program is available as a mechanism to implement section 112(g) during the transition period between promulgation of the section 112(g) rule and adoption by the State of Delaware of rules established to implement section 112(g). EPA is proposing to limit the duration of this approval to an outer limit of 18 months following promulgation by EPA of the section 112(g) rule. Comment is solicited on whether 18 months is an appropriate period taking into consideration the State's procedures for adoption of regulations.

However, since this proposed approval is for the single purpose of providing a mechanism to implement section 112(g) during the transition period, the approval itself will be without effect if EPA decides in the final section 112(g) rule that sources are not subject to the requirements of the rule until State regulations are adopted.

Although section 112(l) generally provides the authority for approval of state air toxics programs, Title V and section 112(g) provide authority for this limited approval because of the direct linkage between implementation of section 112(g) and Title V.

If the State of Delaware does not wish to implement section 112(g) through its Regulation No. 30 permit program and can demonstrate that an alternative means of implementing section 112(g) exists during the transition period, EPA may, in the final action approving the State of Delaware's Part 70 program, approve the alternative instead.

Program for Straight Delegation of Section 112 Standards. Requirements for approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a program for delegation of section 112 standards promulgated by EPA as they apply to Part 70 sources. Section 112(l)(5) requires that the state programs contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under Part 70. Therefore, EPA is also proposing to grant approval under section 112(l)(5) and 40 CFR 63.91 of the State of Delaware's program for receiving delegation of section 112 standards that are unchanged from the federal standards as promulgated. For EPA-promulgated rules which are applicable to sources in the State, the State intends to request delegation after adopting the rules. The details of this delegation mechanism will be established prior to delegating any section 112 standards under the State's approved section 112(l) program for straight delegation. This program applies to both existing and future standards but is limited to sources covered by the Part 70 program.

F. Title IV Provisions/Commitments

As part of the program submittal, the State of Delaware committed to submit all missing portions of the Title IV acid rain program by January 1, 1995. Delaware did not meet the January 1, 1995 date for submitting its Title IV program. EPA requested the State to submit a revised commitment for submitting the Title IV acid rain program. On September 5, 1995, the State submitted a letter committing to adopt and submit to EPA their acid rain program by July 1, 1996.

III. Request for Public Comments

EPA is soliciting public comments on the issues discussed in this notice or on other relevant matters. These comments will be considered before taking final action. Interested parties may participate in this federal rulemaking action by submitting written comments to the EPA Regional office listed in the **ADDRESSES** section of this document.

Proposed Action

EPA is proposing to grant interim approval to the operating permits program submitted by the State of Delaware on November 15, 1993, with supplemental submittals on November 22, 1993, February 9, 1994, May 15, 1995, and September 5, 1995. The scope of the State's Part 70 program applies to all Part 70 sources (''covered sources'' as defined in the State's program) within the State, except for sources of air pollution over which an Indian Tribe has jurisdiction. See, e.g., 59 FR 55813, 55815–18 (Nov. 9, 1994). The term ''Indian Tribe'' is defined under the CAA as ''any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.'' See section 302(r) of the CAA; see also 59 FR 43956, 43962 (Aug. 25, 1994); 58 FR 54364 (Oct. 21, 1993). Prior to full approval by EPA, the State must make the following changes:

1. Revise Regulation 30, Section 6(f), to be consistent with the scope of the permit shield provision of 40 CFR 70.6(f)(1).

2. Revise Regulation 30, Section 7(d)(1)(v), to ensure that any preconstruction review permit requirements that are incorporated into a Title V permit through the

administrative permit amendment procedure meet the provisions of 40 CFR 70.7(d)(1)(v).

3. Revise Regulation 30, Section 7(f)(4) to require that permits for major sources with a permit term of three years or more shall be reopened for cause within 18 months after a new applicable requirement is promulgated, consistent with 40 CFR 70.7(f).

4. Revise Regulation 30, Section 7(j)(4) to require that the Department shall give notice of any public hearing at least 30 days in advance of the hearing, consistent with 40 CFR 70.7(h)(4).

5. Revise the Delaware Water and Air Resources Act, 7 *Del. C.*, Chapter 60, section 6013(b) to provide that each day of violation shall be considered as a separate violation, consistent with 40 CFR 70.11.

This interim approval, which may not be renewed, extends for a period of up to 2 years. During the interim approval period, Delaware is protected from sanctions for failure to have a fully approved Title V, Part 70 program, and EPA is not obligated to promulgate a federal permits program in the State. Permits issued under a program with interim approval have full standing with respect to Part 70, and the 1-year time period for submittal of permit applications by subject sources begins upon interim approval, as does the 3-year time period for processing the initial permit applications.

Requirements for approval, specified in 40 CFR 70.4(b), encompass the CAA's section 112(l)(5) requirements for approval of a program for delegation of section 112 standards applicable to Part 70 sources as promulgated by EPA. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under Part 70.

Therefore, EPA is also proposing under section 112(l)(5) and 40 CFR 63.91 to grant approval of the State's program for receiving delegation of section 112 standards that are unchanged from federal standards as promulgated. This program for delegations only applies to sources covered by the Part 70 program.

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action to propose interim approval of the State of Delaware's operating permits program pursuant to Title V of the CAA and 40 CFR part 70 does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: September 13, 1995.

Stanely L. Laskowski,

Acting Regional Administrator.

[FR Doc. 95–23435 Filed 9–20–95; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Part 799

[OPPTS–42111H; FRL–4972–3]

RIN 2070–AB94

Office of Water Chemicals Test Rule Proposed Modification

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to withdraw the testing requirements for chloroethane, one of the chemical substances listed in the Office of Water Chemicals test rule published in the Federal Register of November 10, 1993. EPA believes that data recently made available provides sufficient information to determine or predict the health effects posed by short and long-term exposures to chloroethane. Therefore, EPA is proposing the withdrawal of the 14-day and 90-day testing requirements for chloroethane.

DATES: Written comments must be received by EPA on or before October 23, 1995.

ADDRESSES: Submit written comments, identified by the docket control number (OPPTS–42111H), in triplicate to: Document Control Office (7407), Office of Pollution Prevention and Toxics, U.S. Environmental Protection Agency, Rm. G–099, 401 M St., SW., Washington, DC 20460. A public version of the administrative record supporting this action, without Confidential Business Information (CBI), is available for inspection in the TSCA Nonconfidential Information Center, Rm. NE–B607, 401 M St., SW., Washington, DC 20460, from 12 noon to 4 p.m., Monday through Friday, except legal holidays.

Comments and data may be submitted electronically by sending electronic mail (e-mail) to: ncic@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted in WordPerfect in 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number OPPTS–42111H. No CBI should be submitted through e-mail. Electronic comments on this proposed rule may be filed online at many Federal Depository Libraries. Additional information on electronic submissions can be found in Unit IV. of this preamble.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD (202) 554–0551, e-mail: TSCA-Hotline@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: This document proposes to withdraw certain testing requirements for one of the chemical substances listed in the Office of Water Chemicals test rule referenced above.

I. Summary of Proposed Modification

Pursuant to section 4 of the Toxic Substances Control Act (TSCA) EPA proposed a test rule (FRL–3712–5) in the Federal Register of May 24, 1990 (55 FR 21393), and finalized the test rule (FRL–4047–2) in the Federal Register of November 10, 1993 (58 FR 59667), requiring certain testing of chloroethane. The final rule concluded that chloroethane is produced in substantial quantities and that there may be substantial exposure to it, there are insufficient data to determine or predict the health effects from short and long-term exposures to chloroethane in drinking water, and that testing is required to determine or predict the health effects from short and long-term exposures to chloroethane. Based on these conclusions, EPA required a subacute toxicity (oral 14-day repeated dose toxicity) and a subchronic (oral 90-day subchronic toxicity) toxicity test. The data from these studies would be used to develop Health Advisories (HAs) for chloroethane in drinking water as under section 1445 of the Safe Drinking Water Act (SDWA).

EPA has recently received information which, in the judgment of EPA, provides sufficient information to determine or predict the health effects from exposure to chloroethane in drinking water (Ref. 1a). On May 1, 1995, the Dow Chemical Company submitted a study entitled ''Ethyl Chloride Palatability and 14-day

Drinking Water Toxicity Study in Fischer 344 Rats.'' The study concluded that there were no toxicological effects from the drinking water administration of chloroethane to the treated rats at the level of practical saturation. After submission of additional information requested by the Agency (Refs. 2, 2a, 3, and 4), EPA conducted a review (Ref. 5). The EPA review, dated July 14, 1995, concluded that the 14-day study provided sufficient information to establish appropriate Health Advisories. Therefore, there is no reason to continue to require the testing specified for chloroethane in the Office of Water Chemicals test rule.

EPA is providing 30 days from publication of this proposed modification for submission of written comments on the elimination of both the subacute (oral 14-day repeated dose toxicity) and subchronic (oral 90-day subchronic toxicity) toxicity test requirements for chloroethane. If the 30-day deadline passes and no adverse public comments have been received, EPA will grant the proposed modification to delete these tests in a final rule published in the Federal Register.

II. Comments Containing Confidential Business Information

Any person who submits comments claimed as CBI must mark the comments as ''confidential,'' ''trade secret,'' or other appropriate designation. Comments not claimed as confidential at the time of submission will be placed in the public file. Any comments marked as confidential will be treated in accordance with the procedures in 40 CFR part 2. Any party submitting confidential comments must prepare and submit a public version of the comments for the EPA public file.

III. Analyses Under Executive Order 12866, the Unfunded Mandates Act of 1995, the Regulatory Flexibility Act, and the Paperwork Reduction Act

Because this action reduces certain pending requirements, this action is not ''significant'' within the meaning of Executive Order 12866 (58 FR 51735, October 4, 1993), and does not impose any Federal mandate on any State, local, or tribal governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). For the same reasons, pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), it has been determined that this action will not have a significant economic impact on a significant number of small entities. Additionally, the information collection requirements associated with TSCA Section 4 Test Rules have been approved by OMB under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, and have been assigned OMB control number 2070–0033. EPA has determined that this proposed rule eliminates certain pending recordkeeping and reporting requirements.

IV. Rulemaking Record

A record has been established for this proposed rule under docket number ''OPPTS–42111H'' (including comments and data submitted electronically as described below). A public version of the record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 12 noon to 4 p.m., Monday through Friday, except legal holidays. The public record is located in the TSCA Nonconfidential Information Center, Rm. NE–B607, 401 M St., SW., Washington, DC 20460.

Electronic comments can be sent directly to EPA at:

ncic@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this proposed rule, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer all comments received electronically into printed, paper form as they are received and will place the paper copies in the official record which will also include all comments submitted directly in writing. The official record is the paper record maintained at the address in **ADDRESSES** at the beginning of this document.

The record includes the following information:

(1) Letter from Annette L. Hayes of Latham Watkins to Amber L. Aranda, U.S.E.P.A. transmitting April 28, 1995 Dow Chemical Study (May 1, 1995) (with attachment:).

(a) Dow Chemical Company. Study titled ''Ethyl Chloride: Palatibility and 14-Day Drinking Water Toxicity Study in Fischer 344 Rats'' (April 28, 1995).

(2) Facsimile note from Roger A. Nelson, U.S.E.P.A. to Dr. Lynn Pottenger, The Dow Chemical Company requesting information (June 7, 1995) (with attachment:).

(a) Memorandum from Jennifer Orme-Zavaleta, U.S.E.P.A. to Frank Kover, U.S.E.P.A. requesting additional data (June 5, 1995).

(3) Letter from Lynn Pottenger, The Dow Chemical Company to Roger Nelson, U.S.E.P.A., Re: Questions on Chloroethane Study Report (June 9, 1995).

(4) The Dow Chemical Company. ''Report Addendum'' to Ethyl Chloride: Palatibility and 14-Day Drinking Water Toxicity Study in Fischer 344 Rats (June 9, 1995).

(5) Memorandum from Jennifer Orme-Zavaleta, U.S.E.P.A. to Frank Kover, U.S.E.P.A. Office of Water Review (July 14, 1995).

List of Subjects in 40 CFR Part 799

Environmental protection, Chemicals, Chemical export, Hazardous substances, Health effects, Incorporation by reference, Laboratories, Provisional testing, Reporting and recordkeeping requirements, Testing.

Dated: September 12, 1995.

Lynn R. Goldman,

Assistant Administrator for Prevention, Pesticides and Toxic Substances.

Therefore, it is proposed that 40 CFR part 799 be amended as follows:

PART 799—IDENTIFICATION OF SPECIFIC CHEMICAL SUBSTANCE AND MIXTURE TESTING REQUIREMENTS

1. The authority citation for part 799 continues to read as follows:

Authority: 15 U.S.C. 2603, 2611, 2625.

2. Section 799.5075 is amended by revising paragraphs (a)(1), (c)(1)(i)(A), and (c)(2)(i)(A) to read as follows:

§ 799.5075 Drinking water contaminants subject to testing.

(a) *Identification of test substance.* (1) 1,1,2,2-Tetrachloroethane (CAS No. 79–34–5), and 1,3,5-trimethylbenzene (CAS No. 108–67–8) shall be tested as appropriate in accordance with this section.

* * * * *

(c) *Health effects testing*—(1) *Subacute toxicity*—(i) *Required testing.* (A) An oral 14-day repeated dose toxicity test shall be conducted with 1,1,2,2-tetrachloroethane, and 1,3,5-trimethylbenzene in accordance with § 798.2650 of this chapter except for the provisions in § 798.2650 (a), (b)(1), (c), (e)(3), (e)(4)(i), (e)(5), (e)(6), (e)(7)(i), (e)(7)(iv), (e)(7)(v), (e)(8)(vii), (e)(9)(i)(A), (e)(9)(i)(B), (e)(11)(v), and (f)(2)(i). Each substance shall be tested in one mammalian species, preferably a rodent, but a non-rodent may be used. The species and strain of animals used in this test should be the same as those used in the 90-day subchronic test required in paragraph (c)(2)(i) of this section. The tests shall be performed using drinking water. However, if, due to poor stability or palatability, a drinking water test is not feasible for a given substance, that substance shall be

administered either by oral gavage, in the diet, or in capsules.

* * * * *

(2) *Subchronic toxicity*—(i) *Required testing.* (A) An oral 90-day subchronic toxicity test shall be conducted with 1,3,5-trimethylbenzene in accordance with § 798.2650 of this chapter except for the provisions in § 798.2650 (e)(3), (e)(7)(i), and (e)(11)(v). The test shall be performed using drinking water. However, if, due to poor stability or palatability, a drinking water test is not feasible for a given substance, that substance shall be administered either by oral gavage, in the diet, or in capsules.

* * * * *

[FR Doc. 95–23460 Filed 9–20–95; 8:45 am]

BILLING CODE 6560–50–F

LEGAL SERVICES CORPORATION

45 CFR Part 1633

Restriction on Representation in Certain Eviction Proceedings

AGENCY: Legal Services Corporation.

ACTION: Proposed rule.

SUMMARY: This proposed rule is intended to ensure that recipients refrain from using Legal Services Corporation (''LSC'' or ''Corporation'') funds to provide representation in eviction proceedings of persons engaged in certain illegal drug activity.

DATES: Comments must be submitted on or before October 23, 1995.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First Street, N.E., 11th Floor, Washington, DC 20002–4250.

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

SUPPLEMENTARY INFORMATION: On June 25, 1995, the Corporation Board of Directors (''Board'') adopted a resolution requiring Corporation staff to prepare a regulation prohibiting the use of Corporation funds to represent in certain eviction proceedings persons alleged to be engaging in illegal drug activity. On September 9, 1995, the Board's Operations and Regulations Committee (''Committee'') held public hearings on proposed 45 CFR Part 1633. After adopting several changes to the staff draft of the regulation, the Committee voted to publish the proposed rule in the Federal Register for notice and comment.

The LSC Act grants the Corporation both general and specific rulemaking authority. *Texas Rural Legal Aid* v. *LSC,* 940 F.2d 685, 690–91 (D.C. Cir. 1991); see *e.g.*, 42 U.S.C. 2996e(a)(1)(A), (a)(1)(B), and 2996f(a)(3). In particular, section 1007(a)(3) of the LSC Act ''gives [the Corporation] substantial power to regulate the 'delivery of legal assistance' by program recipients.'' *TRLA*, at 691. In addition, as a private corporation granted the powers of a District of Columbia nonprofit corporation, 42 U.S.C. 2996e(a), the Corporation has the power to establish the terms under which it will make grants to entities to provide legal assistance. *Id.* Congress intended the exercise of ''considerable discretion'' by the Corporation in its implementation of the LSC Act. *Id.* Finally, under section 1007(a)(2)(C) of the LSC Act, 42 U.S.C. 2996f(a)(2)(C), the Corporation may provide guidance to its recipients as to appropriate caseload matters by establishing national goals, in conformance with which recipients are to establish priorities for the acceptance of cases. *Id.* at 693.

A purpose of the legal services program is to assist in improving opportunities for low income persons. 42 U.S.C. 2996(3). In addition, in its grantmaking and oversight functions, the Corporation must ensure that recipients provide legal assistance in the most economical and effective manner. 42 U.S.C. 2996f(a)(3). Hence, a principal national goal of the Corporation, based in the LSC Act, is to provide economical and effective legal assistance in a manner that improves opportunities for low income persons.

The drug problem has had a devastating effect on the poor in our country, especially those living in public housing. This situation is of grave concern to the Board, and has been an on-going concern in Congress. For example, section 508(18) of H.R. 2076, an appropriations measure currently before Congress, would prohibit recipients from providing representation in certain drug-related eviction proceedings. See H.R. 2076, 104th Cong., 1st Sess, section 504(18).

Since tenants of public housing projects who engage in illegal drug activity may be viewed as a destructive force within public housing communities acting to the detriment of low income persons, it is the Corporation's considered view that representation of those who engage in such activity undermines the purposes of the LSC Act. Based on the above, the Board directed staff to prepare a proposed regulation addressing these concerns. Such regulation will implement the Corporation's goal of providing economical and effective legal assistance in a manner that improves opportunities for low income persons and will provide specific guidance to recipients to revise their priorities and procedures in the area of representation in drug-related eviction proceedings.

A section-by-section discussion of the proposed rule is provided below.

Section 1633.1 Purpose

This section sets out the purpose of the proposed rule: to implement the goal of the Corporation to provide economical and effective legal assistance in a manner that improves opportunities for low income persons and to provide specific guidance in the case of drug-related eviction proceedings by prohibiting any recipient from providing representation in certain proceedings to evict from public housing projects persons convicted of or being prosecuted for certain drug-related activity.

Section 1633.2 Definitions

This section defines ''controlled substance,'' ''public housing project,'' and ''public housing agency'' in the manner those terms are defined by federal statute. The term ''being prosecuted'' is defined to make clear that the prohibition attaches only when a prosecution has been instituted and is being pursued by a governmental authority, for example, by indictment or information. It is not sufficient for an affidavit to have been sworn by a private citizen or for an arrest to have occurred if no prosecution has followed.

Section 1633.3 Prohibition

This section sets out the prohibition on the use of Corporation funds. It is intended to preclude the provision of representation in a proceeding to evict from a public housing project a person who has been recently convicted of or is being prosecuted for illegal drug activity. Such activity must be evidenced by a conviction or current prosecution for the sale, distribution, use or manufacture of a controlled substance. Under the prohibition if representation was commenced prior to prosecution, the recipient should seek to end the representation if a prosecution is thereafter commenced. The Corporation has concluded that a formal charge of illegal drug activity against a client will suffice to prohibit representation even though a conviction has not as yet resulted. The Corporation, however, believes that the prohibition should apply only when the charge of illegal drug activity has resulted in formal prosecution proceedings.

In addition, the prohibition applies only if the allegation which forms the

basis for the eviction proceeding is that the particular illegal drug activity for which the person has been convicted or is being prosecuted did or does now threaten the health or safety of others living in the public housing project or working in the public housing agency. This qualification is intended to make clear that, in order for the prohibition to apply, the allegation which forms the basis for the eviction must be that, at the time the illegal drug activity was engaged in, it threatened the health or safety of others within the public housing community or that the activity currently threatens such health or safety. In other words, the threat must stem from the illegal drug activity which resulted in prosecution/conviction.

Finally, the prohibition extends only to the individual who has been convicted or is being prosecuted, and does not extend to other members of the individual's household who may be facing eviction because of the individual's illegal activity. For example, if a person is facing eviction based on the fact that another person in the household has been convicted of or is being prosecuted for the illegal sale, distribution, use or manufacture of a controlled substance, then the prohibition would not attach.

Section 1633.4 Recordkeeping

This section requires recipients to maintain documentation regarding representation declined under this part. Such recordkeeping will assist the Corporation in its compliance monitoring efforts and will provide empirical data for informational purposes.

List of Subjects in 45 CFR 1633

Legal services, Drugs, Public housing.

For reasons set forth in the preamble, LSC proposes to amend 45 CFR chapter XVI by adding part 1633 as follows:

PART 1633—RESTRICTION ON REPRESENTATION IN CERTAIN EVICTION PROCEEDINGS

Sec.
1633.1 Purpose.
1633.2 Definitions.
1633.3 Prohibition.
1633.4 Recordkeeping.

Authority: 42 U.S.C. 2996e(a), (b)(1)(A), 2996f(a)(2)(C), 2996f(a)(3), 2996g(e).

§ 1633.1 Purpose.

This part is designed to ensure that Corporation funds will not be used to provide representation in certain eviction proceedings to persons charged with or convicted of illegal drug activities.

§ 1633.2 Definitions.

(a) ''Controlled substance'' has the meaning given that term in section 102 of the Controlled Substances Act (21 U.S.C. 802);

(b) ''Public housing project'' and ''public housing agency'' have the meanings given those terms in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a); and

(c) A person is ''being prosecuted'' if a criminal proceeding has been instituted against such person by a governmental authority with jurisdiction to bring such prosecution.

§ 1633.3 Prohibition.

Corporation funds shall not be used to defend any person in a proceeding to evict that person from a public housing project if:

(a) the person has been recently convicted of or is being prosecuted for the illegal sale, distribution, use or manufacture of a controlled substance; and

(b) the eviction proceeding is brought by a public housing authority on the basis that such illegal drug activity for which the person has been convicted or for which the person is being prosecuted did or does now threaten the health or safety of other tenants residing in the public housing project or employees of the public housing agency.

§ 1633.4 Recordkeeping.

Recipients shall maintain a record of all instances in which representation is declined under this part. Records required by this section shall be available to the Corporation, and should be maintained in a manner consistent with the attorney-client privilege and the rules of professional responsibility applicable in the local jurisdiction.

Dated: September 18, 1995.

Suzanne B. Glasow,

Senior Counsel for Operations & Regulations.

[FR Doc. 95–23490 Filed 9–20–95; 8:45 am]

BILLING CODE 7050–01–P

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45 CFR Part 1634

Competitive Bidding for Grants and Contracts

AGENCY: Legal Services Corporation.

ACTION: Proposed Rule.

SUMMARY: The Corporation anticipates that Congress will adopt legislation requiring the Corporation to utilize a system of competitive bidding for the award of grants and contracts. This proposed rule is intended to implement such a system of competitive bidding for the award of grants and contracts for the delivery of legal services to eligible clients. The competitive bidding system would be structured so as to meet the primary purposes of the Legal Services Corporation Act as amended—to ensure the economical and effective delivery of high quality legal services to eligible clients and improve opportunities for low income persons. Competitive bidding is also intended to encourage recipients to improve their performance in delivering legal services.

DATES: Comments must be submitted on or before October 23, 1995.

ADDRESSES: Comments should be submitted to the Office of General Counsel, Legal Services Corporation, 750 First Street NE., 11th Floor, Washington, DC 20002–4250.

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

SUPPLEMENTARY INFORMATION: On June 25, 1995 the LSC Board of Directors (''Board'') adopted a resolution requiring Corporation staff to prepare a regulation on competition in the delivery of legal services. On September 8 and 9, 1995, the Board's Operations and Regulations Committee and the provision for the Delivery of Legal Services Committee (''Committee'') held public hearings on a draft proposed rule, 45 CFR part 1634. After adopting several changes to the draft proposed rule, the Committees voted to publish a proposed rule in the Federal Register for notice and comment.

Generally, the proposed rule is intended to set out the framework for a system of competitive bidding that would be structured so as to meet the primary purposes of the Legal Services Corporation Act, that is, to ensure the effective and efficient delivery of high quality legal services to eligible clients and to improve opportunities for low-income persons. Through the proposed competitive bidding system, qualified attorneys and entities would be provided an opportunity to compete for grants and contracts to deliver a full range of high quality legal services in service areas determined by the Corporation. Competitive bidding is also intended to encourage recipients to improve their performance in delivering legal services.

The competitive system envisioned in this regulation is intended to encourage realistic and responsible bids aimed toward the provision of quality legal services. Applicants should submit proposals that favor cost-effectiveness rather than cost and a system that provides a full range of legal assistance rather than fragmented services.

Finally, the rule provides authority for the Corporation to modify the timetables and other provisions of the system to conform to requirements imposed by law.

A section-by-section discussion of the proposed rule is provided below.

Section 1634.1 Purpose

This section sets out the purpose of the proposed rule, which is to encourage the efficient and effective delivery of high quality legal services to eligible clients through an integrated system of legal services providers by providing opportunities for qualified attorneys and entities to compete for grants and contracts and by encouraging recipients to improve their performance in delivering legal assistance. The section also indicates that the system of competition will preserve local control over resource allocation and program priorities, and minimize disruptions when there is a change in providers in the delivery of legal services to eligible clients within a service area.

Section 1634.2 Definitions

This section defines key terms used in the regulation. A ''review panel'' is defined to include, at a minimum, lawyers experienced in and knowledgeable about the delivery of legal assistance to low-income persons and eligible clients or representatives of low-income community groups. The definition prohibits any person from membership on a review panel that has a financial conflict of interest with or has, within the last five years, been employed by or has been a board member of the applicant being reviewed. The definition also contemplates that the Corporation would spell out in greater detail what constitutes a conflict of interest. Although Corporation staff should not be part of review panels, they may facilitate the work of the panels by providing planning and administrative services.

''Qualified applicants'' is defined to include recipients and other lawyers or entities qualified to compete.

''Service area'' is defined as an area over which there is to be competition and could include all or part of a current recipient's service area or be larger than an area served by a current recipient. The determination of particular services areas for any particular competitive process would be determined by the Corporation.

Finally, ''subpopulation of eligible clients'' is defined as population groups, such as Native Americans and migrant farm workers, who have been historically recognized as requiring a separate system of delivery in order to provide legal assistance effectively.

Section 1634.3 Competition for Grants and Contracts

This section sets out the framework for competition for grants and contracts awarded under section 1006(a)(1)(A) of the LSC Act and is based on the provisions in HR 1806, the McCollum-Stenholm Bill of 1995, and the language in the House appropriations bill, HR 2076. Paragraph (a) provides that, as of a date certain, all grants and contracts for the direct provision of legal assistance will be awarded by competition. Paragraph (b) provides that the Corporation will determine the service areas or the subpopulations of clients to be served within service areas. Paragraph (c) states that the use of a competitive process for the awarding of the grant or contract for a particular service area, consistent with HR 1806 and HR 2076, will not constitute a termination or denial of refunding pursuant to parts 1606 and 1625 of the Corporation regulations. Paragraph (d) authorizes the Corporation to award more than one grant or contract for all or part of a service area but paragraph (e) states that no grant or contract may be awarded for terms more than five years. Paragraph (e) also clarifies that, if the amount of funding during the period of the grant or contract is reduced as a result of changes in Congressional appropriations, such reductions will not be considered to be the terminations or denials of refunding under Corporation regulations.

Section 1634.4 Announcement of Competition

Paragraph (a) of this section requires the Corporation to publicly announce a competition within a particular service area to current recipients, appropriate bar associations and other interested groups. The Corporation must also publish an announcement in periodicals of State and local bar associations and at least one daily newspaper of general circulation in the area to be served. The timing of the announcements may be dependent upon Congressional directions. Paragraph (b) sets out the general contents for the request for proposals (RFP), but leaves to the Corporation the details of what the RFP will include. The Corporation is required by paragraph (c) to send a copy of the RFP to any person or entity requesting one.

Section 1634.5 Identification of Qualified Applicants for Grants and Contracts

This section lists types of applicants that would qualify to compete under HR 1806 and HR 2076. These include current recipients and other non-profit organizations that have as a purpose the furnishing of legal assistance to eligible clients, private attorneys, groups of private attorneys or law firms, state or local governments and substate regional planning and coordination agencies which are composed of substate areas and whose governing boards are controlled by locally elected officials. The rule proposes that in order to received an award of a grant or contract, all of the above entities would be required to have, depending on the type of applicant, a governing or policy body that is consistent with the provisions of 45 CFR part 1607, the Corporation's regulations on governing bodies. Such a board or policy is not necessarily mandated by law for § 1634.5(a) (3), (4) and (5). Much will depend on the legislation finally enacted. However, the Corporation seeks comments on whether, as a matter of policy, some governing or policy body should be required for all types of grantees so that all grantees are accountable to and guided by the policy decisions of such bodies.

Section 1635.6

This section contemplates that all applicants, including current recipients, who intend to compete for a grant or contract for a particular service area, will file a notice of intent to compete along with any other additional information determined to be necessary and appropriate by the Corporation. Filing deadlines for the notices shall be specified in the RFP. The information requested will give the Corporation notice of the level of competition and some indication as to whether applicants may need assistance in order to complete a full application.

Section 1634.7

This section sets out the application process and the basic requirements that applicants will have to meet in order to compete for a grant or contract to deliver services in a particular service area. The Corporation is given broad discretion to determine what information is needed to complete a particular application.

Pursuant to paragraph (e), the Corporation may require each applicant to agree in writing that, if the applicant is not selected for the award of a grant or contract, the applicant would not

institute a court action regarding the denial of an award until the applicant has participated in a mediation with the Corporation on the matter. The inclusion of this provision in the rule should not suggest that applicants have any property or hearing rights. It is well established that, absent express statutory language to the contrary or a showing that the applicant's statutory or constitutional rights have been violated, pre-award applicants for discretionary grants have no protected property interests in receiving a grant and thus have no standing to appeal the funding decision by the grantor. *See* Cappalli, Federal Grants and Cooperative Agreements, § 3.28 and *Legal Services Corporation* v. *Ehrlich*, 457 F. Supp. 1058, 1062–64 (D. Md. 1978). Nevertheless, the Corporation could decide that it is productive to mediate a particular matter with the applicant so that the applicant might submit a better application the next time around or at least have a better understanding of the process.

Section 1634.8

This section sets out the selection process to be used by the Corporation when deciding what grants or contracts are to be made to service areas. It requires the Corporation to review all relevant information for each applicant, request any necessary additional information, conduct on-site visits if appropriate to fully evaluate an application and summarize in writing any information not contained in an applicant's application. Monitoring and Compliance reports for current or former grantees that are older than five years would not be reviewed by the Corporation because they would lack relevance to the grantee's current status and would create too great an administrative burden on the Corporation and review panel members.

This section also requires the Corporation to convene a review panel if there is more than one applicant for a particular service area although it could choose to convene a panel when there is only one applicant. Review panels would review the applications and any summaries prepared by the Corporation and would make recommendations to the Corporation regarding awards for particular service areas. This section then requires that the Corporation staff consider the review panel's recommendation and forward a staff recommendation to the Corporation President for a final decision. If the staff recommendation differs from that of the review panel, the staff's written recommendation must include the recommendations of the review panel as well as an explanation of why the recommendations differ.

The Corporation staff could recommend that the President make an award up to five years or, if there is no applicant for a service area or no applicant meets the criteria to receive a grant, paragraph (c) makes it clear that the Corporation has discretion to determine how to provide for the provision of legal assistance to the service area. Among other choices, the Corporation could put a current grantee on month-to-month funding in order to conduct a new competition or enlarge the service area of a neighboring grantee.

Finally, this rule provides that the President is to make final decisions of what grants will be awarded and for how long (although not exceeding five years). The Corporation is then required to notify all applicants in writing of the President's decisions.

Paragraph (d) provides that the Corporation shall not give any preference to current or previous recipients of funds when awarding grants and contracts under the competitive bidding system.

Section 1634.9

This section sets out the selection criteria that the Corporation will use in selecting recipients for the service areas subject to competition. These criteria include those specified in HR 1806 and HR 2706 as well as additional criteria taken from the provisions of the LSC Act and regulations and from the Performance Measures which the Corporation has developed to measure the performance of recipients.

Subsection (a) requires each applicant to demonstrate an understanding of the basic legal needs of the eligible clients in the area served.

Subsection (b) requires each applicant to demonstrate that its delivery approach adheres to the Corporation's Performance Criteria and the American Bar Association's Standards for Providers of Civil Legal Services to the Poor. Among other things, applicant's ability to meet this criterion could be demonstrated by information regarding the applicant's experience with the delivery of the type of legal assistance contemplated under the grants or contracts.

Subsection (c) requires that, where applicable, the applicant's governing board or policy body meets or will meet all applicable statutory, regulatory or other legal requirements.

Subsection (d) requires that the applicant demonstrate how it will comply with applicable provisions of the law and LSC regulations. Among other things, the applicant's past experience of compliance with the Corporation or other funding sources or regulatory agencies would be evidence of the applicant's ability to comply with this criterion.

Subsection (e) is taken from HR 1806 and requires that the Corporation consider the reputations of the applicant's principals.

Subsection (f) requires applicants to demonstrate their capacity to provide high quality, effective and effective legal services through an integrated delivery system, such as a capacity of the applicant to develop non-Corporation funds and to engage in collaborative efforts with other organizations involved in serving or assisting eligible clients.

Subsection (g) requires that applicants who are not current recipients demonstrate how they will continue service to clients with pending matters.

Subsection (h) focuses on institutional conflicts of interest of the applicant with the client community. Institutional conflicts could prevent applicants from being able to deliver the full range of legal services necessary to address the basic legal needs of clients. Applicants must show that they would not be required by such conflicts to refuse to provide representation on particular cases that are of high priority to the client community because the applicant is not permitted by a funding source independent of LSC to provide such assistance.

Section 1634.10

This section provides for transition steps that the Corporation may take when a current recipient is replaced by another applicant. Under subsection (a)(1), funding can be provided to enable a current recipient to complete cases, or withdraw or transfer such cases to the new recipient or other appropriate legal services provider. Subsection (a)(2) authorizes the Corporation to ensure the appropriate disposition of real and personal property of the current recipient which was purchased in whole or in part with Corporation funds. Subsection (b) provides that the Corporation can use slope funding if necessary to ensure effective and efficient use of Corporation funds during the early months of its grant. Such funding was used effectively in past years when new grantees were funded and helped prevent the accumulation of excessive fund balances.

Section 1634.11

This section provides that the President may waive or amend certain

parts of the regulations, including the timetables established thereunder, in order to comply with requirements imposed by law on the awards of grants and contracts for a particular fiscal year. This is necessary, for example, because HR 2076 requires that LSC use a competitive bidding system for grants and contracts to be awarded for 1996. It will be impossible for LSC to comply with all of the provisions of this part and still issue grants by January of 1996. For example, if the House requirements remain in the appropriation legislation, it will be impossible to use review panels or require a notice of intention to compete. The Corporation seeks comments on whether any other sections of the rule should be waived.

List of Subjects in 45 CFR Part 1634

Contracts, Grants, Legal services.

For the reasons set out in the preamble, LSC proposes to amend 45 CFR Ch. XVI by adding part 1634.

PART 1634—COMPETITIVE BIDDING FOR GRANTS AND CONTRACTS

Sec.

1634.1 Purpose.
1634.2 Definitions.
1634.3 Competition for grants and contracts.
1634.4 Announcement of competition.
1634.5 Identification of qualified applicants for grants and contracts.
1634.6 Notice of intent to compete.
1634.7 Application process.
1634.8 Selection process.
1634.9 Selection criteria.
1634.10 Transition provisions.
1634.11 Emergency procedures and waivers.

Authority: 42 U.S.C. 2996e(a)(1)(A).

§ 1634.1 Purpose.

This part is designed to improve the delivery of legal assistance to eligible clients through the use of a competitive system to award grants and contracts for the delivery of legal services. The purpose of such a competitive system is to:

(a) Encourage the effective and efficient delivery of high quality legal services to eligible clients that is consistent with the Corporation's Performance Criteria and the American Bar Association's Standards for Providers of Civil Legal Services to the Poor through an integrated system of legal services providers;

(b) Provide opportunities for qualified attorneys and entities to compete for grants and contracts to deliver high quality legal services to eligible clients;

(c) Encourage ongoing improvement of performance by recipients in providing high quality legal services to eligible clients;

(d) Preserve local control over resource allocation and program priorities; and

(e) Minimize disruptions in the delivery of legal services to eligible clients within a service area during a transition to a new provider.

§ 1634.2 Definitions.

(a) *Qualified applicants* are those persons, groups or entities described in § 1634.5(a) of this part who are eligible to submit notices of intent to compete and applications to participate in a competitive bidding process as described in this part.

(b) *Review panel* means a group of individuals who are not Corporation staff but who are engaged by the Corporation to review applications and make recommendations regarding awards or contracts for the delivery of legal assistance to eligible clients. Review panels must include, at a minimum, lawyers experienced in and knowledgeable about the delivery of legal assistance to low-income persons, and eligible clients or representatives of low-income community groups. No person may serve on a review panel for any applicant with whom the person has a financial interest or ethical conflict; nor may the person have been a board member of or employed by such applicant in the past five years.

(c) *Service area* is the area defined by the Corporation to be served by grants or contracts to be awarded on the basis of a competitive bidding process. A service area is defined geographically and may consist of all or part of the area served by a current recipient, or it may include an area larger than the area served by a current recipient.

(d) *Subpopulation of eligible clients* includes Native Americans and migrant farm workers and may include other groups of eligible clients that, because they have special legal problems or face special difficulties of access to legal services, might better be served by a separate system to deliver legal assistance in order to serve that client group effectively.

§ 1634.3 Competition for grants and contracts.

(a) After the effective date of this part, all grants and contracts for legal assistance awarded by the Corporation under section 1006(a)(1)(A) of the LSC Act shall be subject to the competitive bidding process described in this part. No grant or contract for the delivery of legal assistance shall be awarded by the Corporation for any period after _____ [1] unless the recipient of that grant has been selected on the basis of the competitive bidding process described in this part.

(b) The Corporation shall determine the service area to be covered by grants or contracts and shall determine whether the population to be served will consist of all eligible clients within the service area or a specific subpopulation of eligible clients within one or more service areas.

(c) The use of the competitive bidding process to award grant(s) or contract(s) shall not constitute a termination or denial of refunding of financial assistance to a current recipient pursuant to parts 1606 and 1625 of this chapter.

(d) The Corporation may award more than one grant or contract to provide legal assistance to eligible clients or a subpopulation of eligible clients within a service area, provided that, to the maximum extent possible, such grants and contracts are awarded so as to ensure that all eligible clients within the service area will have access to a full range of legal services in accordance with the LSC Act.

(e) In no event may the Corporation award a grant or contract for a term longer than five years, and the amount of funding provided annually under each such grant or contract is subject to changes in Congressional appropriations or restrictions on the use of those funds by the Corporation. A reduction in a recipient's annual funding required as a result of a change in the law or a reduction in funding appropriated for the Corporation shall not be considered a termination or denial of refunding under parts 1606 or 1625 of this chapter.

§ 1634.4 Announcement of competition.

(a) The Corporation shall give public notice that it intends to award a grant or contract for a service area on the basis of a competitive bidding process and shall take appropriate steps to announce the availability of such a grant or contract in the periodicals of State and local bar associations and shall publish a notice of the Request For Proposals (RFP) in at least one daily newspaper of general circulation in the area to be served under the grant or contract. In addition, the Corporation shall notify current recipients, other bar associations, and other interested groups within the service area of the availability of the grant or contract and shall conduct such other outreach as the Corporation determines to be appropriate to ensure that interested parties are given an opportunity to participate in the competitive bidding process.

[1] The date will depend upon the appropriation or reauthorization provisions that are enacted into law.

(b) The Corporation shall issue an RFP which shall include information regarding: Who may apply; application procedures; the selection process; selection criteria; the service areas that will be the subject of the competitive bidding process; the amount of funding available for the service area, if known; applicable timetables and deadlines; and the LSC Act, regulations, guidelines and instructions and any other applicable federal law. The RFP may also include any other information that the Corporation determines to be appropriate.

(c) The Corporation shall make available a copy of the RFP to any person, group or entity that requests a copy in accordance with procedures established by the Corporation.

§ 1634.5 Identification of qualified applicants for grants and contracts.

(a) The following persons, groups and entities are eligible to submit a notice of intent to compete and an application to participate in the competitive bidding process:

(1) Current recipients;

(2) Other non-profit organizations that have as a purpose the furnishing of legal assistance to eligible clients;

(3) Private attorneys, groups of attorneys or law firms (except that no private law firm that expends 50 percent or more of its resources and time litigating issues in the broad interests of a majority of the public may be awarded a grant or contract under the LSC Act);

(4) State or local governments;

(5) Substate regional planning and coordination agencies which are composed of substate areas and whose governing boards are controlled by locally elected officials.

(b) All persons, groups and entities listed in paragraph (a) of this section must have a governing or policy body consistent with the requirements of part 1607 of this Chapter or other applicable law.

(c) Applications may be submitted jointly by more than one qualifying individual, group or entity.

§ 1634.6 Notice of intent to complete.

(a) In order to participate in the competitive bidding process, an applicant must submit a notice of intent to compete on or before the date designated by the Corporation in the RFP. The Corporation may extend the date if necessary to take account of special circumstances or to permit the Corporation to solicit additional notices of intent to compete.

(b) Either at the time or prior to the filing of the notice of intent to complete, each applicant must provide the Corporation with the following information as well as any additional information that the Corporation determines is appropriate:

(1) Names and resumes of principals and key staff;

(2) Names and resumes of current and proposed governing board or policy body members and their appointing organizations;

(3) Initial description of area proposed to be served by the applicant and the services to provided.

§ 1634.7 Application process.

(a) The Corporation shall set a date for receipt of applications and shall announce the date in the RFP. The date shall afford applicants adequate opportunity, after filing the notice of intent to compete, to complete the application process. The Corporation may extend the application date if necessary to take account of special circumstances.

(b) The application shall be submitted in a form to be determined by the Corporation.

(c) A completed application shall be include all of the information requested by the RFP. It may also include any additional information needed to fully address the selection criteria, and any other information requested by the Corporation. In complete applications will not be considered for competition by the Corporation.

(d) The Corporation shall establish a procedure to provide notification to applicants of receipt of the application.

(e) The Corporation may require that, as a condition of being an applicant, an applicant must agree in writing that, prior to instituting any court action regarding a dispute with the Corporation or its employees arising from the application or the Corporation's action regarding the application, the applicant will participate in mediation with a representative of the Corporation. Mediation procedures shall be designed by the Corporation to provide for the convenience of the parties and to encourage the expeditious resolution of the applicant's concerns. The use of such mediation procedures should not be interpreted to suggest that applicants have any property or hearing rights pursuant to the competitive process.

§ 1634.8 Selection process.

(a) After receipt of all applications for a particular service area, Corporation staff shall:

(1) Review each application and any additional information that the Corporation has regarding each applicant, including for any applicant that is or includes a current or former recipient, past monitoring and compliance reports, performance evaluations and other pertinent records for the past five years;

(2) Request from an applicant and review any additional information that the Corporation determines is appropriate to evaluate the application fully;

(3) Conduct one or more on-site visits to an applicant if the Corporation determines that such visits are appropriate to evaluate the application fully;

(4) Summarize in writing information regarding the applicant that is not contained in the application if appropriate for the preview process; and

(5) Unless there is only one applicant for a particular service area and the Corporation therefore determines that use of a review panel is not appropriate, convene a review panel to:

(i) Review the applications and the summaries prepared by the Corporation staff. (The Corporation staff shall also identify other information reviewed by the Corporation and which the review panel may request in order to evaluate the applications fully); and

(ii) Make a written recommendation to the Corporation regarding the award of grants or contracts from the Corporation for a particular service area.

(6) After considering the recommendation made by the review panel, if a review panel was convened, make a staff recommendation to the Corporation President. If the staff recommendation differs from that of the review panel, the staff recommendation shall include the recommendation of the review panel and an explanation of the basis for the staff recommendation.

(b) After reviewing the written recommendations, the President shall select the applicants to be awarded grants or contracts from the Corporation and the Corporation shall notify each applicant in writing of the President's decision regarding each applicant's application. The President of the Corporation shall not make an award of a grant or contract for a term longer than five years.

(c) In the event that there are no applicants for a service area or the Corporation determines that no competitor meets the criteria and therefore determines not to award a grant for a particular service area, the Corporation has discretion to determine how to provide the provision of legal assistance to the service area under competition, including but not limited to, enlarging the service area of a neighboring program or putting a current recipient on month-to-month

funding in order to permit the Corporation to conduct a new competition.

(d) In selecting recipients of awards for grants or contracts under this part, the Corporation shall not grant any preference to current or previous recipients of funds from the Corporation.

§ 1634.9 Selection criteria.

The Corporation shall consider the following criteria in selecting recipients.

(a) Whether the applicant has a full understanding of the basic legal needs of the eligible clients in the area to be served;

(b) The quality, feasibility and cost-effectiveness of the applicant's legal services delivery approach in relation to the Corporation's Performance Criteria and the American Bar Association's Standards for Providers of Civil Legal Services to the Poor, as evidenced by, among other things, the applicant's experience with the delivery of the type of legal assistance contemplated under the proposal;

(c) Whether the applicant's governing or policy body meets or will meet all applicable requirements of the LSC Act, regulations, guidelines, instructions and any other requirements of law;

(d) Applicant's capacity to comply with all other applicable provisions of the LSC Act, rules, regulations, guidelines and instructions, as well as with ethical requirements and any other requirements imposed by law. Evidence of the applicant's capacity to comply with this criterion may include, among other things, the applicants compliance experience with the Corporation or other funding sources or regulatory agencies, including but not limited to federal or state agencies, bar associations or foundations, courts, IOLTA programs, and private foundations;

(e) The reputations of the applicant's principals and key staff;

(f) The applicant's knowledge of the various components of the legal services delivery system in the State and its willingness to coordinate with them as appropriate to assure the availability of a full range of legal assistance, including its capacity to:

(1) develop and increase non-Corporation resources,

(2) cooperate with State and local bar associations, private attorneys and pro bono programs to increase the involvement of private attorneys in the delivery of legal assistance and the availability of pro bono legal services to eligible clients, and

(3) have knowledge of and cooperate with other services providers, community groups, public interest organizations and human services providers in a manner that is consistent with the local ethical requirements;

(g) Applicant's capacity to ensure continuity in client services and representation of eligible clients with pending matters.

(h) Applicant does not have known or potential conflicts of interest, institutional or otherwise, with client community and demonstrates a capacity to protect against such conflicts that may arise during the term of the grant or contract.

§ 1634.10 Transition provisions.

(a) When the competitive bidding process results in the award of a grant or contract to an applicant other than the current recipient to serve the area currently served by that recipient, the Corporation may, if the law permits;

(1) Provide continued funding to the current recipient, for a period and at a level to be determined by the Corporation after consultation with the recipient, to ensure the prompt and orderly completion of or withdrawal from pending cases or matters or the transferral of such cases or matters to the new recipient or to other appropriate legal services providers in a manner consistent with the rules of ethics or professional responsibility for the jurisdiction in which those services are being provided;

(2) Ensure, after consultation with the recipient, the appropriate disposition of real and personal property purchased by the current recipient in whole or in part with Corporation funds.

(b) Awards of grants or contracts for legal assistance to any applicant that is not a current recipient may, in the Corporation's discretion, provide for incremental increases in funding up to the annualized level of the grant or contract award in order to ensure that the applicant has the capacity to use Corporation funds in an effective and efficient manner.

§ 1634.11 Emergency Procedures and Waivers

The President of the Corporation may waive the requirements of § § 1634.6 and 1634.8(a)(3) and (5), when necessary to comply with requirements imposed by law on the awards of grants and contracts for a particular fiscal year.

Dated: September 18, 1995.

Suzanne B. Glasow,

Senior Counsel for Operations and Regulations.

[FR Doc. 95–23491 Filed 9–20–95; 8:45 am]

BILLING CODE 7050–01–M

45 CFR Part 1635

Timekeeping Requirement

AGENCY: Legal Services Corporation.

ACTION: Proposed rule.

SUMMARY: This proposed rule requires all recipients of Legal Services Corporation (''LSC'' or ''Corporation'') funds to account for the time spent on all cases, matters and other activities by their attorneys and paralegals, whether funded by the Corporation or by other sources.

DATES: Comments must be submitted on or before October 23, 1995.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First Street, NE., 11th Floor, Washington, DC 20002–4250.

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

SUPPLEMENTARY INFORMATION: On June 25, 1995, in order to improve the accountability of recipients for their Corporation funds, and in response to concerns expressed during congressional hearings, the LSC Board of Directors (''Board'') adopted a resolution requiring Corporation staff to prepare a regulation specifying a time and recordkeeping system for implementation by LSC recipients. On September 8, 1995, the Board's Operations and Regulations Committee (''Committee'') held public hearings on proposed 45 CFR part 1635. After adopting several changes to the proposed rule, the Committee voted to publish the proposed rule in the Federal Register for notice and comment.

This proposed rule requires recipients to account for the time spent on all cases, matters and other activities by their attorneys and paralegals. These requirements apply whether the case, matter or activity is funded by the Corporation or by other sources. Such timekeeping is not now required under 45 C.F.R. part 1630.

Perhaps a quarter of current Corporation recipients already maintain time records that meet most or all of the conditions of the proposed rule. They are already able to avail themselves of the potential benefits of timekeeping to recipients, such as improved supervisory information, better cost estimation in bidding for other funds, enhanced control of priority implementation by their local boards of directors and more informative reports to grantors and the public.

The Corporation is mindful of the costs which this regulation will impose

on its recipients, especially those who currently do not have the capacity to maintain the time records required by this proposed rule. Timekeeping is time consuming, and record keeping systems have real costs. Nevertheless, despite the possibility that implementation of this proposed rule will reduce a recipient's LSC-funded capacity for client services by one- or two-percent or more, the Corporation has concluded that timekeeping by attorneys and paralegals will materially improve recipient accountability for Corporation funds.

If adopted, this part shall be effective January 1, 1996.

A section-by-section discussion of the proposed rule is provided below.

Section 1635.1 Purpose

This section sets out the purpose of the proposed rule: to improve recipient accountability for the use of funds provided by the Corporation. This section also sets out the manner in which the proposed rule achieves its stated purpose: by assuring supporting documentation of allocations of expenditures of Corporation funds, by enhancing recipients' ability to determine costs, and by increasing the information available to the Corporation for assuring recipient compliance.

Section 1635.2 Definitions

This section defines ''case'', ''matter'' and ''activity,'' the functions of a program for which time records are required to be kept. The definitions are formulated so as to cover all allocations of recipients. Some examples of ''matters'' are education of eligible clients and development of written materials explaining legal rights and responsibilities. ''Administrative and general'' is a catchall category within ''activity.'' It is designed to encompass everything that does not fall within cases or matters or fund-raising activities, and would include, for example, skills training and professional activities.

Section 1635.3 Timekeeping Requirement

This section sets out the timekeeping requirement. It is intended to require all recipients to account for the time spent on all cases, matters and other activities by their attorneys and paralegals, whether funded by the Corporation or by other sources. Recipients must account for one hundred percent of attorney and paralegal time spent in the course of their employment, even if the time is spent outside normal business hours. Allocation of costs based on time and other records continues to be governed by 45 C.F.R. part 1630, which requires a reasonable basis for allocations of expenses to all funds.

The Corporation does not prescribe either manual or automated timekeeping systems, nor specific report formats or contents. Each recipient will need to determine the appropriate matters and activities for which time will be kept, keeping in mind its particular service patterns. In order to assist recipients, the Corporation plans to make available this fall a manual of forms and operating systems already in use by some recipients.

Section 1635.4 Administrative Provisions

This section advises recipients of the Corporation's access to the time records required by this part. Since these records will be available for examination by auditors and representatives of the Corporation, they should be maintained in a manner consistent with the attorney-client privilege and all applicable rules of professional responsibility. As a practical matter, this may mean that client names should not appear in time records.

List of Subjects in 45 CFR Part 1635

Legal services, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, LSC proposes to amend 45 CFR chapter XVI by adding part 1635 as follows:

PART 1635—TIMEKEEPING REQUIREMENT

Sec.
1635.1 Purpose.
1635.2 Definitions.
1635.3 Timekeeping Requirement.
1635.4 Administrative Provisions.

Authority: 42 U.S.C. 2996e(b)(1)(A), 2996g(a), 2996g(b), 2996g(e).

§ 1635.1 Purpose.

This part is intended to improve recipient accountability for the use of funds provided by the Corporation by:

(a) assuring that allocations of expenditures of Corporation funds pursuant to 45 C.F.R. part 1630 are supported by accurate and contemporaneous records of the cases, matters and activities for which the funds have been expended;

(b) enhancing the ability of recipients to determine the cost of specific functions; and

(c) increasing the information available to the Corporation for assuring recipient compliance with federal law and Corporation rules and regulations.

§ 1635.2 Definitions.

As used in this part—

(a) ''Activity'' means all other actions of or by a recipient, including fund-raising and administrative and general, which are not cases or matters.

(b) ''Case'' means the provision of advice to representation of one or more clients.

(c) ''Matter'' means the provision of other program services that do not involve advice to or representation of one or more clients.

§ 1635.3 Timekeeping Requirement.

(a) All expenditures of funds for recipient actions are, by definition, for cases, matters or activities. The allocation of all expenditures must be carried out in accordance with 45 C.F.R. part 1630.

(b) Time spent by attorneys and paralegals must be documented by time records which record the amount of time spent on each case, matter or activity. Time records must be created contemporaneously and must account for time in increments not greater than one-quarter of an hour which aggregate to all of the efforts of the attorneys and paralegals for which compensation is paid.

§ 1635.4 Administrative Provisions.

Time records required by this section shall be available for examination by auditors and representatives of the Corporation, and should be maintained in a manner consistent with the attorney-client privilege and the rules of professional responsibility applicable in the local jurisdiction.

Dated: September 18, 1995.

Suzanne B. Glasow,

Senior Counsel for Operations & Regulations.

[FR Doc. 95–23489 Filed 9–20–95; 8:45 am]

BILLING CODE 7050–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CC Docket No. 91–35; FCC 95–374]

Operator Service Access and Payphone Compensation

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission adopted a Notice of Proposed Rulemaking (''Notice'') seeking comment on tentative proposals for implementing a per-call system of compensation for the largest operator services providers

(''OSPs''), in lieu of the current flat-rate compensation system. Under the Commission's current rules, certain OSPs pay competitive payphone owners (''PPOs'') a flat-rate of $6 per payphone per month for originating interstate access code calls. An ''access code'' is ''a sequence of numbers that, when dialed, connects the caller to the OSP associated with that sequence, as opposed to the OSP presubscribed to the originating line.'' In particular, this Notice seeks comment on how individual access calls could be tracked and the appropriate per-call compensation amount.

DATES: Comments must be received on or before October 10, 1995; replies must be received on or before October 31, 1995.

ADDRESSES: Comments and replies must be filed with the Office of the Secretary, Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554; one copy shall also be filed with the Commission's contractor, International Transcription Services, Inc. (ITS, Inc.) 2100 M Street, NW., Suite 140, Washington, DC 20037 (202–857–3800). The complete text of this Notice is available for inspection and copying during normal business hours in the FCC Reference Center, 1919 M Street, NW., Room 239, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Michael Carowitz, 202–418–0960, Enforcement Division, Common Carrier Bureau.

SUPPLEMENTARY INFORMATION:

Synopsis of Notice

1. Ability of IXCs to Track Interstate Access Code Calls

The Commission believes that tracking 1–800 and 1OXXX access code calls through the use of automatic number identification (ANI) and the special billing treatment ''07'' code would provide OSPs with a means of paying compensation to PPOs on a per-call basis. Because this solution to the problem of tracking access code calls builds on an OSP's existing capabilities, we believe that it would be relatively easy and inexpensive to administer for those OSPs that receive a large number of access code calls. The Commission notes that AT&T and Sprint have already agreed to meet their compensation obligations through this method.

According to data submitted by the American Public Communications Council (''APCC''), the volume of 1–950 access code calls that cannot be tracked directly does not appear to be so significant as to justify rejection of a per-call compensation mechanism. The Commission tentatively concludes that it would be reasonable to require OSPs that utilize 1–950 access to rely upon a usage-based surrogate to determine their per-call compensation obligations. The Commission also tentatively finds that such a surrogate could be based on the ratio of 1–950 access code calls to the total access code calls received by OSPs. The Commission tentatively concludes that the ratios set forth by APCC in its petition are appropriate for calculating the compensation obligations of those OSPs that utilize 1–950 access. The Commission encourages parties, particularly MCI and LDDS, to comment on this tentative conclusion and to submit data supporting alternative ratios. The Commission also tentatively concludes that the relatively minor percentage of competitive payphones in non-equal access areas, as estimated by APCC, which do not transmit the ANI required to track access phone calls, should be subject to status quo flat-rate compensation. The Commission invites parties to comment on the accuracy of APCC's estimates and to suggest alternative approaches for compensating PPOs for access code calls originating from non-equal access areas.

2. IXCs Required to Pay Per-Call Compensation

The Commission tentatively concludes that the largest OSPs should be required to pay compensation to PPOs on a per-call basis. The Commission notes that AT&T and Sprint have already begun paying per-call compensation. In the absence of a showing to the contrary, the Commission believes that the two other OSPs that currently have annual toll revenues exceeding $1 billion dollars should be able to pay compensation on a per-call basis without incurring significantly different administrative costs that those associated with the current per-phone mechanism. The Commission invites parties to comment on these tentative conclusions. The Commission also tentatively concludes that the flat-rate compensation obligations of the OSPs not meeting the annual revenue threshold should not change as a result of the implementation of per-call compensation for the largest OSPs. However, the Commission believes that such OSPs should be given the opportunity to pay compensation on a per-call basis, at their option. In addition, the Commission proposes to continue to monitor call-tracking capabilities within the industry for the purpose of moving in the future to a per-call compensation mechanism for all OSPs that receive access code calls.

3. Proposed Compensation Amount

The Commission established a range of reasonable compensation rates in the *Second Report and Order*, 57 FR 21038–01 (1992). The proposed rate of $.25 per call, identical to that negotiated by AT&T and APCC, is clearly within that range. The Commission sees no reason to reconsider at this juncture its conclusions about the reasonableness of possible compensation rates, unless the participants in this docket submit useful data that differ significantly from the information that the Commission previously examined in this proceeding. The Commission tentatively concludes that a per-call rate will lead to a more efficient compensation mechanism through which both PPOs and OSPs ultimately will benefit. In addition, consumers will benefit because the per-call rate will encourage PPOs to place their payphones in locations that are likely to generate the most calls. The parties are invited to comment on these tentative conclusions.

4. Compensable Access Code Calls

The definition of ''acess code'' set for in the Communications Act encompasses ''sequence[s] of numbers'' such as 1–800––COLLECT, 1–800–OPERATOR, and others that connect a caller to an OSP which is not presubscribed to the originating line. The Commission tentatively concludes that OSPs must pay per-call compensation for 1–800 or 1–950 access code calls, whether or not the dialing sequences were in use at the time the Commission adopted its previous orders in this docket. The Commission notes that AT&T has already agreed to pay APCC per-call compensation on the various 1–800 dialing sequences that allow callers to reach its operator services.

5. Functioning of Per-Call Compensation Mechanism

In the Second Report and Order, the Commission prescribed the existing direct-billing arrangement because it placed the burden of implementing the compensation mechanism on those parties that receive the benefits of access code calls—IXCs and PPOs. The Commission tentatively concludes that this direct-billing arrangement should be maintained with the simple addition of requiring each OSP to send back to each PPO a statement indicating the number of access code calls that it has received from each of that PPO's competitive payphones. As before, the Commission continues to leave the

specific details of the billing arrangement for the parties to determine. The Commission believes that this slight modification of the *status quo* most efficiently implements payments of per-call compensation by the largest OSPs.

6. Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. Section 601 *et seq.* (1981), the Commission has prepared a Regulatory Flexibility Analysis of the expected impact on small entities resulting from the policies and proposals set forth in the *Notice*. The full analysis is contained within the *Notice*. The Secretary shall send a copy of the *Notice* to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

7 Ex Parte Rules—Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda, provided they are disclosed as provided in Commission rules.

All interested may file comments on the per-call compensation issues by October 10, 1995, and reply comments by October 31, 1995. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of comments and reply comments. If participants want each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. The petition, comments, and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 230) of the Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554. Copies of the petition and any subsequently filed documents in this matter may be obtained from ITS, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857–3800.

Ordering Clauses

It is Ordered, pursuant to Sections 1, 4(i)–4(j), 201–205, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 201–205, 226, and 303(r), that a Further Notice of Proposed Rulemaking is Issued.

It is further ordered That the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures, if necessary, to provide for a fuller record and a more efficient proceeding.

List of Subjects in 47 CFR Part 64

Communications common carriers, Operator service access, Payphone compensation, Telephone.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 95–23406 Filed 9–20–95; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Chapter VI

[I.D. 091195A]

South Atlantic Fishery Management Council; Public Hearings

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

ACTION: Public hearings.

SUMMARY: The South Atlantic Fishery Management Council (SAFMC) will hold public hearings to solicit comments on management measures for a new Fishery Management Plan for the Golden Crab Fishery of the South Atlantic Region (FMP).

DATES: Written comments regarding the issues being discussed at the hearings will be accepted through October 19, 1995.

The hearings are scheduled as follows:

1. Tuesday, September 26, 1995, 7.00 p.m., Cocoa Beach, FL; 2. Wednesday, September 27, 1995, 7.00 p.m., Dania, FL; and 3. Thursday, September 28, 1995, 7.00 p.m., Key West, FL.

ADDRESSES: To send comments, and to request copies of public hearing documents, write to: Susan Buchanan, Public Information Officer, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407–4699. Copies of a revised draft FMP will be available to the public at the hearings.

The hearings will be held at the following locations:

1. Cocoa Beach—Holiday Inn, 1300 N. Atlantic Avenue, Cocoa Beach, FL 32931; telephone (407) 783–2271;

2. Dania—Sheraton Design Center Hotel, 1825 Griffin Road, Dania, FL 33004; telephone (305) 920–3500; and

3. Key West—Holiday Inn Beachside, 3841 N. Roosevelt Blvd., Key West, SC 29407–4699; telephone (305) 294–2571.

FOR FURTHER INFORMATION CONTACT: Susan Buchanan, (803) 571–4366; Fax: (803) 769–4520.

SUPPLEMENTARY INFORMATION: At its meeting of August 21–25, 1995, the SAFMC decided to make changes in its proposed golden crab management program, which will be specified in a revised draft FMP. The SAFMC has decided to hold additional public hearings in order to solicit public views on the revised management measures for inclusion in the FMP.

The FMP management unit is the population of golden crab occurring along the U.S. Atlantic coast from the east coast of Florida to the North Carolina/Virginia border. Other deep-water crabs, such as red crab and jonah crab, are included in the FMP for data collection purposes only; no management actions are planned for these species under the initial FMP. Although all three species of crab are harvested in the Gulf of Mexico and Mid-Atlantic/New England, it is believed that the populations are sufficiently separated from one another to be managed independently.

The following types of management measures for golden crab are under consideration by the SAFMC for inclusion in its final FMP:

(1) Definition of terms, including: Optimum yield, overfishing, and crustacean trap;

(2) Gear controls, including: Use of traps only and a limit on their size, requirements for trap escape gaps, degradable escape panels, use of rope only as trap main line, and requiring that crabs be landed whole;

(3) Measures to ensure conservation of the fishery, including: No retention of females;

(4) Establishment of the following zones in the golden crab fishery:

(A) Northern Zone—North of the Volusia/Flager Line (29° 25′ N. lat.) to the North Carolina/Virginia border;

(B) Mid Zone—29° 25′ to 25° N. lat.; and

(C) Southern Zone—South of 25° N. lat. to the boundary between the areas of jurisdiction of the SAFMC/Gulf of Mexico Fishery Management Council;

(5) Measures to limit access to the fishery. Criteria for access will be as follows: Apply an April 7, 1995, control

date to limit fishery access in the southern and mid-zones, and apply a date of September 1, 1995, as a criterion for limiting fishery access in the northern zone. Criteria for fishery access will be based on demonstrated landings from the Council's area of jurisdiction prior to the dates specified;

(6) Area restrictions, including limiting deployment of traps to depths of 900 ft (295 m) or greater in the northern zone and 700 ft (230 m) or greater in the middle and southern zones;

(7) Bait restrictions to protect snapper and grouper;

(8) Enforcement provisions, including: Vessel permits, and dealer permits;

(9) Collection of information requirements for science and research purposes, such as use of information from sales reports, and logbook requirements, and;

(10) Framework rulemaking procedures to provide administrative flexibility to change management measures in a timely manner.

The Council intends to finalize the FMP at its meeting in Wilmington, NC from October 23–27, 1995. The public will have an opportunity to comment at the full Council session before the Council takes final action to adopt the FMP's management measures. Once finalized, the FMP will be submitted to NMFS for review, approval and implementation. NMFS will provide for a 60-day public comment period on the FMP and a 45-day public comment period on the proposed implementing rule during its 110-day review period.

These hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office by September 21, 1995.

For special accommodations regarding the hearings, contact the Council (see **ADDRESSES**).

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

Dated: September 15, 1995.

Richard W. Surdi,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 95–23398 Filed 9–18–95; 12:52 pm]

BILLING CODE 3510–22–F

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50 CFR Part 638

[I.D. 091295A]

Coral and Coral Reefs off the Southern Atlantic States; Amendment 3

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

ACTION: Notice of availability of an amendment to a fishery management plan; request for comments.

SUMMARY: NMFS announces that the South Atlantic Fishery Management Council (Council) has submitted Amendment 3 to the Fishery Management Plan for Coral and Coral Reefs off the Southern Atlantic States (FMP) for review, approval, and implementation by NMFS. Written comments are requested from the public.

DATES: Written comments must be received on or before November 17, 1995.

ADDRESSES: Comments must be sent to the Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702.

Requests for copies of Amendment 3, which includes a regulatory impact review, a social impact assessment, and an environmental assessment, should be sent to the South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407–4699, telephone: 803–571–4366; FAX: 803–769–4520.

FOR FURTHER INFORMATION CONTACT: Georgia Cranmore, 813–570–5305.

SUPPLEMENTARY INFORMATION: The Magnuson Fishery Conservation and Management Act (Magnuson Act) requires that a council-prepared amendment to a FMP be submitted to NMFS for review and approval, disapproval, or partial disapproval. The Magnuson Act also requires that NMFS, upon receiving an amendment, immediately publish a document in the Federal Register stating that the amendment is available for public review and comment.

Amendment 3 proposes the following measures: Establish a live rock aquaculture permit system applicable to the exclusive economic zone off the southern Atlantic states (including a prohibition on chipping of aquacultured live rock); prohibit octocoral harvest north of Cape Canaveral, FL; and prohibit anchoring of fishing vessels in the Oculina Bank Habitat Area of Particular Concern.

Proposed regulations to implement Amendment 3 are scheduled for publication within 15 days.

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

Dated: September 15, 1995.

Richard W. Surdi,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 95–23399 Filed 9–18–95; 12:52 pm]

BILLING CODE 3510–22–F

Notices

Federal Register
Vol. 60, No. 183
Thursday, September 21, 1995

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Action Affecting Export Privileges; David Brownhill; Order Denying Permission To Apply for or Use Export Licenses

On October 6, 1993, David Brownhill (Brownhill) was convicted in the U.S. District Court for the Eastern District of New York of violating the International Emergency Economic Powers Act (50 U.S.C.A. 1701–1706 (1991)) (IEEPA). Specifically, Brownhill was convicted of knowingly and willfully attempting to export and causing to be exported, from the United States to Republic of South Africa, three polygraph machines and one MCM component part, without having first obtained the required validated export license.

Section 11(h) of the Export Administration Act of 1979, as amended (50 U.S.C.A. app. §§ 2401–2420 (1991, Supp. 1993, and Pub. L. 103–277, July 5, 1994)) (the Act),[1] provides that, at the discretion of the Secretary of Commerce,[2] no person convicted of violating the IEEPA, or certain other provisions of the United States Code, shall be eligible to apply for or use any export license issued pursuant to, or provided by, the Act or the Export Administration Regulations (currently codified at 15 CFR Parts 768–799 (1995)) (the Regulations) for a period of up to 10 years from the date of the conviction. In addition, any export license issued pursuant to the Act in which such a person had any interest at the time of conviction may be revoked.

Pursuant to Sections 770.15 and 772.1(g) of the Regulations, upon notification that a person has been convicted of violating the IEEPA, the Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, shall determine whether to deny that person permission to apply for or use any export license issued pursuant to, or provided by, the Act and the Regulations, and shall also determine whether to revoke any export license previously issued to such a person.

Having received notice of Brownhill's conviction for violating the IEEPA, and following consultations with the Director, Office of Export Enforcement, I have decided to deny Brownhill permission to apply for or use any export license, including any general license, issued pursuant to, or provided by, the Act and the Regulations, for a period of 10 years from the date of his conviction. The 10-year period ends on October 6, 2003. I have also decided to revoke all export licenses issued pursuant to the Act in which Brownhill had an interest at the time of his conviction.

Accordingly, it is hereby Ordered

I. All outstanding individual validated licenses in which Brownhill appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Brownhill's privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

II. Until October 6, 2003, David Brownhill, 13 Robin Road, Northcliff Ext. 12, Johannesburg, South Africa, hereby is denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction in the United States or abroad involving any commodity or technical data exported or to be exported from the United States, in whole or in part, and subject to the Regulations. Without limiting the generality of the foregoing, participation, either in the United States or abroad, shall include participation, directly or indirectly, in any manner or capacity: (i) As a party or as a representative of a party to any export license application submitted to the Department; (ii) in preparing or filing with the Department any export license application or request for reexport authorization, or any document to be submitted therewith; (iii) in obtaining from the Department or using any validated or general export license, reexport authorization or other export control document; (iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported or to be exported from the United States, and subject to the Regulations; and (v) in financing, forwarding, transporting, or other servicing of such commodities or technical data.

III. After notice and opportunity for comment as provided in Section 770.15(h) of the Regulations, any person, firm, corporation, or business organization related to Brownhill by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order.

IV. As provided in Section 787.12(a) of the Regulations, without prior disclosure of the facts to and specific authorization of the Office of Export Licensing, in consultation with the Office of Export Enforcement, no person may directly or indirectly, in any manner or capacity: (i) Apply for, obtain, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to an export or reexport of commodities or technical data by, to, or for another person then subject to an order revoking or denying his export privileges or then excluded from practice before the Bureau of Export Administration; or (ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate: (a) In any transaction which may involve any commodity or technical data exported or to be exported from the United States; (b) in any reexport thereof; or (c) in any other transaction which is subject to the Export Administration Regulations, if the person denied export privileges may

[1] The Act expired on August 20, 1994. Executive Order 12924 (59 FR 43437, August 23, 1994) continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. 1701–1706 (1991)).

[2] Pursuant to appropriate delegations of authority that are reflected in the Regulations, the Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, exercises the authority granted to the Secretary by Section 11(h) of the Act. Because of a recent Bureau of Export Administration reorganization, this responsibility now rests with the Director, Office of Exporter Services. Subsequent regulatory references herein to the ''Director, Office of Export Licensing,'' should be read as meaning ''Director, Office of Exporter Services.''

obtain any benefit or have any interest in, directly or indirectly, any of these transactions.

V. This Order is effective immediately and shall remain in effect until October 6, 2003.

VI. A copy of this Order shall be delivered to Brownhill. This Order shall be published in the Federal Register.

Dated: September 11, 1995.

Eileen M. Albanese,

Acting Director, Office of Export Services.

[FR Doc. 95–23361 Filed 9–20–95; 8:45 am]

BILLING CODE 3510–DT–M

Action Affecting Export Privileges; Edward A. Johnson; Order Denying Permission to Apply for or Use Export Licenses

On August 7, 1995, Edward A. Johnson (Johnson) was convicted in the U.S. District Court for the Southern District of Florida of violating section 38 of the Arms Export Control Act (22 U.S.C.A. 2778 (1990)) (the AECA), among other crimes. Specifically, Johnson was convicted on one count of causing the export of ordnance grade zirconium from the United States to Chile without obtaining the required license or written approval from the U.S. Department of State.

Section 11(h) of the Export Administration Act of 1979, as amended (50 U.S.C.A. app. 2401–2420 (1991, Supp. 1993, and Pub. L. No. 103–277, July 5, 1994)) (the Act),[1] provides that, at the discretion of the Secretary of Commerce,[2] no person convicted of violating the AECA, or certain other provisions of the United States Code, shall be eligible to apply for or use any export license issued pursuant to, or provided by, the Act or the Export Administration Regulations (currently codified at 15 C.F.R. Parts 768–799 (1995)) (the Regulations) for a period of up to 10 years from the date of the conviction. In addition, any export license issued pursuant to the Act in which such a person had any interest at the time of conviction may be revoked.

Pursuant to Sections 770.15 and 772.1(g) of the Regulations, upon notification that a person has been convicted of violating the AECA, the Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, shall determine whether to deny that person permission to apply for or use any export license issued pursuant to, or provided by, the Act and the Regulations, and shall also determine whether to revoke any export license previously issued to such a person.

Having received notice of Johnson's conviction for violating the AECA, and following consultations with the Director, Office of Export Enforcement, I have decided to deny Johnson permission to apply for or use any export license, including any general license, issued pursuant to, or provided by, the Act and the Regulations, for a period of 10 years from the date of his conviction. The 10-year period ends on August 7, 2005. I have also decided to revoke all export licenses issued pursuant to the Act in which Johnson had an interest at the time of his conviction.

Accordingly, it is hereby Ordered

I. All outstanding individual validated licenses in which Johnson appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Exporter Services for cancellation. Further, all of Johnson's privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

II. Until August 7, 2005, Edward A. Johnson, 1655 Ferguson Drive, N.W., Albany, Oregon 97321, hereby is denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction in the United States or abroad involving nay commodity or technical data exported or to be exported from the United States, in whole or in part, and subject to the Regulations. Without limiting the generality of the foregoing, participation, either in the United States or abroad, shall include participation, directly or indirectly, in any manner or capacity: (i) As a party or as a representative of a party to any export license application submitted to the Department; (ii) in preparing or filing with the Department any export license application or request for reexport authorization, or any document to be submitted therewith; (iii) in obtaining from the Department or using any validated or general export license, reexport authorization or other export control document; (iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported or to be exported from the United States, and subject to the Regulations; and (v) in financing, forwarding, transporting, or other servicing of such commodities or technical data.

III. After notice and opportunity for comment as provided in Section 770.15(h) of the Regulations, any person, firm, corporation, or business organization related to Johnson by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order.

IV. As provided in Section 787.12(a) of the Regulations, without prior disclosure of the facts to and specific authorization of the Office of Export Licensing, in consultation with the Office of Export Enforcement, no person may directly or indirectly, in any manner or capacity: (i) apply for, obtain, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to an export or reexport of commodities or technical data by, to, or for other person then subject to an order revoking or denying his export privileges or then excluded from practice before the Bureau of Export Administration; or (ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate: (a) In any transaction which may involve any commodity or technical data exported or to be exported from the United States; (b) in any reexport thereof; or (c) in any other transaction which is subject to the Export Administration Regulations, if the person denied export privileges may obtain any benefit or have any interest in, directly or indirectly, any of these transactions.

V. This Order is effective immediately and shall remain in effect until August 7, 2005.

VI. A copy of this Order shall be delivered to Johnson. This Order shall be published in the Federal Register.

Dated: September 11, 1995.

Eileen M. Albanese,

Acting Director, Office of Exporter Services.

[FR Doc. 95–23362 Filed 9–20–95; 8:45 am]

BILLING CODE 3510–DT–M

[1] The Act expired on August 20, 1994. Executive Order 12924 (59 FR 43437, August 23, 1994) continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. 1701–1706 (1991)).

[2] Pursuant to appropriate delegations of authority that are reflected in the Regulations, the Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, exercises the authority granted to the Secretary by Section 11(h) of the Act. Because of a recent Bureau of Export Administration reorganization, this responsibility now rests with the Director, Office of Exporter Services. Subsequent regulatory references herein to the ''Director, Office of Export Licensing,'' should be read as meaning ''Director, Office of Exporter Services.''

Action Affecting Export Privileges; George Rosen

Order Denying Permission To Apply For or Use Export Licenses

In the Matter of: George Rosen, 21–80 33rd Road, Long Island City, New York 11106.

On May 11, 1993, George Rosen (Rosen) was convicted in the U.S. District Court for the Southern District of New York of violating the Export Administration Act of 1979, as amended (50 U.S.C.A. app. §§ 2401–2420 (1991, Supp. 1993, and Pub. L. No. 103–277, July 5, 1994)) (the Act).[1] Specifically, Rosen was convicted on one count of knowingly and willfully exporting and causing to be exported, from the United States to Iran, a polygraph machine and specifically designed parts and accessories, without having first obtained the required validated export license, and with knowledge that the polygraph machine was destined for and would be used for the benefit of Iran, a country to which exports are controlled for foreign policy purposes.

Section 11(h) of the Act, provides that, at the discretion of the Secretary of Commerce,[2] no person convicted of violating the Act, or certain other provisions of the United States Code, shall be eligible to apply for or use any export license issued pursuant to, or provided by, the Act or the Export Administration Regulations (currently codified at 15 CFR parts 768–799 (1995)) (the Regulations) for a period of up to 10 years from the date of the conviction. In addition, any export license issued pursuant to the Act in which such a person had any interest at the time of conviction may be revoked.

Pursuant to Sections 770.15 and 772.1(g) of the Regulations, upon notification that a person has been convicted of violating the Act, the Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, shall determine whether to deny that person permission to apply for or use any export license issued pursuant to, or provided by, the Act and the Regulations, and shall also determine whether to revoke any export license previously issued to such a person.

Having received notice of Rosen's conviction of violating the Act, and following consultations with the Director, Office of Export Enforcement, I have decided to deny Rosen permission to apply for or use any export license, including any general license, issued pursuant to, or provided by, the Act and the Regulations, for a period of 10 years from the date of his conviction. The 10-year period ends on May 11, 2003. I have also decided to revoke all export licenses issued pursuant to the Act in which Rosen had an interest at the time of this conviction.

Accordingly, it is hereby Ordered

I

All outstanding individual validated licenses in which Rosen appears or participates, in any manner of capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Rosen's privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

II

Until May 11, 2003, George Rosen, 21–80 33rd Road, Long Island City, New York 11106, hereby is denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction in the United States or abroad involving any commodity or technical data exported or to be exported from the United States, in whole or in part, and subject to the Regulations. Without limiting the generality of the foregoing, participation, either in the United States of abroad, shall include participation, directly or indirectly, in any manner or capacity: (i) As a party or as a representative of a party to any export license application submitted to the Department; (ii) in preparing or filing with the Department any export license application or request for reexport authorization, or any document to be submitted therewith; (iii) in obtaining from the Department or using any validated or general export license, reexport authorization or other export control document; (iv) in carrying on negotiations with respect to, or in receiving, ordering buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported or to be exported from the United States, and subject to the Regulations; and (v) in financing, forwarding, transporting, or other servicing of such commodities or technical data.

III

After notice and opportunity for comment as provided in Section 770.15(h) of the Regulations, any person, firm, corporation, or business organization related to Rosen by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order.

IV

As provided in Section 787.12(a) of the Regulations, without prior disclosure of the facts to and specific authorization of the Office of Export Licensing, in consultation with the Office of Export Enforcement, no person may directly or indirectly, in any manner or capacity: (i) Apply for, obtain, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to an export or reexport of commodities or technical data by, to, or for another person then subject to an order revoking or denying his export privileges or then excluded from practice before the Bureau of Export Administration; or (ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate: (a) In any transaction which may involve any commodity or technical data exported or to be exported from the United States; (b) in any reexport thereof; or (c) in any other transaction which is subject to the Export Administration Regulations, if the person denied export privileges may obtain any benefit or have any interest in, directly or indirectly, any of these transactions.

V

This Order is effective immediately and shall remain in effect until May 11, 2003.

VI

A copy of this Order shall be delivered to Rosen. This Order shall be published in the Federal Register.

Dated: September 11, 1995.

Eileen M. Albanese,

Acting Director, Office of Exporter Services.

[FR Doc. 95–23357 Filed 9–20–95; 8:45 am]

BILLING CODE 3510–DT–M

[1] The Act expired on August 20, 1994. Executive Order 12924 (59 FR 43437, August 23, 1994) continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. 1701–1706 (1991)).

[2] Pursuant to appropriate delegations of authority that are reflected in the Regulations, the Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, exercises the authority granted to the Secretary by Section 11(h) of the Act. Because of a recent Bureau of Export Administration reorganization, this responsibility now rests with the Director, Office of Exporter Services. Subsequent regulatory references herein to the ''Director, Office of Export Licensing,'' should be read as meaning ''Director, Office of Exporter Services.''

Action Affecting Export Privileges; Philip J. Rosen; Order Denying Permission to Apply for or Use Export Licenses

On March 22, 1995, Philip J. Rosen (Rosen) was convicted in the U.S. District Court for the Eastern District of New York of violating the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701–1706 (1991)) (IEEPA). Specifically, Rosen was convicted on one count of knowingly and willfully attempting to export and causing to be exported from the United States to the Republic of South Africa, three polygraph machines, without having first obtained the required validated export license.

Section 11(h) of the Export Administration Act of 1979, as amended (50 U.S.C.A. app. §§ 2401–2420 (1991, Supp. 1993, and Pub. L. 103–277, July 5, 1994)) (the Act),[1] provides that, at the discretion of the Secretary of Commerce,[2] no person convicted of violating the IEEPA, or certain other provisions of the United States Code, shall be eligible to apply for or use any export license issued pursuant to, or provided by, the Act or the Export Administration Regulations (currently codified at 15 CFR Parts 768–799 (1995)) (the Regulations) for a period of up to 10 years from the date of the conviction. In addition, any export license issued pursuant to the Act in which such a person had any interest at the time of conviction may be revoked.

Pursuant to Section 770.15 and 772.1(g) of the Regulations, upon notification that a person has been convicted of violating the IEEPA, the Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, shall determine whether to deny that person permission to apply for or use any export license issued pursuant to, or provided by, the Act and the Regulations, and shall also determine whether to revoke any export license previously issued to such a person.

Having received notice of Rosen's conviction for violating the IEEPA, and following consultations with the Director, Office of Export Enforcement, I have decided to deny Rosen permission to apply for or use any export license, including any general license, issued pursuant to, or provided by, the Act and the Regulations, for a period of 10 years from the date of his conviction. The 10-year period ends on March 22, 2005. I have also decided to revoke all export licenses issued pursuant to the Act in which Rosen had an interest at the time of his conviction.

Accordingly, it is hereby Ordered

I. All outstanding individual validated licenses in which Rosen appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Rosen's privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

II. Until March 22, 2005, Philip J. Rosen, 432 Links Drive East, Oceanside, New York 11572, hereby is denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction in the United States or abroad involving any commodity or technical data exported or to be exported from the United States, in whole or in part, and subject to the Regulations. Without limiting the generality of the foregoing, participation, either in the United States or abroad, shall include participation, directly or indirectly, in any manner or capacity: (i) As a party or as a representative of a party to any export license application submitted to the Department; (ii) in preparing or filing with the Department any export license application or request for reexport authorization, or any document to be submitted therewith; (iii) in obtaining from the Department or using any validated or general export license, reexport authorization or other export control document; (iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported or to be exported from the United States, and subject to the Regulations; and (v) in financing, forwarding, transporting, or other servicing of such commodities or technical data.

III. After notice and opportunity for comment as provided in Section 770.15(h) of the Regulations, any person, firm, corporation, or business organization related to Rosen by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order.

IV. As provided in Section 787.12(a) of the Regulations, without prior disclosure of the facts to and specific authorization of the Office of Export Licensing, in consultation with the Office of Export Enforcement, no person may directly or indirectly, in any manner or capacity: (i) Apply for, obtain, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to an export or reexport of commodities or technical data by, to, or for another person then subject to an order revoking or denying his export privileges or then excluded from practice before the Bureau of Export Administration; or (ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate: (a) In any transaction which may involve any commodity or technical data exported or to be exported from the United States; (b) in any reexport thereof; or (c) in any other transaction which is subject to the Export Administration Regulations, if the person denied export privileges may obtain any benefit or have any interest in, directly or indirectly, any of these transactions.

V. This Order is effective immediately and shall remain in effect until March 22, 2005.

VI. A copy of this Order shall be delivered to Rosen. This Order shall be published in the Federal Register.

Dated: September 11, 1995.

Eileen M. Albanese,

Acting Director, Office of Exporter Services.

[FR Doc. 95–23364 Filed 9–20–95; 8:45 am]

BILLING CODE 3510–DT–M

[1] The Act expired on August 20, 1994. Executive Order 12924 (59 FR 43437, August 23, 1994) continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701–1706 (1991)).

[2] Pursuant to appropriate delegations of authority that are reflected in the Regulations, the Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, exercises the authority granted to the Secretary by Section 11(h) of the Act. Because of a recent Bureau of Export Administration reorganization, this responsibility now rests with the Director, Office of Exporter Services. Subsequent regulatory references herein to the ''Director, Office of Export Licensing,'' should be read as meaning ''Director, Office of Exporter Services.''

Action Affecting Export Privileges; Swissco Management Group, Inc.; Order Denying Permission To Apply for or Use Export Licenses

On August 7, 1995, Swissco Management Group, Inc. (Swissco) was convicted in the U.S. District Court for the Southern District of Florida of violating the Export Administration Act of 1979, as amended (50 U.S.C.A. app. §§ 2401–2420 (1991, Supp. 1993, and Pub. L. No. 103–377, July 5, 1994)) (the Act),[1] among other crimes. Specifically,

[1] The Act expired on August 20, 1994. Executive Order 12924 (59 FR 43437, August 23, 1994) continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (1991)).

Swissco was convicted on one count of exporting zirconium from the United States to Chile in violation of the terms of a U.S. Department of Commerce export license.

Section 11(h) of the Act, provides that, at the discretion of the Secretary of Commerce,[2] no person convicted of violating the Act, or certain other provisions of the United States Code, shall be eligible to apply for or use any export license issued pursuant to, or provided by, the Act or the Export Administration Regulations (currently codified at 15 CFR Parts 768–799 (1995)) (the Regulations) for a period of up to 10 years from the date of the conviction. In addition, any export license issued pursuant to the Act in which such a person had any interest at the time of conviction may be revoked.

Pursuant to sections 770.15 and 772.1(g) of the Regulations, upon notification that a person has been convicted of violating the Act, the Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, shall determine whether to deny that person permission to apply for or use any export license issued pursuant to, or provided by, the Act and the Regulations, and shall also determine whether to revoke any export license previously issued to such a person.

Having received notice of Swissco's conviction for violating the Act, and following consultations with the Director, Office of Export Enforcement, I have decided to deny Swissco permission to apply for or use any export license, including any general license, issued pursuant to, or provided by, the Act and the Regulations, for a period of 10 years from the date of its conviction. The 10-year period ends on August 7, 2005. I have also decided to revoke all export licenses issued pursuant to the Act in which Swissco had an interest at the time of its conviction.

Accordingly, it is hereby Ordered

I. All outstanding individual validated licenses in which Swissco appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Swissco's privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

II. Until August 7, 2005, Swissco Management Group, Inc., 15485 Eagle Nest Lane, #210, Miami Lakes, Florida 33014, hereby is denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction in the United States or abroad involving any commodity or technical data exported or to be exported from the United States, in whole or in part, and subject to the Regulations. Without limiting the generality of the foregoing, participation, either in the United States or abroad, shall include participation, directly or indirectly, in any manner or capacity: (i) As a party or as a representative of a party to any export license application submitted to the Department; (ii) in preparing or filing with the Department any export license application or request for reexport authorization, or any document to be submitted therewith; (iii) in obtaining from the Department or using any validated or general export license, reexport authorization or other export control document; (iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported or to be exported from the United States, and subject to the Regulations; and (v) in financing, forwarding, transporting, or other servicing or such commodities or technical data.

III. After notice and opportunity for comment as provided in Section 770.15(h) of the Regulations, any person, firm, corporation, or business organization related to Swissco by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order.

IV. As provided in Section 787.12(a) of the Regulations, without prior disclosure of the facts to and specific authorization of the Office of Export Licensing, in consultation with the Office of Export Enforcement, no person may directly or indirectly, in any manner or capacity: (i) Apply for, obtain, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to an export or reexport of commodities or technical data by, to, or for another person then subject to an order revoking or denying its export privileges or then excluded from practice before the Bureau of Export Administration; or (ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate: (a) In any transaction which may involve any commodity or technical data exported or to be exported from the United States; (b) in any reexport thereof; or (c) in any other transaction which is subject to the Export Administration Regulations, if the person denied export privileges may obtain any benefit or have any interest in, directly or indirectly, any of these transactions.

V. This Order is effective immediately and shall remain in effect until August 7, 2005.

VI. A copy of this Order shall be delivered to Swissco. This Order shall be published in the Federal Register.

Dated: September 11, 1995.

Eileen M. Albanese,

Acting Director, Office of Exporter Services.

[FR Doc. 95–23363 Filed 9–20–95; 8:45 am]

BILLING CODE 3510–DT–M

[2] Pursuant to appropriate delegations of authority that are reflected in the Regulations, the Director, Office of Export Licensing, in consultation with the Director, Office of Export Enforcement, exercises the authority granted to the Secretary by Section 11(h) of the Act. Because of a recent Bureau of Export Administration reorganization, this responsibility now rests with the Director, Office of Exporter Services. Subsequent regulatory references herein to the ''Director, Office of Export Licensing,'' should be read as meaning ''Director, Office of Exporter Services.''

Foreign-Trade Zones Board

Docket A(32b1)–17–95

Foreign-Trade Zone 84—Houston, TX, Subzone 84J, Shell Oil Company (Oil Refinery Complex); Request for Modification of Restrictions

A request has been submitted to the Foreign-Trade Zones Board (the Board) by the Port of Houston Authority, grantee of FTZ 84, pursuant to § 400.32(b)(1) of the Board's regulations, for modification of the restrictions in FTZ Board Order 669 (58 FR 68116, 12/23/93) authorizing Subzone 84J at the crude oil refinery complex of Shell Oil Company (Shell) in Harris County, Texas. The request was formally filed on September 13, 1995.

The Board Order in question was issued subject to certain standard restrictions, including one that required the election of privileged foreign status on incoming foreign merchandise. The zone grantee has requested that the latter restriction be modified so that Shell would have the option available under the FTZ Act to choose non-privileged foreign (NPF) status on foreign refinery inputs used to produce certain petrochemical feedstocks and by-products, including the following: Benzene, toluene, xylenes, other hydrocarbon mixtures, distillates/residual fuel oils, kerosene, naphthas, liquified petroleum gas, ethane, methane, propane, butane, ethylene,

propylene, butylene, butadiene, petroleum coke, asphalt, sulfur, and sulfuric acid.

The request cites the FTZ Board's recent decision in the Amoco, Texas City, Texas case (Board Order 731, 60 FR 13118, 3/10/95) which authorized subzone status with the NPF option noted above. In the Amoco case, the Board concluded that the restriction that precluded this NPF option was not needed under current oil refinery industry circumstances.

Public comment on the proposal is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is October 23, 1995.

A copy of the application and accompanying exhibits will be available for public inspection at the following location: Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Room 3716, 14th & Pennsylvania Avenue, NW, Washington, DC 20230.

Dated: September 15, 1995.

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 95–23486 Filed 9–20–95; 8:45 am]

BILLING CODE 3510–DS–P

A–538–802

Shop Towels From Bangladesh; Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Review.

SUMMARY: On December 28, 1994, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order on shop towels from Bangladesh. The review covers six producers and/or exporters of this merchandise to the United States and the period September 21, 1991, through February 28, 1993.

We gave interested parties an opportunity to comment on the preliminary results. Based on our analysis of the comments received and the correction of certain clerical errors, we have made certain changes for the final results. The review indicates the existence of dumping margins for certain firms during the review period.

EFFECTIVE DATE: September 21, 1995.

FOR FURTHER INFORMATION CONTACT: Davina Hashmi or Michael Rill, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 482–4733.

SUPPLEMENTARY INFORMATION:

Background

On March 29, 1993, the Department of Commerce (the Department) published in the Federal Register (57 FR 9688) the antidumping duty order on shop towels from Bangladesh. Milliken & Company (Milliken), the petitioner, requested in accordance with 19 C.F.R. 353.22 that we conduct an administrative review of the period September 12, 1991, through February 28, 1993. We published a notice of initiation of administrative review for this period on May 6, 1993 (58 FR 26960). On December 28, 1994, we published the preliminary results of the administrative review (59 FR 66910).

The Department has now completed the administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute and to the Department's regulations are references the provisions as they existed on December 31, 1994.

Scope of Review

The product covered by this administrative review is shop towels. Shop towels are absorbent industrial wiping cloths made from a loosely woven fabric. The fabric may be either 100 percent cotton or a blend of materials. Shop towels are currently classifiable under item numbers 6307.10.2005 and 6307.10.2015 of the Harmonized Tariff Schedule (HTS). Although HTS subheadings are provided for convenience and customs purposes, our written description of this proceeding remains dispositive.

The administrative review covers six firms for the period September 21, 1991, through February 28, 1993: Eagle Star Mills, Ltd. (Eagle Star); Greyfab (Bangladesh) Ltd. (Greyfab); Hashem International (Hashem); Khaled Textile Cotton Mills, Ltd. (Khaled); Shabnam Textiles (Shabnam); and Sonar Cotton Mills (BD), Ltd. (Sonar).

Analysis of Comments Received

The Department gave interested parties the opportunity to comment on the preliminary results. At the request of both respondents and petitioner, we held a hearing on February 13, 1995. We received case and rebuttal briefs from the petitioner and respondents Greyfab, Hashem, Khaled, Shabnam, and Sonar.

General Comments

Comment 1: Respondents Greyfab, Khaled and Sonar contend that the Department should not adjust their constructed value (CV) by calculating an imputed interest expense on the loans made by directors to their companies during the initial stages of production. Respondents argue that such interest-free loans represent a form of equity infusion and are the typical form of capitalization in the Bangladesh shop towel industry for companies which do not finance operations through bank loans. Respondents note the use of this form of capitalization by three respondents as evidence of industry practice in Bangladesh. Respondents claim that the actual interest expense recorded on their financial statements should be used for CV, since this reflects the actual costs the companies incurred. Further, respondents contend that the Department did not have statutory authority to apply the ''best evidence available'' provision for these related party transactions to the general expenses, which include interest expenses. Moreover, respondents maintain that, in calculating CV, the Department has not established a precedent for imputing interest expense on interest-free loans.

Finally, respondents assert that, if the Department considers it appropriate to impute interest expense on the director loans, it should not rely on the short- or medium-term interest rate used to compute CV for the preliminary results of review. Rather, respondents contend that, because the loans do not have fixed repayment schedules, they are designed to meet the three companies' long-term financing needs. As such, respondents argue that the Department should impute interest expense based on an interest rate charged on a long-term bank loan to one of the other two remaining respondents. According to Greyfab, Khaled and Sonar, this bank loan rate, charged by an unrelated party, represents an appropriate interest rate.

Petitioner argues that the Department properly imputed interest expense on interest-free loans from related parties and that this is consistent both with related party transaction provisions in the statute and with the Department's normal practice. Petitioner also states that the director loans are not equity capital, as claimed by the respondents. In petitioner's view, the CV the Department uses in its margin

calculations should reflect the fair market cost of this type of loan. Petitioner further asserts that, contrary to respondents' claim, director loans are not the customary form of financing shop towel production in Bangladesh, since two of the five respondents do not have such loans, and that other alternative forms of financing, including bank loans, are normally used. Petitioner contends that the Department used an appropriate short- to medium-term interest rate for the preliminary results. Petitioner argues that the absence of a specified repayment schedule and the use of funds from the loans for start-up costs support the Department's treatment of these loans as short- to medium-term in nature. Petitioner asserts that the Department should use the same interest rate for its final results.

DOC Position: We agree with petitioner. The director loans are identified on the respondents' financial statements as ''Loan from Director'' and ''Director's Loan.'' Additionally, there is no evidence on the record to support respondents' contention that these amounts should be treated as equity capital and, in fact, equity accounts appear elsewhere on their financial statements. Since we have no basis to reclassify these amounts to equity, we consider them to be loans, consistent with respondents' financial statement treatment. See Final Determination of Sales at Less than Fair Value: Fresh Cut Roses from Ecuador, 60 FR 7019, 7039 (February 6, 1995).

We disagree with respondents' assertion that we do not have the statutory authority to apply the ''best evidence available'' provision to determine the interest rate applicable to these related party transactions. Section 773(e)(2) of the statute permits the Department to use best evidence available to assign an appropriate amount to any element of value, including interest expense, which it believes is not fairly valued. As demonstrated in Final Determination of Sales at Less than Fair Value: Aramid Fiber Formed of Poly-Phenylene Terephthalamide From the Netherlands, 59 FR 23684, 23689 (May 6, 1994), our practice is to impute interest expense on transactions when the rate charged by a related party lender does not reflect a fair market rate. In this case, we do not consider the respondents' interest-free related party loans to be reflective of the fair market borrowing rate in Bangladesh since such loans typically involve some cost to the borrower. Therefore, we imputed interest expense on these loans using a rate of 15 percent.

We obtained the 15-percent interest rate from the November 1993 version of International Financial Statistics, published by the International Monetary Fund (IMF). The publication describes the rate as representative of the amount Bangladesh banks charge ''usually to meet the short- and medium-term financing needs of the private sector'' (as shown on page XVIII). Despite their claim that the director loans should be classified as long-term liabilities, respondents only point to the absence of a fixed repayment schedule in support of their claim. We disagree with respondents; in this instance, the absence of a fixed repayment schedule is, in fact, indicative of a short-term demand note because the lender can demand payment on the principal at any time. In addition, there is evidence on the record supporting the position that these amounts should be considered current liabilities, including the significant loan repayments made by Greyfab and Sonar and the statement by respondents that the amounts are refundable when funds become available from company operations.

Finally, we do not believe the alternative interest rate suggested by the respondents is appropriate, as the bank loan to which they refer occurred after the period of review (POR) and the interest rate is adjustable. Accordingly, we consider the IMF rate for short- and medium-term financing to be a reasonable approximation of the fair market borrowing rate in Bangladesh for similar loans.

Comment 2: Khaled claims that the Department's calculation of interest expense on director loans for the preliminary results of review was incorrect. Khaled notes that the Department multiplied the amount of the director loan by the imputed interest rate to obtain a twelve-month interest expense figure and then divided this amount by the cost of goods sold figure from Khaled's audited financial statements to calculate the interest factor. Khaled argues that this is inappropriate because the financial statements cover an eight-month period and claims that the Department should adjust the interest expense figure to reflect an eight-month period.

Petitioner contends that the Department's calculation of interest expense for Khaled is understated. Petitioner states that the Department should use a twenty-month period to calculate interest expense because the director loans were outstanding during a twelve month period in which operations were suspended, plus the eight months immediately following, which were covered by Khaled's financial statements.

DOC Position: Since we have determined that it is appropriate to impute interest on the director loans, we must consider the proper period over which to calculate the imputed interest. It is well-established Department practice to calculate a net interest expense factor based on a respondent's full-year audited financial statements for the year that most closely corresponds to the POR. See, e.g., Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand, 60 FR 29553, 29569 (June 5, 1995). Khaled's financial statements include a statement from its auditors expressing an opinion on the profit and loss statement ''for the year ended on that date'' (February 28, 1993). However, the heading of the profit and loss statement suggests that it covers a period from July 1992 to February 1993. Due to the conflicting evidence in Khaled's financial statements, we were unable to determine with certainty whether the profit and loss statement does, in fact, cover only eight months. Therefore, in accordance with our practice, we computed the interest expense factor by dividing the full year's imputed interest expense by the cost of goods sold figure listed in the respondent's financial statement.

Comment 3: Sonar disagrees with the Department's decision to reject portions of its brief regarding the prior year adjustments it reported on its financial statements for fiscal years 1991, 1992, and 1993. Sonar states that its submission containing these explanations does not represent new factual information, as determined by the Department. Rather, Sonar contends, the submission merely explains and reorganizes data it submitted earlier in the review. In addition, Sonar states that the Department should not apply best information available (BIA) to the company's general expenses because of the unexplained prior year adjustment amounts. Sonar notes that it has substantially cooperated with the Department. Thus, in Sonar's view, it would be unjust for the Department to apply an adverse methodology due to the company's failure to provide a complete response to one question of a supplemental questionnaire.

Sonar asserts that if the Department does use BIA, then it should select a neutral surrogate amount for selling, general and administrative (SG&A) expenses rather than the BIA methodology which the Department used in the preliminary results of review. Sonar claims that the approach the Department used for the preliminary

results is inconsistent, since the Department treated negative and positive prior year adjustments in the same manner, *i.e.*, by adding the adjustment amounts to the reported SG&A expenses. Sonar also claims that this methodology is arbitrary in that it results in SG&A figures which are many times as high as those shown for other companies in the industry.

Petitioner asserts that, because Sonar submitted its explanation of the prior year adjustments long after the Department's due date, the Department's treatment of these adjustments using BIA is justified. Petitioner views the respondent's failure to provide the necessary information regarding the prior year adjustments as uncooperative and states that the Department should reject Sonar's submitted costs and, citing *National Steel Corporation et al.* v. *United States*, Slip. Op. 94–194 (CIT December 13, 1994), argues that the Department should instead apply a first-tier total BIA margin of 42.31 percent. Petitioner further argues that even if the Department does not use first-tier total BIA to establish Sonar's dumping margin, then the Department should apply an adverse partial BIA because Sonar omitted information that was not beyond its control and which affects a large portion of its total sales during this review period. Finally, petitioner suggests that even if the Department considers its use of BIA inappropriate, it should still include the prior year adjustments in CV as it is within the Department's discretion to do so.

DOC Position: We disagree with Sonar that the Department should accept its untimely submission of information explaining the prior year adjustments. Sonar submitted this information of the prior year adjustments on the record well beyond the due date (see letter from Director, Office of Antidumping Compliance, addressed to Sonar Cotton Mills (BD), April 18, 1995).

We also disagree with petitioner that the Department should apply a first-tier total BIA. Because Sonar cooperated in all other aspects of the review, application of total BIA is inappropriate. However, because we did not receive a timely explanation of these prior year adjustment amounts, we have applied a partial BIA approach in our treatment of them for purposes of calculating CV. As BIA, we have included the negative ''expense'' prior year adjustment amounts and we have excluded the positive ''income'' prior year adjustment amount.

Comment 4: Greyfab argues that the Department erroneously double-counted the treatment of inspection fees on U.S. sales by subtracting these fees from United States price (USP) while adding these fees to the foreign market value (FMV). Respondents request that the Department change its calculations to ensure that its sales reflect the adjustment correctly.

Department's Position: We disagree with respondents. The Department made the correct calculation for the circumstance-of-sale adjustment by subtracting inspection fees from only USP. We did not make an adjustment to FMV for inspection fees in our preliminary results. Therefore, no change to our calculations is necessary.

Comment 5: Hashem contends that the Department used the incorrect invoice price for two shipments. Hashem states that it submitted the correct invoice price for both shipments to the Department in the supplemental questionnaire response dated April 1, 1994. However, Hashem asserts the Department neglected to use this information in the preliminary calculations.

Department's Position: We agree with Hashem. We have made the necessary changes for these final results.

Comment 6: Hashem argues that for the sales it made to a certain customer, the Department erroneously used the amounts that Hashem reported as ''total net weight (lbs)'' instead of using the amounts reported as ''total net weight (kgs)''. Respondent asserts that the Department should use the value for ''total net weight (kgs)'' in its calculation of USP because, in its view, to do otherwise significantly overstates the ''total net weight (kgs)'' which has a significant impact on the Department's calculation of USP. In addition, respondent asserts that the Department used the incorrect values in the ''total net weight (kgs)'' column for three observations in the calculations of USP. The respondent states that for one of the observations, the Department erroneously divided the weight (kgs/bale) by the conversion factor used to convert pounds to kilograms, when none of the other figures in the same column within the spreadsheet were manipulated by the conversion factor. The respondent states that in the case of the other two observations, the figures used by the Department in the ''total net weight column'' were not the values it reported for these specific observations, but rather, were values taken from different observations in Hashem's reported spreadsheet.

Department's Position: We agree with the respondent and have made the necessary corrections for these final results.

Comment 7: Petitioner argues that the Department should add an imputed interest expense to Sonar's CV for a bank loan which appears on the company's financial statements. Petitioner notes that even though Sonar did not make any interest payments on this bank loan, Sonar has incurred a period obligation to pay interest. Petitioner suggests that Sonar's attempt to obtain a waiver is evidence that there is an obligation to pay interest it incurred during the period. According to petitioner, the Department should include this obligation in Sonar's CV and impute interest at the prevailing lending rate of 15 percent.

Sonar claims that the Department has no authority to disregard actual general expenses in transactions between unrelated parties in calculating CV. Sonar also notes that a reserve has not been recorded on its audited financial statements for any potential interest obligation and that there is no evidence on the record that it will pay interest to the bank which made the loan. Sonar argues that any interest which it might pay to the bank in the future is currently a potential contingent liability and claims that the Department's practice does not support adjusting actual expenses under such circumstances.

DOC Position: We agree with petitioner. Although Sonar did not reserve for interest related to the bank loan in its financial statements, we believe there is a basis for imputing interest on the loan and adding this expense to the company's CV. The Department's practice is to rely on a respondent's books and records prepared in accordance with its home country GAAP unless those accounting principles do not reasonably reflect costs associated with the production of the subject merchandise. See, e.g., Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand, 60 FR 29553, 29560 (June 5, 1995). In this instance, respondent's accounting principles do not reasonably reflect costs. Although Sonar has provided audited financial statements which do not reflect an interest accrual, there is no evidence to support the position that the company does not have an obligation to pay interest on its bank loan. We consider zero interest expense on a loan an unreasonable cost of borrowing. The interest expense associated with this bank loan should properly be reflected in the cost of producing the subject merchandise. Therefore, we imputed interest expense on this loan and adjusted CV accordingly.

Comment 8: Petitioner argues that the Department should adjust Greyfab's CV

to include the balance of ''Liabilities for Other Finance'', which appears on the respondent's June 30, 1993, balance sheet. While acknowledging that this amount concerns expenses incurred for the 1991 hurricane that damaged the company's factory building and production facilities, petitioner argues that the Department should include this expense in CV. Petitioner asserts that there is no basis to exclude such repair and shut-down expenses from CV.

Greyfab claims that the Department should not include the Liabilities for Other Finance in CV since this amount represents extraordinary, non-operating expenses. According to Greyfab, the Department's normal practice is to exclude such extraordinary losses which are not related solely to current operations.

DOC Position: We disagree with petitioner. Petitioner refers to ''Liabilities for Other Finance'', which is a balance sheet item. The balance sheet reports a company's assets and liabilities as of a certain date, and does not necessarily reflect expenses incurred during the POR. We are satisfied that Greyfab reconciled all costs reported on its financial statements to its submitted costs. In addition, while this liability reflects an expense which was recognized in either the current year or a past year, there is no evidence on the record to indicate that Greyfab has excluded POR repair and shut-down expenses related to this liability. Accordingly, we have not adjusted CV for the ''Liabilities for Other Finance'' amount Greyfab reported on its balance sheet.

Comment 9: Petitioner argues that the Department should adjust Khaled's CV to include expenses related to a twelve-month suspension of company operations. Petitioner claims that Khaled's reported expenses for this event are inadequate and the Department should substitute a BIA approach to calculate the actual costs incurred by the respondent. Petitioner suggests that the temporary suspension of operations should have resulted in the recording of significant expenses, including depreciation of idle plant and equipment, shut-down costs, start-up costs, inventory disposal expenses, and payments to officers and employees. According to petitioner, Khaled did not account for any of these expenses in its submissions.

Khaled argues that petitioner has no basis for suggesting that its reported costs are inadequate and claims that the record provides no evidence to suggest that Khaled incurred any expenses beyond those which it submitted in its response. Khaled argues that all costs have been properly reported in its audited financial statements and suggests that there is no support for the Department to apply BIA.

DOC Position: We agree with the respondent. We are satisfied that Khaled reconciled all costs reported on its financial statements to its submitted costs. Khaled and its counsel have certified to the Department that its submitted costs are accurate. See Antifriction Bearings (other than Tapered Roller Bearings) and Parts Thereof from France, Final Results of Antidumping Duty Administrative Review, 57 FR 28360 (1992). From a review of the record, there is no basis to conclude that Khaled has not reported all costs related to its twelve-month suspension of operations. Therefore, we have not adjusted CV as petitioner suggests.

Comment 10: Petitioner claims that the Department should use BIA to determine the cost associated with operating the weavers villages (employee housing) that Khaled and Shabnam have established. According to petitioner, the record indicates that Khaled and Shabnam have not fully accounted for all expenses relating to these villages in their cost submissions. Petitioner suggests that the fixed asset schedules Khaled and Shabnam submitted do not appear to cover all assets and expenditures related to the establishment and maintenance of the weavers villages. Specifically, petitioner argues that the reported costs do not reflect each company's cost of providing roads, repairs and maintenance, security and health services, utilities, telephones and entertainment. Additionally, petitioner claims that the Department should adjust respondents' labor costs to reflect the provision of company housing to employees. As BIA, petitioner suggests that the Department use World Bank statistics which provide U.S. housing costs as a percentage of total personal consumption expenditures.

Khaled and Shabnam claim that petitioner has no basis for arguing that they have not properly accounted for the costs related to the weavers' housing. They claim that they included amounts in their submissions for repairs and maintenance, entertainment, and miscellaneous expenses, and that their depreciation schedules include amounts for colony and road development. Khaled and Shabnam also indicate that the workers are responsible for maintenance of their own homes. Respondents argue that the BIA methodology petitioner proposes is unreasonable and claim that there is no rational relationship between housing costs as a percentage of total personal consumption expenditures in the United States and the cost of company housing in Bangladesh.

DOC Position: We agree with the respondents. There is no reason for the Department to apply a BIA rate to adjust respondents' labor costs to reflect the provision of company housing to employees. From a review of the record, there is no basis to conclude that Khaled and Shabnam have not reported all costs related to the establishment and maintenance of the weaver villages. In addition, respondents and their counsel certified the accuracy of the respondents' responses. See Antifriction Bearings (other than Tapered Roller Bearings) and Parts Thereof from France, Final Results of Antidumping Duty Administrative Review, 57 FR 28360 (1992). We are therefore satisfied that Khaled and Shabnam reported all costs.

Comment 11: Sonar claims that the Department made a clerical error in its calculation of SG&A for the preliminary results of review. Sonar states that there is an incorrect formula in the Department's calculations of CV for each product. Sonar requests that the Department review its calculation of SG&A and make the appropriate corrections.

DOC Position: We agree with Sonar and have corrected this error in our SG&A calculation for the final results of review.

Final Results of the Review

As a result of the comments received, we have revised our final results and determine that the following margins exist for the period September 21, 1991 through February 28,1993:

Manufacturer/exporter	Margin (percent)
Eagle Star	42.31
Greyfab	0.00
Hashem	0.01
Khaled	9.61
Shabnam	0.15
Sonar	8.30

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit requirements will be effective 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)(1) of the Tariff Act: (1) The cash deposit rates for Eagle Star, Greyfab, Hashem, Khaled, Shabnam, and Sonar 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) the cash deposit rate for all other manufacturers or exporters will be 4.60 percent, the ''all others'' rate from the LTFV investigation.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d)(1). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: September 13, 1995.

Susan G. Esserman,

Assistant Secretary for Import Administration.

[FR Doc. 95–23487 Filed 9–20–95; 8:45 am]

BILLING CODE 3510–DS–P

[A–538–802]

Shop Towels From Bangladesh; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to a request from the petitioner, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on shop towels from Bangladesh. The review covers 6 manufacturers/exporters of the subject merchandise to the United States. The period of review (POR) is March 1, 1993, through February 28, 1994.

We have preliminarily determined that one exporter made no shipments during the POR and that the use of best information available (BIA) is appropriate for two exporters. We have also preliminarily determined that sales by the remaining exporters have been made below the foreign market value (FMV). If these preliminary results are adopted in our final results of the administrative review, we will instruct U.S. Customs to assess antidumping duties equal to the difference between the United States price (USP) and the FMV.

Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: September 21 ,1995.

FOR FURTHER INFORMATION CONTACT: Matthew Rosenbaum, Davina Hashmi or Michael Rill, Office of Antidumping Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, Washington, DC 20230; telephone: (202) 482–4733.

SUPPLEMENTARY INFORMATION:

Background

On March 20, 1992, the Department published in the Federal Register (57 FR 9688) the antidumping duty order on shop towels from Bangladesh. On March 4, 1994, the Department published a notice of ''Opportunity to Request an Administrative Review'' (59 FR 10368) of this antidumping duty order for the period March 1, 1993, through February 28, 1994. On March 15, 1994, the petitioner, Milliken & Company, requested an administrative review for six manufacturers/exporters of shop towels from Bangladesh.

We published a notice of initiation of the review on April 15, 1994 (59 FR 18099). The Department is now conducting this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute and to the Department's regulations are references to the provisions as they existed on December 31, 1994.

Scope of Review

The product covered by this administrative review is shop towels. Shop towels are absorbent industrial wiping cloths made from a loosely woven fabric. The fabric may be either 100 percent cotton or a blend of materials. Shop towels are currently classifiable under item numbers 6307.10.2005 and 6307.10.2015 of the Harmonized Tariff Schedules (HTS). Although HTS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding remains dispositive.

United States Price

In calculating USP, the Department used purchase price as defined in section 772(b) of the Act, because the subject merchandise was sold to unrelated U.S. purchasers prior to importation and the exporter's sales price (ESP) methodology was not indicated by other circumstances.

Purchase price was based on ex-factory, f.o.b., c.i.f., or c&f prices to unrelated purchasers in the United States. We made adjustments, where applicable, for ocean freight, insurance, and forwarding charges in accordance with section 772(d)(2) of the Act.

No other adjustments were claimed or allowed.

Foreign Market Value

We calculated FMV based on constructed value (CV) in accordance with section 773(e) of the Act, because none of the respondents sold such or similar merchandise in the home market or in any third-country market during the POR. The CV includes the cost of materials and fabrication of the merchandise exported to the United States, plus general expenses, profit and packing. To calculate CV we used: (1) Actual general expenses, or the statutory minimum of 10 percent of materials and fabrication, whichever was greater; (2) profit, as calculated by using the statutory minimum of 8 percent of materials, fabrication costs and general expenses; and (3) packing costs for

merchandise exported to the United States. Because the only general expenses incurred were those incurred for U.S. sales, we used these general expenses in our calculation of CV. We made no adjustments.

Currency Conversion

In our analysis, we normally make currency conversions in accordance with 19 CFR 353.60 using the exchange rates certified by the Federal Reserve Bank of New York. Since the Federal Reserve Bank of New York does not provide exchange rate information for Bangladesh, we used the average monthly exchange rates published in the International Monetary Fund's International Financial Statistics.

Best Information Available

In accordance with section 776(c) of the Act, we have preliminarily determined that the use of BIA is appropriate for two companies that did not submit timely or complete responses to the questionnaire. Section 776(c) of the Act states that the Department shall use BIA wherever a company refuses or is unable to produce information in a timely manner and in the form required, or significantly impedes an administrative review.

In determining what to use as BIA, section 353.37(b) of the Department's regulations provides that the Department may take into account whether a party refuses to provide requested information or impedes a proceeding. The Department employs a two-tiered methodology that takes into account the degree of cooperation provided by a respondent.

In the case of respondents who refuse to provide information requested in a timely manner, or who otherwise significantly impede the review, we use as BIA the higher of (1) the highest of the rates found for any firm for the same class or kind of merchandise in the less-than-fair-value (LTFV) investigation or prior administrative reviews; or (2) the highest calculated rate in the current review for any firm. When a company substantially cooperates with our requests for information, but fails to provide all information requested in a timely manner or in the form requested, we use as BIA the higher of (1) the highest rate (including the ''all others'' rate) ever applicable to the firm for the same class or kind of merchandise from the same country from either the LTFV investigation or a prior administrative review; or (2) the highest calculated rate in the current review for any firm for the class or kind of merchandise from the same country (see Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al., 58 FR 39729 (July 26, 1993)). See also Allied-Signal Aerospace Co. v. United States, 996 F.2d 1195 (Fed. Cir. 1993); Krupp Stahl AG et al v. United States, 822 F. Supp 789 (CIT May 26, 1993).

In our original questionnaire we stated that companies must report all entries of purchase price sales of subject merchandise during the POR. In Khaled Textiles Mills Ltd. (Khaled)'s initial response to our questionnaire, it indicated that it did not produce shop towels during the review period and therefore was not interested in participating in this review. Since Khaled did not indicate in its submission that it had no shipments during the review period we sent a letter to Khaled in order to clarify its statement. Khaled responded by indicating that it did ship shop towels to the United States during the period of review, from the prior year's production. We then sent Khaled a letter requiring it to respond completely to our original questionnaire. After several extensions, Khaled responded to our questionnaire. Khaled indicated that it had already answered the narrative portion of the questionnaire in the first administrative review and was only submitting additional sales data for the second review period. However, the Department does not accept questionnaire responses submitted in previous reviews because the Department views each review as a distinct and separate proceeding. See Barium Chloride from the People's Republic of China; Final Results of Antidumping Administrative Review, 54 FR 52 (January 3, 1989).

The information that Khaled did submit was highly deficient. Khaled submitted only the invoice number, bill of lading number and date, invoice value, terms of sale, freight expenses and weight for each shipment. Without a narrative response, we do not know if Khaled included all relevant expenses. In addition, the constructed value information Khaled submitted could not be used since Khaled calculated one constructed value for both shop towels and non-subject merchandise, and it was not calculated on a per-unit basis. Given the deficiencies of Khaled's response, in accordance with section 776(c) of the Act, we have determined that the use of BIA is appropriate. Because Khaled attempted to provide the necessary information to the Department in a timely manner, we have considered Khaled to be a cooperative respondent. Accordingly, we have preliminarily assigned Khaled a margin of 9.61 percent, which is the highest rate ever applicable for Khaled.

In Sonar's initial response to our questionnaire, it indicated that it was no longer producing shop towels and had temporarily closed its factory. Sonar further stated that it did not have competent staff to respond to the questionnaire. Since Sonar did not indicate that it had no shipments of subject merchandise during the period of review, we sent a letter to Sonar in order to clarify its statement. Sonar responded by indicating that it did ship subject merchandise to the United States during the POR. In this letter it provided the commercial invoice number, the bill of lading number, the invoice value and ocean freight. We then sent another letter requesting that it respond fully to the questionnaire. Sonar did not submit a response until four days after the extended due date. We have returned Sonar's late submission in accordance with 19 CFR 353.31(b)(2)(1994). Since Sonar did not submit a timely response to the questionnaire, in accordance with section 776(c) of the Act, we have determined that the use of BIA is appropriate for Sonar, and we have considered Sonar to be an uncooperative respondent. Accordingly, we have preliminarily assigned Sonar a margin of 42.31 percent, which is the highest rate in the LTFV investigation and the highest rate ever found in this proceeding.

Preliminary Results of Review

As a result of this review, we preliminarily determine that the following margins exist for the period March 1, 1993, through February 28, 1994:

Manufacturer/exporter	Margin (percent)
Eagle Star Mills Ltd.	[1] 42.31
Greyfab (Bangladesh) Ltd.	0.00
Hashem International	0.00
Khaled Textile Mills Ltd.	9.61
Shabnam Textiles	1.74
Sonar Cotton Mills (Bangladesh) Ltd.	42.31

[1] No shipments or sales subject to this review; rate is from LTFV investigation.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between USP and FMV may vary from the percentages stated above. Upon completion of the review the Department will issue appraisement

instructions concerning all respondents directly to the Customs Service.

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 the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) The cash deposit rates for the reviewed companies will be those rates established in the final results of the review; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review or the original investigation, the cash deposit rate will be 4.60 percent, the ''All Others'' rate established in the LTFV investigation (57 FR 3996). These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Interested parties may request disclosure within 5 days of the date of publication of this notice and may request a hearing within 10 days of the date of publication. Any hearing, if requested, will be held as early as convenient for the parties but not later than 44 days after the date of publication or the first work day thereafter. Case briefs or other written comments from interested parties may be submitted not later than 30 days after the date of publication of this notice. Rebuttal briefs and rebuttal comments, limited to issues in the case briefs, may be filed not later than 37 days after the date of publication. The Department will publish the final results of this administrative review, including the results of its analysis of issues raised in any such written comments.

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22(c).

Dated: September 13, 1995.

Susan G. Esserman,

Assistant Secretary for Import Administration.

[FR Doc. 95–23488 Filed 9–20–95; 8:45 am]

BILLING CODE 3510–DS–P

National Technical Information Service

Notice of Prospective Extension of Exclusive Patent License

This is notice in accordance with 35 U.S.C. 209 (c)(1) and (d) and 37 CFR 404.7 (a)(1)(i) and (b)(1)(i) that the National Technical Information Service (NTIS), U.S. Department of Commerce, is contemplating extending its grant of an exclusive license in the United States of America and certain foreign countries to practice the inventions embodied in U.S. Patent Nos. 4,311,826 (Ser. No. 6–085,450) and 4,391,969 (Ser. No. 6–266,484) to Martin Resources, Inc., having a place of business in Kilgore, Texas. The patent rights in these inventions have been assigned to the United States of America.

The prospective extension of the exclusive license will include royalty terms and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license extension may be granted unless, within 60 days from the date of this published notice, NTIS receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

The respective inventions expressed in the patents cited above describe: (1) A modified sulfur cement comprising the polymeric reaction product of elemental sulfur and a cyclopentadiene oligomer containing reactant; cement compositions can be formulated by blending an aggregate material with the modified sulfur cement; and (2) a modified sulfur cement formulation, comprising the polymeric reaction product of sulfur with a cyclopentadiene oligomerdicyclopentadiene containing modifier in which the cyclopentadiene oligomer content of said modifier is at least 37 wt. %, the sulfur cement product having a softening point ranging up to 116 °C.

The availability of the inventions for licensing were published in Federal Register notices on April 27, 1982, Vol. 47, No. 81, p. 18019 and October 16, 1985, Vol. 50, No. 200, p. 41931, the latter in the form of a notice of ''intent to grant a license.'' Copies of the instant U.S. patents are available from the Commissioner of Patents and Trademarks, Box 9, Washington, DC at a cost of $3.00 each.

Any inquiries and comments relating to the contemplated license must be submitted to Neil L. Mark, Office of Federal Patent Licensing, NTIS, Box 1423, Springfield, Virginia 22151. Properly filed competing license applications received by the NTIS in response to this notice will be considered as objections to the grant of the contemplated license.

Douglas J. Campion,

Director, Office of Federal Patent Licensing.

[FR Doc. 95–23446 Filed 9–20–95; 8:45 am]

BILLING CODE 3510–04–M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board Notice of Closed Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Dates of Meeting: 21 & 22 September 1995.

Time of Meeting: 0900–1700.

Place: Pentagon—Washington, DC.

Agenda: The Army Science Board's 1994 Summer Study on ''Technical Architecture C4I'' will meet for discussions on ASB business. These meetings will be closed to the public in accordance with Section 552b(c) of title 5, U.S.C., specifically subparagraph (4) thereof, and Title 5, U.S.C., Appendix 2, subsection 10(d). The proprietary matter to be discussed is so inextricably intertwined so as to preclude opening any portion of these meetings. For further information, please contact Michelle Diaz at (703) 695–0781.

Michelle P. Diaz,

Acting Administrative Officer, Army Science Board.

[FR Doc. 95–23450 Filed 9–20–95; 8:45 am]

BILLING CODE 3710–08–M

Department of the Navy

Naval Research Advisory Committee; Closed Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. App.2), notice is hereby given that the Naval Research Advisory Committee Special Study Panel to Review the Department of the Navy Science and Technology Program will

meet on October 11 and 12, 1995. The session on October 11 will be held at the Pentagon, Arlington, Virginia; the session on October 12 will be held at the Naval Surface Warfare Center, Carderock Division, Bethesda, Maryland. The meeting will commence at 9:00 a.m. and terminate at 5:00 p.m. on October 11 and 12, 1995. All sessions of the meeting will be closed to the public.

The purpose of the meeting is to provide an assessment of the Department of the Navy Science and Technology Program, make recommendations on how to best posture the Department to be a world class customer of science and technology innovation, and determine whether the Department's execution philosophy and management structure allow for the most effective utilization of innovation. The agenda will include briefings and discussions on perspectives from internal Department of the Navy sources, as well as the Department of the Air Force, the Department of the Army, and the Advanced Research Projects Agency. These briefings and discussions will involve sensitive Department of Defense information. Premature public disclosure of this information would be likely to significantly frustrate proposed agency action. The information involved is specifically authorized under criteria established by Executive order to be withheld from the public if the agency determines it to be in their best interest. The sensitive matters to be discussed are so inextricably intertwined as to preclude opening any portion of the meeting.

Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of the meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(9)(B) of title 5, United States Code.

For further information concerning these meetings contact: Ms. Diane Mason-Muir, Office of Naval Research, Ballston Center Tower One, 800 North Quincy Street, Arlington, VA 22217-5660, Telephone Number: (703) 696-4870.

Dated: September 15, 1995

M. A. Waters,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 95–23482 Filed 9–20–95; 8:45 am]

BILLING CODE 3810–FF–F

DELAWARE RIVER BASIN COMMISSION

Notice of Commission Meeting and Public Hearings

I. Notice is hereby given that the Delaware River Basin Commission will hold a public hearing on Wednesday, September 27, 1995. The hearing will be part of the Commission's regular business meeting which is open to the public and scheduled to begin at 10:30 a.m. in the Lecture Room of the Brandywine River Museum, located on U.S. Route 1 just south of PA Route 100 in Chadds Ford, Pennsylvania. Entrance to the Lecture Room is on the river side of the building, lower level. No smoking is permitted in the building. For those interested in touring the museum, there is a $5 admission fee.

An informal conference among the Commissioners and staff will be held at 10 a.m. at the same location to discuss upcoming public hearing records and response documents.

The subjects of the September 27, 1995 hearing will be as follows:

Possible Drought Emergency Declaration

Section 10.4 of the Delaware River Basin Compact provides that in the event of a drought or other condition which may cause an actual and immediate shortage of available water supply within the Basin, or within any part thereof, the Commission may, after public hearing, determine and delineate the area of such shortage and declare a water supply emergency therein. For the duration of such emergency, the Commission could limit the extent to which water users may divert or withdraw water for any purpose. The Commission is considering whether current and developing conditions of water supply and demand require the declaration of a water supply emergency. The purpose of this hearing is to permit the public to comment on these matters and to make any suggestions or recommendations concerning possible Commission action.

At the conclusion of the drought hearing, the business meeting will recess and reconvene at 1:30 p.m.

Applications for Approval of the Following Projects Pursuant to Article 10.3, Article 11 and/or Section 3.8 of the Compact

1. *Holdover Project: C S Water & Sewer Associates D–76–21 (Revised).* An application to revise DRBC Docket No. D–76–21 to approve an existing discharge from a 0.1 million gallons per day (mgd) sewage treatment plant (STP) to an unnamed tributary of the Delaware River; the applicant also proposes to modify the plant by adding an equalization tank. The STP was originally approved predicated upon a discharge directly to the Delaware River. The project STP is located in Lackawaxen Township, Pike County, Pennsylvania. The STP will continue to serve the community of Masthope Rapids. This hearing continues that of August 9, 1995.

2. *Public Service Electric & Gas Company D–68–20 CP (Revised).* An application for approval to revise the heat dissipation area specified in DRBC Docket No. D–68–20 CP for the thermal discharge of the Salem Generating Station, and incorporate modifications reflecting requirements of the NJPDES permit. The project is located in DRBC Zone 5 on Artificial Island in Lower Alloways Creek Township, Salem County, New Jersey.

3. *Merrill Creek Owners Group (MCOG) D–77–110 CP (Amendment 7).* An application for inclusion of the Logan Generating Company L.P. Keystone Facility (approved by Docket D–90–48 on September 25, 1991) as an additional Designated Unit to Table A (Revised) of the Merrill Creek Reservoir Project, to enable releases from the reservoir to make up for consumptive water use during drought periods. The Keystone Facility is expected to average approximately 2.7 mgd in consumptive use and is located west of Route 130, adjacent to the Delaware River in Logan Township, Gloucester County, New Jersey; Merrill Creek Reservoir is located in Harmony Township, Warren County, New Jersey.

4. *Merrill Creek Owners Group (MCOG) D–77–110 CP (Amendment 8).* An application for inclusion of the Northampton Generating Company, L.P. Northampton Cogeneration Facility [approved by Docket No. D–91–95 (Revision 1) on April 28, 1993] as an additional Designated Unit of Table A (Revised) of the Merrill Creek Reservoir project, to enable releases from the reservoir to make up for consumptive water use during drought periods. The Northampton Facility is expected to average approximately 2.02 mgd in consumptive use and is located in Allen Township with its withdrawal located on the Lehigh River in Northampton Borough, all in Northampton County, Pennsylvania; Merrill Creek Reservoir is located in Harmony Township, Warren County, Pennsylvania.

5. *City of Lewes, Board of Public Works D–85–54 CP RENEWAL.* An application for the renewal of a ground water withdrawal project to supply up to 60 million gallons (mg)/30 days of water to the applicant's distribution

system from Well Nos. 1A, 2A, 3A, 4A and 5A. Commission approval on October 30, 1985 was limited to ten years and will expire unless renewed. The applicant requests that the total withdrawal from all wells remain limited to 60 mg/30 days. The project is located in the City of Lewes, Sussex County, Delaware.

6. *Perkasie Borough Authority D–92–75 CP.* An application for the renewal of a ground water withdrawal project to supply up to 45 mg/30 days of water to the applicant's distribution system, and to consolidate all Perkasie Borough Authority wells into one comprehensive docket with an increase in total allocation. Commission approval of Docket No. D–87–75 CP (Well No. 11) on February 24, 1988 was limited to five years. The applicant requests that the total withdrawal from all wells be increased from 34.2 mg/30 days to 45 mg/30 days. The project is located in Perkasie Borough, Bucks County, in the Southeastern Pennsylvania Ground Water Protected Area.

7. *Borough of Glassboro D–93–39 CP.* An application for approval of a ground water withdrawal project to supply up to 17.8 mg/30 days of water to the Borough of Glassboro's distribution system from existing Well No. 6, screened in the Mount Laurel-Wenonah Aquifer, and up to 25.9 mg/30 days of water from new Well No. 7 (and possibly a second well at this location) screened in the Cohansey Aquifer, without an increase in the existing total allocation of ground water. The project is located in Glassboro Borough, Gloucester County, New Jersey.

8. *Borough of Medford Lakes D–93–44 CP.* A project to upgrade the existing Medford Lakes 0.55 mgd capacity STP located in, and serving only, the Borough of Medford Lakes, Burlington County, New Jersey. The existing STP provides secondary biological treatment via a trickling filter and the proposed upgraded STP will be an extended aeration activated sludge process with tertiary filtration. The upgraded STP will continue to operate at 0.55 mgd and discharge to Aetna Run, a tributary of Birchwood Lakes in the Haynes Creek portion of the Southwest Branch Rancocas Creek Watershed.

9. *South Jersey Water Supply Company D–93–50 CP.* An application for approval of a ground water withdrawal project to supply up to 21.9 mg/30 days of water to the applicant's distribution system from new Well No. 6, and to increase the existing withdrawal limit of 11 mg/30 days from all wells to 42.4 mg/30 days. The project is located in Harrison Township, Gloucester County, New Jersey.

10. *Evesham Municipal Utilities Authority D–94–33 CP.* A project to modify and expand the applicant's existing 2.3 mgd STP to treat 3.0 mgd (average flow) and continue to serve a portion of Evesham Township in Burlington County, New Jersey. The STP will continue to provide advanced secondary treatment and tertiary filtration prior to discharging via the existing outfall to the Southwest Branch Rancocas Creek. The STP is located just east of Elmwood Road and north of the receiving stream in Evesham Township.

11. *Burlington Township D–94–67 CP.* An application for approval of a ground water withdrawal project to supply up to 43.2 mg/30 days of water to the applicant's distribution system from new Well No. 6, and to increase the existing withdrawal limit of 69 mg/30 days from all wells to 98.2 mg/30 days. The project is located in Burlington Township, Burlington County, New Jersey.

12. *East Marlborough Township D–95–22 CP.* A project to construct a new 0.125 mgd capacity STP to create a centralized treatment facility to replace failing on-lot treatment systems within East Marlborough Township, Chester County, Pennsylvania. The proposed STP will provide a lagoon treatment/spray irrigation system, and there will be no stream discharge. The STP and spray irrigation disposal fields are located just north of Street Road approximately 1500 feet west of Route 82, in the West Branch Red Clay Creek watershed (Water Quality Zone C–5) in East Marlborough Township.

13. *Borough of Dublin D–95–25 CP.* An application for approval of a ground water withdrawal project to supply up to 1.73 mg/30 days of water to the applicant's distribution system from new Well No. 5, and to retain the existing withdrawal from all wells of 4.36 mg/30 days. Well No. 5 will be a replacement supply to homes with wells that have been contaminated with trichloroethene, and a part of a ground water remediation system. The project is located in the Borough of Dublin, Bucks County, in the Southeastern Pennsylvania Ground Water Protected Area.

14. *Clement Pappas & Company, Inc. D–95–37.* An application for approval of a ground water withdrawal project to supply up to 73.4 mg/30 days of water to the applicant's food processing facility from new Well No. 6B, and to retain the existing withdrawal limit from all wells of 73.4 mg/30 days. The project is located in Upper Deerfield Township, Cumberland County, New Jersey.

15. *Sun Company, Inc. (R&M) Philadelphia Refinery D–95–41.* An application for approval of a ground water withdrawal project to withdraw up to 12.35 mg/30 days of water (as part of the applicant's decontamination project) from 36 new wells, Nos. RW100–RW502, and to increase the existing withdrawal limit of 9.2 mg/30 days from all wells to 12.35 mg/30 days. The project is located in the City of Philadelphia, Philadelphia County, Pennsylvania.

Documents relating to these items may be examined at the Commission's offices. Preliminary dockets are available in single copies upon request. Please contact George C. Elias concerning docket-related questions. Persons wishing to testify at this hearing are requested to register with the Secretary prior to the hearing.

II. The Commission will hold a public hearing on Wednesday, October 18, 1995 at 6:30 p.m. in the UGI Utilities, Inc. Auditorium, Lehigh Valley Industrial Park One, 2121 City Line Road, Bethlehem, Pennsylvania.

The subject of the hearing is an application for approval of the following project: *Blue Mountain Power, L.P. D–95–42.* A proposal to construct and operate a 150 megawatt (MW) combined cycle electric power generating facility. The proposed independent power plant will withdraw approximately 1.2 mgd from the Lehigh River at its south bank in the City of Bethlehem, Lehigh County, Pennsylvania, and pipe it approximately 15 miles to the power generation plant situated just southeast of the intersection of the Reading Railroad with California Road in Richland Township, Bucks County, Pennsylvania. The intake structure will be situated near the Pennsylvania Highway 378 bridge over the Lehigh River. Consumptive use is expected to be 100 percent since the applicant proposes a zero-liquid discharge system which recycles and reuses process wastewater. Blue Mountain Power presently has an agreement to supply the generated electrical power to Metropolitan Edison.

The Commission's preliminary docket is available upon request. Please contact George C. Elias concerning docket-related questions. Persons wishing to testify at this hearing are requested to register with the Secretary prior to the hearing and may be asked to limit their remarks to five minutes, to enable all who wish to speak to do so.

Other Scheduled Hearings

By earlier notice, the Commission announced its schedule of public hearings on proposed amendments to its

Comprehensive Plan, Water Code and Water Quality Regulations concerning water quality criteria for toxic pollutants, and policies and procedures to establish wasteload allocations and effluent limitations for point source discharges to Zones 2 through 5 (Trenton, New Jersey to the Delaware Bay) of the tidal Delaware River. Specifically, water quality criteria for selected toxic pollutants are proposed for incorporation in the Comprehensive Plan and Article 3 of the Water Code and Water Quality Regulations as stream quality objectives. Revisions are also proposed for Article 4 of the Water Quality Regulations describing the policies and procedures to be used to establish wasteload allocations for those discharges containing pollutants which impact the designated uses of the river. Adoption of these revisions will provide a mechanism for identifying toxic pollutants which may impair aquatic life and human health, and developing uniform and equitable wasteload allocations for these pollutants for all NPDES discharges to the tidal Delaware River. The permitting authorities of the states will utilize the allocations developed by the Commission to establish effluent limitations for NPDES permittees in their jurisdictions.

Hearing Dates: The public hearings are scheduled as follows:

October 5, 1995, beginning at 1:30 p.m. and continuing until 5:00 p.m., as long as there are people present wishing to testify.

October 11, 1995, beginning at 1:30 p.m. and continuing until 5:00 p.m., and resuming at 6:30 p.m. and continuing until 9:00 p.m., as long as there are people present wishing to testify.

October 13, 1995, beginning at 1:30 p.m. and continuing until 5:00 p.m., as long as there are people present wishing to testify.

The deadline for inclusion of written comments in the hearing record will be announced at the hearings.

Addresses: The October 5, 1995 hearing will be held in the Second Floor Auditorium of the Carvel State Building at 820 N. French Street, Wilmington, Delaware.

The October 11, 1995 hearing will be held in the Franklin Room of the Holiday Inn at 4th and Arch Streets, Philadelphia, Pennsylvania.

The October 13, 1995 hearing will be held in the Goddard Conference Room of the Commission's offices at 25 State Police Drive, West Trenton, New Jersey.

For Further Information Contact: Copies of the full text of the proposed amendments, the Water Code and the Water Quality Regulations as well as Basis and Background Documents entitled ''Water Quality Criteria for Toxic Pollutants for the Delaware River Estuary'' and ''Implementation Policies and Procedures Phase I TMDLs for Toxic Pollutants in the Delaware River Estuary'' may be obtained by contacting Susan M. Weisman, Commission Secretary, Delaware River Basin Commission, telephone (609) 883–9500 ext. 203.

Persons wishing to testify are requested to notify the Secretary in advance. Written comments on the proposed amendments should also be submitted to the Secretary at the Delaware River Basin Commission, P.O. Box 7360, West Trenton, New Jersey 08628.

Dated: September 12, 1995.

Susan M. Weisman,

Secretary.

[FR Doc. 95–23454 Filed 9–20–95; 8:45 am]

BILLING CODE 6360–01–P

DEPARTMENT OF ENERGY

Availability of the Dual Axis Radiographic Hydrodynamic Test Facility Final Environmental Impact Statement

AGENCY: Department of Energy.

ACTION: Notice of availability.

SUMMARY: The Department of Energy (DOE) announces the availability of the Dual Axis Radiographic Hydrodynamic Test (DARHT) Facility Final Environmental Impact Statement (EIS), DOE/EIS–0228. The alternative actions analyzed in the EIS would occur at the DOE's Los Alamos National Laboratory (LANL) in northern New Mexico.

DATES: The Final EIS was approved by the Department on August 25, 1995. The U.S. Environmental Protection Agency published its Notice of Availability regarding this Final EIS on September 8, 1995 (60 FR 46833). DOE intends to issue a Record of Decision on the DARHT project; the decision may be issued no sooner than 30 days from the date of the Environmental Protection Agency Notice of Availability.

ADDRESSES: Requests for copies of the DARHT EIS should be addressed to: Ms. Diana Webb, DARHT EIS Project Manager, Los Alamos Area Office, Department of Energy, 528 35th Street, Los Alamos NM 87544. Ms. Webb may be contacted by telephone at (505) 665–6353 or by facsimile at (505) 665–4872. In addition, DOE is issuing the DARHT Final EIS in CD ROM format. Interested parties may obtain a copy of the CD version by contacting Ms. Webb at the address and phone number above.

FOR FURTHER INFORMATION CONTACT: For general information on the DARHT project, interested parties may contact Ms. Webb at the address and phone number above. For general information on the DOE NEPA process, please contact Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Assistance, EH–42, Department of Energy, 1000 Independence Ave., SW., Washington DC 20585. Ms. Borgstrom may be contacted by leaving a message at (800) 472–2756 or by calling (202) 586–4600.

SUPPLEMENTARY INFORMATION: The DARHT Final EIS was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality NEPA regulations (40 CFR Parts 1500–1508) and the DOE NEPA regulations (10 CFR part 1021).

The Department proposes to provide enhanced high-resolution radiography (x-ray) capability for the purpose of performing hydrodynamic tests and dynamic experiments in support of its national defense mission. The enhanced radiographic facility would be a key component of the Department's near-term science-based stockpile stewardship and management program. These hydrodynamic tests and dynamic experiments are needed to assist DOE in ensuring the continued safety, performance and reliability of existing nuclear weapons as they age.

The DARHT EIS analyzes the environmental consequences of alternative ways to accomplish the proposed action. The DOE's preferred alternative would be to complete and operate the DARHT facility at LANL in northern New Mexico, and provide an enhanced level of environmental protection by using steel containment vessels, with implementation to be phased over a 10-year period. Radiographic hydrodynamic testing is now conducted in two existing facilities within the DOE complex—a 30-year-old facility at LANL, and a 10-year-old facility at the DOE's Lawrence Livermore National Laboratory in California. The DARHT EIS compares the environmental impacts that would be expected to occur from continuing to operate the existing facility at LANL (the No Action Alternative) with the consequences that would be expected to occur if DOE implemented the Preferred Alternative or one of four other operational alternatives. The DARHT EIS has a classified supplement that provides additional information and analysis.

DOE issued a DARHT Draft EIS in May 1995 and invited comments on the adequacy and accuracy of the draft analysis. Over sixty parties provided comments on the Draft EIS. The Final EIS reflects changes made by DOE to respond to public comments received, to provide additional environmental baseline information, and to discuss additional technical considerations. The Final EIS also reflects the commitment made by the President on August 11, 1995, to seek a ''zero-yield'' Comprehensive Test Ban Treaty. The type of capability proposed for the DARHT facility is essential to assuring the continued safety and reliability of the nuclear weapons stockpile under a test ban. DOE made the following major changes between the Draft and Final EIS:

—A Phased Containment Option was added to the Enhanced Containment Alternative, and was designated as DOE's preferred alternative.
—DOE discovered the presence of the federally listed threatened species, the Mexican spotted owl, in the vicinity of the DARHT site, identified measures to mitigate any adverse effects to the owl, and received concurrence from the US Fish and Wildlife Service that operation of the facility is not likely to adversely effect the owl.
—Additional mitigation measures were added after consultation with affected American Indian tribes.
—The DOE proposal incorporates upgraded accelerator equipment within both the first and second axis of the proposed DARHT facility.
—DOE incorporated information regarding its Stockpile Stewardship and Management Programmatic Environmental Impact Statement (60 FR 31291, June 14, 1995).
—The Final EIS includes unclassified information from the impact analysis in the classified supplement, which had been made available to the public during the comment period on the Draft EIS.

DOE has distributed copies of the DARHT Final EIS to appropriate Congressional members and committees, the State of New Mexico, affected American Indian tribes, local county governments, other federal agencies, and other interested parties. DOE expects to issue a Record of Decision on the DARHT proposal in October, 1995.

Signed in Washington, DC, this 15th day of September, 1995, for the United States Department of Energy.

Everet H. Beckner,

Principal Deputy Assistant Secretary for Defense Programs.

[FR Doc. 95–23493 Filed 9–20–95; 8:45 am]

BILLING CODE 6450–01–P

Financial Assistance: Institute of Paper Science and Technology (IPST), Atlanta, GA

AGENCY: U.S. Department of Energy (DOE).

ACTION: Notice of intent.

SUMMARY: The U.S. Department of Energy, Idaho Operations Office, announces that pursuant to the DOE Financial Assistance Rules 10 CFR 600.7, it intends to renew Grant Number DE–FG02–90CE40936 to Institute of Paper Science and Technology, Atlanta, Georgia. It is DOE's intent to provide funds for the renewal of a project entitled: ''Black Liquor Combustion-Validated Recovery Boiler Modeling''. The project goal is to develop various submodels that incorporate all of the available knowledge of the chemical reactions occurring in a recovery boiler, together with a specially developed computational fluid dynamics (CFD) modeling code, to obtain an overall (global) computer model useful for the analysis, design, and optimization of recovery boilers. The original proposal ''Black Liquor Combustion—Validated Recover Boiler Modeling'' was submitted to DOE by IPST in April 1990 as an unsolicited proposal. The project has previously been funded for a cost of $5,143,000 with a 29% IPST cost share. The proposed renewal will have a duration of 15 months. IPST proposed total cost is $1,219,740 of which the proposed DOE cost is $849,999 and IPST's and associated partner's proposed cost-share is $370,740 (30%) of the total cost.

The Federal Domestic Catalog Number is 81.078.

FOR FURTHER INFORMATION CONTACT:

Kara Twitchell, U.S. Department of Energy, Drive, MS 1221, Idaho Falls, Idaho 83401–1563, (208) 526–4958.

SUPPLEMENTARY INFORMAITON: The statutory authority for the proposed award is the Energy Conservation Program begun in 1975 under the mandate of the Federal Non-Nuclear Energy Idaho Operations Office, 850 Energy Research and Development Act of 1974 (Pub. L. 93–577). The proposal meets the criteria for ''non-competitive'' financial assistance as set forth in 10 CFR Part 600.7(b)(2)(i)(A). The applicant is an institution of higher education. The anticipated period to complete the renewal is fifteen (15) months. The total estimated cost of this renewal project is $1,219,740 of which the proposed DOE cost is $849,999 and IPST's and associated partner's proposed cost-share is $370,740 (30%) of the total cost.

B.G. Bauer,

Acting Director, Procurement Services Division.

[FR Doc. 95–23447 Filed 9–20–95; 8:45 am]

BILLING CODE 6450–01–M

Financial Assistance: Institute of Paper Science and Technology (IPST), Atlanta, GA

AGENCY: U.S. Department of Energy (DOE).

ACTION: Notice of intent.

SUMMARY: The U.S. Department of Energy, Idaho Operations Office, announces that pursuant to the DOE Financial Assistance Rules 10 CFR 600.7, it intends to renew Grant Number DE–FG02–85CE40738 to Institute of Paper Science and Technology, Atlanta, Georgia. It is DOE's intent to provide funds for the renewal of a project entitled: ''Advanced Water Removal Processes for Drying in the Pulp and Paper Industry—Impulse Drying''. The project goal is to demonstrate through pilot testing a novel water removal process, Impulse Drying, for the manufacture of paper. Utilizing this process would greatly reduce the energy and associated costs required for the full cycle of drying required for paper manufacture. The original proposal ''Advanced Water Removal Processes for Drying in the Pulp and Paper Industry'' was submitted to DOE by IPST in May 1984 as an unsolicited proposal. The project has previously been funded at a cost of $5,152,000 with a 35% IPST cost share. The proposed renewal will have a duration of two (2) years. IPST proposed total cost is $2,446,250 of which the proposed DOE cost is $1,957,000 and IPST's and associated partner's proposed cost-share is $489,250 (20%) of the total cost.

The Federal Domestic Catalog Number is 81.078.

FOR FURTHER INFORMATION CONTACT: Kara Twitchell, U.S. Department of Energy, Idaho Operations Office, 850 Energy Drive, MS 1221, Idaho Falls, Idaho 83401–1563, (208) 526–4958.

SUPPLEMENTARY INFORMATION: The statutory authority for the proposed award is the Energy Conservation Program begun in 1975 under the mandate of the Federal Non-Nuclear Energy Research and Development Act of 1974 (Pub. L. 93–577). The proposal meets the criteria for ''non-competitive'' financial assistance as set forth in 10 CFR Part 600.7(b)(2)(i)(A). The applicant is an institution of higher education.

The anticipated period to complete the renewal is two (2) years. The total estimated cost of this renewal project is $2,446,250 of which the proposed DOE cost is $1,957,000 and IPST's and associated partner's proposed cost-share is $489,250 (20%) of the total cost.

B.G. Bauer,

Acting Director, Procurement Services Division.

[FR Doc. 95–23465 Filed 9–20–95; 8:45 am]

BILLING CODE 6450–01–M

Senior Executive Service; Performance Review Board

AGENCY: Department of Energy.

ACTION: SES Performance Review Board Standing Register.

SUMMARY: This notice provides the Performance Review Board Standing Register for the Department of Energy. This listing supersedes all previously published lists of PRB members.

EFFECTIVE DATE: These appointments are effective as of September 30, 1995.

Acharya, Sarbeswar Nmi
Ackerly, Lawrence R.
Adler, Ira M.
Alcock, Robert M.
Alessi, Victor E.
Allen, Grover L.
Alvarez, Robert
Andersen, Arthur T.
Anderson, Phyllis L.
Baca, Frank A.
Bacher, Stephen Eugene
Bajura, Rita A.
Baker, Kenneth E.
Bamberger, Craig S.
Barber, Robert W.
Barker Jr., William L.
Barnes, Wesley E.
Barrett, Lake H.
Bartholomew, John W.
Baublitz, John E.
Bechtel, Thomas F.
Beckett, Thomas H.
Beckner, Everet H.
Beecy, David J.
Bell, George E.
Bellows, Jerry L.
Benedict, George W.
Bergholz Jr., Warren E.
Berls Jr., Robert E.
Bernard, Peter A.
Berube, Raymond P.
Bielan, Douglas J.
Bishop, Yvonne M.
Bixby, Willis W.
Black, Richard L.
Blackwood, Edward B.
Borgstrom, Carol M.
Borgstrom, Howard G.
Bornhoft Jr., Budd B.
Bostock, Judith L.
Bowman, Gerald C.
Boyd, Gerald G.
Boyle, Phillip D.
Bradley Jr., Theron M.
Brechbill, Susan R.
Bresee, James C.
Breznay, George
Brice, James F.
Brockman, David A.
Brodman, John R.
Brogan, John J.
Brolin, Edson C.
Brown Jr., Charles H.
Brown, Frederick R.
Brown, Richard W.
Brush, Peter N.
Bryant, McKinley E.
Buffum, Elizabeth
Burns Jr., Thomas F.
Canter, Howard R.
Carabetta, Ralph A.
Cardinali, Henry A.
Carey Jr., Edwin F.
Carlson, John T.
Carlson, Kathleen Ann
Carlson, Lynda T.
Caruso, Guy F.
Castelli, Brian T.
Chappell, Gerald F.
Chaput, Ernest S.
Cheney, David W.
Chernock, Warren P.
Christensen, William J.
Christopher, Robert K.
Chun, Sun W.
Chupka, Marc
Claflin, Alan B.
Clark, John R.
Clausen, Max Jon
Cole, George F. III
Combs, Marshall O.
Cone, Ronald E.
Conley, Michael W.
Cook, John S.
Cornwell, Thomas F.
Costello, William J.
Cote, Joel S.
Cowan, Stephen P.
Crandall, David H.
Crawford, Timothy S.
Cross, Claudia A.
Crowe, Richard C.
Culpepper, James W.
Cumesty, Edward G.
Curtis, James H.
Cygelman, Andre I.
Czajkowski, Anthony F.
Davies, James D.
Davies, Nelia A.
Davis, Howlie R.
Davis, James T.
Decker, James F.
Degrasse Jr., Robert W.
Dehanas, Thomas W.
Dempsey, Robert D.
Dennison, William J.
Der, Victor K.
Dials, George E.
Diaz Jr., Romulo L.
Didisheim, Peter F.
Diebold, Robert E.
Dienes, Nicholas S.
Difiglio, Carmen
Dirks, Timothy M.
Divone, Louis V.
Doherty, Donald P.
Domagala, Martin J.
Dorsey, William A.
Dover, Agnes P.
Doyle, Mark J.
Durnan, Denis D.
Edmondson, John J.
Edwards, Gregory A.
Egger, Mary H.
Engel, Walter P.
Erb, Donald E.
Esvelt, Terence G.
Evans, Thomas W.
Fausett, Stephen A.
Feibus, Howard
Feider, James C.
Fiore, James J.
Fiore, Joseph N.
Fiori, Mario P.
Fisher, Roger E.
Fitzgerald Jr., Joseph E.
Ford, James L.
Ford, John A.
Forrister, Derrick L.
Fowler, Jennifer Johnson
Fox Penner, Peter S.
Frank, Clyde William
Franklin, John R.
Frei, Mark W.
Friedman, Gregory H.
Furiga, Richard D.
Fygi, Eric J.
Garson, Henry K.
Garvie, William H.
Gebus, George R.
Geidl, John C.
Geisbush, Jon C.
Gibson Jr., William C.
Gibson, Judith D.
Gilbertson, Mark A.
Goldenberg, Neal
Goldenberg, Ralph D.
Goldman, David Tobias
Goldsmith, Robert
Gollomp, Lawrence A.
Gottlieb, Paul
Graham, A. Diane
Greenwood, Johnnie D.
Greiner, Lloyd M.
Gross, Thomas J.
Gruenspecht, Howard K.
Guidice, Carl W.
Guidice, Stephen J.
Gunn Jr., Marvin E.
Gurule, David A.
Guyer, Arthur E.
Haberman, Norton
Hacskaylo, Michael S.
Hahn, Richard D.
Hale, Douglas R.
Hall Jr., Spain W.
Hall, James C.
Hamer Jr, David L.

Hamric, Jon P.
Hanessian, Souren
Hansen, Charles A.
Hardin, Michael G.
Hardy, Randall W.
Harris, Jessie J.
Hartman, James K.
Harvey, Gordon W.
Haspel, Abraham E.
Hawkins, Francis C.
Heath, Charles C.
Heenan, Thomas F.
Hegburg, Alan S.
Heinkel, Joan E.
Henderson, Lynwood H.
Hendricks, Nancy L.
Hendrie, David L.
Henry, Carol J.
Hensley Jr., Willie F.
Hess, Wilmot N.
Heusser, Roger K.
Hickey, Sue F.
Hickok, Steven G.
Highland, Nadine M.
Hirahara, James S.
Hoffman, Allan R.
Hogan, Danny A.
Holbrook, Phillip L.
Hopf, Richard H.
Hopkins, T. J.
Hughes, Jeffrey L.
Hunter, Ray A.
Hutzler, Mary Jean.
Inge Jr., Edwin F.
Inlow, Rush O.
Isaacs, Thomas H.
Izatt, Ronald D.
Izell, Kathy D.
Jaffe, Harold
Jhirad, David J.
Johansen, Judith A.
Johnson, Frederick M.
Johnson, Gerald W.
Johnson, Milton D.
Johnson, Owen B.
Johnston, Marc
Jones, C. Rick
Jones, David A.
Joseph, Antionette Grayso
Juckett, Donald A.
Karol, Michael S.
Katz, Maurice J.
Kelly, Cynthia C.
Kennedy, John P.
Kight, Gene H.
Kilgore, Webster C.
Kilpatrick, Michael A.
Kingsbury, Robert L.
Kinzer, Jackson E.
Klein, Keith A.
Klein, Susan Elaine
Knuth, Donald F.
Koontz, Max A.
Kountoupes, Lisa M.
Kripowicz, Robert S.
Landers, James C.
Lane, Anthony R.
Langenfeld, Cherri J.
Larson Jr., Victor R.
Lash, Terry R.
Lavin, Ann W.
Leclaire, David B.
Lewis Jr., Howard E.
Lewis Jr., William A.
Lewis, Lenora J.
Lewis, Roger A.
Lien, Stephen C.T.
Lightner, Ralph G.
Lique, E Diane W.
Longton, Joseph N.
Loose, Ronald R.
Lorenz, Milton C.
Lowe, Owen W.
Luongo, Kenneth N.
Lynch, Oliver D. T. Jr.
Lytle, Jill Ellman
MacDougall, Carmen E.
MacLachlan, Alexander
Magruder, James K.
Mahaley, Joseph S.
Mangeno, James J.
Mann, Thomas O.
Manning, William F.
Marchese, Andrew R.
Marianelli, Robert S.
Marlay, Robert C.
Maroldo, James H.
Marquess, Paul T.
Marquez, Richard A.
Mathamel, Martin S.
Maupin, Gary T.
Maxey, Kenneth G.
Mayhew, Delmar D.
McCallum, Edward J.
McCammon, Helen M.
McClain, Linda K.
McCoy, Frank R. III
McCraney, Percy P.
McFadden Jr., George L.
McIntyre, Donald D.
Michelsen, Stephen J.
Miller, Clarence L.
Miller, Deborah C.
Millhone, John P.
Milner, Ronald A.
Monlyn, Sylvia McDonald
Moore, Kenneth G.
Moorer, Richard F.
Morris, Marcia L.
Mournighan, Stephen D.
Mravca, Andrew E.
Murphy, Robert E.
Nealy, Carson L.
Neilsen, Finn K.
Nelson, David B.
Nelson, Rodney R.
Nettles Jr, John J.
Newman, David G.
Nichols, Clayton R.
Nolan, Elizabeth A.
Nulton, John D.
O'Brien Jr., Robert A.
O'Fallon, John R.
Oliver, Lawrence R.
Olson, Gary C.
Parnes, Sanford J.
Patil, Pandit G.
Patrinos, Aristides A.
Patton, Gloria S.
Pearman Jr., Donald W.
Pearson, Orin F.
Pelletier, Raymond
Perin, Stephen G.
Pesyna, Gail M.
Peters, Franklin G.
Pettengill, Harry J.
Pettis, Lawrence A.
Piper II, Lloyd L.
Plaisance Jr., Paul J.
Podonsky, Glenn S.
Poe, Robert W.
Pollock III, Walter E.
Powers, James G.
Pray, Charles P.
Prewitt, Jana S.
Price Jr., Robert S.
Prudom, Gerald H.
Przybylek, Charles S.
Pumphrey, David L.
Pye, David B.
Rabago, Karl R.
Rabben, Robert G.
Reddick, William C.
Reicher, Dan W.
Reid, James E.
Rhoades, Daniel R.
Richardson, Herbert.
Richardson, Steven D.
Riggs, John A.
Roberson, Jessie M.
Roberts, Michael.
Robertson, John S.
Robison, Sally A.
Rock, Bernard J.
Rodeheaver, Thomas N.
Rodekohr, Mark E.
Rohlfing, Joan B.
Rollow, Thomas A.
Romm, Joseph J.
Rooney, John M.
Rosen, Sol.
Rosenzweig, Richard.
Rosselli, Robert M.
Rousso, Samuel NMI.
Rozzi, Dolores L.
Rudins, George.
Rudy, Gregory P.
Rumsey, Terry Cornwell
Ryder, Thomas S.
Salm, Philip E.
Saltzman, Jerome D.
Salvador, Louis A.
Samber, Martin
San Martin, Robert L.
Scheetz, Karl G.
Schiavo, Lisa C.
Schmitt, Carl H.
Schmitt, Eugene C.
Schmitt, William A.
Schnapp, Robert.
Schneider, Sandra L.
Scott, Randal.
Season Jr., Harry T.
Semedo, Barbara.
Shafer, John M.
Shelor, Dwight E.
Shirley Sr., John W.

Siebert Jr., Arlie B.
Sienkiewicz Jr., E. W.
Silverman, Mark N.
Simon, Robert M.
Simpson, Charles Kyle
Singer, Marvin I.
Sitzer, Scott B.
SJostrom, Leonard C.
Smedley, Elizabeth E.
Smith, Alexandra B.
Smith, David A.
Smith, Douglas W.
Smith, Leanne Waldo
Sohinki, Stephen M.
Spigal, Harvard P.
Spiller, Reginal W.
Stadler, Silas D.
Stallman, Robert M.
Stark, Richard M.
Stello Jr., Victor (NMN)
Stewart Jr., Frank M.
Stewart Jr., Jake W.
Stone, Philip M.
Strakey Jr., Joseph P.
Stumbaugh, David C.
Sulak, Stanley R.
Sullivan, Mary Anne
Swink, Denise F.
Sye, Linda G.
Taboas, Anibal L.
Tamura, Thomas T.
Tavares, Antonio F.
Tedrow, Richard T.
Terrell, Robert L.
Thomas, Iran L.
Thompson, Jerry F.
Throckmorton, Ralph R.
Tierney, Charles R.
Tillman, Luther J.
Torkos, Thomas M.
Tryon, Arthur E.
Tseng, John C.
Tucker, William E.
Turi, James A.
Turner, James M.
Tuttle III, Edward H.
Twining, Bruce G.
Vaeth, Terry A.
Vagts, Kenneth A.
Vanzandt, Vickie R.
Volpe, Frederick J.
Wagner, Mary Louise
Wagoner, John D.
Walsh, Robert J.
Walton, Howard L.
Warnick, Walter L.
Watkins, Anthony Lee.
Watts, Carolyn Herr.
Weidenfeller, Nancy K.
Werner, James D.
Whitaker Jr., Mark B.
White, James K.
Whiteman, Albert E.
Wieber, Paul R.
Wieker, Thomas L.
Wilcynski, John M.
Wilken, Daniel H.
Williams, Edward R.
Williams, Mark H.
Willis, John W.
Wilmot, Edwin L.
Wisenbaker Jr., William
Wooley, John C.
Yuan-Soo Hoo, Camille C.

Issued in Washington, DC September 14, 1995.

Archer L. Durham,

Assistant Secretary for Human Resources and Administration.

[FR Doc. 95–23494 Filed 9–20–95; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket No. TM96–1–97–000]

Chandeleur Pipe Line Company; Notice of Annual Charge Adjustment Clause Filing

September 15, 1995.

Take notice that on September 11, 1995, Chandeleur Pipe Line Company (Chandeleur) tendered for filing proposed tariff sheets designed to add an Annual Charge Adjustment Clause to its FERC Gas Tariff.

Chandeleur also proposed to adjust its rates to reflect the Commission's FY 1996 annual charge for natural gas pipeline companies of $0.0023 per Mcf. Chandeleur has proposed an effective date for the revised tariff sheets of October 1, 1995.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before September 22, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 95–23385 Filed 9–20–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. RP95–68–000, RP94–223–000, and RP94–379–000 (not consolidated)]

Colorado Interstate Gas Company; Notice of Telephone Technical Conference

September 15, 1995.

Pursuant to the Commission order which issued on December 30, 1994, a telephone technical conference will be conducted by the Commission Staff on Wednesday, September 27, 1995, at 3:15 p.m., to resolve the issues in the above-captioned proceeding.

Parties who wish to participate in, or have any questions about the conference, should contact Maria Sweitzer at (202) 208–0417 no later than Tuesday, September 26, 1995.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 95–23382 Filed 9–20–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. GT95–10–003]

Texas Eastern Transmission Corporation; Notice of Compliance Filing

September 15, 1995.

Take notice that on September 11, 1995, pursuant to Section 154.62 of the Commission's Regulations and in compliance with the Commission's March 17, 1995 order in Docket No. GT95–10–000, Texas Eastern Transmission Corporation (Texas Eastern) herewith submits for filing executed Section 7(c) service contracts listed on Appendix A of the filing between Texas Eastern, as Pipeline, and New Jersey Natural Gas Company under its firm Rate Schedules FTS, FTS–2, FTS–4, FTS–5, FTS–7, FTS–8 and SS.

Texas Eastern requests that the Commission waive all necessary rules and regulations to permit the contracts listed on Appendix A of the filing to become effective on the first day of the primary term as stated in each contract.

Texas Eastern states that a copy of the letter of transmittal and its attached contracts are being sent to the listed customers.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before September 22, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding.

Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 95–23381 Filed 9–20–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP95–436–000]

Transcontinental Gas Pipe Line Corporation; Notice of Petition For Declaratory Order

September 15, 1995.

Take notice that on September 1, 1995, Transcontinental Gas Pipe Line Corporation (Transco) and certain traditional shippers [1] (herein collectively, with Transco, referred to as the Transco Group) filed a Petition for Declaratory Order.

The Transco Group requests that the Commission order Coastal Eagle Point Oil Company to comply with Transco's tariff provision requiring the payment of overrun penalty amounts incurred as a result of unauthorized takes of gas in excess of its maximum firm contract entitlement during December of 1992. In support thereof, the Transco Group seeks a declaratory order finding that (1) a shipper's intent at the time that it incurs an overrun is not relevant to the assessment of an overrun penalty; (2) a ''harm'' standard is not relevant to the assessment of an overrun penalty, and (3) Transco is not required to provide verbal or written notice to a shipper prior to the assessment of an overrun penalty.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before September 25, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Linwood A, Watson, Jr.,

Acting Secretary.

[FR Doc. 95–23383 Filed 9–20–95; 8:45 am]

BILLING CODE 6717–01–M

[1] The Brooklyn Union Gas Company, Consolidated Edison Company of New York, Inc., Elizabethtown Gas Company a division of NUI Corporation, Long Island Lighting Company, North Penn Gas, Inc., Penn Fuel Gas, Inc., Pennsylvania Gas and Water Company, Philadelphia Gas Works, Piedmont Natural Gas Company and Public Service Electric & Gas Company have joined Transco in this Petition to evidence their support for the findings requested.

[Docket No. RP95–437–000]

WestGas InterState, Inc.; Notice of Proposed Changes in FERC Gas Tariff

September 15, 1995.

Take notice that on September 12, 1995, WestGas Interstate, Inc. (WGI) tendered for filing certain revised tariff sheets to First Revised Volume No. 1 of its FERC Gas Tariff, as identified on the Appendix A attached to the filing. The proposed effective date of these tariff sheets is November 1, 1995.

WGI states that the tariff revisions reflect a decrease in all of the rates applicable under WGI's transportation rate schedules and would decrease overall revenues from WGI's jurisdictional services by $105,510, based on the twelve-month period ended June 30, 1995, as adjusted for known changes through December 31, 1995. Specifically, WGI proposes to decrease its maximum reservation charge under Rate Schedule FT from $2.2344 per dth to $1.2828 per Dth and to decrease its maximum commodity charge under Rate Schedule IT from $0.0492 per dth to $0.0401 per dth. WGI further states that the revised tariff sheets also reflect certain revisions which update and clarify WGI's FERC gas tariff, and bring WGI's tariff into conformance with recent Commission Orders.

WGI states that a copy of its filing was served on each of its jurisdictional customers and affected state commissions.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20406, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such petitions or protests should be filed on or before September 22, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 95–23384 Filed 9–20–95; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5297–7]

Agency Information Collection Activities up for Renewal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) listed below is coming up for renewal. Before submitting the renewal package to the Office of Management and Budget (OMB), EPA is soliciting comments on specific aspects of the collection as described below.

DATES: Comments must be submitted on or before November 20, 1995.

ADDRESSES: U.S. Environmental Protection Agency, Assessment and Modeling Division, Emission Inventory Group, 2565 Plymouth Road, Ann Arbor, MI 48105.

FOR FURTHER INFORMATION CONTACT: Donald M. Szeles. Telephone: (313) 668–4513, Facsimile: (313) 668–4497.

SUPPLEMENTARY INFORMATION:

Affected Entities

The entity affected by this action is the general public that own on-road motor vehicles.

Title

Mobile Source Emission Factor Survey—2060–0078.

Abstract:

The EPA Emission Inventory Group, through contractors, solicits the general public to voluntarily offer their vehicle for emissions testing. The owner is also asked to complete a multiple choice form of nine questions that summarize vehicle usage. There are two methods of soliciting the general public for participation in the Emission Factor Program (EFP):

1. Postal cards are sent to a random selection of vehicle owners using State motor vehicle registration lists.

2. A random selection of motor vehicle owners who arrive at State emission inspection stations on an annual or biennial schedule.

Information from the EFP provides a basis for developing State Implementation Plans (SIPs), Reasonable Further Progress (RFP) reports, attainment status assessments for the National Ambient Air Quality Standards (NAAQS).

The legislative basis for the Emission Factor Program is Section 103(a)(1)(2)(3) of the Clean Air Act, which requires the Administrator to: ''conduct * * * research, investigations, experiments, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, and control of air pollution'' and ''conduct investigations and research and make surveys concerning any specific problem of air pollution in cooperation with any air pollution control agency * * *''

EPA uses the data from the EFP to verify predictions of the computer model known as MOBILE, which calculates the contribution of mobile source emissions to ambient air pollution. MOBILE is used by EPA, state and local air pollution agencies, the auto industry, and other parties interested in estimating mobile source emissions.

The EPA would like to solicit comments to:

(i) 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;

(ii) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; and

(iii) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated technology (e.g., permitting electronic submission of responses).

Burden Statement: Public reporting burden for this collection of information is estimated to average 10 minutes per response for a contractor laboratory questionnaire and up to 2 hours per response for a post card questionnaire, including the time for reviewing instructions, completing the questionnaire, and delivering the vehicle for testing.

Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Chief, Information Policy Branch, PM–223, U.S. Environmental Protection Agency, 401 M St., S.W., Washington, DC 20460;

and the

Paperwork Reduction Project (OMB # 2060–0078), Office of Information and Regulatory Affairs, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

No person is required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are displayed in 40 CFR Part 9.

Send comments regarding these matters, or any other aspect of the information collection, including suggestions for reducing the burden, to the address listed above.

Dated: September 1, 1995.

Donald M. Szeles,

Mechanical Engineer.

[FR Doc. 95–23434 Filed 9–20–95; 8:45 am]

BILLING CODE 6560–50–P

[AMS-FRL–5300–6]

California State Nonroad Engine Pollution Control Standards; Authorization of State Standards; Notice of Decision

AGENCY: Environmental Protection Agency.

ACTION: Notice regarding authorization of State standards.

SUMMARY: EPA is authorizing California to enforce regulations for exhaust emission standards and test procedures for 1996 and later new heavy-duty off-road diesel cycle engines 175 horsepower and greater pursuant to section 209(e) of the Clean Air Act.

ADDRESSES: The Agency's decision document containing an explanation of the Administrator's decision, as well as all documents relied upon in reaching that decision, including those submitted by the California Air Resources Board (CARB), are available for public inspection in the Air and Radiation Docket and Information Center in Docket A–94–44 during the working hours of 8:00 a.m. to 5:30 p.m. at the Environmental Protection Agency, Air Docket (6102), Room M–1500, Waterside Mall, 401 M Street, S.W., Washington, D.C. 20460. Copies of the decision can be obtained from EPA's Manufacturers Operations Division by contacting David Dickinson, as noted below.

FOR FURTHER INFORMATION CONTACT: David Dickinson, Attorney/Advisor, Manufacturers Operations Division (6405J), U.S. Environmental Protection Agency, 401 M Street S.W., Washington, D.C. 20460. Telephone: (202) 233–9256.

SUPPLEMENTARY INFORMATION: I have decided to authorize California to enforce regulations for standards and test procedures for nonroad engines pursuant to section 209(e) of the Clean Air Act, as amended (Act), 42 U.S.C. 7543. These regulations establish exhaust emission standards and test procedures for 1996 and later new heavy-duty off-road diesel cycle engines 175 horsepower and greater, including alternate-fueled engines, produced on or after January 1, 1996. A comprehensive description of these California regulations can be found in the decision document for this authorization and in materials submitted by CARB.

On the basis of the record before me, I cannot make the findings required to deny authorization under section 209(e)(2) of the Act. Therefore, I am authorizing California to enforce these regulations.

On February 14, 1995 EPA published a notice of opportunity for a public hearing and a request for written comments concerning California's request.[1] EPA received no request for a hearing. EPA received comments from the United States Office of the Deputy Under Secretary of Defense. Consequently, this determination is based on written submissions by CARB, the written comments submitted in response to the above-mentioned notice and all other relevant information.

Section 209(e) of the Act as amended, 42 U.S.C. 7543(e), addresses state regulation of nonroad engines and vehicles. EPA issued on July 20, 1994 a final regulation to implement section 209(e) entitled ''Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards'' (section 209(e) rule).[2] Section 209 preempts states from regulating several types of new nonroad engines and vehicles, including new engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower; and new locomotives or new engines used in locomotives. The section 209(e) rule sets forth definitions for these preempted categories of engines.

For those new pieces of equipment or new vehicles other than those a State is not permanently preempted from regulating under section 209(e)(1), the State of California may promulgate standards regulating such new equipment or new vehicles provided California complies with Section 209(e)(2). The section 209(e) rule provides that if certain criteria are met, the Administrator shall authorize

[1] 60 FR 8381 (February 14, 1995).

[2] See 59 FR 36969 (July 20, 1994) and codified at 40 C.F.R. Part 85, Subpart Q, §§ 85.1601–85.1606.

California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines. The criteria include consideration of whether California arbitrarily and capriciously determined that its standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards; whether California needs state standards to meet compelling and extraordinary conditions; and whether California's standards and accompanying enforcement procedures are consistent with section 209.

California determined that its standards and test procedures would not cause California emission standards, in the aggregate, to be less protective of public health and welfare as the applicable Federal standards. I was not presented with any information opposing California's authorization request or demonstrating that California arbitrarily or capriciously reached this protectiveness determination. Therefore, I cannot find California's determination to be arbitrary or capricious.

CARB has continually demonstrated the existence of compelling and extraordinary conditions justifying the need for its own motor vehicle pollution control program. In addition, CARB provided information regarding actions taken by the California Legislature in an effort to address the current air quality conditions in California, directing CARB to consider adopting regulations for off-road engines. No information has been submitted to demonstrate that California no longer has a compelling and extraordinary need for its own program. Based on previous showings by California in the context of motor vehicle waivers and CARB's submission to the record regarding the status of air quality in the state, I agree that compelling and extraordinary conditions warrant the need in California for separate standards for heavy-duty off-road diesel cycle engines. Thus, I cannot deny the waiver on the basis of the lack of compelling and extraordinary conditions.

CARB has submitted information that the requirements of its emission standards and test procedures are technologically feasible and present no inconsistency with Federal requirements and are, therefore, consistent with section 209 of the Act.

The one issue of inconsistent test procedures was resolved. For the test procedure for hydrocarbons (HC), carbon monoxide (CO), and oxides of nitrogen (NO_X), EPA has more stringent test specifications such that EPA cannot be certain that if an engine were tested and met the California test specifications, that it would definitely meet the EPA test specifications. It is clear, on the other hand, that an engine that passed the EPA test specifications could definitely be deemed to have passed the CARB test specifications. CARB presented a letter to EPA dated January 21, 1995, which resolved this issue.[3] The letter stated that ''tests properly conducted by the manufacturer, according to the U.S. EPA procedure, will be considered valid for purposes of California certification, quality-audit, and new engine compliance testing.'' Thus, the manufacturer will be able to accomplish both Federal and California certification requirements with one test and the test procedure tier of the consistency criterion is met.

The Agency received no comments regarding this issue. Since both California and Federal certification requirements can be met with the same test vehicle in the course of a single test, test procedure inconsistency is not a bar to California to obtaining authorization by EPA to adopt and enforce California regulations. Thus, based on the foregoing information, I cannot find that California's standards and accompanying enforcement procedures are inconsistent with section 209 of the Act.

The Agency received written comment from the United States Department of Defense expressing concern that CARB's emission standards will have a major impact on military operations in California. As further explained in the decision document for this authorization, EPA expects CARB to adequately address this concern by adopting regulatory language to closely parallel the national security exemption provisions promulgated by EPA.

Accordingly, I cannot make the determinations required for a denial of this authorization under section 209(e) of the Act, and therefore, I authorize the State of California to enforce these regulations.

My decision will affect not only persons in California but also the manufacturers outside the State who must comply with California's requirements in order to produce nonroad equipment engines for sale in California. For this reason, I hereby determine and find that this is a final action of national applicability.

Under section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by November 20, 1995. Under section 307(b)(2) of the Act, judicial review of this final action may not be obtained in subsequent enforcement proceedings.

As with past waiver and authorization decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Finally, the Administrator has delegated the authority to make determinations regarding waivers of Federal preemption under section 209(e) of the Act to the Assistant Administrator for Air and Radiation.

Dated: September 15, 1995.

Mary D. Nichols,

Assistant Administrator for Air and Radiation.

[FR Doc. 95–23436 Filed 9–20–95; 8:45 am]

BILLING CODE 6560–50–P

[3] Letter to Charles N. Freed, EPA from K.D. Drachand, CARB dated January 21, 1995. Docket A–94–44 II–D–3.

[FRL–5300–2]

Border Environment Cooperation Commission Guidelines

AGENCY: Border Environment Cooperation Commission (BECC).

ACTION: Notice.

SUMMARY: This notice announces the availability of the BECC Guidelines for Project Submission and Criteria for Project Certification document to the public.

FOR FURTHER INFORMATION OR A COPY CONTACT: April Lander, Manager-Environmental Program, Border Environment Cooperation Commission, P.O. Box 221648, El Paso, TX 79913, tel. (011–52–16) 29–23–95, fax (011–52–16) 29–23–97, Email becc1@itsnet.com.

SUPPLEMENTARY INFORMATION: A report to the public discussing BECC responses to public comment is also available to the public. For further information or a copy contact April Lander, H. Roger Frauenfelder, General Manager, Border Environment Cooperation Commission, P.O. Box 221648, El Paso, TX 79913.

Dated: September 11, 1995.

H. Roger Frauenfelder,

General Manager.

BECC Guidelines for Project Submission and Criteria for Project Certification

I. Authority

These guidelines and criteria are adopted under the authority of the November 1993 Agreement Between the Government of the United States of America (U.S.) and the Government of the United Mexican States (Mexico) Concerning the Establishment of a Border Environment Cooperation Commission (BECC) and a North American Development Bank (NADBank) (Agreement) which authorizes the BECC Board of Directors (Board) to determine its general operational and structural policies as may be necessary or appropriate to conduct BECC business.

II. Program Purpose

The purpose of BECC is to help preserve, protect, and enhance the environment of the border region in order to advance the well-being of the people of the United States and Mexico and achieve sustainable development. In carrying out this purpose, BECC will cooperate as appropriate with the NADBank and other national and international institutions, and with private sources supplying capital for environmental infrastructure projects in the border region.

III. Program Scope

In carrying out its purpose, BECC will: (1) assist states and localities and other public entities, and private investors in (A) coordinating, preparing, developing, implementing, and overseeing environmental infrastructure projects; (B) assisting with planning, design, construction management, operation and maintenance; (C) providing technical assistance to applicants in the development of proposals, project feasibility planning, engineering design, and environmental assessments; (D) assessing the technical and financial feasibility of projects; (E) evaluating social, environmental, and economic benefits of projects; (F) organizing, developing, and arranging public and private financing for projects; (G) assisting with the development of a comprehensive public outreach and participation plan, and (2) certify projects for financing by the NADBank or other sources.

Projects located within 100 km (62 miles) on either side of the U.S./Mexico border may be considered for certification. Projects outside this region may be considered for certification only if the BECC, with concurrence of the U.S. Environmental Protection Agency (EPA) and the Mexican Secretaria de Desarrollo Social, find the project would remedy an environmental or health problem within the 100 km (62 mile) area.

In certifying projects, or in providing technical assistance, BECC shall give preference to projects relating to:

(a) water pollution,

(b) wastewater treatment,

(c) municipal solid waste management, and

(d) related matters.

Potential water pollution projects could include, but are not limited to:

(a) potable water treatment,

(b) water supply systems,

(c) water pollution prevention, and

(d) projects to improve or restore the quality of water resources.

Potential wastewater treatment projects could include, but are not limited to:

(a) wastewater collection systems,

(b) wastewater treatment plants,

(c) water reuse systems, and

(d) systems for treatment and beneficial use of sludge.

Potential municipal solid waste projects could include, but are not limited to:

(a) landfills,

(b) solid waste collection and disposal, and

(c) reuse, recycling, or waste-to-energy projects.

Related projects include projects which in some way directly or indirectly correspond to the three priority areas described above. Interpretation of this term will be at the discretion of the BECC Board of Directors on a case-by-case basis.

The BECC acknowledges the importance of the environmental goals and objectives embodied in the following international agreements: Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (La Paz Agreement) the North American Free Trade Agreement (NAFTA), and the North American Agreement on Environmental Cooperation as well as other agreements undertaken by the United States or Mexico.

IV. Definition of Terms

Advisory Council. Advisory Council of the BECC. The Council has eighteen members, nine from the United States and nine from Mexico. The Council may provide advice to the Board of Directors or the General Manager on any matter within the scope of BECC functions, including certifications, and may perform such other functions as directed by the BECC Board of Directors. The BECC shall consult with the Council regarding community participation and requests for technical assistance.

Agreement. Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank dated November 1993.

Applicant. States and localities, other public entities, and private investors which submit proposals for certificates or technical assistance to the BECC. Applicants may include individuals, non-profit organizations, and non-governmental organizations.

Appropriate Technology. Technology which closely matches the level of technology used with the ability of the local user to operate and maintain the system without creating dependency on high levels of resource inputs from outside the community and without adding significant stress to the environment or the social fabric of the community.

Board of Directors. Board of Directors of the BECC. The Board has ten directors, five from the United States and five from Mexico. The Board determines general operational and structural policies for the BECC, evaluates projects and certifies qualified projects pursuant to the Agreement.

Certification. The approval of the BECC Board of Directors that an environmental infrastructure project meets the criteria for certification as described in the Agreement and in this document.

Community Participation. Active and interactive involvement by individuals or groups who reside in an affected community, or other representatives officially designated by the affected community, who can represent the community's interest in decision-making during the project life cycle.

Cultural Resources. Historical, archeological, and ethnic resources, both past and present.

Environmental Infrastructure Project. A project that will prevent, control, or reduce environmental pollutants, improve the drinking water supply, or protect flora and fauna so as to improve human health, promote sustainable development, or contribute to a higher quality of life.

General Manager. General Manager of the BECC.

Impacts. Potential and actual environmental, social, and economic effects of project development and

implementation. Impacts may be adverse or beneficial.

Life Cycle Cost. Cost of the entire project from beginning to end, including planning, construction, operations and maintenance phases. Includes purchase of land, site restoration, and post-closure maintenance whenever applicable.

Mitigation. Avoidance of negative impacts by not taking an action and/or the minimization of impacts by limiting the degree or magnitude of the action.

Municipal Solid Wastes. Domestic and commercial non-hazardous waste accumulated by a community.

Natural Resources. Flora, fauna, minerals, soil, surface water, groundwater, wetlands, and air.

Project Life Cycle. Planning, development, construction, operation, closure, and post-closure phases of a project.

Sustainable Development. Development which meets the needs of the current generation without compromising the needs of future generations to meet their own needs (Brundtland Report: Our Common Future, World Commission on Environment and Development, 1987, p. 43).

User Fees. Fees paid by users of the infrastructure projects.

Wastewater Treatment. Pre-treatment, primary, secondary, or tertiary treatment of a polluted liquid of diverse composition coming from domestic, industrial, commercial, agricultural, livestock waste, or other sources.

Water Pollution. Presence of one or more contaminants in the environment which damage or degrade the quality of water resources.

V. Technical Assistance Proposal Submission Procedures

Requests for technical assistance for development of proposals, planning and project feasibility, including community involvement in the process and engineering design studies, and environmental assessments may be submitted at any time to the General Manager with the Step I Project Pre-Proposal Submission Form. Funds for technical assistance in the form of direct grants are limited but BECC is working on a revolving fund to enable initial grants for planning which would then be paid back as part of the overall loan package if the project is certified by BECC and financed by NADBank. A technical assistance guide will be developed with public input to help potentially eligible project applicants in this process. Also, BECC staff is available to assist with general proposal guidance. BECC will give technical assistance priority to communities which have the least available resources for project development.

VI. Project Proposal Submission Procedures

A. Preapplication Communication

Prior to project submission, project originators are highly encouraged to meet or communicate with BECC staff to establish fundamental eligibility of the proposed project and to be briefed on the two step BECC project submission process and the BECC technical assistance program.

B. Step I: Project Pre-Proposal Submission Process

Step I is a preliminary stage in the project proposal submission process to be completed prior to the comprehensive project proposal as described in Step II: Project Proposal Submission Process. Step I involves completion of a simple form describing the project's basic parameters. These parameters will be used to establish initial project conformance with BECC objectives and will indicate the applicant's need for technical assistance. The Step I: Project Pre-Proposal Form may be submitted at any time to the General Manager of the BECC. After positive review of Step I, the Applicant may submit Step II. Applicants will be sent a letter acknowledging receipt of Step I within 30 days.

The project information requested on the Step I Form includes the project title, project type, project sponsor information, and contractor, if known. Additionally, general project information is requested such as project location and type of technical assistance needed. Furthermore, information describing the project and project planning information is requested. In the case that not all information requested is available, please indicate that you are in the process of developing this information and include the approximate date this information will be provided to the BECC. The Step I Form is provided at the end of this document.

C. Step II: Project Proposal Submission Process

Step II of the project submission process may be undertaken after completion of the Step I Form. Step II involves provision of detailed project proposal information, based upon the proper engineering, environmental, economic, financial and social studies, to the BECC in the following areas:

(1) general project description,
(2) environment and human health,
(3) technical feasibility,
(4) economic and financial feasibility,
(5) social issues,
(6) community participation,
(7) operation and maintenance, and
(8) sustainable development.

Although it is not entirely necessary to have the final design of the project completed by the time that Step II is submitted, it is required that the process design is well advanced and a fairly good estimation of the total project cost is available, so that the NADBank can determine its funding feasibility. The greater the detail provided in the areas mentioned above, the easier it will be for the BECC staff to review and come up with a recommendation for certification to the Board of Directors.

The proposed project must meet fundamental BECC criteria for certification. The project Applicant should not only provide as much information as possible on each of the above areas, but should describe and fully justify all of the components involved in the project, especially those related to the different fundamental criteria that appear in the following sections. Applicants will be sent a letter acknowledging receipt of Step II within 30 days.

The BECC requests the project information be submitted in the same order and using the same alphanumeric system as in this document, in order to make the document easier to review and speed-up the certification process.

VII. Project Certification Criteria

Each of the following eight categories of fundamental criteria must be satisfactorily met in order for projects to obtain BECC certification. The BECC Board of Directors, with advice from the BECC Advisory Council, will make the final decision on project certification. Certification will formally document the project's compliance, or ability to comply, with the fundamental criteria prior to submission to NADBank, or other financing sources. Certification by BECC is not a guarantee that NADBank will approve the project for financing; however, once certified, BECC will work with project applicants to obtain financing for the project.

1. General Project Description

Information Requested

a. Project Applicant's. Provide information, that has changed from the Step I form, including, lead organization, all co-applicants, and contractor information, if applicable. Information should include lead contact persons, addresses, phone numbers, fax

numbers, and Email addresses. Additionally, provide history of cooperation between applicants, if applicable. Provide evidence of financial responsibility and performance history of company contracted for the project, if applicable.

b. Project Location.

i. Describe the geographical location of the project and provide a site location map as well as a regional map showing the site location. Also, describe the area of project impact as specifically as possible. If possible, use a scale of 1:24000 for regional area maps and of 1:2400 for project site maps. Provide Geographic Information System (GIS) maps or overlays, if available.

ii. Describe the suitability of the proposed site, identifying such factors as the existence and capacity of available infrastructure, natural resources, etc.

c. Environmental Issue. Describe the environmental condition or issue to be addressed by the project and the activities taken in response to the environmental condition that led up to the proposed project. If available, include preliminary reports.

d. Project Alternatives. Describe the analysis of alternatives considered to address the environmental and or health issues.

e. Project Justification. Justify aspects which make project implementation necessary, including the consequences of not implementing the project. Explain why the proposed project is the best alternative to solve the problem. Describe the net environmental benefit to be achieved by the project both onsite and overall. Discuss project strengths and weaknesses and available resources to overcome the weaknesses. Provide relevant health statistics, environmental monitoring results, or other materials, if available, documenting the justification.

f. Transboundary Aspects. Discuss difficulties and opportunities, if any, created by projects which are located in and/or impact both the United States and Mexico. Explain how these difficulties might be resolved or opportunities taken. Consider applicable international agreements.

g. Project Work Tasks. Provide a detailed list of project work tasks through construction. List who will complete the task, the cost of each task, and a time schedule for each task.

Fundamental BECC Criteria

a. Project Location. The project must be located within 100 km (62 miles) of the U.S./Mexican border or has been found by the BECC, in concurrence with the U.S. Environmental Protection Agency and the Mexican Secretaria de Desarrollo Social, to remedy a transboundary environment or health issue.

b. Project Work Tasks. Project work tasks and budget estimates by task must be reasonable, in order to complete project as planned by the Applicant.

2. Environment and Human Health

The goal of BECC is to help preserve, protect, and enhance the environment in a sustainable manner in order to improve the quality of life in the U.S./Mexico border region. The applicant should ensure that negative environmental impacts of the project have been avoided to the extent reasonably possible. Those negative impacts that are unavoidable should have been identified and considered in the project evaluation process, and the Applicant must ensure that appropriate safeguards have been included in the project for potential impacts which could cause damage to the environment and human health. All projects, once completed, must be in compliance with applicable local, regional, state, and federal laws, rules, standards and applicable international agreements.

Information Requested

a. Documentation of Environmental Regulatory Compliance. Project applicants must coordinate with appropriate local, regional, state, and federal agencies, as early in the project planning process as possible, to identify all environmental impacts to natural resources. Applicants must demonstrate that the project will meet all applicable environmental regulations once the project is constructed, although all permits may not be completed at the time of BECC certification. Such a project may be certified by BECC on the condition that all environmental authorizations are obtained prior to construction. Applicants must identify for the BECC all environmental and regulatory authorizations that are required for completion of the project and demonstrate that the project is capable of meeting those regulatory requirements.

i. Describe environmental action required, including no action, regulatory organization requiring the action, proof of action completed or proof of approval for method to complete the action in the future, and contact person.

ii. List required authorizations (i.e. permits, licenses, etc.), regulatory organization providing authorizations, date authorizations approved or anticipated, status of authorization or proof of authorization approval, and contact person. Such information should include the appropriate environmental standards to be met.

iii. Provide copies of all documents submitted to regulatory agencies to BECC at the time of application, and all future documentation when available.

iv. Identify any environmental issues not already addressed in i.–iii. that may be affected by project development.

v. Provide environmental baseline studies and other environmental or health reports, if available. If not available, describe gaps in the environmental impact information.

b. Conformance with Local and Regional Conservation and Development Plans. Projects submitted to the BECC must conform with local and regional plans as well as land use and zoning regulations.

i. List applicable local and regional plans and regulations, agency (or agencies) with authority, and contact person.

ii. Describe how the project addresses or will address the plans and regulations.

c. Environmental Assessment. Every Applicant must submit an environmental assessment before the project may be considered for certification. On a case-by-case basis the BECC may certify a project before the assessment is ''final'' according to applicable environmental law. In such instances, the BECC may condition the certification upon successful completion of the assessment.

i. The assessment should include an analysis of a full range of project alternatives, including implications of not implementing the project, as well as justification for the alternative chosen. Additionally, it should include a discussion on indirect, cumulative, and short, medium, and long-term positive and negative impacts on biological diversity, ecosystem integrity, sensitive environmental habitats, and human health. If negative impacts are unavoidable describe actions to be taken to mitigate these impact. Furthermore, provide an overview of environmental risks and costs, environmental standards and objectives of the affected area, and appropriate additional information which has not already been described in documents provided to the BECC.

ii. Each assessment must include a discussion on transboundary effects. If the project is located in and/or impacts both the United States and Mexico, the assessment should include a discussion on possible effects in both countries. If the project is located in only one country it should include a discussion of possible impacts on the other country.

Fundamental BECC Criteria

a. Enhancement of Environment and Human Health. All projects must address a critical human health and/or environmental need.

b. Environmental Protection. Projects should achieve a high level of environmental protection for the affected area that results in a benefit to the environment or human health. Projects with negative impacts must provide actions to mitigate the impacts.

c. Compliance with Applicable Environmental Regulations. All projects certified by the BECC must demonstrate compliance with all applicable local, regional, state, and federal environmental regulations before project operations begin. The BECC may condition its certification upon the Applicant's ability to comply with applicable environmental regulations.

d. Environmental Assessment. Every Applicant must submit an environmental assessment before the project may be considered for certification. On a case-by-case basis, the BECC may certify a project before the assessment is ''final'' according to applicable domestic environmental laws. In such instances, the BECC may condition the certification upon successful completion of the assessment.

e. Conformance with Applicable Local and Regional Plans. All projects must address applicable local and regional plans as well as land use and zoning regulations.

f. Conformance with Applicable International Agreements. Projects must comply with applicable international agreements.

3. Technical Feasibility

BECC projects must utilize appropriate technology and provide a close match between the level of technology used and the ability of the local user to operate and maintain the system without creating dependency on high levels of resource inputs from outside the community and without adding significant stress to the environment or the social fabric of the community.

Information Requested

a. Project Specifications. It is necessary to include all technical aspects which justify the project, including a study of sensitivity analysis and a justification of the following factors, depending upon the type of project:

i. Water Supply. Growth analysis, both mid and long range for the proposed planning time frame; average and peak daily consumption rate; characteristics of the production source, water quality analysis, water conservation program, pollution prevention program, description of the well-head protection program (for groundwater system, if any), transportation, and distribution infrastructure; type capacity of treatment and its efficiencies; estimate of design and construction costs, estimated annual operation, and maintenance costs; and any other information that will ensure a better understanding of the project.

ii. Wastewater Treatment. Quantity and quality of wastewater to be treated; industrial wastewater control program; projection of the wastewater volume for the proposed life of the project; design of collection system including pumping; design of treated wastewater discharge or reuse systems; analysis of treated wastewater quality; sludge treatment system, analysis of treated sludge and final disposal system; stormwater pollution prevention and treatment systems if applicable, and any other information that will ensure a better understanding of the project.

iii. Municipal Solid Waste. Projection of amounts of solid waste generated by the population for the proposal life of the project; source reduction, separation, treatment and recycling programs; areas of collection; description of operation efficiency; type and capability of proposed equipment; plan for treatment and disposal of household hazardous waste; recycling and waste stream reduction proposals; plan for the expansion, upgrade, or closure of landfills; incineration capabilities; composting capabilities; energy production capabilities; and any other information that will ensure a better understanding of the project.

b. Technical Process. Use of appropriate technologies known to be effective is encouraged. Criteria for selection and justification of the chosen technology should be included with emphasis on appropriateness to the community and efficiency of operation.

c. Quality Control Program. Submit the quality control plan for all aspects of the project. It should include contractor and equipment quality control and personnel training, as well as other quality control issues.

d. Investment Timetable. Submit the project financing plan and the required sequence to be followed in order to implement different stages of the project. Additionally, provide project development with a detailed description of stages, and activities necessary to reach the objectives in a timely and cost-effective manner. Include a bar diagram showing the actions to be carried out, an investment schedule, stages of progress, cost and source of funds.

Fundamental BECC Criteria

a. Appropriate Technology. BECC will only certify projects which use appropriate technology and which are designed to be constructed, operated, and maintained in a cost-effective manner to achieve the project's purpose.

4. Economic and Financial Feasibility

BECC projects must show financial feasibility, considering that any NADBank financing will require loan repayment. Potential access to grants and the amount of owner equity will be key considerations in BECC's evaluation of financial feasibility.

Information Requested

Applicants are requested to submit financial information that allows the analysis of the project's future results. All projects must show with a reasonable assurance, based on sound assumptions, that their future performance is going to be financially successful regardless of the project's source of funds. Specifically, the applicant is requested to provide the following information:

a. Main Financial Information. This should include cash flow, balance sheet, income statement, and sources of financing. In case of an existing business, the financial information should cover the past five years.

b. Planning, Construction, Operations, and Maintenance Budget. The Budget should show fixed and variable costs as well as expected revenues during the investment recovery period. It should also include an analysis and characterization of anticipated income sources. If a user fee or other dedicated revenue source is to be established, the budget must state clearly how the system will be set up and what assurances there are that users will pay.

c. Sensitivity Analysis. Tests the impact on the results of the analysis from changes in one or more of the input variables.

d. Break-Even Analysis (Operational and financial). Determine the level of revenues at which the project will just recover fixed and variable costs.

e. Economic Benefits. Provide an analysis of the economic benefits of the project.

Fundamental BECC Criteria

a. Debt Coverage. Project revenues must be sufficient to cover debt amortization and operation and

maintenance costs with an appropriate safety margin.

5. Social Issues

The BECC recognizes the need to assess social issues which may affect the success of a project. A goal of BECC is to improve quality of life in the border zone.

Information Requested

a. General Information on the Community. Provide information on the size of the population based on the most recent census, population growth rate, and demographic information.

b. Description of Local Environmental Services. Provide information on the current availability of environmental services (i.e. water, wastewater, solid waste).

c. Potential Economic Impacts. Provide information on the number of people who will directly benefit if the project is implemented, as a percentage of the total population, and the number of people who would be affected directly and indirectly if the project is not implemented. Discuss the positive and negative impacts of the project on the community, including local employment, local economic development, social development (i.e. education, training, and institutional strengthening), quality of life, and other local issues.

d. Project Impacts on Cultural Resources. Provide information about project impacts on cultural resources including historical, archeological, and ethnic resources.

e. Other Project Impacts. Other predicted impacts on the local population (e.g. odors, noise, or visual impacts).

Fundamental BECC Criteria

a. Compliance with Applicable Cultural Resource Regulations. All projects certified by the BECC must comply with all appropriate cultural resource (i.e. historical, archeological, and ethnic) regulations.

6. Community Participation

In order to fulfill BECC's mission, each project submitted must demonstrate community acceptance. An interactive process has been developed to ensure meaningful community participation in the development and implementation of project proposals.

Information Requested

a. Comprehensive Community Participation Plan. Before a project may be certified, an Applicant must submit to the BECC a ''Comprehensive Community Participation Plan'' that must be approved by BECC and implemented by the Applicant.

Each Comprehensive Community Participation Plan will vary with the specifics of each project and will be designed to meet the particular needs of the community where the project will be located. In each case, the Applicant must demonstrate how the public will be meaningfully engaged in project development and implementation.

Members of the BECC Board of Directors, Advisory Council, and staff will participate, where appropriate, in the implementation of this Comprehensive Plan to ensure compliance with the community participation criteria.

Each Comprehensive Community Participation Plan should contain at least the following essential components:

i. Local Steering Committee. The Applicant may develop a local steering committee made up of representatives from diverse organizations in the affected community (i.e. business, government, elected, education, academia, civic, non-profit, environment, etc.) to assist with all aspects of community participation. The steering committee may be made up of representatives from both countries if the proposed project is located in and/or impacts both the United States and Mexico.

The local steering committee may be responsible for developing detailed outreach activities, disseminating information about the project, engaging public participation in the process, developing public education and media campaigns, and soliciting public acceptance. The local steering committee may also be involved in developing the Comprehensive Community Participation Plan.

ii. Meetings with Local Organizations (Consultations). The Applicant must meet individually with local organizations affected by the project and provide information on and develop acceptance for the project (i.e. business, civic, community, neighborhood, environmental, academic, etc.).

iii. Public Meeting. Each Applicant must hold at least one public meeting in the community affected by the project. If the project affects more than one community, a public meeting should be held in each community.

The Applicant must comply with the following requirements of a BECC-approved public meeting:

(1) The Applicant must provide legal notice of a public meeting to include the date, time, place, and agenda at least 30 days prior to the meeting to the BECC, in the local newspaper, and other media avenues, where appropriate. The legal notice must include an accessible location where the public may obtain the Applicant's project proposal and supporting documentation, in English and Spanish where appropriate, 30 days prior to the meeting.

(2) During the public meeting the Applicant must provide a briefing on the proposed project and hear public comments on the proposed project. The Applicant's project proposal and supporting documentation must be made available during the public meeting.

(3) The Applicant must record Minutes of the public meeting to include the names of the participants and comments made. The Minutes will serve as an official record of the meeting.

The public meeting may be conducted in conjunction with public meetings required to comply with existing state or federal environmental law as long as the state or federal agency agrees to such and the legal notice of a public meeting is written and published accordingly.

iv. Report to BECC. The Applicant must provide a written report to the BECC documenting the successful completion of the Comprehensive Community Participation Plan. The report must include supporting documentation including a list of local steering committee members and their activities related to the project, if applicable, a list of the local meetings conducted, a copy of the legal notice of the public meeting, the minutes from the public meeting, and other such documentation as to demonstrate the scope and success of the public participation plan. The report should convey that the community understands and accepts the project and the associated environmental, health, and social benefits and associated costs such as a tariff increase.

v. Post-Certification Participation Plan. The Applicant must develop a post-certification participation plan with a goal of achieving public awareness of and acceptance for the construction, operation, and maintenance of a facility during its life cycle.

Fundamental BECC Criteria

a. Comprehensive Community Participation Plan. Applicants must submit and implement a BECC-approved Community Participation Plan that will consist of meeting with local organizations conducting at least one publicly advertised public meeting, and may utilize a local steering committee.

b. Public Acceptance. The Comprehensive Community

Participation Plan report submitted to the BECC following implementation shall indicate the degree of public acceptance of the project.

7. Operation and Maintenance

It is important to detect and correct any shortcomings in operations at an early stage in order to reach planned operational efficiency levels as soon as possible.

Information Requested

a. Start-Up Operation Program. Establish the sequence in which operation of the infrastructure will be initiated, as well as how any projected problems or defects in equipment or workmanship will be identified and corrected during the start-up phase.

b. Contingency Program. Describe actions and corrective measures to be taken should a contingency program be needed during start-up and operational phases of the project.

c. Operation and Maintenance Program. A well-defined long-term operation and maintenance program is necessary. Describe the system's operation and maintenance program to include training and certification of operators, training of maintenance personnel, and preparation of operation and maintenance instruction material. Also quantify funds reserved in project budget to ensure adequate support for operation and maintenance program.

d. Safety Program. An operational safety program should be an integral part of the operation and maintenance program.

c. Pollution Prevention Plan. Projects having a potential for release of pollutants must submit a pollution prevention plan identifying pollutants of concern generated during operation, actions that will be taken to prevent or reduce their release, including projected year to year improvements during the life of the facility.

f. Closure and Post-Closure Plan for Landfills. Submit a closure and post-closure plan which describes how waste resulting from the closure of the facility will be treated and disposed of, and how the site will be monitored after closure.

Fundamental BECC Criteria

a. Operation and Maintenance Program. Project documents must include an operation and maintenance program, including an effective program for emergency planning, an occupational health and safety plan, training plan for operation and maintenance personnel, and where applicable, a pollution prevention plan, facility closure plan, and post-closure plan.

8. Sustainable Development

Sustainable development is that which meets the needs of the present without compromising the ability of future generations to meet their own needs. The BECC adheres to this definition and the following sustainable development principles:

Principle 1. Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature;

Princple 2. The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations; and

Principle 3. In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Information Requested

Much of the information related to a project's contribution to sustainable development will have been provided under previous headings including environment and human health; technical feasibility; economic and financial feasibility; social issues; community participation; and operation and maintenance. A proposed project may, however, have characteristics contributing to sustainable development that are not fully described under those headings. Examples of such characteristics are described below under the headings: conservation of natural resources, energy efficiency, natural resource preservation, capacity building, and benefits for low income communities.

Applicants should provide as much information as possible about any additional development characteristics of their projects not described under prior headings in order to maximize their chances of attracting funding from sources particularly concerned with sustainable development. In particular, there are a number of foundations that may be willing to make grants in support of projects that exhibit additional sustainable development characteristics such as those described below.

In its certification documents, BECC will give explicit recognition to those projects that incorporate a large number of sustainable development characteristics (including, but not limited to, the following examples) that go beyond the minimum requirements of the fundamental sustainable development criteria and effectively promote sustainable development.

Fundamental BECC Criteria

a. Principles. Projects must adhere to the principles of sustainable development set forth above.

b. Institutional and Human Capacity Building. Projects must demonstrate and strengthen the ability of the community for long-term support and maintenance, including measures to build human and institutional capacities.

Examples of Project Characteristics that Contribute to Sustainable Development

Natural Resource Management

a. Ecosystem Management. Projects that adopt a comprehensive approach to natural resource management and environmental protection by implementing ecosystem management.

b. Source Reduction. Projects that reduce the amount of pollution per unit of economic activity through more efficient use of inputs and/or superior technology.

c. Recycling. Projects that recycle residuals to the production of saleable products.

d. Project Life Cycle Planning. Projects that combine source reduction and recycling into an overall product life cycle approach that minimizes residuals.

Technical Efficiency

a. Project Life Cycle Cost. Projects that are designed to lower their life cycle cost by reducing inputs of energy, equipment, maintenance, and other resources.

b. Energy Production Efficiency. Projects that increase the efficiency of energy production (i.e., more efficient turbines).

c. Energy End-Use Efficiency. Projects that increase the efficiency of energy end use (i.e. better insulation, energy efficient lighting, variable speed motors).

Natural Resource Preservation

a. Habitat Preservation or Enhancement. Projects that preserve or enhance a wildlife habitat such as wetlands used by migratory birds or a forest inhabited by an endangered species.

b. Creation or Improvement of Parks or Reserves. Projects that create or improve the quality of parks, reserves, or other areas where people can enjoy nature.

Environmental Protection

a. Prevention and Compliance. Projects that implement an effective

pollution-prevention program and implement an effective environmental compliance program.

Benefits to Low-Income Residents

a. Jobs. Projects that provide additional long-term job opportunities to low-income residents.

b. Better Environmental or Health Services. Projects that improve the quality of environmental or health services (i.e. clean drinking water in low-income communities).

c. Other Community Enhancements. Projects that provide new recreational, educational, or other community development benefits.

Community Participation

a. Education Program. Projects that include an environmental education program directed at schools, civic organizations, and other institutions.

b. Post-Certification Participation Plan. Projects that present an effective post-certification plan with a goal of achieving public awareness.

VII. Project Certification

After review of the proposed project, BECC staff will make a determination on whether to recommend certification of the project to the Board of Directors, based on the fundamental criteria described in this document. The BECC should be involved in local public meetings on the projects under consideration prior to certification in order to achieve a higher level of appreciation for public acceptance. The Board will certify projects during its scheduled public meetings. Projects certified by the Board will be submitted as a proposal for financing to the NADBank or to other sources of funding a appropriate. Project certification does not guarantee financing by the NADBank or by other sources.

BECC

BORDER ENVIRONMENT COOPERATION COMMISSION

STEP I

FORM FOR PRESENTING PROJECTS FOR CERTIFICATION

Date of Submittal to the BECC _____
Date of Receipt of BECC _____

NAME AND TYPE OF PROJECT

1. NAME OF THE PROJECT:
_____
_____
_____

2. TYPE OF PROJECT:
A. ____ Water Supply.
B. ____ Wastewater Treatment.
C. ____ Solid Waste Management.
D. ____ Other Related Projects.

PRIMARY APPLICANT INFORMATION

3. NAME OF THE ORGANIZATION: _____
Name of Contact Person: _____
Position: _____
Address: _____
City:_____State: _____ ZIP CODE: _____
Phone No.:_____ Fax:_____
E-mail Address: _____

CO-APPLICANT INFORMATION (IF APPLICABLE)

4. NAME OF THE ORGANIZATION: _____
Name of Contact Person: _____
Position: _____
Address: _____
City:_____ State: _____ ZIP CODE: _____
Phone No.:_____ Fax: _____
E-mail Address: _____

CONTRACTOR INFORMATION (IF APPLICABLE)

5. NAME OF THE FIRM: _____
Name of Contact Person: _____
Position: _____
Address: _____
City:_____ State: _____ ZIP CODE: _____
Phone No.:_____ Fax: _____
E-mail Address: _____

GENERAL PROJECT INFORMATION

6. LOCATION OF PROJECT SITE: Mexico_____ U.S.A._____
7. NEAREST City:_____ State:_____
8. DISTANCE FROM NEAREST City (in miles): _____
9. POPULATION OF NEAREST CITY: _____
10. POPULATION BENEFITED: _____
11. IS PROJECT WITHIN THE BORDER REGION? (62 mi either side) Yes____ No____
12. IF THE ANSWER TO QUESTION 11 IS NO: HOW does the Project Affect the Border Region?:
_____
_____

13. TYPE OF PROJECT: NEW SYSTEM, EXPANSION OR REHABILITATION OF CURRENT ONE?:
New_____ Expansion_____ Rehabilitation_____
14. ESTIMATED USEFUL LIFETIME OF THE PROJECT:_____years.

TECHNICAL ASSISTANCE

15. IS TECHNICAL ASSISTANCE REQUIRED?: Yes____ No____
If the Answer is Yes, Indicate Type and Amount of Technical Assistance Required in Order to Complete the Documentation Necessary for STEP II:

(a) ____ Environmental Assessment Study ..... _____ $U.S.
(b) ____ Technical Feasibility and Preliminary Engineering Study ..... _____ $U.S.
(c) ____ Development of Project Final Design ..... _____ $U.S.
(d) ____ Economic and Financial Feasibility Study ..... _____ $U.S.
(e) ____ Evaluation of Social and Sustainability Aspects of the Project ..... _____ $U.S.
(f) ____ Planning the Public Outreach Program ..... _____ $U.S.
(g) ____ Development of the Operation and Maintenance Program ..... _____ $U.S.
(h) ____ Other ..... _____ $U.S.
(i) ____ Total ..... _____ $U.S.

DESCRIPTION OF THE PROJECT

A. IF THE PROJECT IS RELATED TO WATER SUPPLY, IT CONCERNS:

16. DEVELOPMENT OF A WATER SOURCE: ..... Yes _____ No _____
17. WATER TREATMENT: ..... Yes _____ No _____
18. WATER DISTRIBUTION: ..... Yes _____ No _____
19. CONTROL OF SUPPLY IN DISTRIBUTION SYSTEM: ..... Yes _____ No _____
20. PUMP STATIONS AND SUMPS: ..... Yes _____ No _____
21. WATER TRANSMISSION LINES: ..... Yes _____ No _____
22. OTHER: _____

B. IF THE PROJECT IS RELATED TO WASTEWATER TREATMENT, IT CONCERNS:

22. TYPE OF WASTEWATER: Municipal _____ Industrial _____
24. SEWER SYSTEM: ..... Yes _____ No _____
25. COLLECTOR TRUNK LINES: ..... Yes _____ No _____
26. WASTEWATER TREATMENT PLANTS: ..... Yes _____ No _____
27. WATER REUSE: ..... Yes _____ No _____
28. DISCHARGE OF TREATED WASTEWASTER: ..... Yes _____ No _____
29. TREATMENT OF WASTEWATER GENERATED SLUDGE: ..... Yes _____ No _____
30. DISPOSAL OF WASTEWATER GENERATED SLUDGE: ..... Yes _____ No _____
31. OTHER: _____

C. IF THE REPORT IS RELATED TO MUNICIPAL SOLID WASTE, IT CONCERNS:

32. RECOVERY OF RECYCLABLE MATERIALS: ..... Yes _____ No _____
33. TREATMENT OF MUNICIPAL SOLID WASTE:
_____ Composting
_____ Incineration
_____ Power Generation
34. DISPOSAL OF MUNICIPAL SOLID WASTE:
_____ Sanitary Landfill
35. OTHER: _____

D. IN CASE OF OTHER RELATED PROJECTS PLEASE INDICATE RELATIONSHIP:

36. PREVENTION, CONTROL OR REMEDIATION OF POLLUTION CASES RELATED TO:
Water Supply ..... Yes _____ No _____
Treatment of Wastewater ..... Yes _____ No _____
Municipal Solid Waste Disposal ..... Yes _____ No _____

Indicate How the Project is Related to the Three Previously Mentioned Subjects:
Q_____
_____
_____
_____
_____

PROJECT PLANNING INFORMATION

THE PROJECT ALREADY HAS COMPLETED:

37. ENVIRONMENTAL ASSESSMENT STUDY: ..... Yes _____ No _____
38. PRELIMINARY ENGINEERING STUDY: ..... Yes _____ No _____
39. TECHNICAL FEASIBILITY STUDY: ..... Yes _____ No _____
40. ECONOMIC AND FINANCIAL FEASIBILITY STUDY: ..... Yes _____ No _____
41. PRELIMINARY DESIGN: ..... Yes _____ No _____
42. FINAL DESIGN: ..... Yes _____ No _____
43. COST ANALYSIS: ..... Yes _____ No _____
44. COST ESTIMATE FOR:.
Final Design Development: _____ $U.S.
Construction of Facilities: _____ $U.S.
Operation & Maintenance (annual): _____ $U.S.
Financing Costs (annual): _____ $U.S.

45. ESTIMATE THE TIME REQUIRED FOR EXECUTION OF:
Planning: _____ months.
Design: _____ months.
Construction: _____ months.
Environmental Permits: _____ months.
Preparation of Site: _____ months.
Plant Start-up: _____ months.
Total Time Required: _____ months.
46. HAVE POTENTIAL SOURCES OF FINANCING BEEN IDENTIFIED: Yes _____ No _____
Indicate Which and the Percentage that may be Contributed by each (mark all that apply):
_____ MUNICIPAL _____ %
_____ FEDERAL _____ %
_____ WORLD BANK _____ %
_____ STATE _____ %
_____ NADBANK _____ %
_____ PRIVATE BANK _____ %
_____ NON-GOVERNMENTAL ORGANIZATIONS _____ %
_____ INTERAMERICAN DEVELOPMENT BANK _____ %
_____ EQUITY _____ %
_____ OTHER _____ %
47. WHAT WILL BE THE SOURCE OF REVENUE FOR REPAYMENT OF THE LOANS? (mark all that apply):
a) Government _____
b) Serviced Users _____
c) Industrial Clients _____
d) Other _____
e) In Process of Identification _____
48. PUBLIC MEETINGS HAVE BEEN HELD IN THE COMMUNITY: Yes _____ No _____
49. PUBLIC PARTICIPATION PLAN HAS BEEN DEVELOPED: Yes _____ No _____

ADDITIONAL INFORMATION

50. ADDITIONAL INFORMATION THAT YOU WOULD LIKE TO PROVIDE:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

The projects that will be presented to the BECC should be sent to either one of the following addresses:

In Mexico: Apartado Postal, Apartado Postal 3114–J, Cd. Juárez, Chihuahua, México. Teléfonos: (91–16) 29–2395, Fax: (91–16) 29–2397, Email: becc1@itsnet.com.
Office Location: Blvd. Tomás Fernández #7940, Torres Campestre, Piso 6, Cd. Juárez, Chihuahua C.P. 32470, México.
In the United States: Post Office Box, P.O. Box 221648, El Paso, TX 79913, USA. Phone: (011–52–16) 29–2395, Fax: (011–52–16) 29–2397, Email: becc1@itsnet.com.

[FR Doc. 95–23439 Filed 9–20–95; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL RESERVE SYSTEM

Agency Forms Under Review

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice.

BACKGROUND: Notice is hereby given of the final approval of proposed information collections by the Board of Governors of the Federal Reserve System (Board) under OMB delegated authority, as per 5 C.F.R. 1320.9 (OMB Regulations on Controlling Paperwork Burdens on the Public).

FOR FURTHER INFORMATION CONTACT:

Federal Reserve Board Clearance Officer—Mary M. McLaughlin—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202-452-3829).

OMB Desk Officer—Milo Sunderhauf—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, D.C. 20503 (202-395-7340).

Final approval under OMB delegated authority of the extension, with revisions, of the following report:

1. Report title: Report of Commercial Paper Outstanding Placed by Brokers and Dealers (FR 2957a); Report of Commercial Paper Outstanding Placed Directly by Issuers (FR 2957b); Daily Report of Offering Rates on Commercial Paper (FR 2957d).
Agency form numbers: FR 2957a, b, and d
OMB Docket number: 7100-0002
Frequency: Daily, weekly, and monthly
Reporters: Brokers and dealers and direct issuers of commercial paper
Annual reporting hours: 1,858
Estimated average hours per response: 0.20 to 0.75
Number of respondents: 68
Small businesses are not affected.

General description of report: This information collection is voluntary and is authorized by law [12 U.S.C. §248(a)(2)]. The FR 2957a and b are confidential [5 U.S.C. §552(b)(4)].

Abstract: These reports provide information on the amounts outstanding and selected offering rates on commercial paper, which the Federal Reserve uses to gauge the aggregate flow of funds and to determine the composition of short-term financing components in credit markets.

2. Report title: International Applications and Prior Notifications under Subparts A and C of Regulation K.
Agency form number: FR K-1
OMB Docket number: 7100-0107

Frequency: On occasion
Reporters: State member and national banks, Edge and corporations, and bank holding companies.
Annual reporting hours: 440
Estimated average hours per response: Varies from 10 to 20 hours
Number of respondents: 38
Effecitve Date: [insert a date 30 days after publication]
Small businesses are not affected.

General description of report: This information collection is required (sections 25 and 25A of the Federal Reserve Act (12 U.S.C. 601-604(a) and 611-631), and the Bank Holding Company Act (12 U.S.C. 1843(c)(13), 1843(c)(14), and 1844(c))). The applying organization has the opportunity to request confidentiality for information that it believes will qualify for a Freedom of Information Act exemption.

Abstract: The FR K-1 is a compilation of all the applications and prior notification requirements in Regulation K that govern the formation of Edge and Agreement corporations and the international and foreign activities of U.S. banking organizations.

The proposed revisions include the addition of one item, expansion of an existing item, and clarifications to the reporting instructions. The Federal Reserve proposes adding a new item that will require foreign banking organizations that are seeking to either establish or acquire control of an existing Edge corporation to furnish information relating to the supervision and regulation of the foreign banking organization by its home country supervisor, as well as information to allow the Federal Reserve to determine whether the foreign banking organization will be able to provide whatever information is deemed necessary to determine and enforce compliance with U.S. law. This is the same type of information that a foreign banking institution must provide (pursuant to the Foreign Bank Supervision Enhancement Act of 1991) in order to acquire ownership or control of a subsidiary bank or commercial lending company or to establish a branch or agency in the United States. The Federal Reserve proposes that Attachment H require applicants seeking to engage in any activity that the Federal Reserve has not previously determined to be of a banking or financial nature to discuss the extent to which such activity is usual in connection with the transaction of banking or other financial operations in the country in which the activity is to be conducted, supported by examples. The proposed revision to item 2.f. would enable the Federal Reserve to determine whether a proposed new activity is usual in connection with the transaction of the business of banking or other financial operations abroad, as the Federal Reserve is required to do under section 211.5(d)(20) of Regulation K.

Final approval under OMB delegated authority of the extension, without revision, of the following reports:

1. Report title: Annual Daylight Overdraft Capital Report for U.S. Branches and Agencies of Foreign Banks
Agency form number: FR 2225
OMB Docket number: 7100-0216
Frequency: Annual
Reporters: U.S. branches and agencies of foreign banks
Annual reporting hours: 240
Estimated average hours per response: 1.0
Number of respondents: 240
Small businesses are not affected.

General description of report: This information collection is voluntary (sections 11(i), 16, and 19(f) of the Federal Reserve Act). The FR 2225 is a public report subject to the right of individual reporters to request confidential treatment on an ad hoc basis for particular items.

Abstract: This report was implemented in March 1986 as part of the procedures used to administer the Federal Reserve's Payments System Risk policy. The report provides the Federal Reserve with the foreign bank's worldwide capital figure which, in connection with a net debit cap multiple, is used to calculate the bank's daylight overdraft limit.

Under the Federal Reserve's Payments System Risk policy, all institutions that maintain a Federal Reserve account are assigned or may establish a net debit cap that represents a maximum limit on daylight overdrafts incurred in that account on a single day or on average during a two-week maintenance period. The net debit cap is a multiple applied to the risk-based capital for a U.S.-chartered institution and to the consolidated U.S. capital equivalency for a U.S. branch or agency of a foreign bank.

The FR 2225 report was designed to minimize the reporting burden for foreign banks by relying as much as possible on publicly available data regarding capital and by requiring most foreign banks to submit their capital and asset figures only once each year, within three months following the end of the bank's fiscal year. A bank may voluntarily submit the report more frequently to have their overdraft limit based on current data. However, the overdraft limit generally would be smaller for any bank that does not provide the requested information because the limit would be based on the imputed capital of the bank's U.S. branches and agencies.

2. Report title: Report of Net Debit Cap
Agency form number: FR 2226
OMB Docket number: 7100-0217
Frequency: Annually
Reporters: Depository institutions, Edge and agreement corporations, and U.S. branches and agencies of foreign banks
Annual reporting hours: 2,250
Estimated average hours per response: 1.0
Number of respondents: 2,250
Small businesses are not affected.

General description of report: This information collection is required (sections 11, 16, and 19 of the Federal Reserve Act) and is given confidential treatment (5 U.S.C. 552(b)(4)).

Abstract: The Federal Reserve is concerned about the risks associated with critical payment systems. The Federal Reserve Banks are directly exposed to the risk of loss if a depository institution uses Federal Reserve intraday credit to settle Fedwire funds or book-entry securities transfer payments and is unable to repay the extension of credit. The Federal Reserve has adopted a payment system risk reduction policy that relies in part on the efforts of individual institutions to identify, control, and reduce their exposure. The Report of Net Debit Cap comprises one or more resolutions filed by an institution's board of directors.

Under the Federal Reserve's Payments System Risk policy, all institutions that maintain a Federal Reserve account are assigned or may establish a net debit cap that represents a maximum limit on daylight overdrafts incurred in that account on a single day or on average during a two-week maintenance period. The net debit cap is a multiple applied to the risk-based capital for a U.S.-chartered institution and to the U.S. capital equivalency for a U.S. branch or agency of a foreign bank.

3. Report title: Applications for the Issuance and Cancellation of Federal Reserve Stock--National Bank, Nonmember Bank, Member Bank
Agency form number: FR 2030, 2030a, 2056, 2086a, 2086b, and 2087
OMB Docket number: 7100-0042
Frequency: On occasion
Reporters: National, State Member and Nonmember Banks
Annual reporting hours: 942 (FR 2030: 43; FR 2030a: 29; FR 2056: 797; FR 2086a: 26; FR 2086b: 24; FR 2087: 23).
Estimated average hours per response: 0.5 (for each form)
Number of respondents: 1,881 (FR 2030: 86; FR 2030a: 57; FR 2056: 1,594; FR 2086a: 52; FR 2086b: 47; FR 2087: 45).
Small businesses are affected.

General description of report: This information collection is mandatory [12 U.S.C. §§35, 222, 282, 287, 288, and 321 and 12 C.F.R. §§209.1, 209.3, 209.5(b), 209.6, 209.7, and 209.8] and is not given confidential treatment.

Abstract: These Federal Reserve Bank stock application forms are required to be submitted to the Federal Reserve System by any national bank, state member bank, or state nonmember bank wanting to purchase stock in the Federal Reserve System, increase or decrease its Federal Reserve Bank stock holdings, or cancel such stock.

National banks, chartered by the Comptroller of the Currency, are required to become members of the Federal Reserve System. State-chartered commercial banks may elect to become members if they meet the requirements established by the Board of Governors of the Federal Reserve System. When a bank receives approval for membership in the Federal Reserve System, the bank agrees to certain conditions of membership which are contained in an approval letter sent to the bank by the Federal Reserve Bank in the District where the bank is located. In addition to the conditions of membership, the bank also is advised by the Reserve Bank that it must subscribe to the capital stock of the Federal Reserve Bank of its District in an amount equal to 6 percent of the bank's paid-up capital and surplus, including reserve for dividends payable in common stock, pursuant to Section 5 of the Federal Reserve Act and Regulation I. However, the bank is required to make payment for only 50 percent of the subscription, which is recorded as paid-in capital on the Reserve Bank's balance sheet. The remaining 50 percent is subject to call by the Board of Governors of the Federal Reserve System. On June 30, 1994, there were 4,160 Federal Reserve member banks, and their consolidated paid-in capital at the twelve Federal Reserve Banks was $3.5 billion.

The applications are necessary in order to obtain account data on the bank's capital and surplus and to document its request to increase or decrease its holdings of Federal Reserve Bank stock. Another purpose of the applications is to verify that a request has been duly authorized and to prevent unauthorized requests for issuance or cancellation of Federal Reserve Bank stock. The applications are used exclusively by the applying banks and the Federal Reserve Banks. The information collected on the applications is not available from any other source.

Board of Governors of the Federal Reserve System, September 15, 1995.

William W. Wiles,

Secretary of the Board.

[FR Doc. 95–23386 Filed 9–20–95; 8:45AM]

Billing Code 6210–01–F

Nathaniel Anderson, et al.; Change in Bank Control Notice

Acquisition of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for the notice or to the offices of the Board of Governors. Comments must be received not later than October 4, 1995.

A. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. Nathaniel Anderson, B.M. Broderick, Jr., Manfred Hill, and Gary J. Marshik, all of Canton, South Dakota, each to acquire an additional 5 percent, for a total of 25 percent, of the voting shares of Canton Bancshares, Inc., Canton, South Dakota, and thereby indirectly acquire First American Bank, Canton, South Dakota.

Board of Governors of the Federal Reserve System, September 14, 1995.

William W. Wiles,

Secretary of the Board.

[FR Doc. 95–23371 Filed 9–20–95; 8:45 am]

BILLING CODE 6210–01–F

Bank of Boston Corporation; Notice of Application to Engage de novo in Permissible Nonbanking Activities

The company listed in this notice has filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can ''reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.'' Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 4, 1995.

A. Federal Reserve Bank of Boston (Robert M. Brady, Vice President) 600 Atlantic Avenue, Boston, Massachusetts 02106:

1. Bank of Boston Corporation, Boston, Massachusetts; to engage *de novo*, through its subsidiary BancBoston Leasing Investments, Inc., Boston, Massachusetts, in arranging and investing in entities for the financing of low-income housing eligible for Federal income tax credits under Section 42 of the Internal Revenue Code, and providing advice to customers in connection therewith; and the acquisition of both real and personal property for lease to customers and acting as broker, agent or advisor in connection therewith pursuant to §§ 225.25(b)(4), 225.25(b)(5), and 225.25(b)(6) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, September 14, 1995.

William W. Wiles,

Secretary of the Board.

[FR Doc. 95–23375 Filed 9–20–95; 8:45 am]

BILLING CODE 6210–01–F

The Bessemer Group, Incorporated; Notice to Engage in Certain Nonbanking Activities

The Bessemer Group, Incorporated, Woodbridge, New Jersey (Notificant), has provided notice pursuant to section 4(c)(8) of the Bank Holding Company Act (12 USC 1843(c)(8)) (BHC Act) and section 225.23 of the Board's Regulation Y (12 CFR 225.23), to establish a wholly owned *de novo* subsidiary, Bessemer Asset Management, Inc., New York, New York (Company), that would establish and control one or more limited partnerships (Partnerships), including Old Westbury Investment Partners, L.P., New York, New York. Company would serve as the sole general partner of the Partnerships and would provide administrative services to the Partnerships. In order to serve as the general partner of the Partnerships, Company would register with the Commodity Futures Trading Commission as a commodity pool operator (CPO). Company would engage unaffiliated asset managers to manage the investment portfolios of the Partnerships, and the limited partnership interests in the Partnerships would be privately placed with institutional customers by Notificant's subsidiary banks and a broker-dealer subsidiary of one of Notificant's subsidiary banks. Directors, officers and employees of Notificant's subsidiary banks and trust companies may serve as directors and officers of Company. However, directors of Notificant's subsidiary banks and trust companies would not be engaged in the management or performance of Company's day-to-day operations. Notificant proposes that the Partnerships be permitted to invest in the following instruments:

1. U.S. government and agency securities and other securities in which national banks may invest;

2. All types of debt and equity securities;

3. Loan participations;

4. Foreign exchange and interest rate contracts, including spot, forward, swap, futures, options, and options on futures contracts;

5. Money market instruments and commercial paper;

6. options, swaps, futures and options on futures on financial assets and indices, including securities and bond indices;

7. Gold and silver coin, bar, round and bullion, as well as spot, forward, futures, options, and options on futures contracts on such metals;

8. Futures and options on futures contracts on a wide variety of non-financial commodities;

9. Distressed debt securities, including debt securities of an issuer that are in default, bankruptcy, receivership, or subject to an assignment for the benefit of creditors; and

10. Platinum and palladium coin, bar, round and bullion, as well as spot, forward, futures, options and options on futures contracts on these metals.Notificant has stated that the Partnerships may establish wholly owned subsidiaries to hold certain assets, instruments and contracts. The proposed activities are to be conducted throughout the United States.

Section 4(c)(8) of the BHC Act provides that a bank holding company may, with Board approval, engage in any activity ''which the Board, after due notice and opportunity for hearing, has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto''. In determining whether a proposed activity is closely related to banking for purposes of the BHC Act, the Board considers, *inter alia*, the matters set forth in *National Courier Association v. Board of Governors of the Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975). These considerations are

1. Whether banks generally have in fact provided the proposed services,

2. Whether banks generally provide services that are operationally or functionally so similar to the proposed services as to equip them particularly well to provide the proposed services, and

3. Whether banks generally provide services that are so integrally related to the proposed services as to require their provision in a specialized form. *See* 516 F.2d at 1237. In addition, the Board may consider any other basis that may demonstrate that the activity has a reasonable or close relationship to banking or managing or controlling banks. *Board Statement Regarding Regulation Y*, 49 FR 806 (1984).

Notificant maintains that the Board previously has permitted a bank holding company to organize, act as the general partner of, and provide administrative services to limited partnerships whose interests are not registered under the Securities Act of 1933. *See Meridian Bancorp, Inc.*, 80 Federal Reserve Bulletin 736 (1994) (*Meridian*). Notificant also maintains that the proposed activities of the Partnerships, which include investing in instruments that were not considered in *Meridian*, are operationally and functionally similar to the investment portfolio services that Notificant's subsidiary trust companies perform for their customers.

Notificant states that the limited partnerships involved in *Meridian* were permitted to invest in the instruments listed in paragraphs 1 and 2. Notificant also states that the Board has permitted bank holding companies to invest for their own accounts in most of the instruments listed in paragraphs 3 through 8. *See* 12 CFR 225.25(b)(1) (acquiring participations in loans); *The Hongkong and Shanghai Banking Corporation*, 75 Federal Reserve Bulletin 217 (1989) (trading foreign exchange); *The Hongkong and Shanghai Banking Corporation*, 72 Federal Reserve Bulletin 345 (1986), *Westpac Banking Corporation*, 73 Federal Reserve Bulletin 61 (1987), and *Swiss Bank Corporation*, 81 Federal Reserve Bulletin 185 (1995) (*Swiss Bank*) (trading money market instruments, interest rate contracts, gold, silver, contracts on certain financial assets and indices, and contracts on non-financial commodities and indices). Notificant maintains that the Office of the Comptroller of the Currency (OCC) has permitted national banks to purchase and sell for hedging purposes those instruments listed in paragraphs 6 through 8 that the Board has not permitted bank holding companies to trade. For this reason, Notificant states that these activities are functionally and operationally so similar to activities conducted by banks that banking organizations are particularly well equipped to engage in the proposed activities.

The Board has not previously permitted a bank holding company to act as a CPO. Notificant contends that this activity is similar to organizing, and acting as the general partner of, a closed-end investment company or an unregistered limited partnership. *See Meridian* and 12 CFR 225.24(b)(4). Notificant also notes that the OCC has permitted a national bank to act as a CPO under certain circumstances. *See* OCC Interpretive letter No. 496 (December 18, 1989).

Notificant believes that investing in the instruments and commodities listed in paragraphs 9 and 10 is closely related to banking. Notificant maintains that investing in distressed debt is within the scope of a bank holding company's authority to acquire non-controlling positions in the securities of any issuer. In this regard, Notificant has made certain commitments in its notice, including that the Partnerships would not acquire quantities of distressed debt that are reasonably likely to result in the Partnerships acquiring more than 5

percent of the voting securities of the obligor. In addition, Notificant maintains that investing in platinum and palladium is closely related to banking. Notificant states that since the Board's denial of an application by a bank holding company to deal in platinum and palladium, *Standard and Chartered Banking Group*, Ltd., 38 FR 27,552 (1973), the Board has permitted bank holding companies, under Regulation K, to trade these metals. *See Republic National Bank of New York*, 80 Federal Reserve Bulletin 177 (1994); *J.P. Morgan & Company, Inc.*, 76 Federal Reserve Bulletin 552 (1990). The Board also has permitted a bank holding company, under Regulation Y, to trade platinum coin, bullion and futures. *See Swiss Bank*. Notificant maintains that based on these orders, and in light of the precious metals activities currently conducted by banks, the proposed activities are functionally and operationally so similar to activities conducted by banks that banking organizations are particularly well equipped to engage in the proposed activities.

In order to approve the proposal, the Board must determine that the proposed activities ''can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices.'' 12 U.S.C. 1843(c)(8).

Notificant believes that the proposed activities would produce public benefits that outweigh any potential adverse effects. These public benefits include increased competition and greater convenience to Notificant's customers. In addition, Notificant indicates that the proposed activities, in light of Notificant's proposed safeguards and the commitments made by Notificant, would not result in adverse effects such as an undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.

In publishing the proposal for comment, the Board does not take a position on issues raised by the proposal. Notice of the proposal is published solely to seek the views of interested persons on the issues presented by the notice and does not represent a determination by the Board that the proposal meets, or is likely to meet, the standards of the BHC Act.

Any comments or requests for hearing should be submitted in writing and received by William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, not later than October 19, 1995. Any request for a hearing on this notice must, as required by section 262.3(e) of the Board's Rules of Procedure (12 C.F.R. 262.3(e)), be accompanied by a statement of the reasons why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

The notice may be inspected at the offices of the Board of Governors or the Federal Reserve Bank of New York.

Board of Governors of the Federal Reserve System. September 14, 1995.

William W. Wiles,

Secretary of the Board

[FR Doc. 95–23369 Filed 9–20–95; 8:45 am]

BILLING CODE 6210–01–F

Carroll County Bancshares, Inc.; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can ''reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.'' Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 4, 1995.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Carroll County Bancshares, Inc., Carroll, Iowa; to acquire Carroll Credit, Inc., Carroll, Iowa, and thereby engage in owning and operating a finance company, and to engage in credit insurance activities through Notificant's subsidiary, Credit, pursuant to §§ 225.25(b)(1)(i) and 225.25(b)(8)(i) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, September 14, 1995.

William W. Wiles,

Secretary of the Board.

[FR Doc. 95–23372 Filed 9–20–95; 8:45 am]

BILLING CODE 6210–01–F

Doniphan Bancshares, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than October 13, 1995.

A. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. Doniphan Bancshares, Inc., Doniphan, Nebraska to become a bank holding company by acquiring 100 percent of the voting shares of Bank of Doniphan, Doniphan, Nebraska.

2. Estes Park Bank Restated Employee Stock Ownership 401(k) Plan and Retirement Trust, Estes Park, Colorado; to acquire 51.45 percent of the voting shares of Estes Bank Corporation, Estes Park, Colorado, and thereby indirectly acquire The Estes Park Bank, Estes Park, Colorado.

Board of Governors of the Federal Reserve System, September 14, 1995.

William W. Wiles,

Secretary of the Board.

[FR Doc. 95–23373 Filed 9–20–95; 8:45 am]

BILLING CODE 6210–01–F

First American Corporation, et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than October 16, 1995.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. First American Corporation, Nashville, Tennessee; to merge with First City Bancorp, Inc., Murfreesboro, Tennessee, and thereby indirectly acquire First City Bank, Murfreesboro, Tennessee, and Citizens Bank, Smithville, Tennessee.

2. The Queensborough Company, Louisville, Georgia; to acquire 100 percent of the voting shares of Ogeechee Valley Bank, Millen, Georgia.

B. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. Randall Bancorp, Inc., Pine River, Minnesota; to become a bank holding company by acquiring 72.22 percent of the voting shares of Randall Holding Co., Inc., Pine River, Minnesota, and thereby indirectly acquire Randall State Bank, Randall, Minnesota.

In connection with this application, Applicant also has applied to acquire 13.66 percent of the voting shares of Norbanc Group, Inc., Pine River, Minnesota, and thereby indirectly acquire Pine River State Bank, Pine River, Minnesota.

C. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Overton Financial Corporation, Overton, Texas; to acquire an additional 4.28 percent, for a total of 31.14 percent, of the voting shares of Longview Financial Corporation, Longview, Texas, and thereby indirectly acquire Longview Delaware Corporation, Dover, Delaware; Longview Bank & Trust, Longview, Texas; and First State Bank, Van, Texas.

In connection with this application, Overton Delaware Corporation, Dover, Delaware, has applied to acquire an additional 4.28 percent, for a total of 31.14 percent, of the voting shares of Longview Financial Corporation, Longview, Texas; and thereby indirectly acquire Longview Delaware Corporation, Dover, Delaware; Longview Bank & Trust, Longview, Texas; and First State Bank, Van, Texas.

Board of Governors of the Federal Reserve System, September 15, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–23413 Filed 9–20–95; 8:45 am]

BILLING CODE 6210–01–F

Louis G. Titus, et al. Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 95-22566) published on page 47369 of the issue for Tuesday, September 12, 1995.

Under the Federal Reserve Bank of Kansas City heading, the entry for Louis G. Titus, is revised to read as follows:

1. Liscomb J. Titus and Paula E. Titus, trustees of the Louis G. Titus Revocable Trust to vote 51.2 percent; Paula E. Titus, to vote an additional 9.16 percent; and John L. Titus, all of Holdrege, Nebraska, to vote 39.2 percent of the voting shares of LJT, Inc., Holdrege, Nebraska, and thereby indirectly acquire The First National Bank of Holdrege, Holdrege, Nebraska.

Board of Governors of the Federal Reserve System, September 15, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–23416 Filed 9–20–95; 8:45 am]

BILLING CODE 6210–01–F

National Westminster Bank PLC; Notice of Application to Engage de novo in Permissible Nonbanking Activities

The company listed in this notice has filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can ''reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.'' Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party

commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 5, 1995.

A. Federal Reserve Bank of New York (William L. Rutledge, Senior Vice President) 33 Liberty Street, New York, New York 10045:

1. National Westminster Bank PLC, London, England, and Natwest Holdings Inc., New York, New York; to engage *de novo* through their subsidiary, Natwest Investment Management, Inc., Boston, Massachusetts, in providing advisory services to affiliated and non-affiliated entities with respect to futures contracts; and in providing advisory services with respect to certain futures contracts and options on futures contracts on index products previously approved by the Board, pursuant to § 225.25(b)(18) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, September 15, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–23414 Filed 9–20–95; 8:45 am]

BILLING CODE 6210–01–F

Richard Conrad Skates, et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than October 5, 1995.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. Richard Conrad Skates, Woodland, Georgia; to acquire a total of 74.35 percent of the voting shares of Canebrake Bancshares, Inc., Uniontown, Alabama, and thereby indirectly acquire First State Bank of Uniontown, Uniontown, Alabama.

B. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105:

1. Ernest J. Boch, Edgartown, Massachusetts; to acquire a total of 9.93 percent; Byrne & Sons, l.p., Norwich, Vermont, to acquire a total of 7.82 percent; Edward A. Fox, Harborside, Maine, to acquire a total of 4.91 percent; Charles E. Hugel, Melvin Village, New Hampshire, to acquire a total of 2.79 percent; Robert P. Keller, Gilford, New Hampshire, to acquire a total of .45 percent; K. Thomas Kemp, Hanover, New Hampshire, to acquire a total of 1.12 percent; Jefferson W. Kirby, Short Hills, New Jersey, to acquire 9.93 percent; Northwood Ventures, Syosset, New York, to acquire a total of 3.13 percent; Northwood Capital Partners LLP, Syosset, New York, to acquire a total of 1.12 percent; John J.F. Sherrerd, Bryn Mawr, Pennsylvania, to acquire a total of 3.35 percent; and George U. Wyper, Darien, Connecticut, to acquire a total of 1.45 percent, of the voting shares of SDN Bancorp, Encinitas, California, and thereby indirectly acquire San Dieguito National Bank, Encinitas, California. Comments regarding this application, must be received not later than September 25, 1995.

Board of Governors of the Federal Reserve System, September 15, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–23415 Filed 9–20–95; 8:45 am]

BILLING CODE 6210–01–F

Stichting Prioriteit ABN AMRO Holding; Notice to Engage in Certain Nonbanking Activities

Stichting Prioriteit ABN AMRO Holding, Stichting Administratiekantoor ABN AMRO Holding, ABN AMRO Holding N.V., and ABN AMRO Bank N.V., all of Amsterdam, The Netherlands (collectively, Notificants), have provided notice pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) (BHC Act) and § 225.23(a)(3) of the Board's Regulation Y (12 CFR 225.23(a)(3)), to retain their interest in Alfred Berg, Inc., New York, New York (Alfred Berg), and thereby engage in the following activities:

1. Underwriting and dealing in debt and equity securities, other than interests in open-end investment companies;

2. Acting as agent in the private placement of securities;

3. Acting as riskless principal in the purchase and sale of all types of securities on behalf of customers;

4. Providing full service securities brokerage services; and

5. Providing investment advisory services.

Notificants propose that Alfred Berg engage in these activities throughout the world.

Section 4(c)(8) of the BHC Act provides that a bank holding company may, with Board approval, engage in any activity which the Board, after due notice and opportunity for hearing, has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. This statutory test requires that two separate tests be met for an activity to be permissible for a bank holding company. First, the Board must determine that the activity is, as a general matter, closely related to banking. Second, the Board must find in a particular case that the performance of the activity by the applicant bank holding company may reasonably be expected to produce public benefits that outweigh possible adverse effects.

A particular activity may be found to meet the ''closely related to banking'' test if it is demonstrated that banks generally have provided the proposed activity, that banks generally provide services that are operationally or functionally similar to the proposed activity so as to equip them particularly well to provide the proposed activity, or that banks generally provide services that are so integrally related to the proposed activity as to require their provision in a specialized form. *National Courier Ass'n v. Board of Governors*, 516 F.2d 1229, 1237 (D.C. Cir. 1975). In addition, the Board may consider any other basis that may demonstrate that the activity has a reasonable or close relationship to banking or managing or controlling banks. Board Statement Regarding Regulation Y, 49 FR 806 (1984).

Notificants maintain that the Board previously has determined by order and regulation that the activities listed in paragraphs 2 through 5 are closely related to banking. *See* 12 CFR 225.25(b)(4) (investment advisory services); 12 CFR 225.25(b)(15) and *PNC Financial Corp*, 75 Federal Reserve Bulletin 396 (1986) (full services securities brokerage); *Bankers Trust New York Corporation*, 75 Federal Reserve Bulletin 829 (1989) (acting as agent in the private placement of securities and purchasing and selling securities on the order of investors as a

riskless principal). Notificants have stated that Alfred Berg would conduct these proposed activities within the limitations and prudential guidelines established by the Board.

Notificants also maintain that the Board has determined that underwriting and dealing, to a limited extent, in debt and equity securities is closely related to banking. *See Canadian Imperial Bank of Commerce*, 76 Federal Reserve Bulletin 158 (1990) (*CIBC*); *J.P. Morgan & Co. Incorporated, et al.*, 75 Federal Reserve Bulletin 192 (1989), *aff'd sub nom. Securities Industries Ass'n v. Board of Governors of the Federal Reserve System*, 900 F.2d 360 (D.C. Cir. 1990); and *Citicorp, et al.*, 73 Federal Reserve Bulletin 473 (1987), *aff'd sub nom. Securities Industry Ass'n v. Board of Governors of the Federal Reserve System*, 839 F.2d 47 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988). Notificants have stated that Alfred Berg would conduct the proposed activities within the limitations and prudential guidelines established by the Board in previous orders, with one exception. In particular, Notificants propose to modify firewall number 19 of *CIBC* to permit Alfred Berg, in connection with its market making activities, to purchase from and sell to its foreign affiliates American Depositary Receipts (ADRs) and the underlying foreign securities represented by the ADRs in such quantities that are reasonably related to *bona fide* indications of buying and selling interest of unaffiliated customers of Alfred Berg. Notificants maintain that their proposal is consistent with the Board's determination in *CIBC* to permit foreign affiliates of an underwriting subsidiary, in certain circumstances, to purchase from the underwriting subsidiary securities being underwritten by such subsidiary. Notificants also state that the purchases and sales of ADRs and foreign securities between Alfred Berg and its foreign affiliates would not be for the purpose of providing liquidity or capital support to Alfred Berg.

In order to approve the proposal, the Board must determine that the proposed activities to be conducted by Alfred Berg ''can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.'' 12 U.S.C. 1843(c)(8). Notificants believe that the proposal would produce public benefits that outweigh any potential adverse effects. In particular, Notificants maintain that the proposal would enhance competition and enable Notificants to offer their customers a broader range of products. Notificants also maintain that their proposal would not result in any adverse effects.

In publishing the proposal for comment, the Board does not take a position on issues raised by the proposal. Notice of the proposal is published solely to seek the views of interested persons on the issues presented by the application and does not represent a determination by the Board that the proposal meets, or is likely to meet, the standards of the BHC Act. Any comments or requests for hearing should be submitted in writing and received by William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, not later than October 19, 1995. Any request for a hearing on this application must, as required by § 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e)), be accompanied by a statement of the reasons why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

This application may be inspected at the offices of the Board of Governors or the Federal Reserve Bank of Chicago.

Board of Governors of the Federal Reserve System, September 14, 1995.

William W. Wiles,

Secretary of the Board.

[FR Doc. 95–23374 Filed 9–20–95; 8:45 am]

BILLING CODE 6210–01–F

GENERAL SERVICES ADMINISTRATION

Privacy Act of 1974: System of Records

AGENCY: General Services Administration (GSA).

ACTION: Notice of a system of records subject to the Privacy Act of 1974.

SUMMARY: The following notice is reissued to show that the record system GSA/OEA–1, Records of Defunct Agencies, is still in effect. It also updates references to offices and officials.

FOR FURTHER INFORMATION CONTACT: Mary L. Cunningham, Records Officer (202) 501–3415.

SUPPLEMENTARY INFORMATION: Under a reimbursable agreement, the GSA services the records of governmental units that have shut down, including presidential commissions, committees, small agencies, and boards.

GSA/OEA–1 1–23–00–0103

SYSTEM NAME:

Records of Defunct Agencies.

SYSTEM LOCATION:

The system of records is located in the GSA regional office building, 7th & D Streets, SW., Washington, DC 20407, and at the GSA National Payroll Center, Kansas City, MO 64131.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Employees of defunct agencies, including but no limited to, presidential commissions, committees, small agencies, and boards, whose records the GSA services under a reimbursable agreement.

CATEGORIES OF RECORDS IN THE SYSTEM:

Payroll and financial records, including but not limited to, time and attendance cards, payment vouchers, employee health benefit records, requests for deductions, tax forms, including W–2 forms, overtime requests, leave data, retirement records, and vendor register and payment tapes.

AUTHORITY FOR MAINTAINING THE SYSTEM:

The Money and Finance Act, 31 U.S.C. 1535, 1536, and 3324, and the Federal Property and Administrative Services Act of 1949, 63 Stat. 377.

ROUTINE USES OF THE RECORDS IN THE SYSTEM, INCLUDING TYPES OF USERS AND THE PURPOSES OF SUCH USES:

The GSA uses the records for concluding the administrative operations of the defunct agency. Routine uses include providing a copy of an employee's Department of the Treasury Form W–2, and Wage and Tax Statement, to the State, city, or other local jurisdiction that has authority to tax the employee's pay. The agency also provides a record under a withholding agreement between a State, city, or other jurisdiction and the Department of the Treasury under 5 U.S.C. 5516, 5517, and 5520, or in response to the written request of an authorized official of the taxing jurisdiction to the Regional Administrator, General Services Administration (6A), 1500 East Bannister Road, Kansas City, MO 64131. The request must include a copy of the statute or ordinance showing the authority of the jurisdiction to tax the employee based on place of residence, place of employment, or both.

Under a withholding agreement between a city and the Department of

the Treasury (5 U.S.C. 5520), the GSA furnishes copies of executed city tax withholding certificates to the city in response to a written request from the proper city official to the GSA official named in the paragraph above.

Records are also released to the General Accounting Office for audits and to the Internal Revenue Service for use in investigations.

Additional routine uses are:

A. To disclose a record to the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, or regulation, or order, where the GSA becomes aware of an indication of a violation, or potential violation of a civil or criminal law or regulation.

b. To disclose a record to a Federal, State, or local agency maintaining civil, criminal, or related enforcement information or information, such as licenses, when needed to make a decision on hiring or retaining an employee, issuing a security clearance, letting a contract, or issuing a license, grant, or other benefit.

c. To disclose a record to an authorized appeal or grievance examiner, formal complaints examiner, equal employment opportunity investigator, arbitrator, or other authorized official engaged in investigating or settling a grievance, complaint, or appeal filed by an employee.

d. To disclose a record to a congressional office in response to an inquiry of that office made at the request of the subject of the record.

e. To disclose a record to the Office of Management and Budget for reviewing private relief legislation at any stage of the legislative clearance process.

f. To disclose a record to (1) an expert, consultant, or contractor of the GSA as needed to further the performance of a Federal duty and (2) a physician to conduct a fitness-for-duty examination of a GSA officer or employee.

g. To disclose a record to the OPM concerning pay, benefits, retirement deductions, and other information needed under that agency's responsibility to evaluate Federal personnel management.

To the extent that official personnel records in the GSA's custody are covered within systems of records published by the OPM as Governmentwide records, the records are considered part of the Governmentwide system. Other personnel records covered by notices published by the GSA and considered to be separate systems of records may be transferred to the OPM under personnel programs as a routine use.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records are in file folders and card files. Microfilm records are on reels and in cabinets. Magnetic tapes and cards are in cabinets and storage libraries. Electronic records are stored in computers and attached equipment.

RETRIEVABILITY:

Payroll records are retrievable by social security number and other records by name.

SAFEGUARDS:

When not in use by an authorized person, the records are stored in locked metal containers or in secured rooms.

RETENTION AND DISPOSAL:

The Division Director of the Agency Liaison Division disposes of the records as scheduled in the handbook, GSA Records Maintenance and Disposition System (OAD P 1820.2).

SYSTEM MANAGERS AND ADDRESS:

The system manager is the Director, Agency Liaison Division (WB–E), General Services Administration, 7th & D Streets, SW., Washington, DC 20407.

NOTIFICATION PROCEDURE:

Requests to review or receive a copy of a record should be sent to the system manager named above.

RECORD ACCESS PROCEDURES:

See 41 CFR part 105–64, published in the Federal Register, for the procedures. Address your written request to review or copy records to the system manager, with the words ''Privacy Act Request'' written on the the letter and on the envelope.

CONTESTING RECORD PROCEDURES:

See 41 CFR part 105–64.

RECORDS SOURCE CATEGORIES:

When it shuts down, the agency that the GSA services publishes a notice in the Federal Register transferring administrative responsibility for the records to the GSA.

Dated: September 14, 1995.

Kenneth S. Stacey,

Acting Director, Information Management Division.

[FR Doc. 95–23445 Filed 9–20–95; 8:45 am]

BILLING CODE 6820–34–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Council; Notice of Meeting

Correction

In Federal Register Document 95–20814 appearing at pages 43805–06 in the issue for Wednesday, August 23, 1995, the September 27, 1995, meeting of the ''National Advisory Council on Nurse Education and Practice and the Council on Graduate Medical Education'' has been changed. The meeting will include a demonstration of the computer-based requirements model at 7:45 p.m. to 9:00 p.m. on September 26.

All other information is correct as it appears.

Dated: September 15, 1995.

Jackie E. Baum,

Advisory Committee Management Officer, HRSA.

[FR Doc. 95–23417 Filed 9–20–95; 8:45 am]

BILLING CODE 4160–15–P

Office of Inspector General

Program Exclusions: September 1995

AGENCY: Office of Inspector General, HHS.

ACTION: Notice of program exclusions.

During the month of September 1995, the HHS Office of Inspector General imposed exclusions in the cases set forth below. When an exclusion is imposed, no program payment is made to anyone for any items or services (other than an emergency item or service not provided in a hospital emergency room) furnished, ordered or prescribed by an excluded party under the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs. In addition, no program payment is made to any business or facility, e.g., a hospital, that submits bills for payment for items or services provided by an excluded party. Program beneficiaries remain free to decide for themselves whether they will continue to use the services of an excluded party even though no program payments will be made for items and services provided by that excluded party. The exclusions have national effect and also apply to all Executive Branch procurement and non-procurement programs and activities.

Subject city, state	Effective date
Program-Related Convictions	
AUTORINO, MARK M, SUFFIELD, CT	08/29/95
DRAKE, SAMUEL L, VISTA, CA	08/29/95
J P HARRISON, INC. DELMAR, DE	08/29/95
NATIVIDAD, GLORIA Q, KIRKLAND, WA	08/29/95
PATEL, MANNY, TAMPA, FL	08/29/95
PEARSON, STEPHEN D, ROGERSVILLE, TN	08/29/95
RUSSELL, ALEXANDER B, SOLDOTNA, AK	08/29/95
VALDES, EMILIO, MIAMI, FL	09/11/95
WISECARVER, GLORIA, SOLDOTNA, AK	08/29/95
Patient Abuse/Neglect Convictions	
BARNES, ADDISON A JR, SHERIDAN, OR	08/29/95
HERT, CAMERON J, GLENDALE, AZ	08/29/95
JORDAN, JOE L, NASHVILLE, TN	08/29/95
KIMBELL, CYNTHIA R, TUCSON, AZ	08/29/95
LAWRENCE, CLARENCE O, MAYSVILLE, NC	08/29/95
SPENCE, ZELIA, YORKTOWN HGTS, NY	08/29/95
VERNON, PATRICIA, TUCSON, AZ	08/29/95
Conviction for Health Care Fraud	
WILLIAMS, DESIREE JONES, HARVEY, LA	08/29/95
License Revocation/Suspension/Surrender	
APPLEBAUM, WAYNE S, MINNEAPOLIS, MN	09/11/95
BALMES, RUBEN ALONZO, TEMPE, AZ	09/11/95
BOYADJIAN, VAHE, WEEHAWKEN, NJ	08/29/95
CAUTHEN, JENNIFER B, WHITE BLUFF, TN	08/29/95
CRIM, KELLY, MIDDLETOWN, RI	08/29/95
DEITZLER, MARGARET, ALAMEDA, CA	08/29/95
DOLORES, MICHAEL A, SAN FRANCISCO, CA	09/11/95
ENGVICK, JOHN, CAMP VERDE, AZ	08/29/95
HIGNELL, THOMAS E, CHICO, CA	08/29/95
KIRKPATRICK, JAMES D, INDIANAPOLIS, IN	08/29/95
LINDEN, ZENA, LOS GATOS, CA	09/11/95
LOWE, CRAIG EDMOND, MONTEBELLO, CA	09/11/95
MACLEAN, CHARLES A, OWOSSO, MI	08/29/95
NADELL, RAYMOND, BROOKLYN, NY	08/29/95
OLIVER, JOHN PAUL, PHOENIX, AZ	09/11/95
PAYNE, KENNETH E, CAMPBELL, CA	08/29/95
ROSCHEN, FRITZ, ELK GROVE, CA	08/29/95
SOULE, SHEILA, WEST HAVEN, CT	08/29/95
STARK, WILLIAM R, JOHNSTON, RI	08/29/95
WIERSUM, JEFFREY, SYRACUSE, NY	08/29/95
Federal/State Exclusion/Suspension	
BINGHAM, CHARLES B, VEYO, UT	08/29/95
Entities Owned/Controlled by Convicted/Excluded	
MEDICINE SHOPPE PHARMACY, HENDERSONVILLE, TN	08/29/95
Default on Public Health Service Loan	
BACHWALD-HEILIG, BONNIE I, TUCSON, AZ	08/29/95
BURKART, JOHN D, DENVER, CO	08/29/95
CASELLA, ANGELA, BRONX, NY	08/29/95
CORLEY, LEE JR, EVERETT, WA	08/29/95
DAVIS, CLARENCE JR, NASHVILLE, TN	08/29/95
HALL, PATRICIA L, TAMPA, FL	09/11/95
HOEHN, JAMES D JR, W LAKE VILLAGE, CA	08/29/95
KECK, JULIE N, NASHVILLE, TN	08/29/95
LEVIN, NANCY E, PALM BCH GARDENS, FL	08/29/95
MORA, ALFRED JOSE, PALM BAY, FL	09/11/95
MULHOLLEN, KELLI M, MEMPHIS, TN	09/11/95
OWEN, GARY L, LUBBOCK, TX	08/29/95
PRESCOD, GLENN S, PROVIDENCE, RI	08/29/95
QUAST, SEAN C, WHITE BEAR LAKE, MN	08/29/95
RUTA, EUGENIO, LIVINGSTON, NJ	08/29/95
SCHECHER, VALERIE A, EAST MEADOW, NY	08/29/95
SMITH, MARK A, CAPE CORAL, FL	09/11/95
WILSON, SONI Y, DETROIT, MI	08/29/95

Dated: September 14, 1995.

William M. Libercci,

Director, Health Care Administrative Sanctions, Office of Civil Fraud and Administrative Adjudication.

[FR Doc. 95–23448 Filed 9–20–95; 8:45 am]

BILLING CODE 4150–04–P

National Institutes of Health

Proposed Data Collections Available for Public Comment and Recommendations

Section 3506(c)(2)(A) of the Paperwork Reduction act of 1995 requires that Federal agencies provide a 60-day notice in the Federal Register concerning each proposed collection of information. The National Institute of Child Health and Human Development (NICHD) of the National Institutes of Health (NIH) is publishing this notice to solicit public comment on a proposed data collection for the Contraception and Infertility Research Loan Repayment Program. To request copies of the data collection plans and instruments, call Dr. Louis DePaolo on (301) 496–6515 (not a toll-free number).

Comments are invited on: (a) Whether the proposed collection is necessary, including whether the information has practical use; (b) ways to enhance the clarity, quality, and use of the information to be collected; (c) the accuracy of the agency's estimate of burden of the proposed collection; and (d) ways to minimize the collection burden of the respondents. Written comments are requested within 60 days of the publication of this notice. Send comments to Dr. Louis DePaolo, Reproductive Sciences Branch, Center for Population Research, NICHD, NIH, Building 61E, Rm. 8B01, Bethesda, Maryland 20892–7510.

Proposed Project

The Center for Population Research of the NICHD, NIH, intends to make available educational loan repayment under the NICHD Contraception and Infertility Research Loan Repayment Program (CIR–LRP). The CIR–LRP is authorized by Section 487B of Part G of Title IV of the Public Health Service (PHS) Act (42 U.S.C. 288–2) as amended by the NIH Revitalization Act of 1993 (Pub. L. 103–43). The program intends to provide for the repayment of the educational loan debt of health professionals (including graduate students) who agree to commit to a period of obligated service of not less than two years conducting research with respect to contraception and/or infertility. The CIR–LRP will pay up to

$20,000 of the principal and interest of such individual's educational loans for each year of commitment not to exceed one-half of the remaining loan balance. The CIR–LRP is designed to provide an incentive for health professionals to work in areas of reproductive research directly related to contraceptive development and/or infertility diagnosis and treatment by providing assistance in repaying educational loans for such individuals. The long-range objective of the CIR–LRP is to stimulate the commitment of researchers to sustaining a career focus on contraception and/or infertility research.

The information proposed for collection will be used by the NICHD to determine an applicant's eligibility for participation in the CIR–LRP. The CIR–LRP application consists of two parts: Part I (Information About the Applicant) is completed by the applicant; Section A of Part II (Loan Information and Permission for Disclosure) is also completed by the applicant; and Section B, Part II (Lender's Verification) is completed by the Lending Institution. It may also be necessary for a State or other entity to verify an outstanding service obligation. In these instances, written verification of the service obligation will be requested from the State or other entity.

The annual burden estimates are as follows:

	No. respondents	No. responses per respondent	Avg. burden per response (hrs)
Applicant	50	1	5.5
Lender	200	1	0.5
State/Other Entity	8	1	0.5

Dated: September 5, 1995.

Benjamin E. Fulton,

Deputy Executive Officer, National Institute of Child Health and Human Development.

[FR Doc. 95–23392 Filed 9–20–95; 8:45 am]

BILLING CODE 4140–01–M

Proposed Data Collection Available for Public Comment

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the National Institutes of Health (NIH), National Cancer Institute (NCI) will publish periodic summaries of proposed projects. To request more information on the proposed project, call Frances E. Thompson, Ph.D., Epidemiologist, at (301) 496–8500.

Comment 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. Send comments to Frances E. Thompson, Ph.D., National Cancer Institute, EPN 313, 6130 Executive Blvd MSC 7344, Bethesda, MD 20892–7344. Written comments should be received by November 20, 1995.

Proposed Project: Checklist Validation of Dietary Questionnaire—New—This experiment will compare the performance of two self-administered food frequency questionnaires which use different approaches to collect the information. The purpose of the study is to determine which food frequency approach more nearly replicates the information collected on the criterion Daily Checklist Instrument, which is a list of about 30 key food items selected especially for this comparative assessment. The Checklist will be completed daily for 30 days by each study participant. Following the 30-day period, one group will complete the NCI Health Habits and History Questionnaires (HHHQ), and the other group will complete the NCI Diet History Questionnaire (DHQ). Respondents to each data collection instrument will estimate how often they eat a series of food items in the last month. Complete questionnaires will be obtained on 250 subjects in each of the two study groups. Study participants will be compensated. The results of the study will be used to refine the NCI Diet History Questionnaire. Participants will be adult volunteers from the Washington, DC metropolitan area. Burden estimates are as follows:

	No. of respondents	Instrument type	No. of responses per respondent	Avg. burden/response (hrs)
Group 1	250	Checklist	30	.114
		HHHQ	1	.500
Group 2	250	Checklist	30	.114
		DHQ	1	.667

Dated: September 13, 1995.

Philip D. Amoruso,

NCI Executive Officer.

[FR Doc. 95–23393 Filed 9–20–95; 8:45 am]

BILLING CODE 4140–01–M

Proposed Data Collection Available for Public Comment

In compliance with the requirement of Section 3506(c)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the National Institute of Child Health and Human Development (NICHD), is publishing this notice of a proposed project. Written comments are requested within 60 days of the publication of this notice. For more information, please contact the NICHD Clearance Liaison at (301) 496–1971 (not a toll-free number).

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.

Proposed Project: Evaluation of study entitled Preventing Problem Behavior Among Middle School Students. The purpose of the study is to test the effect of education on the prevalence of problem behavior. The study involves the students in seven middle schools in one Maryland school district. The school board, school superintendent, principals of each middle school, and various parent and teacher groups have reviewed and approved or endorsed the study, including data collection. At the beginning of 6th grade, and at the end of 6th, 7th, 8th, and 9th grades, students will be asked to complete questionnaires on attitudes and behavior regarding the use of tobacco and alcohol and misconduct at school and in the community. Also, a sample of 1000 parents will be interviewed by telephone about practices that protect children from problem behavior. The estimated annual burden is 4900 hours, with 7900 respondents providing an average of .73 responses of .91 hours duration.

Send comments to Bruce Simons-Morton, Project Officer, 6100 Executive Blvd, 7B05, DESPR, NICHD, Rockville, MD 20852.

Dated September 11, 1995.

Heinz Berendes,

Director, DESPR, NICHD, National Institute of Child Health and Human Development.

[FR Doc. 95–23394 Filed 9–20–95; 8:45 am]

BILLING CODE 4140–01–M

Division of Research Grants; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Division of Research Grants Special Emphasis Panel (SEP) meetings:

Purpose/Agenda

To review individual grant applications.
Name of SEP: Clinical Sciences.
Date: October 24, 1995.
Time: 2:00 p.m.
Place: Ramada Hotel, Arlington, VA.
Contact Person: Dr. Priscilla Chen, Scientific Review Administrator, 6701 Rockledge Drive, Room 4104, Bethesda, Maryland 20892, (301) 435–1787.

Name of SEP: Multidisciplinary Sciences.
Date: November 1–2, 1995.
Time: 7:00 p.m.
Place: University Inn, Urbana-Champagne, IL.
Contact Person: Dr. Harish Chopra, Scientific Review Administrator, 6701 Rockledge Drive, Room 5112, Bethesda, Maryland 20892, (301) 435–1169.

Name of SEP: Clinical Sciences.
Date: November 1, 1995.
Time: 1:00 p.m.
Place: NIH, Rockledge II, Room 4218, Telephone Conference.
Contact Person: Dr. Shirley Hilden, Scientific Review Administrator, 6701 Rockledge Drive, Room 4218, Bethesda, Maryland 20892, (301) 435–1198.

Name of SEP: Biological and Physiological Sciences.
Date: November 17, 1995.
Time: 9:00 a.m.
Place: American Inn, Bethesda, MD.
Contact Person: Dr. David Remondini, Scientific Review Administrator, 6701 Rockledge Drive, Room 6154, Bethesda, Maryland 20892, (301) 435–1038.

Purpose/Agenda

To review Small Business Innovation Research.
Name of SEP: Multidisciplinary Sciences.
Date: October 11, 1995.
Time: 1:00 p.m.
Place: Holiday Inn-National Airport, Crystal City, VA.
Contact Person: Dr. Lee Rosen, Scientific Review Administrator, 6701 Rockledge Drive, Room 5116, Bethesda, Maryland 20892, (301) 435–1171.

Name of SEP: Multidisciplinary Sciences.
Date: October 30–November 1, 1995.
Time: 8:00 a.m.
Place: Doubletree Hotel, Rockville, MD.
Contact Person: Dr. Dharam Dhindsa, Scientific Review Administrator, 6701 Rockledge Drive, Room 5206, Bethesda, Maryland 20892, (301) 435–1174.

Name of SEP: Clinical Sciences.
Date: November 8, 1995.
Time: 8:00 a.m.
Place: Holiday Inn, Chevy Chase, MD.
Contact Person: Dr. Shirley Hilden, Scientific Review Administrator, 6701 Rockledge Drive, Room 4218, Bethesda, Maryland 20892, (301) 435–1198.

The meetings will be closed in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the grant review cycle.

(Catalog of Federal Domestic Assistance Program Nos. 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 14, 1995.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 95–23387 Filed 9–20–95; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*):

PRT–806153

Applicant: Donald Bedell, Sikeston, MO.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from the captive herd maintained by Mr. L. Kock, Verborgenfontein, Merriman, South Africa for the purpose of enhancement of the survival of the species.

PRT–806318

Applicant: Mike Murray, Tulsa, OK.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) from culled from the captive herd maintained by the Ciskei Government, Tsolwana Game Reserve, Tarkastad, South Africa for the purpose of enhancement of the survival of the species.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 420(c), Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication.

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S.

Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 420(c), Arlington, Virginia 22203. Phone: (703/358–2104); FAX: (703/358–2281).

Dated: September 15, 1995.

Caroline Anderson,

Acting Chief Branch of Permits,' Office of Management Authority.

[FR Doc. 95–22356 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–55–P

Availability of a Draft Recovery Plan for the Ute Ladies'-tresses (Spiranthes diluvialis) for Review and Comment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of a draft recovery plan for the Ute ladies'-tresses (*Spiranthes diluvialis*) This plant occurs on public, private, and Ute tribal lands in the Uinta Basin, along the Wasatch Front, and in the west desert in Utah; along Colorado's's Front Range north of Denver; in two locations in Wyoming; and in one location in Montana. The Service solicits review and comment from the public on this draft recovery plan.

DATES: Comments on the draft recovery plan must be received on or before November 20, 1995 to ensure they receive consideration by the Service.

ADDRESSES: Persons wishing to review the draft recovery plan may obtain a copy by contracting the Field Supervisor, U.S. Fish and Wildlife Service, Lincoln Plaza, Suite 404, 145 East 1300 South, Salt Lake City, Utah 84115. Written comments and materials regarding this plan should be sent to the Field Supervisor at the Salt Lake City address given above. Comments and materials received are available on request for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Lucy A. Jordan, Fish and Wildlife Biologist (see **ADDRESSES** above), at telephone 801/524–5001.

SUPPLEMENTARY INFORMATION:

Background

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the U.S. Fish and Wildlife Service's endangered species program. To help guide the recovery effort, the Service is working to prepare recovery plans for most of the listed species native to the United States. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for recovery levels for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act, as amended in 1988, requires that public notice and an opportunity for public review and comment be provided during recovery plan development. The Service will consider all information presented during a public comment period prior to approval of each new or revised recovery plan. The Service and other Federal agencies also will take these comments into account in the course of implementing approved recovery plans.

The Ute ladies'-tresses (*Spiranthes diluvialis*) is a perennial, terrestrial orchid 20 to 50 cm (8 to 20 inches) tall. The flowers are white or ivory and cluster into a spike arrangement at the top of the stem. The plan generally occurs in small, scattered groups in low elevation riparian, spring, and lakeside wetland meadows. The species range includes the west desert, Wasatch Front, and Uinta Basin in Utah; the Front Range north of Denver in Colorado, southeastern to central Wyoming, and southwestern Montana.

The Ute ladies'-tresses was listed as a threatened species on January 17, 1992 (57 FR 2053), under the authority of the Act. It was listed due to current and potential threats to the species' population and habitat from increasing urbanization, water diversions, alteration and management of stream systems that result in a decrease in stream dynamics, increasing recreation, and invasion of habitat by exotic plant species. The goal of the recovery plan is to maintain and protect viable populations to ensure the species' survival and to guide recovery actions to facilitate downlisting and delisting of the species. Recovery efforts will focus on developing and implementing watershed management programs that help retain and restore streams and streamside habitats where the plant occurs, establishing formal land management designations that provide long-term protection of the species and its habitat, conducting biological and habitat management research, managing recreation, and implementing integrated pest management for weed control.

Public Comments Solicited

The Service solicits written comments on the recovery plan described above. All comments received by the date specified in the **DATES** section above will be considered prior to approval of the recovery plan.

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: September 14, 1995.

Terry T. Terrell,

Deputy Regional Director, Denver, Colorado.

[FR Doc. 95–23481 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–55–M

Bureau of Land Management

[AZ–024–05–3809–00; AZA–29237]

Notice of Intent To Prepare an Environmental Impact Statement Analyzing the Impacts of the Proposed Yarnell Mine Project, Yarnell, AZ

AGENCY: Bureau of Land Management, Department of Interior.

ACTION: Notice of Intent to prepare an environmental impact statement for a proposed gold mine near Yarnell, Arizona.

SUMMARY: This notice advises the public that the Bureau of Land Management, Phoenix District Office, intends to prepare an environmental impact statement on the impacts of a proposed gold mining and processing project near the town of Yarnell, in Yavapai County, Arizona. Yarnell Mining Company, a wholly-owned subsidiary of Bema Gold (U.S.) Incorporated, has submitted a proposed mining plan of operations to the Bureau of Land Management, as required under the Code of Federal Regulations and Title V of the Federal Land Policy and Management Act of 1976. The Bureau of Land Management has responsibility for review, analysis, and approval of the mining plan. Preparation of the environmental impact statement will follow the Code of Federal Regulations, title 40, subpart 1500.

The mining plan proposes conventional open-pit excavation, waste rock dumps, and cyanide heap leach processes to mine the Yarnell gold deposit over a period of approximately six years, with an additional two years for reclamation. The proposed project area includes 160 acres, located 1.5 miles south of Yarnell and 70 miles northwest of Phoenix.

The no action alternative and alternatives that consider various

engineering designs and impact mitigating measures will be analyzed. Anticipated issues include surface and groundwater quality, groundwater depletion, visual impacts, public safety, noise, air quality, effects of blasting, mine reclamation, impacts on socioeconomic values, and impacts on riparian, wildlife, and cultural resources.

DATES: Public scoping meetings will be held to determine issues of concern. Public meetings will be held at the following locations and times:

(1) Wickenburg meeting: October 17, 1995, 6:00–9:00 p.m., at the Wickenburg Community Center, 160 North Valentine Street, Wickenburg, Arizona (520) 684–7656.

(2) Yarnell meeting: October 18, 1995, 6:00–9:00 p.m., at the Yarnell Senior Citizens Center, 136 Broadway, Yarnell, Arizona (520) 427–6401.

(3) Prescott meeting: October 19, 1995, 6:00–9:00 p.m., at the Prescott Resort Conference Center, Cottonwood Room, 1500 Highway 69, Prescott, Arizona (520) 776–1666.

Public input may be submitted during the public meetings or in writing to the address given in the section below. Public comments relating to the identification of issues will be accepted until 60 days from this publication date. There will be additional opportunities for public comment on completion of the draft environmental impact statement.

ADDRESSES: Written comments concerning the environmental impact statement should be submitted to the Bureau of Land Management, Attn: Gail Acheson, Area Manager, Phoenix Resource Area, 2015 West Deer Valley Road, Phoenix, Arizona 85027.

FOR FURTHER INFORMATION CONTACT: Connie Stone, EIS Project Manager, Bureau of Land Management, Phoenix Resource Area, 2015 West Deer Valley Road, Phoenix, Arizona 85027, telephone (602) 780–8090.

Dated: September 15, 1995.

David J. Miller,

Associate District Manager.

[FR Doc. 95–23456 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–32–P

[CA–067–7123–00]

Extension of Comment Period for Proposed Update of Off-Road Vehicle Designation of Routes of Travel on Public Land In Eastern San Diego and Imperial Counties, California

AGENCY: Bureau of Land Management, Interior.

ACTION: Designation of open, closed and limited routes of travel.

SUMMARY: Notice is hereby given that the comment period for Route of Travel Designations on Public Land in Eastern San Diego and Imperial Counties is being extended. The environmental assessment, Maps and Proposed Vehicle Route Designation Records for each route may be reviewed Monday through Friday at the following locations through November 10, 1995: El Centro Resource Area Office, 1661 South 4th Street, El Centro, CA, 7:45 a.m.–4:30 p.m.; California Desert District Office, 6221 Box Springs Blvd., Riverside, CA, 7:45 a.m.–4:30 p.m.; J's Maintenance Service, 3550 Foothill Blvd., La Cresenta, CA., 9 a.m.–6 p.m.; and Fibertech Manufacturing, 10809 Prospect Ave., Santee, CA., 9 a.m.–6 p.m. (9 a.m.–4 p.m. Saturdays).

DATES: For Comments: The public review period has been extended for review of the proposed route designations. Written comments must be filed no later than November 10, 1995.

ADDRESSES: Written comments must be filed no later than November 10, 1995, and be addressed to: Bureau of Land Management, 1661 South 4th Street, El Centro, CA 92243.

FOR ADDITIONAL INFORMATION CONTACT: Robert Bower, Outdoor Recreation Planner, Bureau of Land Management, El Centro Resource Area, 1661 South 4th Street, El Centro, California, 92243.

SUPPLEMENTARY INFORMATION: The El Centro Resource Area is updating its vehicle designations for Public Lands in Eastern San Diego County and in Imperial County those Public Lands west of a line along the Chocolate Mountains Aerial Gunnery Range and the east side of the Imperial Sand Dunes. Numerous requests were received to extend the comment period during public meetings held the week of August 28, 1995. This extension is in response to these requests.

Dated: September 13, 1995.

G. Ben Koski,

Area Manager.

[FR Doc. 95–23451 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–40–P

[NM–070–1430–01; NMNM95192]

Notice of Right-of-Way Application; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: An application, serialized as NMNM95192, was received from El Paso Natural Gas Company (EPNG) for a natural gas pipeline right-of-way in San Juan County, New Mexico.

Notice is hereby given that, pursuant to Section 28 of the Mineral Leasing Act of 1020 (30 USC 185); as amended by the Act of November 16, 1973, (37 Stat. 576), EPNG has applied for a right-of-way for 34 inch diameter pipeline that is 2,719 feet in length. An additional 29 miles are located on land administered by the Bureau of Indian Affairs, and on Navajo Nation land. The project would loop existing lines and will help relieve line pressure and also help in accommodating projected volumes. The proposed line crosses the following public lands.

New Mexico Principal Meridian

T. 29 N., R. 13 W.,
Sec. 30, 2½.

The purpose of this notice is to inform the public that the Bureau will be making a decision on approval of the right-of-way, and if so, under what terms and conditions.

Interested persons desiring to express their views should send their name and address to the District Manager, Bureau of Land Management, 1235 La Plata Highway, Farmington, New Mexico 87401 within 15 days of publication of this notice. Additional information can be obtained by contacting Jerry Crockford at (505) 599–6333.

Dated: September 15, 1995.

Robert Moore,

Acting Assistant District Manager for Resources.

[FR Doc. 95–23483 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–FB–M

[AZ–050–05–1210–00; AZA 29273]

Mohave County, Arizona: Realty Action, AZA–29273

AGENCY: Bureau of Land Management, DOI.

ACTION: Notice of Realty Action—Leasing of Public Lands; Mohave County, Arizona.

SUMMARY: The following public lands in Mohave County, Arizona will be leased under the provisions of Section 302 of the Federal Land Policy and Management Act of 1976 and 43 CFR Part 2920. The lands will be leased for commercial use to Albert and Ernestine Warminski.

Gila and Salt River Meridian, Arizona

T. 20 N., R. 22 W.,
Sec. 12, portion of lot 5.
Containing 0.63 acres, more or less.

This action will convert the Warminski's present Bureau of Reclamation lease to BLM leasing authority. The lease will be for 25 years.

DATES: On or before November 6, 1995, interested persons may submit comments regarding the proposed lease to the address under the ADDRESSES caption of this notice. Any adverse comments will be evaluated by the Area Manager who may vacate or modify this Realty Action and issue a final determination. In the absence of any action by the Area Manager, this Realty Action will become the final determination of the Bureau.

ADDRESSES: For further information or to submit comments regarding the proposed lease contact Karen Montgomery, Realty Specialist, Bureau of Land Management, Havasu Resource Area, 3189 Sweetwater Avenue, Lake Havasu City, AZ 86406. (520) 855–8017.

SUPPLEMENTARY INFORMATION: This parcel is located on lands withdrawn by the Bureau of Reclamation, and they concur with the proposed leasing action on this parcel.

Dated: September 13, 1995.

Wlliam J. Liebhauser,

Area Manager.

[FR Doc. 95–23453 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–32–P

(AZ-024–05–1430–01; AZA–1232 and AZA–16865)

Notice of Realty Action; Recreation and Public Purposes (R&PP) Act Classification; Arizona

AGENCY: Bureau of Land Management, DOI

ACTION: Notice.

SUMMARY: The following public lands in Maricopa County, Arizona have been examined and found suitable for classification for conveyance to Arizona Game and Fish Department under the provision of the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 et seq.).

The lands are not needed for Federal purposes. Conveyance is consistent with current BLM land use planning and would be in the public interest.

(1) AZA–1232. The Arizona Game and Fish Department is currently leasing the following described lands for an archery range associated with the Ben Avery Shooting Range.

Gila and Salt River Meridian

T. 6N., R. 2E.,
Sec. 28, S½SW¼SW¼;
Sec. 33, W½NW¼, NW¼SW¼.

Containing 120 acres.

(2) AZA–16865. The Arizona Game and Fish Department is currently leasing the lands described below for their Mesa Regional Office.

Gila and Salt River Meridian, Arizona

T. 1N., R. 7E.,
Sec. 18, W½W½SW¼SE¼, that portion lying North of University Road.

Containing 8.89 acres.

The patents, when issued, will be subject to the following terms, conditions and reservations:

1. Provisions of the Recreation and Public Purposes Act and to all applicable regulations of the Secretary of the Interior.

2. A right-of-way for ditches and canals constructed by the authority of the United States.

3. All minerals shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals.

In addition to the above, the following will also be subject to the following terms, conditions and reservations as it effects the identified case.

(AZA–1232)

1. Those rights for transmission line purposes granted to Arizona Public Service Company by Right-of-Way number AZA–22432.

(AZA–16865)

1. Those rights for power transmission/irrigation project purposes granted to the Bureau of Reclamation Regional Office by Right-of-Way number AZPHX–086506.

2. Those rights for road (University Drive) purposes granted to Maricopa County, Department of Transportation by Right-of-Way number AZAR–035348.

3. Those rights related to the withdrawal to the Bureau of Reclamation for Salt River Project by serial number AZA–13014.

FOR FURTHER INFORMATION CONTACT: Jim Andersen, bureau of Land Management, Phoenix Resource Area Office, 2015 West Deer Valley road, Phoenix, Arizona 85027. telephone (602) 780–8090.

Upon publication of this notice in the Federal Register, the lands will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for lease or conveyance under the Recreation and Public Purposes Act and leasing under the mineral leasing laws. For a period of 45 days from the date of publication of this notice in the Federal Register, interested parties may submit comments regarding the proposed lease/conveyance or classification of the lands to the District Manager, Phoenix District Office, 2015 West Deer Valley Road, Phoenix, Arizona 85027.

Classification Comments: Interested parties may submit comments involving the suitability of the land for the purposes described above. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

Application Comments: Interested parties may submit comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability for an archery range associated with the Ben Avery Shooting Range and the Arizona Game and Fish Department Mesa Regional Office.

Any adverse comments will be reviewed by the State Director. In the absence of any adverse comments, the classification will become effective 60 day from the date of publication in the Federal Register.

September 14, 1995.

David J. Miller,

Associate District Manager.

[FR Doc. 95–23455 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–32–P

[CA–010–05–1430–01; CA–35289]

Notice of Realty Action; Land Use Lease of Public Lands, Nevada County, CA

AGENCY: Bureau of Land Management, Interior.

REALTY ACTION: Land Use Lease, Nevada County, CA–35289.

SUMMARY: The following described public land is being considered for a land use lease pursuant to Section 302 of the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1713):

T. 15 N., R. 10 E., M.D.M.
Sec. 6: lot 89 (portion of). Nevada County, CA.

Containing 4.71 acres, more or less.

The above parcel of public land would be leased to the R.J. Miles Company of Colfax, CA, through a non-competitive process to resolve a trespass situation. Due to a boundary discrepancy, a gravel operation plant was constructed on and has been

operating on the public lands. The lease would authorize this activity on the public lands and would be issued for an initial term of five years, subject to renewal. The land will be leased at fair market value.

The lease would be subject to any prior existing rights. A categorical exclusion and decision record have been completed. The proposal is consistent with the Bureau's land use plans that support the settlement of trespass by lease where equities through prior use of the land exists.

ADDRESSES: Interested parties may submit comments to the District Manager, c/o Folsom Resource Area Manager, 63 Natoma Street, Folsom, California 95630. Comments must be received within 45 days from date of publication of this notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Marianne Wetzel at (916) 985–4474 or at the address above.

Timothy J. Carroll,

Acting Area Manager.

[FR Doc. 95–23457 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–40–M

[MT–930–5420–00–EO25; MTM 84344]

Recordable Disclaimer; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Herigstad Ranch Inc., has applied for a Recordable Disclaimer of Interest from the United States under the provisions of Section 315 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1745 (1994), for an irregular tract of land situated West and adjacent to the Yellowstone River in the S½ and NE¼ of Section 17, T. 19 N., Range 58 E., Principal Meridian, Montana, containing 145.94 acres.

FOR FURTHER INFORMATION CONTACT: Dick Thompson, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406–255–2829.

SUPPLEMENTARY INFORMATION: The official records of the Bureau of Land Management (BLM) were reviewed and a determination made that the United States may have no claim to or interest in the land described, and issuance of a recordable disclaimer will remove a cloud on the title to the land. The record on this application, including the complete metes and bounds description, is available for review at the above address.

For a period of 90 days from the date of publication of this notice, all persons who wish to present comments, suggestions, or objections in connection with the proposed disclaimer may do so by writing to the Chief, Branch of Land Resources, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107. If no objections are received, the disclaimer will be published shortly after the 90 days has lapsed.

Dated: September 12, 1995.

Thomas P. Lonnie,

Deputy State Director, Division of Resources.

[FR Doc. 95–23445 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–DN-P

[AZ–942–05–1420–00]

Notice of Filing of Plats of Survey; Arizona

September 14, 1995.

1. The plat of survey of the following described lands was officially filed in the Arizona State Office, Phoenix, Arizona, on the date indicated:

A plat representing the survey of a portion of the south boundary, a portion of the subdivisional lines, and a metes-and-bounds survey in section 31, Township 17 South, Range 5 East, Gila and Salt River Meridian, Arizona, was approved August 21, 1995, and officially filed August 29, 1995.

This plat was prepared at the request of the Bureau of Indian Affairs, Phoenix Area Office.

2. This plat will immediately become the basic record for describing the land for all authorized purposes. This plat has been placed in the open files and is available to the public for information only.

3. All inquiries relating to these lands should be sent to the Arizona State Office, Bureau of Land Management, P.O. Box 16380, Phoenix, Arizona 85011.

Lanny K. Talbot,

Acting Chief Cadastral Surveyor of Arizona.

[FR Doc. 95–23452 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–32–M

[NV–930–1430–01; N–59007]

Partial Cancellation of Proposed Withdrawal; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice terminates the segregative effect of a proposed withdrawal insofar as it affects 27.98 acres of public land requested by the Department of the Army, Corps of Engineers for flood control facilities in Clark County, Nevada. This action will open the 27.98 acres to surface entry and mining, subject to valid existing rights, the provision of existing withdrawals, other segregation of record, and the requirements of applicable law.

EFFECTIVE DATE: October 23, 1995.

FOR FURTHER INFORMATION CONTACT: Dennis J. Samuelson, BLM Nevada State Office, P.O. Box 12000, Reno, Nevada 89520, 702–785–6532.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Withdrawal was published in the Federal Register, 59 FR 60998, November 29, 1994, which segregated the lands described therein from settlement, sale, location, or entry under the general land laws, including the mining laws, subject to valid existing rights. The Corps of Engineers has determined that certain lands will not be needed in connection with the flood control facilities and has cancelled its application for those lands. The lands are described as follows:

Mount Diablo Meridian

T. 21 S., R. 60 E.,
Sec. 29, E½SW¼SE¼SE¼.
T. 21 S., R. 61 E.,
Sec. 31, lots 26, 30, 35, 36, S½S½NE¼NW¼, and NE¼SE¼NE¼NW¼.

The lands described aggregate 27.98 acres in Clark County.

1. At 9 a.m. on October 23, 1995, the lands will be opened to the operation of the public land laws generally, subject to valid existing rights, the provision of existing withdrawals, other segregation of record, and the requirements of applicable law. All valid applications received at or prior to 9 a.m. on October 23, 1995, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

2. At 9 a.m. on October 23, 1995, the lands will be opened to location and entry under the United States mining laws, subject to valid existing rights, the provision of existing withdrawals, other segregation of record, and the requirements of applicable law. Appropriation of any of the lands described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (1988), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has

provided for such determinations in local courts.

Dated: September 13, 1995.

William K. Stowers,

Lands Team Lead.

[FR Doc. 95–23458 Filed 9–20–95; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to Clean Air Act

In accordance with Department of Justice policy, 28 CFR § 50.7, notice is hereby given that on September 8, 1995 a proposed Consent Decree in *United States* v. *Cleveland Asbestos Abatement, Inc. et al,* Case No. 1:93CV01317, was lodged in the United States District Court for the Northern District of Ohio. The Complaint filed by the United States alleges violations of the Clean Air Act and the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Asbestos, 40 CFR Part 61, Subpart M. The Consent Decree requires Cleveland Asbestos Abatement, Inc., to comply with the asbestos NESHAP and to provide United States Environmental Protection Agency approved training to its asbestos abatement workers and inspectors during the term of the decree. The consent decree also requires Cleveland Asbestos Abatement to pay a civil penalty of $22,500.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments concerning the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044, and should refer to *United States* v. *Cleveland Asbestos Abatement, Inc., et al.*, D.J. Ref. No. 90–5–2–1–1825.

The proposed Consent Decree may be examined at any of the following offices: (1) The United States Attorney for the Northern District of Ohio, 1800 Band One Center, 600 Superior Avenue, East, Cleveland, Ohio 44114–2600 (contact Assistant United States Attorney Steven J. Paffilas): (2) the U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Ill. 60604–3590 (contact Assistant Regional Counsel David P. Mucha); and (3) the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005, (202) 624–0892. A copy of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005. For a copy of the Consent Decree, please enclose a check in the amount of $3.00 (25 cents per page reproduction charge) payable to Consent Decree Library.

Joel Gross,

Acting Chief, Environmental Enforcement Section.

[FR Doc. 95–23358 Filed 9–20–95; 8:45 am]

BILLING CODE 4410–01–M

Notice of Lodging of Consent Decree Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Notice is hereby given that a proposed Consent Decree in *United States* v. *River Properties, et al.,* has been lodged on August 30, 1995, with the United States District Court for the Eastern District of Wisconsin. The proposed Consent Decree concerns the J.K. Drum Superfund Site (''J.K. Drum Site'' or ''Site''), located at 615 West Wolf River Road, New London (Waupaca County), Wisconsin. The Site was contaminated with numerous hazardous substances, which included heavy metals, flammable materials, acids and cyanide liquids, during the operation of a drum disposal, cleaning and recycling business from 1985 until 1989. Pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (''CERCLA''), 42 U.S.C. 9607(a), the complaint in this action seeks recovery of costs incurred by the United States during the removal of hazardous substances at the Site.

The 24 Settling Defendants have agreed in the proposed Consent Decree to reimburse the United States in the amount of $780,000, which comprises approximately 95% of the costs incurred at the Site.

The Department of Justice will receive comments concerning the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044, and should refer to *United States* v. *River Properties, et al.,* D.O.J. Number 90–11–2–1077.

The proposed Consent Decree may be examined at any of the following offices: (1) The Office of the United States Attorney for the Eastern District of Wisconsin, Federal Building Room 530, 517 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, (414) 297–1700; (2) the U.S. Environmental Protection Agency, Region 5, 77 W. Jackson Blvd. Chicago, Illinois 60604 (312) 886–6609; and (3) the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005, (202) 624–0892. Copies of the proposed Decree may be obtained by mail from the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005. For a copy of the Consent Decree, please enclose a check for $17.25 ($.25 per page reproduction charge) payable to ''Consent Decree Library.''

Joel M. Cross,

Acting Chief, Environmental Enforcement Section, Environment & Natural Resources Division.

[FR Doc. 95–23359 Filed 9–20–95; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–31,206, 207, and 207A]

Anchor Glass Container Corporation; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 USC 2273) the Department of labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 12, 1995, applicable to all workers at the Anchor Glass Container Corporation locations in Gurnee, Illinois, and Huntington Park, California. The notice was published in the Federal Register on August 9, 1995 (60 FR 40613).

The Department, on its own motion, reviewed the certification for workers of the subject firm. New information received by the Department shows that imports of articles like or directly competitive with glass containers produced at Anchor's Keyser, West Virginia location contributed importantly to company sales, production, and employment declines at that location. Accordingly, the Department is expanding its certification to those workers at Anchor Glass Container Corporation, Keyser, West Virginia.

The amended notice applicable to TA–W–31,207 is hereby issued as follows:

''All workers of Anchor Glass Container Corporation, Gurnee, Illinois (TA–W–31,206); Huntington Park, California (TA–W–31,207); and Keyser, West Virginia (TA–W–31,207A) engaged in employment related to the production of glass containers who became totally or partially separated from

employment on or after June 16, 1994 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 8th day of September 1995.

Victor J. Trunzo,

Program Manager, Policy and Reemployment Services, Office of Trade Adjustment Assistance.

[FR Doc. 95–23467 Filed 9–20–95; 8:45 am]

BILLING CODE 4510–30–M

[TA–W–31,352]

Don Shapiro Industries a/k/a Action West, El Paso, Texas; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 USC 2273) the Department of Labor issued a Notice of Certification Regarding Eligibility to Apply for Worker Adjustment Assistance on August 31, 1995, applicable to all workers of Don Shapiro Industries located in El Paso, Texas. The notice will soon be published in the Federal Register.

New information received from the company show that some of the workers at Don Shapiro Industries had their unemployment insurance (UI) taxes paid to Action West.

Accordingly, the Department is amending the certification to properly reflect this matter.

The amended notice applicable to TA–W–31,352 is hereby issued as follows:

''All workers of Don Shapiro Industries, a/k/a Action West, El Paso, Texas engaged in employment related to the production of jeans, shorts and skirts who became totally or partially separated from employment on or after August 9, 1994 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 8th day of September 1995.

Victor J. Trunzo,

Program Manager, Policy and Reemployment Services, Office of Trade Adjustment Assistance.

[FR Doc. 95–23468 Filed 9–20–95; 8:45 am]

BILLING CODE 4510–30–M

[TA–W–31,241A]

Majesty a/k/a Colberts, Incorporated, Dallas, Texas; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 USC 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 10, 1995, applicable to all workers at the subject firm. The notice was published in the Federal Register on August 24, 1995 (60 FR 44079).

New information received from the State Agency shows that some of the workers at Majesty, Dallas, Texas, had their unemployment insurance (UI) taxes paid to Colberts, Incorporated.

The Department is amending the certification to properly reflect this matter.

The amended notice applicable to TA–W–31,241A is hereby issued as follows:

''All workers of Majesty, a/k/a Colberts, Incorporated, Dallas, Texas who became totally or partially separated from employment on or after June 30, 1994 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.''

Signed at Washington, DC this 12th day of September 1995.

Victor J. Trunzo,

Program Manager, Policy and Reemployment Services, Office of Trade Adjustment Assistance.

[FR Doc. 95–23469 Filed 9–20–95; 8:45 am]

BILLING CODE 4510–30–M

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than October 2, 1995.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than October 2, 1995.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 11th day of September, 1995.

Victor J. Trunzo,

Program Manager, Policy & Reemployment Services, Office of Trade Adjustment Assistance.

APPENDIX

[Petitions Instituted on 09/11/95]

TA–W	Subject firm (petitioners)	Location	Date of petition	Product(s)
31,405	W.C.A. Industries (CJA)	Merrill, WI	08/29/95	Architectual Millwork.
31,406	Integrated Circuit System (Wkrs)	Valley Forge, PA.	08/29/95	Integrated Circuits.
31,407	D and H Companies (Co.)	Odessa, TX	08/20/95	Oil Recovery Services.
31,408	Columbus Energy Corp. (Co.)	Denver, CO	08/23/95	Crude Oil, Natural Gas.
31,409	Springtown Apparel Corp. (UNITE)	Wrightsville, GA.	08/31/95	Underwear.
31,410	Springtown Knitwear, Inc. (UNITE)	Cartersville, GA	08/31/95	Underwear.
31,411	Enpak Battery (Co.)	Memphis, TN	08/29/95	Auto & Truck Batteries.
31,412	DNT, Inc. (Co.)	Byrdstown, TN	08/28/95	Ladies' Sportswear.
31,413	Anderson's Peanuts (Wkrs)	Opp, AL	09/01/95	Peanuts (110 lbs bags).
31,414	Vaagen Brothers Lumber (Co.)	Colville, WA	08/30/95	Dimensional Lumber.
31,415	Vaagen Brothers Lumber (Co.)	Ione, WA	08/30/95	Dimensional Lumber.
31,416	Vaagen Brothers Lumber (Co.)	Republic, WA	08/30/95	Dimensional Lumber.

[FR Doc. 95–23466 Filed 9–20–95; 8:45 am]
BILLING CODE 4510–30–M

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 95–85; Exemption Application No. D–09882, et al.]

Grant of Individual Exemptions; Retirement Plan for Employees of Automobile Club of New York, Inc.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of Individual Exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the Federal Register of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

Retirement Plan for Employees of Automobile Club of New York, Inc. (the Plan) Located in Garden City, New York

[Prohibited Transaction Exemption 95–85; Exemption Application No. D–9882]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the: (1) The purchase (the Purchase) by the Plan of a certain office building (the Building) from Automobile Club of New York, Inc. (the Club), a sponsor of the Plan and a party in interest with respect to the Plan; (2) a subsequent leaseback (the Lease) of the Building by the Plan to the Club; and (3) the potential future exercise of (a) a repurchase option (the Repurchase Option) between the Club and the Plan; and (b) a make whole obligation (the Make Whole Obligation) whereby the Club will pay the Plan the difference between the original acquisition price paid by the Plan for the Building, and the price received by the Plan upon the sale of a Building to a purchaser other than the Club; provided that the following conditions are satisfied:

(1) All terms and conditions of the Purchase, the Lease, the Repurchase Option, and the Make Whole Obligation are and will be at least as favorable to the Plan as those the Plan could obtain in an arm's-length transaction with an unrelated party;

(2) the Lease will have an initial term of fifteen years with three five year renewal options, and will be a triple net lease under which the Club as the tenant is obligated for all operating expenses, including real estate taxes, insurance, repairs, maintenance, electricity and other utilities;

(3) the fair market value of the Building has been determined by an independent qualified appraiser, and will be updated as of the date of purchase by the Plan;

(4) with respect to the Lease, the fair market rental amount has been and will be determined by an independent qualified appraiser, which amount will never be below the initial fair market annual rental amount of $470,000;

(5) with respect to the Lease, appraisals of the Building will be performed at three year intervals during the initial fifteen year term of the Lease, and at five year intervals with respect to the three renewal periods for purposes of updating the fair market rental amount to be received by the Plan;

(6) the fair market value of the Building will not exceed 25% of the Plan's total assets. Notwithstanding this condition, if the 25% limitation is ever exceeded the Club will have 60 days to comply with the 25% limit. In the event the 25% limit cannot be met within the 60 days, the Plan will undertake an orderly disposition of its interests in the Building in such manner as to cure the violation within nine (9) months of the date when the 25% limit was initially exceeded. If at any time during the 9 month disposition period, the Building exceeds 30% of the Plan's total assets, the exemption will no longer be available;

(7) an independent fiduciary will be appointed to review, approve and monitor the transactions described herein, and the fees received by the independent fiduciary for serving in such capacity, combined with any other fees derived from the Club or related parties, will not exceed 1% of its annual income for each fiscal year that it continues to serve in the independent fiduciary capacity with respect to these transactions;

(8) U.S. Trust, as the independent fiduciary, will evaluate the transactions described herein and deemed them to be administratively feasible, protective and in the interest of the Plan;

(9) U.S. Trust, as the independent fiduciary, will monitor the terms and the conditions of the exemption and the Lease throughout its initial term plus the three renewal periods, and will take whatever action is necessary to protect the Plan's rights;

(10) U.S. Trust, as the independent fiduciary, will monitor the net subleasing amount received by the Club during any annual period under the Lease. If such subleasing amount results in a profit to the Club, the Club will contribute this profit to the Plan; and

(11) the Plan will bear no costs or expenses with respect to the transactions described herein.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on July 31, 1995 at 60 FR 39016/39020.

Written Comments

The Department received two written comments on the proposed exemption

and no requests for a hearing. The Automobile Club of New York, Inc., the applicant, suggested certain modifications to the language of the proposed exemption as it appears in the Federal Register to clarify and more accurately reflect the conditions and representations surrounding the transactions. U.S. Trust, as the independent fiduciary with respect to the transactions described herein, concurs with these suggested modifications. Specifically, the applicant suggests that:

1. The words ''its interests in'' should be inserted in condition 6, line 9 of the proposed exemption as it appears in the Federal Register, such that condition 6 should read, in relevant part, ''* * *the Plan will undertake an orderly disposition of its interests in the Building* * *''.

2. The words ''for no more than'' should have been inserted in the Summary of Facts and Representations (the Summary), paragraph 2, line 4, such that it would have read, ''First, the Plan will purchase the Building from the Club for no more than fair market value* * *'', and the words '' for no less than'' should have been inserted in paragraph 2, line 11, such that it would have read, ''* * *the Club will lease the Building from the Plan for no less than fair market rental* * *''.

3. The words ''the Plan'' should have been substituted for ''U.S. Trust'' in the Summary, paragraph 6, line 14, such that it would have read, ''* * *with three renewable options of five years each at the discretion of the Plan.''

4. The words ''the Plan'' should have been substituted for ''U.S. Trust as the independent fiduciary'' in the Summary, paragraph 9, line 8, such that it would have read, ''the Repurchase Option can be exercised under certain circumstances under the discretion of the Plan* * *''.

5. The words ''its interests in'' should have been inserted in the Summary, paragraph 17, line 26, such that it would have read, ''* * *the Plan will undertake an orderly disposition of its interests in the Building* * *''. The Department concurs with these modifications.

One former employee of the applicant asserted in a comment that the fair market value of the Building, and subsequent evaluations thereof, should be determined by at least two qualified appraisers, not one as currently proposed, to assure a fair and accurate finding. Also, the commentor asserted that the appraisers should be certified as completely independent of, and receiving no other business from, the Automobile Club of New York, its Board of Directors, the Retirement Committee, the American Automobile Association, as well as independent of any of the individuals (and their relatives) associated with any of the above bodies.

In response to this comment the applicant asserted that the retention of a second appraiser is unnecessary. The appraiser(s) for the initial and all subsequent appraisals of the Building is being selected by U.S. Trust, as the independent fiduciary, not the Automobile Club of New York, Inc. The integrity of the appraisal is ensured through the use of an independent fiduciary to retain and evaluate the appraiser. Also, the applicant asserted that this requirement is substantially satisfied by the Certificate of Appraisal contained in the limited scope appraisal dated January 10, 1995, which was submitted to the Department by the applicant as part of the exemption application.

After giving full consideration to the record, the comments submitted to the Department, and the response of the applicant, the Department has determined to grant the exemption, as described herein.

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan, U.S. Department of Labor, telephone (202) 219–8883. (This is not a toll-free number).

Adel E. Zaki Money Purchase Pension Plan (the Plan) Located in Los Angeles, California

[Prohibited Transaction Exemption 95–86; Exemption Application No. D–9883]

Exemption

The restrictions of sections 406(a), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the cash sale of a parcel of improved real property (the Property) by the Plan to Adel E. Zaki, M.D. (Dr. Zaki), a party in interest with respect to the Plan; provided that (1) the sale will be a one-time transaction for cash; (2) as a result of the sale, the Plan receives in cash the greater of $710,000 or the fair market value of the Property, as determined by an independent, qualified appraiser, as of the date of the sale; (3) the Plan pays no commissions, fees, or other expenses as a result of the transaction; and (4) the terms of the sale are no less favorable to the Plan than those it would have received in similar circumstances when negotiated at arm's length with unrelated third parties.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice of Proposed Exemption published on July 12, 1995 at 60 FR 35943.

FOR FURTHER INFORMATION CONTACT: Angelena C. Le Blanc of the Department, telephone (202) 219–8883 (This is not a toll-free number.)

John L. Rust Co. Profit Sharing Plan (the Plan) Located in Albuquerque, New Mexico

[Prohibited Transaction Exemption 95–87; Exemption Application No. D–09943]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to (1) the past and proposed purchases by the Plan of certain leases of equipment (the Leases) from John L. Rust Co. (Rust), the Plan sponsor and a party in interest with respect to the Plan, and (2) the agreement by Rust to indemnify the Plan against any loss relating to the Leases and also to repurchase any Leases that are in default in accordance with paragraph (E) below, provided that the following conditions are met:

A. Any sale of Leases to the Plan will be on terms at least as favorable to the Plan as an arm's length transaction with an unrelated third party would be.

B. Subsequent to the date of publication of the proposed exemption (July 21, 1995), the acquisition of a Lease from Rust shall not cause the Plan to hold immediately following the acquisition (i) more than 25% of the current value (as that term is defined in section 3(26) of the Act) of Plan assets in customer notes and Leases sold by Rust or (ii) more than 10% of Plan assets in the aggregate of Leases with and customer notes of any one entity.

C. Prior to the purchase of each Lease, an independent, qualified fiduciary must determine that the purchase is appropriate and suitable for the Plan and that any Lease purchase is a fair market value transaction.

D. The independent fiduciary, on behalf of the Plan, will monitor the terms of the Leases and the exemption and take whatever action is necessary to enforce the rights of the Plan.

E. Upon default by the lessee on any payment due under a Lease, Rust has agreed to repurchase the Lease from the Plan at the payout value as of the date of the default, without discount, and to indemnify the Plan for any loss suffered. The occurrence of any of the following events shall be considered events of default for purposes of this section: The lessee's failure to pay any amounts due

hereunder within five days after receipt of written notice from the Plan's independent fiduciary, or the lessee's failure to pay any amounts due hereunder within 30 days after payment becomes past due, if earlier; the lessee's failure to perform any other obligation under this agreement within ten days of receipt of written notice from the Plan's independent fiduciary; abandonment of the equipment by the lessee; the lessee's cessation of business; the commencement of any proceeding in bankruptcy, receivership or insolvency or assignment for the benefit of creditors by the lessee; false representation by the lessee as to its credit or financial standing; attachment or execution levied on lessee's property; or use of the equipment by third parties without lessor's prior written consent.

F. The Plan receives adequate security for the Lease. For purposes of this exemption, the term adequate security means that the Lease is secured by a perfected security interest in the leased property which will name the Plan as the secured party.

G. Insurance against loss or damage to the leased property from fire or other hazards will be procured and maintained by the lessee and the proceeds from such insurance will be assigned to the Plan.

H. The Plan shall maintain for the duration of any Lease which is sold to the Plan pursuant to this exemption, records necessary to determine whether the conditions of this exemption have been met. The Plan will continue to maintain the records for a period of six years following the expiration of the Lease or the disposition by the Plan of the Lease. The records referred to above must be unconditionally available at their customary location for examination, for purposes reasonably related to protecting rights under the Plan, during normal business hours by the Internal Revenue Service, the Department of Labor, Plan participants, any employee organization any of whose members are covered by the Plan, or any duly authorized employee or representative of the above described persons.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on July 21, 1995 at 60 FR 37685.

Temporary Nature of Exemption

EFFECTIVE DATE: This exemption is effective December 30, 1985. However, the exemption is temporary and will expire five years from the date the exemption is granted with respect to the Plan's future purchases of Leases. The Plan may hold the Leases pursuant to the terms of the exemption subsequent to the end of the five year period.

FOR FURTHER INFORMATION CONTACT: Mr. Gary Lefkowitz of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Donald D. Busker Individual Retirement Account (the IRA) Located in Detroit Lakes, Minnesota

[Prohibited Transaction Exemption 95–88; Application No. D–10005]

Exemption

The sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed cash sale of two parcels of unimproved real property (the Properties) by the IRA to Donald D. Busker, a disqualified person with respect to the IRA,[1] provided the following conditions are met:

(a) The sale is a one-time transaction for cash;

(b) The terms and conditions of the sale are at least as favorable to the IRA as those obtainable in an arm's-length transaction with an unrelated party;

(c) The IRA receives the fair market value of the Properties as established at the time of the sale by an independent qualified appraiser; and

(d) The IRA is not required to pay any commissions, costs or other expenses in connection with the sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption Notice published on August 11, 1995, 60 FR 41125.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

Banc One Capital Corporation (Banc One) Located in Columbus, OH

[Prohibited Transaction Exemption 95–89; Exemption Application No. D–10046]

Exemption

Section I. Transactions

A. Effective June 2, 1995, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to Subsection I.A.(1) or (2).

Notwithstanding the foregoing, Section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.[2]

B. Effective June 2, 1995, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan;

(ii) Solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

(iii) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that

[1] Pursuant to 29 CFR 2510.3–2(d), there is no jurisdiction with respect to the IRA under Title I of the Act. However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

[2] Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(a)(ii) and regulation 29 CFR 2510.3–21(c).

class outstanding at the time of the acquisition; and

(iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.[3] For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that the conditions set forth in paragraphs B.(1)(i), (iii) and (iv) are met; and

(3) The continued holding of certificates acquired by a plan pursuant to Subsection I.B. (1) or (2).

C. Effective June 2, 1995, the restrictions of sections 406(a), 406(b), and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust, provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) The pooling and servicing agreement is provided to or described in all material respects in the prospectus or private placement memorandum provided to investing plans before they purchase certificates issued by the trust.[4]

Notwithstanding the foregoing, Section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a ''qualified administrative fee'' as defined in Section III.S.

D. Effective June 2, 1995, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975(a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

Section II. General Conditions

A. The relief provided under Section I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as they would be in an arm's length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating at the time of such acquisition that is in one of the three highest generic rating categories from either Standard & Poor's Corporation (S&P's), Moody's Investors Service, Inc. (Moody's), Duff & Phelps Inc. (D&P) or Fitch Investors Service, Inc. (Fitch);

(4) The trustee is not an affiliate of any member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith; and

(6) The plan investing in such certificates is an ''accredited investor'' as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, or any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Section I, if the provision of Subsection II.A.(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in Subsection II.A.(6) above.

Section III. Definitions

For purposes of this exemption:

A. Certificate means:

(1) A certificate—

(a) that represents a beneficial ownership interest in the assets of a trust; and

(b) that entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(2) A certificate denominated as a debt instrument—

(a) that represents an interest in a Real Estate Mortgage Investment Conduit (REMIC) within the meaning of section 860D(a) of the Internal Revenue Code of 1986; and

(b) that is issued by and is an obligation of a trust; with respect to certificates defined in (1) and (2) above for which Banc One or any of its affiliates is either (i) the sole underwriter or the manager or co-

[3] For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

[4] In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this exemption, references to ''certificates representing an interest in a trust'' include certificates denominated as debt which are issued by a trust.

B. Trust means an investment pool, the corpus of which is held in trust and consists solely of:

(1) Either—

(a) secured consumer receivables that bear interest or are purchased at a discount (including, but not limited to, home equity loans and obligations secured by shares issued by a cooperative housing association);

(b) secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in Section III.T);

(c) obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial real property (including obligations secured by leasehold interests on commercial real property);

(d) obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle leases (as defined in Section III.U);

(e) ''guaranteed governmental mortgage pool certificates,'' as defined in 29 CFR 2510.3–101(i)(2);

(f) fractional undivided interests in any of the obligations described in clauses (a)–(e) of this Section B.(1);

(2) Property which had secured any of the obligations described in Subsection B.(1);

(3) Undistributed cash or temporary investments made therewith maturing no later than the next date on which distributions are made to certificateholders; and

(4) Rights of the trustee under the pooling and servicing agreement, and rights under any insurance policies, third-party guarantees, contracts of suretyship and other credit support arrangements with respect to any obligations described in Subsection B.(1).

Notwithstanding the foregoing, the term ''trust'' does not include any investment pool unless: (i) The investment pool consists only of assets of the type which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by S&P's, Moody's, D&P, or Fitch for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. *Underwriter* means:

(1) Banc One;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with Banc One; or

(3) Any member of an underwriting syndicate or selling group of which Banc One or a person described in (2) is a manager or co-manager with respect to the certificates.

D. *Sponsor* means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. *Master Servicer* means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. *Subservicer* means an entity which, under the supervision of and on behalf of the master servicer, services loans contained in the trust, but is not a party to the pooling and servicing agreement.

G. *Servicer* means any entity which services loans contained in the trust, including the master servicer and any subservicer.

H. *Trustee* means the trustee of the trust, and in the case of certificates which are denominated as debt instruments, also means the trustee of the indenture trust.

I. *Insurer* means the insurer or guarantor of, or provider of other credit support for, a trust. Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. *Obligor* means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, ''obligor'' shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

K. *Excluded Plan* means any plan with respect to which any member of the Restricted Group is a ''plan sponsor'' within the meaning of section 3(16)(B) of the Act.

L. *Restricted Group* with respect to a class of certificates means:

(1) Each underwriter;

(2) Each insurer;

(3) The sponsor;

(4) The trustee;

(5) Each servicer;

(6) Any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or

(7) Any affiliate of a person described in (1)–(6) above.

M. *Affiliate* of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. *Control* means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be *independent* of another person only if:

(1) Such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. *Sale* includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. *Forward delivery commitment* means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the

certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificates from, the other party).

R. *Reasonable compensation* has the same meaning as that term is defined in 29 CFR 2550.408c–2.

S. *Qualified Administrative Fee* means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;

(2) The servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

(4) The amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer.

T. *Qualified Equipment Note Secured By A Lease* means an equipment note:

(1) Which is secured by equipment which is leased;

(2) Which is secured by the obligation of the lessee to pay rent under the equipment lease; and

(3) With respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as the trust would have if the equipment note were secured only by the equipment and not the lease.

U. *Qualified Motor Vehicle Lease* means a lease of a motor vehicle where:

(1) The trust holds a security interest in the lease;

(2) The trust holds a security interest in the leased motor vehicle; and

(3) The trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as the trust would receive under a motor vehicle installment loan contract.

V. *Pooling and Servicing Agreement* means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, ''Pooling and Servicing Agreement'' also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

W. *Banc One* means Banc One Capital Corporation, an Ohio corporation, and its affiliates.

The Department notes that this exemption is included within the meaning of the term ''Underwriter Exemption'' as it is defined in Section V(h) of Prohibited Transaction Exemption (PTE) 95–60 (60 FR 35925, July 12, 1995), the Class Exemption for Certain Transactions Involving Insurance Company General Accounts, at 35932.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on August 11, 1995 at 60 FR 41127.

EFFECTIVE DATE: This exemption is effective for transactions occurring on or after June 2, 1995.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 18th day of September, 1995.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits, Administration, U.S. Department of Labor.

[FR Doc. 95–23463 Filed 9–20–95; 8:45 am]

BILLING CODE 4510–29–P

[Application No. L–09927, et al.]

Proposed Exemptions; Plumbers and Steamfitters Local No. 177

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of Proposed Exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restriction of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this Federal Register Notice. Comments and request for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Plumbers and Steamfitters Local No. 177, Health and Welfare Fund (the Welfare Plan), and Plumbers and Steamfitters Local No. 177, Pension Trust Fund (the Pension Plan; collectively, the Plans), Located in Brunswick, Georgia

[Application Nos. L–09927, D–09928 and L–09929]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(A) through (E) of the Code, shall not apply (1) effective February 17, 1994, to the past sale by the Welfare Plan of an office building located in Brunswick, Georgia (the Office Building) to Plumbers and Steamfitters Local No. 177 (the Union), a party in interest with respect to the Plans; and (2) effective February 16, 1995, to the past and proposed leases (the Leases) of space in the Office Building by the Union to the Plans; provided the following conditions are satisfied:

(a) The purchase price paid by the Union for the Office Building was no less than the fair market value of the Office Building as of the date of the sale;

(b) All terms of the Leases are at least as favorable to the Plans as those which the Plans could obtain in arm's-length transactions with unrelated parties;

(c) Rents paid under the Leases do not exceed the fair market rental values of the leased spaces;

(d) The interests of the Plans under the Leases for all purposes are represented by a qualified independent fiduciary who monitors the Leases and takes appropriate action to enforce the Union's compliance with all Lease terms and conditions; and

(e) Within 60 days of the publication in the Federal Register of a notice granting this exemption, the Union pays any excise taxes applicable under section 4975(a) of the Code by virtue of the past Leases for the period commencing February 17, 1994 to February 16, 1995.

EFFECTIVE DATES: This exemption, if granted, will be effective as of February 17, 1994 with respect to the sale of the Office Building, and February 16, 1995 with respect to the Leases.

Summary of Facts and Representations

1. The Welfare Plan is a multi-employer welfare benefit plan with total assets of $650,788 and approximately 600 participants as of July 31, 1994. The Pension Plan is a defined contribution money purchase pension plan, with total assets of $8,406,592, and approximately 240 participants as of December 31, 1994. The Plans are maintained pursuant to collective bargaining agreements between the Union and employers of members of the Union (the Employers). The Plans share the same board of trustees (the Trustees), consisting of three representatives of the Union and three representatives of the Employers.

2. The Office Building, located on the New Jesup Highway in Brunswick, Georgia, was constructed in 1960 as a single-family residence, and has been remodeled and adapted for use as a business office facility. The Office Building has 4,550 square feet of floor space and is situated on a 4.11 acre parcel of land. The Trustees represent that they purchased the Office Building on behalf of the Welfare Plan on August 1, 1985 for $168,000 from an individual unrelated to the Plans, the Union and the Employers. Since 1985 the Office Building has served as the site of the administrative offices of the Welfare Plan. The Welfare Plan also shared space in the Office Building with the Pension Plan and the Union.[1]

3. In early 1994 the Trustees determined that the assets of the Welfare Plan were in need of diversification and enhanced liquidity, and that the Office Building should be sold in order to address these needs. After investigations into the prevailing circumstances of the real estate market in which the Office Building is situated, the Trustees determined to accept an offer by the Union to purchase the Office Building from the Welfare Plan. Accordingly, on February 17, 1994, the Union purchased the Office Building from the Welfare Plan, and the Union immediately commenced leasing space in the Office Building to the Welfare Plan and the Pension Plan (the New Leases). The Trustees are requesting an exemption with respect to the sale of the Office Building to the Union and the past and proposed New Leases, under the terms and conditions described herein.

4. The Trustees represent that their sale of the Office Building was necessary in order to diversify the investment of the assets of the Welfare Plan, which were invested disproportionately in real property, and that the sale to the Union was the most advantageous means of achieving such a sale. The Trustees represent that due to the ''soft'' conditions prevailing in the local real estate market, the Welfare Plan could not reasonably expect to receive the full appraised fair market value of the Office Building in an arm's length sale transaction involving an unrelated buyer. In the sale of the Office Building to the Union, however, the Trustees state that they succeeded in obtaining a purchase price in the amount of the Office Building's full fair market value as of the sale date. The Office Building was appraised by Richard C. Friedman, SRA (Friedman), an independent professional realty appraiser in Brunswick, Georgia, who determined that as of February 5, 1994, the Office Building had a fair market

[1] The Trustees represent that the sharing of office space in the Office Building with the Pension Plan, the apprenticeship plan and the Union satisfied the requirements of Prohibited Transaction Class Exemption 76–1 (PTCE 76–1, 41 FR 12740, March 26, 1976) and Prohibited Transaction Class Exemption 77–10 (PTCE 77–10, 42 FR 33918, July 1, 1977), and, therefore, is exempt from the prohibitions of sections 406(a) and 406(b)(2) of the Act. The Department expresses no opinion on whether the sharing arrangements satisfied the requirements of PTCEs 76–1 and 77–10.

value of $230,000. In accordance with Friedman's appraisal, the Union bought the Office Building on February 17, 1994 for a cash purchase price of $230,000. Aside from a settlement charge of $230, the Union paid all expenses related to the sale transaction.

5. Since the Union's purchase of the Office Building, the Welfare Plan and the Pension Plan have continued to occupy and utilize space therein as they had done prior to the sale transaction. Effective February 28, 1994, leases were executed on behalf of each Plan (the Leases) providing for the Plans' lease of space in the Office Building from the Union. Under the Leases, each Plan leases one half of the same 1,327 square feet of space in the Office Building which the Plans had shared and utilized prior to the Union's purchase of the Office Building from the Union, consisting of a large office, supply room, reception area, and use of all common areas. The Union occupies and utilizes the remaining office space in the Office Building, which consists of an office for the Union's business manager, a general office, meeting space, storage space, reception area, and use of all common areas. The Plans' Leases each have an initial term of three years, with provisions for successive three-year renewal periods under the same terms as the initial Lease, subject to increases in the rental amounts. Under each Lease the Union is responsible for paying all taxes, insurance and utilities other than telephone service, and for all repairs to the Office Building. Each Lease includes a provision giving the Plan the unconditional right to terminate the Lease at any time without penalty upon sixty days written notice. The interests of the Plans for all purposes under the Leases are represented by an independent fiduciary (the Fiduciary), described below, whose functions include the negotiation, monitoring and enforcement of the Leases' terms and conditions on behalf of the Plans.

6. Rent under the Leases, payable monthly, will be no more than the fair market value of the space leased. In another appraisal of the Office Building, Friedman determined that as of April 17, 1995, the fair market rental value of the Office Building space leased under each Lease was $359.40 per month, for a combined total of $718.80. In accordance with Friedman's appraisal, initial rent under each Lease is set at $359.40 per month. Rental during any successive renewal term(s) will be established as follows: During the last two months of the initial term, and thereafter during the last two months of the renewal term, the Fiduciary shall cause the Office Building to be reappraised for its fair market rental value, and the rental in the subsequent renewal term, if any, shall be the newly reappraised fair rental market of the leased space.

7. The interests of the Plans under the Leases are represented for all purposes by the Fiduciary, Julian R. Friedman, Esq., an attorney who represents that he is independent of the Union.[2] The Fiduciary represents that he has substantial experience with collectively-bargained employee benefit plans and the fiduciary responsibility provisions of the Act. Acting as a fiduciary under the Act on behalf of the Plans, the Fiduciary will oversee the relationship between the Union as lessor and the Plans as lessees under the Leases, and will monitor and enforce the Union's performance of its obligations thereunder. The Fiduciary will be responsible for securing the appraisals required by the Leases' rental-review provisions, and for making any adjustments in the rent in accordance with such appraisals. The Fiduciary negotiated and prepared the Leases on behalf of the Plans, and he states that he has determined that they are in the best interests of the participants and beneficiaries of the Plans due to the protective and advantageous features of the Leases. The Fiduciary also represents that he has determined that the particular space in the Office Building which is shared by the Plans and rented from the Union pursuant to the Leases is sufficient and appropriate for the Plans' operations, and that the arrangement does not have the effect of subsidizing the Union's use of other space in the Office Building.

8. The Department is not proposing exemptive relief for the Leases for any period prior to February 16, 1995, because that is the date on which the Plans's interests under the Leases commenced to be represented for all purposes by the Fiduciary. The Union recognizes that the leases of the Office Building to the Plans under the Leases for the period commencing February 28, 1994 to February 16, 1995 constituted prohibited transactions under the Act and the Code for which no exemptive relief is proposed herein. Accordingly, as a condition of the proposed exemption, if granted, within sixty days of the publication in the Federal Register of a notice granting the exemption, the Union will pay any excise taxes which are applicable under section 4975(a) of the Code by reason of such Leases of the Office Building for the period commencing February 28, 1994 to February 16, 1995.

9. In summary, the applicant represents that the past and proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) The sale of the Office Building was necessary to enhance the liquidity and diversification of the assets of the Welfare Plan; (2) The sale was a cash transaction in which the Welfare Plan received the full appraised fair market value of the Property as of the sale date; (3) The interests of the Plans under the Leases are represented by the Fiduciary, who has determined that the Leases are in the best interests and protective of the participants and beneficiaries of the Plans, and who will monitor and enforce the Union's compliance with all Lease terms and conditions; (4) The Plans will pay no more than fair market rental for the space leased in the Office Building; and (5) Each Plan has the right under each Lease to terminate the Lease for any reason upon sixty days written notice.

FOR FURTHER INFORMATION CONTACT: Ronald Willett of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

State Mutual Life Assurance Company of America (State Mutual) Located in Worcester, MA

[Application No. D–10008]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[3]

Section I. Covered Transactions

If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to (a) the receipt of common stock of State Mutual, (b) the substitution of the common stock of Allmerica Financial Corporation (Allmerica), State Mutual's prospective sole owner, for the State Mutual stock, or (c) the receipt of cash or policy credits, by or on behalf of an employee benefit plan policyholder of

[2] The Fiduciary represents that he is not related to Richard C. Friedman, S.R.A., a real property appraiser previously referred to in this summary of facts and representations.

[3] For purposes of this exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

State Mutual (the Plan), other than any policyholder which is a Plan maintained by State Mutual or an affiliate of State Mutual for its own employees (the State Mutual Plans)[4], in exchange for such policyholder's membership interest in State Mutual, in accordance with the terms of a plan of reorganization (the Demutualization Plan) adopted by State Mutual and implemented pursuant to section 19E (Section 19E) of Chapter 175 of the Massachusetts General Laws.

In addition, the restrictions of section 406(a)(1)(E) and (a)(2) and section 407(a)(2) of the Act shall not apply to the receipt and holding, by the State Mutual Pension Plan, of employer securities in the form of excess stock, in accordance with the terms of the Demutualization Plan.

This proposed exemption is subject to the conditions set forth below in Section II.

Section II. General Conditions

(a) The Demutualization Plan is implemented in accordance with procedural and substantive safeguards that are imposed under Massachusetts law and is subject to the review and supervision by the Massachusetts Commissioner of Insurance (the Commissioner).

(b) The Commissioner reviews the terms of the options that are provided to certain policyholders of State Mutual, which include, but are not limited to the subject Plans and the State Mutual Plans (the Eligible Policyholders), as part of such Commissioner's review of the Demutualization Plan, and approves the Demutualization Plan following a determination that such Demutualization Plan is not prejudicial to all Eligible Policyholders.

(c) The Demutualization Plan is filed with the New York Superintendent of Insurance (the Superintendent) who determines whether the Demutualization Plan is fair and equitable to Eligible Policyholders from New York.

(d) Each Eligible Policyholder has an opportunity to comment on the Demutualization Plan and decide whether to vote to approve such Demutualization Plan after full written disclosure is given such Eligible Policyholder by State Mutual, of the terms of the Demutualization Plan.

(e) Any election by an Eligible Policyholder which is a Plan (including the State Mutual Plans), to receive stock, cash or policy credits, pursuant to the terms of the Demutualization Plan is made by one or more independent fiduciaries (the Independent Fiduciaries) of such Plan and neither State Mutual nor any of its affiliates exercises any discretion or provides investment advice with respect to such election.

(f) In the case of the State Mutual Plans, where the consideration is in the form of stock, the Independent Fiduciary—

(1) Elects the form of consideration that such Plans receive;

(2) Monitors, on behalf of such Plans, the acquisition and holding of the stock;

(3) Makes determinations on behalf of such Plans with respect to the voting, the continued holding or the disposition of such stock; and

(4) Disposes, in a prudent manner, shares of stock exceeding the 10 percent holding limitation of section 407(a)(2) of the Act within 90 days following its receipt by the State Mutual Pension Plan. Such shares that are not disposed of during this initial 90 day period must be disposed of within an additional period of 90 days.

(g) After each Eligible Policyholder entitled to receive stock is allocated at least thirty shares of stock, additional consideration is allocated to Eligible Policyholders who own participating policies based on actuarial formulas that take into account each participating policy's contribution to the surplus of State Mutual which formulas have been approved by the Commissioner and the Superintendent.

(h) All Eligible Policyholders that are Plans participate in the transactions on the same basis as other Eligible Policyholders that are not Plans.

(i) No Eligible Policyholder pays any brokerage commissions or fees in connection with their receipt of stock or in connection with the implementation of the commission-free sales program.

(j) All of State Mutual's policyholder obligations remain in force and are not affected by the Demutualization Plan.

Section III. Definitions

For purposes of this proposed exemption:

(a) The term ''State Mutual'' means State Mutual Life Assurance Company of America and any affiliate of State Mutual as defined in paragraph (b) of this Section III.

(b) An ''affiliate'' of State Mutual includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with State Mutual. (For purposes of this paragraph, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(2) Any officer, director or partner in such person, and

(3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

(c) The term ''Eligible Policyholder'' means a policyholder whose name appears on the conversion date on the insurer's records as owner of a participating policy under which there is a right to vote and which is in full force on both the December 31 immediately preceding the conversion date and the date the insurer's board of directors first votes to convert to stock form. Under Massachusetts law, only such policyholders are entitled to receive consideration in the demutualization. Policyholders who are not Eligible Policyholders will not receive any stock or other consideration. As used herein, the term ''Eligible Policyholder'' includes, but is not limited to, the State Mutual Pension Plan as well as those Plans that are not sponsored by State Mutual.

(d) The term ''policy credit'' means an increase in accumulation account value (to which no surrender or similar charges are applied) in the general account or an increase in a dividend accumulation on a policy.

Summary of Facts and Representations

1. State Mutual is a mutual life insurance company organized under the laws of the State of Massachusetts and maintaining its headquarters in Worcester, Massachusetts. It is the fifth oldest life insurance company in the United States. In asset size, State Mutual ranks among the 20 largest mutual life insurance companies in the country. As of December 31, 1994, State Mutual and its subsidiaries had total assets in excess of $10.5 billion and more than $40.2 billion of individual life insurance policies in force. State Mutual has a number of subsidiaries and affiliates that provide a variety of financial services to policyholders including investment management and brokerage services. State Mutual and its investment management subsidiaries had approximately $10.7 billion in

[4] With the exception of the State Mutual Companies' Pension Plan (the State Mutual Pension Plan), State Mutual is not requesting, nor is the Department providing exemptive relief herein with respect to the distributions of State Mutual or Allmerica common stock to other plans that State Mutual or its affiliates maintain for their own employees. State Mutual represents that such stock would constitute qualifying employer securities within the meaning of section 407(d)(5) of the Act and that section 408(e) of the Act would apply to such distributions. In this regard, the Department expresses no opinion on whether such distributions would satisfy the terms and conditions of section 408(e) of the Act.

assets under management as of December 31, 1994.

As a mutual life insurance company, State Mutual has no stockholders. Instead, policyholders of State Mutual are considered members of the company and, in this capacity, are entitled to vote to elect directors of State Mutual and to share in the assets of the company upon its liquidation.

2. State Mutual is the common parent of an affiliated group of companies. One of these companies is SMA Financial Corporation (SMA Financial), a Massachusetts corporation which is a wholly owned, direct subsidiary of State Mutual. SMA Financial owns 57 percent of the common stock of Allmerica Property & Casualty Companies, Inc. (APY), a Delaware corporation. As a majority shareholder, State Mutual exercises management control over APY. SMA Financial also owns 100 percent of the stock of SMA Life Assurance Company (SMA Life), a Delaware stock life insurance company.

The stock of APY that is not held by SMA Financial is widely held and is traded on the New York Stock Exchange. APY is the holding company and is the common parent of an affiliated group of companies which includes two property and casualty insurance companies—The Hanover Insurance Company and Citizens Insurance Company of America.

State Mutual and its affiliates provide a variety of fiduciary and other services to Plans. These services include plan administration and related services, investment management services and securities brokerage and related services. Many Plans for which State Mutual provides services are also State Mutual policyholders. As of December 31, 1994, there were approximately 10,000 State Mutual insurance policies and contracts held by pension and welfare plans.

3. State Mutual and its affiliates sponsor a number of plans for which it is not requesting exemptive relief herein.[5] However, one plan, for which State Mutual has specifically requested exemptive relief is the State Mutual Companies' Pension Plan, a defined benefit plan. The State Mutual Pension Plan covers eligible career agents, general agents and clerical employees of State Mutual and its affiliates. The State Mutual Pension Plan provides retirement, disability and death benefits to eligible participants and their beneficiaries. The trustee of the State Mutual Pension Plan is Mechanics Bank of Worcester, Massachusetts. The decisionmakers with respect to investments in the State Mutual Pension Plan are members of an investment committee consisting of State Mutual's Board of Directors. As of December 31, 1994, the State Mutual Pension Plan had 6,187 participants. As of December 31, 1994, the State Mutual Pension Plan had net assets available for benefits of $156,100,000.

4. In July 1993, State Mutual's Board of Directors authorized management to develop a plan of demutualization whereby State Mutual would be converted from a mutual life insurance company to a stock life insurance company. The purposes of the Demutualization Plan are to (a) improve State Mutual's access to the capital markets and competitiveness in the insurance industry; (b) establish Allmerica, a single, publicly-traded company, which will become the exclusive owner of State Mutual and whose stock will be issued by State Mutual to certain Eligible Policyholders as a result of the demutualization; and (c) raise capital for State Mutual through an initial public offering (the IPO) of the stock of the new publicly-traded company. State Mutual has developed the Demutualization Plan and its Board of Directors formally adopted the Demutualization Plan on February 28, 1995.

5. It is currently anticipated that the following steps will be undertaken with respect to the implementation of State Mutual's Demutualization Plan:

(a) *The Demutualization.* To become a stock life insurance company, State Mutual will demutualize under Massachusetts law as well as under the provisions of the Demutualization Plan. Each policyholder's membership interest in State Mutual will be terminated. As compensation for their membership interests, Eligible Policyholders will receive cash, policy credits and initially, shares of State Mutual common stock. The State Mutual common stock will be issued to First Chicago Trust Company of New York as transfer agent on behalf of Eligible Policyholders and exchanged in the merger described below in Step (b).

(b) *Creation of Special Purpose Subsidiary.* Allmerica will form a special purpose Massachusetts subsidiary called ''Allmerica Merger Subsidiary Inc.'' (Merger Sub). On the effective date of the demutualization (i.e., on or before December 31, 1995), Merger Sub will merge with and into the demutualized State Mutual pursuant to Section 19E of Massachusetts demutualization law. In the merger, Eligible Policyholders will receive shares of Allmerica common stock in exchange for the shares of State Mutual common stock they initially held. The stock of Merger Sub will be converted into the only issued and outstanding stock of State Mutual. State Mutual will then become a wholly owned subsidiary of Allmerica.

(c) *The IPO.* Allmerica may sell new Allmerica stock in an underwritten IPO, which is expected to occur on the same day as the demutualization. At present, the size of the IPO is not known.[6]

(d) *Contribution to the Capital of State Mutual.* Following the transactions described above, Allmerica will contribute cash raised in the IPO to State Mutual. The Demutualization Plan requires that the contribution be in an amount at least equal to the amount required for State Mutual (a) to pay transaction expenses resulting from the demutualization, (b) to pay cash and fund policy credits awarded to Eligible Policyholders required to receive such consideration under the terms of such Demutalization Plan and (c) to purchase assets required for the funding of certain ''closed block'' policies.[7] The amount of this contribution is currently anticipated to be in excess of $100 million.

The Demutualization Plan also permits Allmerica to retain, for general corporate purposes, amounts raised in the IPO (or by the other transactions described above) in excess of the amount to State Mutual.

6. In addition to economic arguments raised by State Mutual in support of the Demutualization Plan, as noted above, State Mutual represents that its proposed conversion from a mutual life insurance company to a stock life insurance company will give Eligible Policyholders marketable securities, cash or policy credits in exchange for their membership interests. State Mutual represents that the

[5] As stated previously, State Mutual believes that distributions of stock to such Plans would constitute ''qualifying employer securities'' within the meaning of section 407(d)(5) of the Act and that section 408(e) of the Act would apply to such distributions.

[6] The Demutualization Plan provides that in addition to the IPO, Allmerica may raise capital through one or more of the following: (a) A private placement of debt securities on or prior to the demutualization date, (b) bank borrowings on or prior to the demutualization date or (c) a public offering of debt securities on the demutualization date.

[7] According to State Mutual, the closed block is an accounting mechanism whereby the experience on certain dividend-paying policies and contracts of State Mutual will be accounted for separately on State Mutual's books so that dividend scales can be revised in the future to reflect that experience. No assets will be physically segregated. The closed block is not set aside or deposited for the purpose of doing business. Thus, the purpose of the closed block is to protect the dividend expectations of such dividend-paying policies and contracts after the effective date of the Demutualization Plan.

demutualization will provide the flexibility to cause its non-insurance operations to become direct holdings of an ''upstream'' holding company and enable it to use stock options or other equity-based compensation arrangements in order to attract and retain talented employees. State Mutual believes these consequences of the conversion will benefit all of its policyholders. State Mutual further explains that its insurance policies will remain in force and policyholders will be entitled to receive the benefits under their policies and contracts to which they would have been entitled if the Demutualization Plan had not been adopted.

7. State Mutual represents that Section 19E of the Massachusetts demutualization law establishes an approval process for the demutualization of a life insurance company organized under Massachusetts law. Section 19E requires that the demutualization plan be filed with, and approved by, the Massachusetts Commissioner of Insurance. The Commissioner may approve the demutalization plan only after notice is given to the insurer, its directors, officers, employees and policyholders and a hearing on such plan is held. All persons to whom notice is given have the right to appear and be heard at the hearing and to present oral or written comments.

After the hearing, State Mutual explains that the Commissioner may approve the demutualization plan if he determines that the plan is not prejudicial to the insurer's policyholders or to the ''insuring public.'' The Commissioner must also determine that the demutualization plan conforms to the provisions of Section 19E. In pertinent part, Section 19E requires that (a) policyholders be provided with reasonable notice of the procedure for voting on the demutualization plan; (b) each policyholder, in exchange for membership interests in the insurer, is given appropriate consideration determined under a fair and reasonable formula, which is based upon the insurer's entire adjusted surplus; (c) unless not approved by the Commissioner, each policyholder is given a preemptive right to acquire such policyholder's proportionate interest in the capital stock of the insurer within a reasonable time period; (d) shares of the insurer's stock are offered to policyholders at a price not greater than that offered to others under the demutualization plan; (e) each policyholder receives consideration which may consist of cash, securities, a certificate of contribution, additional life insurance or annuity benefits, increased dividends or other consideration or any combination of such forms of consideration; (f) the converted insurer's paid-in capital stock is in an amount not less than the minimum paid-in capital stock plus the net cash surplus required of a new domestic stock insurer authorized to transact similar kinds of insurance business; (g) the insurer's management has not sought to affect the number or identity of the insurer's policyholders to be entitled to participate in the demutualization plan, or to secure for the insurer's management, any unfair advantage through the demutualization plan; and (h) the classifications of management and employee groups that are offered shares not subscribed for by policyholders in the preemptive offering are reasonable.

Section 19E authorizes the Commissioner to employ staff personnel and to engage outside consultants to assist the Commissioner in determining whether a demutualization plan meets the requirements of Section 19E and any other relevant provisions of Massachusetts law. In the case of State Mutual, it is anticipated that the Commissioner will retain an actuarial firm, legal advisers and an investment banking firm as consultants, and possibly other consultants as well. A decision by the Commissioner to approve a demutualization plan under Section 19E is subject to judicial review in the Massachusetts courts.

In addition to being approved by the Commissioner, State Mutual represents that the demutualization plan must be approved by the policyholders of the insurer. In this regard, Section 19E, requires that the policyholders be provided with notice of a meeting convened for the purpose of voting on whether to approve the demutualization plan. Moreover, the demutalization plan must be approved by a vote of not less than two-thirds of the votes of the policyholders who may vote in person, by proxy or by mail.[8]

8. State Mutual represents that it is licensed to transact business in all fifty states. However, only the State of New York requires that a foreign insurance company that is planning to demutualize file a copy of its demutualization plan with state insurance authorities. In this regard, State Mutual explains that section 1106(i) (Section 1106(i)) of the New York Insurance Law authorizes the Superintendent to review the demutualization plan of a foreign life insurer licensed in New York and to specify the conditions that the Superintendent would impose in order for the foreign insurer to retain its New York license following its demutualization. Specifically, Section 1106(i) requires that a foreign life insurer licensed in New York file with the Superintendent a copy of the demutualization plan at least 90 days prior to the earlier of (a) the date of any public hearing required to be held on the demutualization plan by the insurer's state of domicile, and (b) the proposed date of the demutualization.

If, after examining the demutualization plan, the Superintendent finds that the plan is not fair or equitable to the New York policyholders of the insurer, the Superintendent must set forth the reasons for his findings. In addition, the Superintendent must notify the insurer and its domestic state insurance regulator of his findings and his reasons for such findings and advise of any requirements he considers necessary for the protection of current New York policyholders in order to permit the insurer to continue to conduct business in New York as a stock life insurer after the demutualization. In the event the Superintendent has any objections to the Demutualization Plan, State Mutual represents that it will amend the Plan so that it will meet the approval of the Superintendent or otherwise, work out a satisfactory solution with the Superintendent. However, should the Superintendent require changes in the Demutualization Plan that are unacceptable to the Commissioner, State Mutual will make a decision on how to proceed.

9. Once finalized, it is expected that State Mutual's Demutualization Plan will provide for Eligible Policyholders to ultimately receive common stock of Allmerica,[9] cash or policy credits as consideration for giving up their membership interests in State Mutual. Accordingly, State Mutual requests an administrative exemption from the Department in order that certain of its

[8] State Mutual has approximately 100,000 policyholders who are eligible to vote on the Demutualization Plan. The voting provisions follow the voting regulations for annual meetings of mutual insurance companies, as set out in Chapter 175, Section 94 of Massachusetts Insurance Law. The number of votes to which any Eligible Policyholder is entitled will vary with the number of policies and the amounts of insurance owned by such Policyholder. In no case, however, may an Eligible Policyholder cast more than 20 votes.

[9] It is expected that Allmerica stock will be traded on the New York Stock Exchange. Under the terms of the Demutualization Plan, Allmerica is required to arrange for the listing of its stock on a national securities exchange and to use its best efforts to maintain such listing for as long as it is a publicly-traded company.

Eligible Policyholders that are Plans, including the State Mutual Plans, may receive stock, cash or policy credits in exchange for their membership interests in State Mutual. In addition, State Mutual requests exemptive relief in order that the State Mutual Pension Plan, may receive consideration in the form of stock. Because the value of the stock to be received by the State Mutual Pension Plan will exceed the 10 percent limitation prescribed in section 407(a)(2) of the Act by 6 percent, State Mutual requests exemptive relief so that the State Mutual Pension Plan may continue holding stock exceeding such limitation for a temporary, three month period.

10. According to the Demutualization Plan, certain Eligible Policyholders will receive cash or policy credits in lieu of stock under the following circumstances:

a. *Cash* will be received in lieu of allocable stock (1) with respect to a policy that is known to State Mutual to be subject to a lien (other than a policy loan made by State Mutual) or a bankruptcy proceeding, or (2) where the Eligible Policyholder's address for mailing purposes, as shown on the records of State Mutual, is located outside the United States of America, or (3) where the Eligible Policyholder has made an affirmative election, on a form provided to such Eligible Policyholder by State Mutual, to receive cash in lieu of stock. (If no such preference is expressed under Item 3, the Eligible Policyholder will receive stock.[10]

b. *Policy credits* will be received in lieu of stock allocable to any policy that is (1) an individual retirement annuity contract within the meaning of section 408 of the Code, (2) a tax sheltered annuity contract within the meaning of section 403(b) of the Code, (3) an individual annuity contract that has been issued pursuant to a plan qualified under section 401(a) of the Code directly to the plan participant, or (4) an individual life insurance policy that has been issued pursuant to a plan qualified under section 401(a) of the Code directly to the plan participant.

The cash or policy credits will have a value equal to the stock such policyholders would otherwise have received, based on the price per share of Allmerica stock in the IPO which is expected to occur at the time of the demutualization. Any election by a Plan, including the State Mutual Plans, to receive stock or cash pursuant to the terms of the Demutualization Plan, will be made by one or more fiduciaries of such Plan which is independent of State Mutual.[11] In addition, neither State Mutual nor any of its affiliates may exercise discretion or provide investment advice with respect to such election. Further, no Eligible Policyholder will pay any brokerage commissions or fees in connection with their receipt of stock.[12]

The stock allocated to Eligible Policyholders will be allocated among them by providing at least thirty shares for each such Policyholder. This number is, however, subject to proportional adjustment. Any remaining stock will be allocated substantially on the basis of the contributions to surplus made by each such Policyholder's in force participating policies. The allocation methodology must be fair and reasonable and approved by the Commissioner. The allocation formulas are also subject to review by the Superintendent.

11. State Mutual notes that the proposed receipt of stock by the State Mutual Pension Plan would violate section 406(a)(1)(E) of the Act because the receipt of such stock would be in violation of section 407(a)(2) of the Act, which prohibits the acquisition by a plan of any qualifying employer security if immediately after such acquisition, the aggregate fair market value of such securities exceeds 10 percent of the fair market value of the plan's assets. State Mutual represents that the stock, which will be a ''qualifying employer security'' represent approximately 16 percent of the assets of the State Mutual Pension Plan after its acquisition and thus will exceed the 10 percent limitation of section 407(a)(2) of the Act. Accordingly, State Mutual represents that the statutory exemptive relief contained in section 408(e) of the Act will not apply to the acquisition and holding of the stock by the State Mutual Pension Plan. Thus, State Mutual requests administrative exemptive relief from the Department. State Mutual further notes that the holding of stock by the State Mutual Pension Plan will not violate the provisions of section 407(f) of the Act.

12. State Mutual represents that pursuant to a Retainer Agreement and an Indemnification Agreement, both of which are dated March 27, 1995 (collectively, the Engagement Agreements), it has retained the services of State Street Bank and Trust Company (State Street) of Quincy, Massachusetts to serve, on behalf of the State Mutual Pension Plan and the other State Mutual Plans, as the Independent Fiduciary

[10] Under the Demutualization Plan, Eligible Policyholders who receive their entire consideration in the form of Allmerica common stock were asked to express a preference for cash in lieu of stock, should funds become available. However, these ''cash elections'' are restricted by a number of factors. First, a limited amount of cash will be available to pay all such cash elections (currently estimated at $24 million). Second, all Eligible Policyholders actually receiving cash pursuant to cash elections will receive their entire consideration in the form of cash. Third, to the extent the available cash is insufficient to satisfy all cash elections, the cash elections of Eligible Policyholders allocated the fewest number of shares will be satisfied first. Fourth, if State Mutual is unable to pay cash to Eligible Policyholders allocated the fewest number of shares who have expressed a cash preference, no cash payments (other than mandatory cash payments) will be made.

Accordingly, on the effective date of the Demutualization Plan, State Mutual, with the approval of the Commissioner, will allocate an amount to make cash elections. Such cash will be applied first to pay the entire consideration of those Eligible Policyholders allocated the fewest number of shares, if all such requests for cash may be satisfied. Thereafter, State Mutual will continue to apply the allocated cash to pay the entire consideration of each Eligible Policyholder requesting cash at higher share allocations until such allocated cash is exhausted. After the allocated cash is exhausted, each Eligible Policyholder whose request cannot be satisfied will receive his or her entire consideration in the form of stock. Thus, Eligible Policyholders electing cash will receive either stock or cash but *not* both.

[11] State Mutual represents that under paragraph 5 of Section 19E of Massachusetts Insurance Law, the policyholder eligible to participate in the distribution of stock, cash, policy credits or other consideration resulting from the Demutualization Plan is ''the person whose name appears . . . on the insurer's records as owner'' of the policy. State Mutual further represents that an insurance or annuity policy that provides benefits under an employee benefit plan, typically designates the employer that sponsors the plan, or a trustee acting on behalf of the plan, as the owner of the policy. In regard to insurance or annuity policies that designate the employer or trustee as owner of the policy, State Mutual asserts that it is required under Massachusetts Insurance Law to make distributions resulting from the Demutualization Plan to the employer or trustee as owner of the policy, with the following exception. Specifically, the Demutualization Plan provides that where group policies or annuities have been issued to a trust established by State Mutual for an employee benefit plan, the employer will be deemed to be the owner of such policy if the employer plan or policy has adopted the master trust to which the policy is issued. The trustee of any such trust established by State Mutual will not be considered a policyholder or owner.

In general, it is the Department's view that, if an insurance policy (including an annuity contract) is purchased with assets of an employee benefit plan, and if there exist any participants covered under the plan (as defined at 29 CFR 2510.3–3) at the time when State Mutual incurs the obligation to distribute stock, cash, policy credits or other compensation, then such consideration would constitute an asset of such plan. Under these circumstances, the appropriate plan fiduciaries must take all necessary steps to safeguard the assets of the plan in order to avoid engaging in a violation of the fiduciary responsibility provisions of the Act.

[12] Under current provisions of the Demutualization Plan, Eligible Policyholders who receive stock or, for that matter, any other form of consideration, will not be entitled to receive subscription rights to purchase additional stock. Under Section 19E of Massachusetts Insurance Law, the Commissioner has the authority to approve a plan which provides for no preemptive rights.

(and also investment manager). Specifically, State Street represents that it has been retained to consider, on behalf of the State Mutual Plans, whether to approve the proposed transactions and, if so approved, whether to receive consideration in the form of stock or cash. To assist State Street in carrying out its fiduciary responsibilities under the Engagement Agreements, State Street has retained Whitman Heffernan Rhein & Co. (WHR & Co.), as its independent financial adviser, and Paul, Weiss, Rifkind, Wharton & Garrison (Paul Weiss), as its independent legal counsel.

State Street represents that it is one of the largest trust companies in the United States with over $170 billion in assets under management, a significant percentage of which consists of pension plan assets. State Street also represents that it has served as an independent fiduciary for numerous retirement plans that acquire or hold employer securities and has managed, at various times, over $20 billion in employer securities held by various retirement plans. In managing such investments, State Street states that it has supervised numerous transactions involving the acquisition, retention and disposition of employer securities. Further, State Street explains that it monitors the performance of the employer securities it manages on a continuing basis.

State Street represents that it has the following *de minimus* business relationships with State Mutual:

(a) Its Insurance Division provides various services to several retained asset accounts of State Mutual and/or various subsidiaries of State Mutual. Revenue received by State Street for these services in 1994 totaled approximately $52,000.

(b) It serves as an investment manager for fixed income investment funds of defined contribution plans. Currently, it manages approximately $6 billion in fixed income securities. Approximately $84 million of that is invested, on behalf of various clients, in guaranteed investment contracts issued by State Mutual. Revenue received in 1994 by State Street for the investment in these contracts totaled less than $10,000.

(c) It provides master trust and custody services to various pension plans. Some of these plans may invest in guaranteed investment contracts issued by State Mutual. It also serves as a directed trustee/custodian to these plans and receives no revenue from the investment in these contracts. State Street receives a trust/custody fee based on the total value of the plan, irrespective of the investments.

(d) It has voting and/or dispositive control over 221,800 shares of Allmerica stock.

State Street also explains that it had revenues in 1994 of over $981 million. However, State Street points out that all revenues and fees that were associated with State Mutual represented less than one-hundredth of one percent of State Street's total revenues.

In addition, State Street represents that none of its officers or directors is an officer or director of State Mutual or vice versa. Further, State Street represents that State Mutual does not have an ownership interest in State Street and State Street does not have an ownership interest in State Mutual except for the relationships described above.

As the Independent Fiduciary for the State Mutual Plans, State Street represents that it understands and acknowledges its duties, responsibilities and liabilities under the Act as a fiduciary for such Plans. In this regard, State Street asserts that it will have the authority and responsibility to monitor the acquisition and holding of the stock that is received by the State Mutual Plans. State Street also represents that it will be authorized to dispose, in a prudent manner, shares of the stock that is held by the State Mutual Pension Plan which exceeds the 10 percent limitation imposed by section 407(a)(2) of the Act. Such disposition will take place within 90 days of the receipt of the stock by the State Mutual Pension Plan. If, however, State Street is unable to dispose of the stock following the initial 90 day period, it will sell the stock within the following 90 day period. Therefore, State Street must dispose of all shares of excess stock that are held by the State Mutual Pension Plan within 180 days of receipt.

State Street also asserts that it will act as the Independent Fiduciary for both the State Mutual Plans with respect to the policyholder vote and decisions to be made by such plans as to the form of consideration. Moreover, State Street explains that it will monitor the proposed transactions throughout their duration on behalf of these Plans and take all actions that are necessary and proper to safeguard the interests of such Plans.

State Street represents that the proposed transactions are prudent for the State Mutual Plans and in the best interests of such Plans' participants and beneficiaries. State Street notes that the consummation of the proposed transactions is conditioned upon approval by Eligible Policyholders of State Mutual as well as the other conditions set forth in the Demutualization Plan (including the receipt of state regulatory approval). As a general matter, however, State Street explains that its determination that the proposed transactions are appropriate for the State Mutual Plans is based upon an economic analysis of the consideration to be acquired by such Plans. In this connection, State Street represents that WHR & Co. has performed a comprehensive analysis of State Mutual in the context of prevailing market conditions and has concluded that for each State Mutual Plan, the proposed consideration to be received is fair to such plan from a financial point of view. In reaching this conclusion, State Street indicates that WHR & Co. has performed various activities such as reviewing annual reports prepared by State Mutual and its affiliates, conducting discussions with senior management of State Mutual and Allmerica and reviewing the Demutualization Plan and portions of the Policyholder Information Statement. In addition, State Street represents that it has conducted its own due diligence which included a review of all available policyholder information, a review of all relevant Plan information, interviews with management and attending policyholder meetings and public hearings relating to the proposed transaction. Finally, State Street asserts that its fiduciary committee met and determined, based on presentations from WHR & Co., Paul Weiss, corporate counsel and other bank management officials, that the transactions would be in the best interests of all of the State Mutual Plans and their participants and beneficiaries. Accordingly, State Street has directed the appropriate fiduciaries to approve the proposed transactions.

13. The Demutualization Plan provides for the establishment of a commission-free sales program whereby Eligible Policyholders will be permitted to sell the stock they have received pursuant to the Demutualization Plan in the public market. The commission-free sales program will commence on the first business day after the six month anniversary of the effective date of the demutualization and will continue for ninety days thereafter. The program may be extended with the approval of the Commissioner, if the Board of Directors of Allmerica determines such extension would be appropriate and in the best interest of Allmerica and its stockholders. In the commission-free sales program, any Eligible Policyholder receiving fewer than one hundred shares of stock will have the opportunity to sell, at prevailing market prices, all of the stock or to increase

such Eligible Policyholder's holdings to a one hundred share round lot. No brokerage commissions, mailing charges, registration fees or other administrative expenses will be charged in connection with either the demutualization or with sales or purchases of stock under the commission-free sales program.

14. In summary, it is represented that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Demutualization Plan will be implemented in accordance with procedural and substantive safeguards that are imposed under Massachusetts law and will be subject to the review and supervision by the Commissioner.

(b) The Commissioner will review the terms of the options that are provided to Eligible Policyholders of State Mutual as part of such Commissioner's review of the Demutualization Plan, and will approve the Demutualization Plan following a determination that such Demutualization Plan is not prejudicial to all Eligible Policyholders.

(c) The Demutualization Plan will be filed with the New York Superintendent who will determine whether the Demutualization Plan is fair and equitable to Eligible Policyholders from New York.

(d) Each Eligible Policyholder will have an opportunity to comment orally or in writing on the Demutualization Plan and decide whether to vote to approve in writing such Demutualization Plan after full written disclosure is given such policyholder by State Mutual, of the terms of the Demutualization Plan.

(e) Any election by an Eligible Policyholder which is a Plan to receive stock, cash or policy credits, pursuant to the terms of the Demutualization Plan will be made by one or more Independent Fiduciaries of such plan and neither State Mutual nor any of its affiliates will exercise any discretion or provides investment advice with respect to such election.

(f) In the case of the State Mutual Plans, where the consideration is in the form of stock, an Independent Fiduciary will (1) monitor, on behalf of such Plans, the acquisition and holding of the stock; (2) make determinations, on behalf of such Plans, with respect to the voting, the holding or the disposition of such stock, and (3) dispose, in a prudent manner, on behalf of the State Mutual Pension Plan, stock that exceeds the 10 percent limitation under section 407(a)(2) of the Act within 90 days following its receipt; however, if there are any shares of excess stock remaining after the initial period, the Independent Fiduciary will have an additional 90 days to sell such stock.

(g) After each Eligible Policyholder is allocated at least thirty shares of stock, additional consideration allocated to Eligible Policyholders who own participating policies will be based on actuarial formulas that take into account each participating policy's contribution to the surplus of State Mutual which formulas have been approved by the Commissioner and reviewed by the Superintendent.

(h) All Plans that are Eligible Policyholders, including the State Mutual Plans and the State Mutual Pension Pension Plan, will participate in the transactions on the same basis as other Eligible Policyholders that are not Plans.

(i) No Eligible Policyholder will pay any brokerage commissions or fees in connection with such Eligible Policyholder's receipt of stock or in connection with the implementation of the commission-free sales program.

(j) All of State Mutual's policyholder obligations will remain in force and will not be affected by the Demutualization Plan.

Notice to Interested Persons

State Mutual will provide notice of the proposed exemption to Eligible Policyholders which include Plans and the State Mutual Plan within 5 days of the publication of the notice of pendency in the Federal Register. Such notice will be provided to interested persons by first class mail and will include a copy of the notice of proposed exemption as published in the Federal Register. The notice will also inform interested persons of their right to comment on the proposed exemption and/or to request a hearing. Comments with respect to the notice of proposed exemption are due within 35 days after the date of publication of this exemption in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Michael Elkin Individual Retirement Account (the IRA), Located in New York, New York

[Application No. D–10022]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed purchase for cash of a certain limited partnership interest in the Medallion Fund (the Interest) by the IRA from Michael Elkin, a disqualified person with respect to the IRA,[13] provided the following conditions are met:

(a) The purchase is a one-time transaction for cash;

(b) The terms and conditions of the purchase are at least as favorable to the IRA as those obtainable in an arm's-length transaction with an unrelated party;

(c) The IRA pays no more than the fair market value of the Interest, as established by an independent qualified appraiser at the time of the transaction;

(d) The IRA is not required to pay any commissions, costs or other expenses in connection with the transaction; and

(e) The fair market value of the Interest is based on an independent valuation of the total net asset value of the Fund and does not represent more than 25% of the total assets of the IRA at the time of the transaction.

Summary of Facts and Representations

1. The IRA is an individual retirement account, as described under section 408(a) of the Code, which was established by Michael Elkin (Mr. Elkin). As of March 31, 1995, the IRA had assets valued at $330,286. The trustee of the IRA is the Independent Trust Corporation, located at 15255 S. 94th Avenue, Orland Park, Illinois.

2. Mr. Elkin owns a limited partnership interest in the Medallion Fund (the Fund). Mr. Elkin's interest in the Fund had a net asset value of $251,854 as of April 30, 1995. The total net asset value of the Fund was $585,910,089, as of April 30, 1995. Thus, Mr. Elkin states that his interest in the Fund represented less than 1/20 of one (1) percent of the total net asset value of the Fund as of such date.

3. The Fund is an investment fund established on April 1, 1988, which was organized as an exempted limited partnership under the laws of the Islands of Bermuda. The Fund was formed for the purpose of investing in commodities of various types (i.e. foodstuffs, metals, industrial raw materials, etc.), commodity futures contracts, financial futures contracts (including stock index futures contracts), forward contracts, as well as

[13] Pursuant to 29 CFR 2510.3–2(d), there is no jurisdiction with respect to the IRA under Title I of the Act. However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

options to purchase or sell any of the foregoing financial instruments. Assets of the Fund not on deposit with brokers are invested principally in U.S. Treasury Bills held at the Bank of New York, checking accounts held at other major banks in the United States, and short-term commercial paper with a minimum rating of A–1 or P–1 by Moody's Investors Service.

Interests in the Fund are not registered under the Securities Act of 1933 (the Securities Act), the Investment Company Act of 1940, or the securities laws of any of the States of the United States. Mr. Elkin states that he purchased his interest in the Fund as part of an offering that was made in reliance upon an exemption from the registration requirements of the Securities Act for a sale of securities which does not involve a public offering, and analogous exemptions under state securities laws. However, Mr. Elkin represents that the Fund otherwise is fully registered with the appropriate U.S. regulatory authorities and complies with various state ''blue sky'' laws, as discussed in the Fund's Information Memorandum. Mr. Elkin also represents that the Fund fully complies with U.S. tax laws. In this regard, the Fund files U.S. tax returns and provides all investors (i.e. partners) with K–1 information returns so that such investors can include their proportionate income in their personal tax returns.

The Information Memorandum for the Fund indicates that interests in the Fund are subject to substantial restrictions on transferability. However, certain transfers of Fund interests to relatives or other entities are permissible under the terms of the Fund. In addition, limited partners of the Fund may redeem all or part of their interests in the Fund at the end of each calendar quarter on ten days notice.

Limited partners may also make, with permission of the managing general partner, additional capital contributions to the Fund on the first day of any calendar quarter. Each limited partner's respective liability for the Fund's debts and other obligations is limited to the balances in such partner's capital account. The Fund's limited partners are under no obligation to make additional capital contributions to the Fund.

4. The managing general partner of the Fund is Medallion Limited, located at 3 Reid Street, Hamilton, Bermuda. The applicant states that the individuals who are officers of Medallion Limited, Norman J. Holbrow (President) and Jan J. Spiering (Vice President), have no relationship to Mr. Elkin or any of his affiliates.

The investment general partner of the Fund is the Renaissance Technologies Corporation (Renaissance), a corporation organized under the laws of the State of Delaware with its principal offices located at 800 Third Avenue, New York, New York. The Information Memorandum for the Fund states that Renaissance has been registered with the Commodity Futures Trading Commission (CFTC) as both the commodity pool operator and commodity trading adviser (CTA) of the Fund since July 6, 1988 and April 2, 1991, respectively. The applicant represents that since Renaissance is registered with the CFTC as a commodity pool operator and a CTA, the Fund is subject to the same regulatory regimen as any U.S. based commodity partnership. Mr. Elkin also states that he is independent of and unrelated to Renaissance and its affiliates.

5. The applicant proposes to have the IRA invest approximately $75,000 to purchase part of Mr. Elkin's interest in the Fund (i.e. the Interest). The IRA would purchase the Interest directly from Mr. Elkin for cash. The applicant represents that the proposed transaction would be permissible under the terms of the Fund as they relate to the restrictions on the transferability of a limited partner's interests in the Fund. The IRA would pay no more than the fair market value of the Interest as established by an independent, qualified appraiser (as described below in Paragraph 7). The IRA would not pay any commissions or other expenses in connection with the transaction.

Mr. Elkin states that the proposed purchase of the Interest for $75,000 would involve approximately 22% of the total assets of the IRA. Mr. Elkin states further that the proposed transaction will not exceed the lesser of either $75,000 or 25% of the IRA's total assets at the time of the transaction (see Paragraph 7 below). After the purchase of the Interest by the IRA, the IRA would own approximately 1/60 of one (1) percent of the Fund, based on recent quarterly valuations for the Fund.[14] Mr. Elkin would continue to own the balance of his current interest in the Fund.

6. Mr. Elkin states that the Fund has exhibited superior investment performance over the last year. Mr. Elkin believes that an investment in the Fund by the IRA would represent an excellent opportunity for the IRA to achieve a high rate of return. Mr. Elkin states that the proposed purchase of the Interest by the IRA would be consistent with his investment strategy for the IRA's assets. In this regard, Mr. Elkin maintains that his primary goal for the assets of the IRA that would be involved in the proposed transaction is growth of capital, despite the higher degree of risk involved with such an investment.[15] Mr. Elkin represents that he has reviewed information regarding investment funds similar to the Fund and believes that the Fund offers a better prospect for achieving superior returns on capital invested than other such funds.

7. Kempe & Whittle Associates Limited (KWAL), the administrators for the Fund, will act as an independent, qualified appraiser to establish the fair market value of the Interest for purposes of the proposed transaction. KWAL is responsible for the maintenance of the Fund's books and records and for the preparation of the Fund's financial statements, annual reports, and monthly reports to investors. In addition, KWAL determines the total net asset value of the Fund on a quarterly basis for purposes of any redemptions of limited partnership interests by partners in the Fund at that time. KWAL states that a limited partnership interest in the Fund is equal to a partner's share of the Fund's total net asset value on such date.

Therefore, Mr. Elkin proposes to have the IRA purchase the Interest from

[14] The applicant represents that the Fund's assets are not considered to be ''plan assets'' under the Department's regulations defining that term for purposes of plan investments because investments in the Fund by benefit plan investors are not significant (see 29 CFR 2510.3–101). In this regard, the Information Memorandum for the Fund states that it is the intention of the Fund to ensure that all types of plan investors collectively will own less than 25 percent of the outstanding interests in the Fund. The Department expresses no opinion in this proposed exemption as to whether the assets held by the Fund would be considered ''plan assets'' under the Department's regulations.

[15] The Department notes that the Internal Revenue Service has taken the view that if a plan is exposed to the risk of large losses because of the speculative nature of investments made by the plan, such an investment strategy may raise questions in regard to the exclusive benefit rule under section 401(a) of the Code. For example, see Rev. Rul. 73–532, 1973–2 C.B. 128, which states, among other things, that the safeguards and diversity that a prudent investor would adhere to must be present in order for the ''exclusive-benefit-of-employees'' requirement to be met. The Department notes further that section 408(a) of the Code, which describes the tax qualification provisions for IRAs, also contains an exclusive benefit rule for an individual and his or her beneficiaries. However, the Department is expressing no opinion in this proposed exemption regarding whether violations of section 408(a) of the Code would occur as a result of an IRA's acquisition of investments that may be speculative in nature, such as the proposed purchase of a partnership interest in a fund which invests in exchange-traded futures contracts as well as forward contracts and options relating to such financial instruments.

himself at an amount equal to the total net asset value which the Interest would represent, as established by KWAL, as of the end of the next calendar quarter following the granting of this proposed exemption, provided that such amount does not exceed the lesser of either $75,000 or 25% of the IRA's total assets at the time of the transaction.

8. In summary, the applicant represents that the proposed transaction would satisfy the statutory criteria of section 4975(c)(2) of the Code because: (a) The terms and conditions of the purchase will be at least as favorable to the IRA as those obtainable in an arm's-length transaction with an unrelated party; (b) the purchase will a one-time cash transaction which will allow the IRA to acquire an asset which, in the applicant's view, has the prospect for superior investment returns; (c) the IRA will pay no more than the fair market value of the Interest, as established by an independent, qualified appraiser at the time of the transaction; (d) the IRA will not pay any commissions or other expenses in connection with the transaction; (e) the fair market value of the Interest will be based on an independent valuation of the total net asset value of the Fund and will not represent more than 25% of the total assets of the IRA at the time of the transaction; and (f) Mr. Elkin has determined that the proposed transaction will be in the best interests of the IRA.

NOTICE TO INTERESTED PERSONS: Because Mr. Elkin is the only participant in the IRA, it has been determined that there is no need to distribute the notice of proposed exemption to interested persons. Comments and requests for a hearing are due thirty (30) days after publication of this notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Mr. E. F. Williams of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 18th day of September, 1995.

Ivan Strasfeld,

Director of Exemption Determinations Pension and Welfare Benefits Administration U.S. Department of Labor.

[FR Doc. 95–23464 Filed 9–20–95; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL SCIENCE FOUNDATION

Collection of Information Submitted for OMB Review

In accordance with the Paperwork Reduction Act and OMB Guidelines, the National Science Foundation is posting a notice of information collection that will affect the public. Interested persons are invited to submit comments by October 15, 1995. Copies of materials may be obtained at the NSF address or telephone number shown below.

(A) *Agency Clearance Officer.* Herman G. Fleming, Division of Contracts, Policy, and Oversight, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, or by telephone (703) 306–1243. Comments may also be submitted to:

(B) *OMB Desk Officer.* Office of Information and Regulatory Affairs, ATTN: Jonathan Winer, Desk Officer, OMB, 722 Jackson Place, Room 3208, NEOB, Washington, DC 20503.

Title: Survey of Industrial Research and Development, 1995–96

Affected Public: Businesses or other for-profit institutions

Respondents/Reporting Burden: 23,300 respondents, 61,300 total burden hours.

Abstract: This survey measures the amount and indicates the direction of R&D expenditures by U.S. industry. Government agencies, corporations, academic researchers, trade associations, research organizations, and others use the statistics produced from the survey to analyze and forecast technological growth, investigate productivity determinants, formulate tax policy, and compare individual company performance with industry averages. Companies with known R&D activity and samples of companies are selected industries which may conduct R&D are included.

Dated: September 15, 1995.

Herman G. Fleming,

Reports Clearance Officer.

FR Doc. 95–23395 Filed 9–20–95; 8:45 am]

BILLING CODE 7555–01–M

Advisory Panel for Biochemistry and Molecular Structure and Function; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Advisory Panel for Biochemistry and Molecular Structure and Function—(1134) (Panel A).

Date and Time: Wednesday, Thursday, and Friday, October 11, 12, and 13, 1995, 8:30 a.m. to 5:00 p.m.

Place: National Science Foundation, 4201 Wilson Blvd., Room 320, Arlington, VA 22230.

Type of Meeting: Closed.

Contact Persons: Drs. Jack Cohen and Valerie Hu, Program Directors for Molecular Biochemistry, Room 655, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230. (703/306–1443).

Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: To review and evaluate research proposals submitted to the Molecular Biochemistry Program as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a

proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: September 18, 1995.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 95–23422 Filed 9–20–95; 8:45 am]

BILLING CODE 7555–01–M

Division of Environmental Biology: Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–464, as amended), the National Science Foundation (NSF) announces the following meetings.

Name: Advisory Panel for Ecological Studies (#1751).

Date and Time: October 12–13, 1995, 8:00 am-5:00 pm each day.

Place: Room 330, National Science Foundation 4201 Wilson Boulevard, Arlington, VA 22230.

Contact Person: Dr. James Callahan, Program Director, Ecological Studies, Room 635, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Telephone: (703) 306–1479.

Agenda: To review and evaluate Ecosystem Studies proposals as part of the selection process for awards.

Name: Advisory Panel for Ecological Studies (#1751).

Date and Time: October 11–13, 1995, 8:30 am-5:00 pm each day.

Place: Room 340, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22203.

Contact Person: Dr. Scott L. Collins, Program Director, Ecological Studies, Room 635, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22203. Telephone: (703) 306–1479.

Agenda: To review and evaluate Ecology proposals as part of the selection process for awards.

Name: Advisory Panel for Systematic and Population Biology (#1753).

Date and Time: October 17–20, 1995, 8:00 am-5:00 pm each day.

Place: Rooms 3751, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Contact Person: Dr. James Rodman, Program Director, Systematic and Population Biology, Room 635, Division of Environmental Biology, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Telephone: (703) 306–1479.

Agenda: To review and evaluate Systematic Biology proposals as part of the selection process for awards.

Name: Advisory Panel for Systematic and Population Biology (#1753).

Date and Time: October 10–13, 1995, 8:00 am-5:30 pm each day.

Place: Room 380 and 390, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22203.

Contact Person: Dr. Mark W. Courtney, Program, Director, Systematic and Population Biology, Room 635, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22203. Telephone: (703) 306–1479.

Agenda: To review and evaluate Population Biology proposals as part of the selection process for awards.

Type of Meetings: Closed.

Purpose of Meetings: To provide advice and recommendations concerning support for research proposals submitted to the NSF for financial support.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information: financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government in the Sunshine Act.

Dated: September 18, 1995.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 95–23421 Filed 9–20–95; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panel in Elementary, Secondary and Informal Education; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Special Emphasis Panel in Elementary, Secondary and Informal Education (59).

Date and Time: October 12–14, 1995; 8:00 to 5:00 each day.

Place: Hyatt Rosslyn, 1325 Wilson Blvd., Arlington, Va.

Type of Meeting: Closed.

Contact Person: Dr. Gerhard Salinger, Program Director, Division of Elementary, Secondary and Informal Education, Room 885, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230, telephone (703) 306–1614.

Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: To review and evaluate Instructional Material Development proposals as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government Sunshine Act.

Dated: September 18, 1995.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 95–23419 Filed 9–20–95; 8:45 am]

BILLING CODE 7555–01–M

Advisory Committee for Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name and Committee Code: Advisory Committee for Engineering (#1170).

Date and Time: October 12, 1995/9:30 am–5:00 pm; October 13, 1995/8:30 am–12 Noon.

Place: Room 1235, (National Science Board Meeting Room) National Science Foundation, 4201 Wilson Boulevard, Arlington, VA.

Type: Open.

Contact Person: Dr. William S. Butcher, Advisory Committee for Engineering, National Science Foundation, Room 505, 4201 Wilson Boulevard, Arlington, VA 22230. Telephone: (703) 306–1302.

Minutes: May be obtained from the contact person listed above.

Purpose: To provide advice, recommendations and counsel on major goals and policies pertaining to Engineering programs and activities.

Agenda: Discussion on issues, opportunities and future directions for the Engineering Directorate, discussion of Engineering Directorate budget situation as well as other items.

Dated: September 18, 1995.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 95–23420 Filed 9–20–95; 8:45 am]

BILLING CODE 7555–01–M

Federal Networking Council Advisory Committee

In accordance with the Federal Advisory Committee Act (Public Law 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Federal Networking Council Advisory Committee (#1177).

Date and Time: October 10, 1995; 9 a.m. to 5 p.m. and October 11, 1995; 9 a.m. to 1 p.m.

Place: Room 1225, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230.

Type of Meeting: Open.

Contact Person: Ms. Tracie Monk, Coordinator, Federal Networking Council, DynCorp ATS, 4001 N. Fairfax Drive, Suite 200, Arlington, VA 22203–1614, Telephone: (703) 522–6410, Fax: (703) 522–7161. Internet: tmonk@csto.snap.org.

Purpose of Meeting: The purpose of this meeting is for the Advisory Committee to provide the Federal Networking Council

(FNC) with technical, tactical, and strategic advice, concerning policies and issues raised in the implementation and deployment of the National Research and Education Network (NREN) Program.

Agenda: Federal Transition Plan, Internet Security, CIC/HPCCIT R&D Agenda, Education, Internet Economics/Statistics Acquisition.

Luncheon: There is no fee to attend this meeting. However, attendees who register in advance may order refreshments and/or a box lunch for which there will be a charge. To obtain registration form, contact Ms. Monk by telephone, fax, or electronic mail at the numbers above. Forms must be received by October 4, 1995.

Dated: September 18, 1995.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 95–23424 Filed 9–20–95; 8:45 am]

BILLING CODE 7555–01–M

Advisory Panel for Genetics and Nucleic Acids; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Advisory Panel for Genetics and Nucleic Acids (1149) (Panel C).

Date and Time: Tuesday Oct. 10 and Wednesday Oct. 11, 1995, at 8:30 am to 5:00 pm.

Place: Room 310, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Closed.

Contact Person: Dr. Todd M. Martensen, Program Director for Biochemical Genetics, Division of Molecular and Cellular Biosciences, Room 655, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. (703) 306–1439.

Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: To review and evaluate research proposals submitted to the Biochemical Genetics Program as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government in the Sunshine Act.

Dated: September 18, 1995.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 95–23425 Filed 9–20–95; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panel in Physics; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Special Emphasis Panel in Physics (#1208).

Date: October 9–11, 1995.

Place: Bridge Annex, California Institute of Technology 1201 E. California Boulevard, Pasadena, California.

Type of Meeting: Closed.

Contact Person: Dr. David Berley, Program Manager, Laser Interferometer Gravitational Observatory, Physics Division, Room 1015, National Science Foundation, 4201 Arlington Blvd., Arlington, VA 22230. Telephone: (703) 306–1892.

Purpose of Meeting: To review the technical aspects and management of the Laser Interferometer Gravitational-Wave Observatory (LIGO) project.

Agenda: An overview of the project. Detailed examination of the technical aspects of the project and the management of the technical systems.

Reason for Closing: The Project plans being reviewed include information of a proprietary or confidential nature, including technical information; information on personnel and proprietary data for present and future subcontracts. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: September 18, 1995.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 95–23418 Filed 9–20–95; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Availability of Draft Application Format and Content Guidance and Review Plan and Acceptance Criteria for Non-Power Reactors

The U.S. Nuclear Regulatory Commission (NRC) is in the process of developing for Non-Power Reactors (NPRs) a ''Format and Content for Applications for the Licensing of Non-Power Reactors'' (F&C) and a ''Standard Review Plan and Acceptance Criteria for Applications for the Licensing of Non-Power Rectors'' (SRP). The NRC has made available a draft of Chapter 11, ''Radiation Protection Program and Waste Management,'' of the F&C and SRP documents for comment.

A copy of this chapter has been placed in the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555. Single copies of this chapter may be requested in writing from Alexander Adams, Jr., Senior Project Manager, U.S. Nuclear Regulatory Commission, MS: 0–11–B–20, Washington, DC 20555. Comments on this chapter should be sent by December 12, 1995, to the Director, Non-Power Reactors and Decommissioning Project Directorate at the above address.

Dated at Rockville, Maryland, this 15th day of September 1995.

For the Nuclear Regulatory Commission.

Seymour H. Weiss,

Director, Non-Power Reactors and Decommissioning Project Directorate, Division of Reactor Program Management, Office of Nuclear Reactor Regulation.

[FR Doc. 95–23410 Filed 9–20–95; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 70–7001; 70–7002]

United States Enrichment Corporation: Paducah Gaseous Diffusion Plant; Portsmouth Gaseous Diffusion Plant; Notice of Receipt of Application for Certification for the Gaseous Diffusion Plants, Notice of Comment Period, and Notice of Public Meetings

I. Receipt of Application and Availability of Documents

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC or the Commission) has received by letter dated September 15, 1995, an application in its entirety to replace the application dated April 18, 1995, from the United States Enrichment Corporation (USEC) for the initial certification of the gaseous diffusion plants (GDPs) located near Paducah, Kentucky and Piketon, Ohio. The Energy Policy Act of 1992 established the USEC to operate the GDPs under lease from the U.S. Department of Energy, and required the NRC to establish a certification process and standards for the GDPs to assure protection of public and workers' health and safety and adequate safeguards and security. NRC determined that USEC's April submittal did not adequately address the standards NRC had established for the GDPs and therefore rejected the application on May 5, 1995. NRC's decision to reject the application was not a determination that the operations of the plants were unsafe. NRC originally intended to issue a certification decision in October 1995. However, because the original application was rejected, NRC now plans to issue a decision in February, 1996.

Copies of the application for certification (except for classified and proprietary portions withheld in accordance with 10 CFR 2.790,

''Availability of Public Records'') are available for public inspection and copying at the Commission's Public Document Room (PDR) in the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and in the Local Public Document Rooms (LPDRs) established for these facilities. A copy of the application for the Paducah plant is available at the Paducah Public Library, 555 Washington Street, Paducah, Kentucky 42003. A copy of the application for the Portsmouth plant is available at the Portsmouth Public Library, 1220 Gallia Street, Portsmouth, Ohio 45662. Copies of related correspondence and staff evaluations (except for portions withheld in accordance with 10 CFR 2.790) will also be made available at these locations. A copy of the original application continues to be available at these public document rooms.

The Energy Policy Act also requires USEC to submit a compliance plan, prepared by the Department of Energy, which addresses areas where the USEC facilities are not yet in compliance with NRC requirements. The compliance plan is expected in early November. A separate notice of its availability and comment period will be issued when it is received.

II. Notice of Comment Period

Any interested party may submit written comments on the September application for certification for either the Paducah plant or the Portsmouth plant for consideration by the staff. To be certain of consideration, comments must be received by November 6, 1995. Comments received after the due date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date. Written comments on the application should be mailed to the Chief, Rules Review and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 or hand delivered to 11545 Rockville Pike, Rockville, MD 20852 between 7:45 am and 4:15 pm Federal workdays. Comments should be legible and reproducible, and include the name, affiliation (if any), and address of the commenter. All comments received by the Commission will be made available for public inspection at the Commission's Public Document Room located in Washington, DC and the Local Public Document Rooms located in Paducah, Kentucky and Portsmouth, Ohio. In accordance with 10 CFR 76.62 and 76.64, a member of the public must submit written comments or provide oral comments at a public meeting described below to petition the Commission requesting review of the Director's decision on certification.

III. Notice of Public Meetings

The NRC will hold two meetings concerning the application for certification for the Portsmouth and Paducah GDPs. These meetings are being held to solicit public input on the initial certification of these facilities. The meeting on the Paducah Gaseous Diffusion Plant will be held at the Paducah Information Age Park Resource Center, 200 McCracken Boulevard in Paducah, Kentucky on December 5, 1995, 7 pm. The meeting on the Portsmouth Gaseous Diffusion Plant will be held at the Vern Riffe Joint Vocational School, 23365 State Rt. 124 in Piketon, Ohio on November 28, 1995, 7 pm.

In order to allow a maximum number of speakers, statements by the public will be limited to 5 minutes per individual. Those interested in speaking at the meetings may register in advance or may register at the meeting. Any person interested in registering in advance may do so by sending a written request to Ms. Rocio Castaneira, U.S. Nuclear Regulatory Commission, T–8A33, Washington, DC 20555. The request should clearly state the individual's name and for which meeting the individual is registering. Written requests must be received by November 16, 1995. Speakers will be taken in the order the requests are received. After all pre-registered speakers have presented their comments, those individuals that register at the door will be taken in the order of sign-up. A record of the public meeting will be placed in the PDR and the LPDR. Written comments will also be accepted at the meetings.

FOR FURTHER INFORMATION CONTACT: Ms. Rocio Castaneira, (301) 415–8103; Mr. Carl B. Sawyer, (301) 415–8174; or Ms. Merri Horn, (301) 415–8126; Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

Dated at Rockville Maryland, this 15th day of September 1995.

For the Nuclear Regulatory Commission.

John W. N. Hickey,

Chief Enrichment Branch Division of Fuel Cycle Safety and Safeguards.

[FR Doc. 95–23409 Filed 9–20–95; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Notice of Request for Expedited Review of a Revised Information Collection OPM Form 2809–EZ2

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, chapter 35), this notice announces a request for expedited review of a revised information collection. OPM Form 2809–EZ2, Open Season Health Benefits Enrollment Change Form, is used by annuitants only at Open Season to elect a change in health benefits coverage.

Approximately 35,345 OPM Forms 2809–EZ2 are completed annually. Each form takes approximately 30 minutes to complete. The annual burden is 17,672 hours.

A copy of this proposal is appended to this notice.

DATES: Comments on this proposal should be received on or before September 26, 1995. OMB has been requested to take action within eight (8) calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—

Lorraine E. Dettman, Chief, Retirement and Insurance Group, Operations Support Division, U.S. Office of Personnel Management, 1900 E Street, NW, Room 3349, Washington, DC 20415

and

Joseph Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building NW., Room 10235, Washington, DC 20503.

FOR INFORMATION REGARDING ADMINISTRATIVE COORDINATION—CONTACT: Mary Beth Smith-Toomey, Management Services Division, (202) 606–0623, U.S. Office of Personnel Management.

Lorraine A. Green,

Deputy Director.

The content of draft OPM Form 2809–EZ2 is set out below:

DRAFT OPM Form 2809–EZ2
1995 FEHB Open Season
Revised October 1995

Federal Employee Health Benefits Program

United States Office of Personnel Management

Civil Service Retirement System/Federal Employees Retirement System

Enrollment Change Form
Form Approved: OMB 3206–0200

Use this form to change your health benefits enrollment during the 1995 Open Season. This form has been personalized with your name, retirement claim number and health benefits plans available to persons residing in your address area. Do Not use someone else's form. Fill in Sections A, B, and C on the reverse side of this form. If You Do Not Want To Change Your Health Plan Or Type Of Coverage, Do Not Return This Form. If you need assistance in completing this form, call the Office of Personnel Management at (202) 606–0500. For the hearing impaired: Call the Retirement Information Office TTD number (202) 606–0551.

Important Directions For Marking Answers & Signing This Form

—Fill out form on hard surface
—Make heavy black marks that fill the circle completely
—Erase any changes completely
—Make no stray marks
—Do not write in margins
[ ] Right
[ ] Wrong

Brochure Requested:
Claim Number:

ADDRESS CORRECTION

[ ] Address Change. If your permanent mailing address is incorrect, darken the Address Change circle and make the necessary corrections in the space provided below.
Street Address (include Apartment No. or Lot no.)
City, State and ZIP Code
Country (if not United States)

Section A—Choose a Self Only or Self and Family enrollment. DARKEN ONLY ONE CIRCLE.

[ ] Self Only or[ ] Self and Family

Section B—PLAN CHOICES

Listed are the health plans in your state. (Select only one—Darken the circle between the two-character enrollment code and the name of the plan you want.)

GOVERNMENT WIDE PLANS

[ ]
[ ]

Fee-for Service—PLANS OPEN TO ALL

[ ]
[ ]*
*There are 8 selections available for ''Fee-for-Service—PLANS OPEN TO ALL''

Fee-for-Service—RESTRICTED PLANS

(You must be a member of a specific group to enroll in a plan below.)
[ ]
[ ]**
**There are 7 selections available for ''Fee-for-Service—RESTRICTED PLANS''

PREPAID PLANS:

[ ]
[ ]***
***There are 41 selections available for ''PREPAID PLANS''.

SECTION C—You must SIGN, date and give your telephone number below. Your Signature *(must be signed by the addressee, an OPM approved representative, or person holding power of attorney).*

Today's Date

Your daytime telephone number & area code ( )

[FR Doc. 95–23412 Filed 9–20–95; 8:45 am]

BILLING CODE 6325–01–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 95–68]

Masik Tool & Die Corporation Profit Sharing Plan (the Plan)

AGENCY: Department of Labor.

ACTION: Notice of technical correction.

On August 9, 1995, the Department of Labor (the Department) published in the Federal Register (60 FR 40623) an individual exemption which permits: (1) the past leasing (the Lease) of a lathe (the Lathe) owned by the Plan and certain individually-directed accounts in the Plan (the Accounts) to Masik Tool and Die Corporation (Masik), a party in interest with respect to the Plan; and (2) the proposed cash sale of the Lathe by the Accounts to Masik.

With respect to the effective date of the exemption for the Lease, the first sentence in the third paragraph of the second column on page 40623 should read as follows:

''* * * This exemption is effective for the period from June 1, 1988 through May 31, 1993 with respect to the Lease.''

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams, of the Department, at (202) 219–8194.

Signed at Washington, D.C., this 18th day of September, 1995.

Ivan L. Strasfeld,

Director, Office of Exemption Determinations, Pension and Welfare Benefits Administration.

[FR Doc. 95–23462 Filed 9–20–95; 8:45 am]

BILLING CODE 4510–29–P

SECURITIES AND EXCHANGE COMMISSION

Request Under Review by Office of Management and Budget

Agency Clearance Officer: Michael E. Bartell, (202) 942–8800
Upon written request copy available from: Securities and Exchange Commission, Office of Filing and Information Services, 450 5th Street NW., Washington, DC 20549

Revision

Mutual Fund Telephone Survey: File No. 270–395
Mall Intercept Survey: File No. 270–393
Mutual Fund Mail Survey: File No. 270–395

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget requests for approval to execute a mutual fund telephone survey, a mall intercept survey, and a mutual fund mail survey. These surveys will attempt to assess the public's understanding of mutual funds and other financial matters. The results will enable the Commission to better understand the level of investor comprehension of mutual fund prospectuses and financial issues.

The mutual fund telephone survey is estimated to require 750 burden hours. Approximately 3,000 people will participate in the telephone survey, with each interview lasting 15 minutes.

The mall intercept survey is estimated to require 33 burden hours. Approximately 100 people will participate in the survey, with each interview lasting 20 minutes.

The mutual fund mail survey is estimated to require 333 burden hours. Approximately 1000 people will participate in the survey, with the interview lasting 20 minutes.

Direct general comments to the Clearance Officer for the Securities and Exchange Commission at the address below. Direct any comments concerning the accuracy of the estimated burden hours for compliance with the Securities and Exchange Commission to Michael E. Bartell, Associate Executive

Director, Office of Information Technology, 450 Fifth Street, NW., Washington DC 20549 and the Clearance Officer for the Securities and Exchange Commission, Project Numbers 3235–0450, 3235–0448, and 3235–0451, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: September 7, 1995.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–23474 Filed 9–20–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–36238; File No. S7–29–95]

Contracting

AGENCY: Securities and Exchange Commission.

ACTION: Notice of intent to modify the prime dissemination contract to deregulate certain prices charged outside of the public reference rooms.

SUMMARY: The Securities and Exchange Commission (the ''SEC'' or the ''Commission'') is announcing that it has reached a preliminary agreement with its prime dissemination contractor,[1] Disclosure Information Services, Inc. (''Disclosure''), to modify the terms of its contract during Fiscal Year 1996. Pursuant to this agreement, the Commission intends to end its current practice of regulating the prices for microfiche and watch services that Disclosure sells to the public outside of the Commission's public reference rooms, effective January 1, 1996. The Commission is publishing this notice to solicit comments from interested persons.

DATES: Comments should be received on or before October 6, 1995.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Stop 6–9, Washington, D.C. 20549. All comment letters should refer to File No. S7–29–95. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 5th Street, NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Fernando Alegria, Contracting Officer, at (202) 942–4000, Office of Administrative and Personnel Management, Securities and Exchange Commission, 450 Fifth Street NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: Under the prime dissemination contract, Disclosure furnishes the Commission and users of the Commission's public reference rooms with various document-related services, including microfiche-based copying services, and offers SEC-regulated microfiche and watch services for SEC filings to its commercial customers outside of the public reference rooms.[2] Disclosure's costs for providing these services are paid for by public reference room revenues, revenues derived by Disclosure from its regulated outside sales, and SEC payments to Disclosure.

The Commission's purpose in regulating the price of Disclosure's microfiche services offered outside of the public reference rooms was to ensure the availability of this records system for SEC filings pending the maturation of electronic technologies, particularly the Electronic Data Gathering Analysis and Retrieval (''EDGAR'') system. EDGAR data now is readily available at very low cost through a variety of service organizations and over the Internet, however. In addition, the National Archives and Records Administration (''NARA'') recently concluded that the Commission can use magnetic tape instead of silver halide microfilm to satisfy NARA's archival requirements, and the Commission soon will begin to use magnetic tape for this purpose. These developments demonstrate that electronic records technologies now are widely accepted. Under these circumstances it no longer makes sense for the Commission to subsidize or regulate the relatively antiquated technology of maintaining records of SEC filings in microfiche form. Accordingly, the Commission intends to end its payments for Edgar-based microfiche and deregulate Disclosure's microfiche prices outside the public reference rooms, effective January 1, 1996.[3]

Notwithstanding deregulation, the existing contracts of regulated-rate microfiche subscribers will be honored by Disclosure until the end of their terms. It also appears that Disclosure and other companies will remain in the market to furnish microfiche of SEC paper filings.[4] Thus, it appears that the supply of such fiche will not come to an abrupt end, although prices should be higher than Disclosure's current regulated rates. In addition, fiche of SEC paper filings will remain available through services Disclosure will provide to the Commission's public reference rooms, including services to public reference room user organizations through whom such fiche might be ordered. Once the Commission's agreement with Disclosure is modified, the Commission no longer will be supporting the production of any Edgar-based fiche, however. Thus, the economics of producing such fiche might not remain attractive to Disclosure, leading to a possible end to this source of supply once all of its existing regulated-rate contracts have been serviced.

Dated: September 15, 1995.

For the Commission, by the Executive Director, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 95–23376 Filed 9–20–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–36226; File No. S7–24–89]

Joint Industry Plan; Solicitation of Comments and Order Approving Amendment No. 4 to Reporting Plan for Nasdaq/National Market Securities Traded on an Exchange on an Unlisted or Listed Basis, Submitted by the National Association of Securities Dealers, Inc., and the Boston, Chicago and Philadelphia Stock Exchanges

September 13, 1995.

On September 12, 1995, the National Association of Securities Dealers, Inc., and the Boston, Chicago, and Philadelphia Stock Exchanges (collectively, ''Participants'')[1] submitted

[1] The Commission's prime dissemination contractor furnishes various services to the Commission, the Commission's public reference rooms, and the outside commercial market, as discussed below, in connection with disseminating SEC filings to the public

[2] The cost for Disclosure's microfiche services outside the public reference rooms are to be recovered by disclosure through charging clients ''not-to-exceed'' regulated prices set forth in the agreement. The regulated price is two-tiered. Under Tier 1, Disclosure call sell microfiche to its commercial clients outside the public reference rooms at cost, but not to exceed .90 cents per microfiche card if they are advance annual subscription purchasers of 50,000 or more microfiche cards per year, or if they are universities or not for profit libraries irrespective of volume. All of Disclosure's other commercial microfiche clients outside of the public reference rooms must pay the Tier 2 price, i.e. at cost, but not to exceed $1.05 per microfiche card.

[3] The affected commercial subscribers will include re-sellers that compete with Disclosure in the aftermarket, and many university and not for profit libraries. Of course, all of Disclosure's sales inside the Commission's public reference rooms will continue to be at prices set by the Commission.

[4] After the next round of filer phase-ins on EDGAR, these mostly will consist of insider trading reports and regulated entity registration forms. The Commission is considering incorporating into EDGAR some or all of the few remaining form types that are filed on paper.

[1] The signatories to the Plan, i.e., the National Association of Securities Dealers, Inc. (''NASD''), and the Chicago Stock Exchange, Inc. (''Chx'')

Continued

to the Commission proposed Amendment No. 4 to a joint transaction reporting plan (''Plan'') for Nasdaq/National Market securities traded on an exchange on an unlisted or listed basis.[2] The Commission is approving the proposed amendment to the Plan and trading pursuant to the Plan on a temporary basis to expire on October 12, 1995.

I. Background

The Commission originally approved the Plan on June 26, 1990.[3] The Plan governs the collection, consolidation and dissemination of quotation and transaction information for Nasdaq/National Market securities listed on an exchange or traded on an exchange pursuant UTP. The Commission originally approved trading pursuant to the Plan on a one-year pilot basis, with the pilot period to commence when transaction reporting pursuant to the Plan commenced. Consequently, the pilot period commenced on July 12, 1993. As requested by the Participants in Amendment Nos. 1, 2, and 3, to the Plan, the Commission has extended the effectiveness of the Plan three times. Accordingly, the effectiveness of the Plan was scheduled to expire on September 12, 1995.[4]

As originally approved by the Commission, the Plan required the Participants to complete their negotiations regarding revenue sharing during the one-year pilot period. The January 1995 Extension Order approved the effectiveness of the Plan through August 12, 1995, and since that time the Commission has expected the Participants to conclude their financial negotiations promptly (at the time, before January 31, 1995), and to submit a filing to the Commission that reflected the results of the negotiations.[5] To date, the Participants have not completed their financial negotiations.

Proposed Amendment No. 4 to the Plan would extend the effectiveness and the negotiation period for an additional month through October 12, 1995. The Commission believes it is appropriate to extend the effectiveness of the pilot program for an additional month in order to continue the pilot program in place while the Commission awaits the Participants' filing of a proposed Plan amendment concerning revenue sharing pursuant to the Plan.[6]

II. Extension of Certain Exemptive Relief

In conjunction with the Plan, on a temporary basis scheduled to expire on September 12, 1995, the Commission granted an exemption from Rule 11Ac1–2 under the Act regarding the calculated best bid and offer (''BBO''), and granted the BSE an exemption from the provision of Rule 11Aa3–1 under the Act that requires transaction reporting plans to include market identifiers for transaction reports and last sale data. At the request of the Participants, this order extends these exemptions through October 12, 1995, provided that the Plan continues in effect through that date pursuant to a commission order.[7] The Commission continues to believe that exemptive relief from these provisions is appropriate through October 12, 1995.

III. Comments on the Operation of the Plan

In the January 1995 Extension Order and the August 1995 Extension Order, the Commission solicited, among other things, comment on: (1) Whether the BBO calculation for the relevant securities should be based on price and time only (as currently is the case) or if the calculation should include size of the quoted bid or offer; and (2) whether there is a need for an intermarket linkage for order routing and execution and an accompanying trade-through rule. The commission continues to solicit comment on these matters.

IV. Solicitation of Comment

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. All submission should refer to File No. S7–24–89 and should be submitted by October 12, 1995.

V. Conclusion

The Commission finds that proposed Amendment No. 4 to the Plan to extend the operation of the Plan and the financial negotiation period for an additional month is appropriate and in furtherance of Section 11A of the Act. The Commission finds further that extensions of the exemptive relief requested through October 12, 1995, as

(previously, the Midwest Stock Exchange, Inc.) Philadelphia Stock Exchange, Inc. (''Phlx''), and the Boston Stock Exchange, Inc. (''BSE''), are the ''Participants.'' The BSE, however, joined the Plan as a ''Limited Participant,'' and reports quotation information and transaction reports only in Nasdaq/National Market (previously referred to as ''Nasdaq/NMS'') securities listed on the BSE. Originally, the American Stock Exchange, Inc., was a Participant to the Plan, but did not trade securities pursuant to the Plan, and withdrew from participation in the Plan in August 1994.

[2] The Commission notes that Section 12(f) of the Act describes the circumstances under which an exchange may trade a security that is not listed on the exchange, *i.e.*, by extending unlisted trading privileges (''UTP'') to the security. Section 12(f) was amended on October 22, 1994, 15 U.S.C. 78*l* (1991) (as amended 1994). Prior to the amendment, Section 12(f) required exchanges to apply to the Commission before extending UTP to any security. In order to approve an exchange UTP application for a registered security not listed on any exchange (''OTC/UTP''), Section 12(f) required the Commission to determine that various criteria had been met concerning fair and orderly markets, the protection of investors, and certain national market initiatives. These requirements operated in conjunction with the Plan currently under review. The recent amendment to Section 12(f), among other matters, removes the application requirement and permits OTC/UTP only pursuant to a Commission order or rule. The order or rule is to be issued or promulgated under essentially the same standards that previously applied to Commission review of UTP applications. The present order fulfills these Section 12(f) requirements.

[3] See Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (''1990 Approval Order''). For a detailed discussion of the history of UTP in OTC securities, and the events that led to the present plan and pilot program, see 1994 Extension Order, *infra* note 4.

[4] See Securities Exchange Act Release No. 34371 (July 13, 1994), 59 FR 37103 (''1994 Extension Order''). See also Securities Exchange Act Release No. 35221, (January 11, 1995), 60 FR 3886 (''January 1995 Extension Order''), and Securities Exchange Act Release No. 36102 (August 14, 1995), 60 FR 43626 (''August 1995 Extension Order'').

[5] See January 1995 Extension Order, *id*, at n. 6.

[6] The NASD, in its letter attached to the present filing, states that all Plan Participants have made a good faith effort to reach final agreement on the revenue sharing plan in accordance with the Commission's direction in the most recent order extending the effectiveness of the Plan. See letter from Robert E. Aber, NASD, to Jonathan Katz, Commission, dated September 11, 1995. Presumably, this is in reference to the Commission's August 1995 statement that: ''The Commission also is directing the Participants to submit the filing [concerning revenue sharing] to the Commission on or before August 31, 1995.'' August 1995 Extension Order *supra* note 4. The Participants are reminded that they currently are in violation of the Commission order because no proposal concerning finances has been filed with the Commission. The Commission urges the Participants to comply with the Commission's request for the filing promptly.

[7] In the August 1995 Extension Order, the Commission extended these exemptions from August 12, 1995, through September 12, 1995. Pursuant to a request made by the NASD, this order further extends the effectiveness of the relevant exemptions from September 12, 1995, through October 12, 1995. See letter dated September 11, 1995, *id*.

described above, also is consistent with the Act and the Rules thereunder. Specifically, the Commission believes that these extensions should serve to provide the Participants with more time to conclude their financial negotiations and with more information to evaluate the effects of and proposed course of action for the pilot program. This, in turn, should further the objects of the Act in general, and specifically those set forth in Sections 12(f) and 11A of the Act and in Rules 11Aa3–1 and 11Aa3–2 thereunder.

It is therefore ordered, pursuant to Sections 12(f) and 11A of the act and (c)(2) of Rule 11Aa3–2 thereunder, that Amendment No. 4 to the Joint Transaction Reporting Plan for Nasdaq/National Market securities traded on an exchange on an exchange on an unlisted or listed basis is hereby approved, and trading pursuant to the Plan is hereby approved on a temporary basis through October 12, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(29).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–23475 Filed 9–21–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–36236; File No. SR–PSE–95–18]

Self-Regulatory Organizations; Pacific Stock Exchange, Inc.; Order Granting Partial, Accelerated Approval of a Proposed Rule Change Relating to the PSE Technology Index and Opening Price Settlement of Component Securities

September 14, 1995.

On August 21, 1995, the Pacific Stock Exchange, Inc. (''PSE'' or ''Exchange'') submitted to the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to increase the existing position and exercise limits for options on the PSE Technology Index (''Technology Index'' or ''Index'') and change the terms of option contracts overlying the Index from closing price (p.m.) settlement to opening price (a.m.) settlement.

Notice of the proposed rule change was published for comment and appeared in the Federal Register on August 31, 1995.[3] No comments were received on the proposal. This order grants partial accelerated approval of that portion of the proposal relating to a.m. settlement of options on the Index.[4]

I. Description of the Proposal

On November 26, 1991, the Commission approved an exchange proposal to re-classify the Technology Index as a broad-based index for position limit and margin purposes.[5] The Index is a price-weighted, European-style[6] index comprised of 100 stocks that are intended to represent a broad spectrum of companies principally engaged in manufacturing and service-related products within advanced technology fields.

The Exchange is proposing that options on the Index be settled based on opening market prices for the underlying securities rather than based on closing market prices for such underlying securities as originally approved. Accordingly, the last day of trading for options on the Index shall be the business day preceding the last day of trading in the underlying securities prior to expiration. This day will generally be the Thursday preceding an expiration Friday. The current index value at the expiration of an opening price settled index option shall be determined based on opening prices on the last day of trading in the underlying securities prior to expiration (*i.e.*, the Friday immediately preceding the third Saturday of the month). In this regard, for settlement purposes, the first reported sale (opening) prices of the underlying securities on such day would be used, except that the last reported sale price of such a security from the previous day would be used in any case where the security does not open for trading on that day. There are no currently outstanding Technology Index option series.

II. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of Section 6(b)(5),[7] in particular, in that it should help remove impediments to and perfect the mechanism of a free and open market, promote just and equitable principles of trade and protect investors and the public interest. Moreover, the Commission believes that the PSE's proposal to reclassify the Technology Index option from a closing price settled contract to an opening price settled contract may help ameliorate the price effects associated with expirations of Technology Index options.

Further, the Commission believes that the PSE's Technology Index option opening price settlement proposal is a reasonable attempt to address and ameliorate the effects on the equity markets that have been associated with, but not necessarily the result of, the expiration of index options.

The Commission has identified several benefits to opening-price settlement for broad-based index options. First, an opening price settlement method for Technology Index options can help facilitate the development of contra-side interest to alleviate order imbalances in underlying markets from the unwinding of index-related positions. In contrast to expirations associated with closing price settled options, firms providing contra-side interest will not necessarily assume overnight or weekend position risks because they will have the rest of the day to liquidate or trade out of their positions. Second, even if the opening price settlement results in a significant change in underlying stock prices, participants in the markets for those stocks will have the remainder of the trading day to adjust to those price movements and to determine whether those movements reflect changes in fundamental values or rather short-term supply/demand considerations. In addition, settling Technology Index options at the underlying market opening will allow corresponding stock positions associated with expiring Technology Index contracts to be subject to the NYSE's auxiliary opening procedures implemented on expiration Fridays, where applicable. These procedures provide for the orderly entry, dissemination and matching of orders. The Commission also notes that because currently there are no Technology Index options series with closing settlement values outstanding, approval of the proposal will not result in investor confusion. This will also

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[1] 15 U.S.C. 78s(b)(1) (1988 & Supp. V 1993).

[2] 17 CFR 240.19b–4 (1994).

[3] See Securities Exchange Act Release No. 36146 (August 23, 1995), 60 FR 45509.

[4] In partially approving the PSE proposal, the Commission is not approving, at this time, the portion of the proposal relating to increasing the position and exercise limits on the Technology Index from 15,000 contracts to 37,500 contracts, with no more than 22,500 of such contracts in the series with the nearest expiration month. That portion of the proposal has been published for comment. The comment period expires on September 21, 1995.

[5] Securities Exchange Act Release No. 29994, 56 FR 63536 (Dec. 4, 1991). The Commission initially approved options trading on the Index in November 1983. See Securities Exchange Act Release Nos. 20424, 48 FR 54557 (Dec. 5, 1983); and 20499, 48 FR 58880 (Dec. 23. 1983).

[6] A European-style option may only be exercised during a specified period prior to expiration.

[7] 15 U.S.C. 78f(b)(5)(1982).

ensure that all series of Technology Index options utilize the same opening price settlement procedures.

The Commission finds good cause for approving that portion of the rule change relating to a.m. settlement prior to the thirtieth day after the date of publication of notice thereof in the Federal Register. As discussed above, and on the basis of the expirations over the past several years, the Commission believes that opening-price settlement of stock index options and futures is beneficial. Opening-price settlement procedures have operated smoothly and effectively and have contributed to dampening expiration Friday volatility. The Commission believes opening price settlement for Technology Index options will permit the market to benefit from the pre-opening procedures described above when positions in the contract are unwound on expiration Fridays. In addition, because there are currently no outstanding Technology Index options series, all new Technology Index options listed in the future will have the same opening settlement procedures, thereby avoiding investor confusion. For these reasons, the Commission believes that it is consistent with Sections 19(b)(2) and 6(b)(5) of the Act to approve the PSE's Technology Index opening price based settlement proposal on an accelerated basis.

It Therefore Is Ordered, pursuant to Section 19(b)(2) of the Act,[8] that the portion of the proposed rule change (SR–PSE–95–18) relating to the changing of the settlement feature of options on the Technology Index from closing price settlement to opening price settlement is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–23378 Filed 9–20–95; 8:45 am]

BILLING CODE 8010–01–M

[8] 15 U.S.C. 78s(b)(2)(1988).

[9] 17 CFR 200.30–3(a)(12)(1994).

[Release No. 34–36239; International Series Release No. 854; File No. SR–Phlx–95–47]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Japanese Yen Quote Spread Parameters

September 15, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on August 22, 1995, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes that the quotation spread parameters (bid/ask differentials) applicable to Japanese yen options be widened to reflect added volatility and appreciation in the market for the underlying currency, the Japanese yen. Option quote parameters govern the width of market quotations, establishing the maximum widths between the bid and the offer for an option contract.

Specifically, the Exchange proposes to change the parameters in Rule 1014(c)(ii) and Floor Procedure Advice (''Advice'') F–6, Option Quote Parameters, from $.000004, $.000006, and $.000008 to $.000006, $.000009, and $.000012. Under the proposal, the new quote spread parameters will be reflected in Rule 1014 as follows: no more than $.000006 between the bid and the offer for each option contract for which the bid is $.000040 or less; no more than $.000009 where the bid is more than $.000040 but does not exceed $.000160; and no more than $.000012 where the bid is more than $.000160.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In response to worldwide market conditions respecting the Japanese yen, the Exchange proposes to increase the applicable quote spread parameters respecting Japanese yen options. During recent years, the value of the yen in relation to the U.S. dollar has risen appreciably. As a result, employing the current option quote parameters, which are too narrow for today's prices, deprives investors from identifying price levels from off-floor where liquidity will be available in the sizes most often sought by currency option investors.

Further, because the Japanese yen spot value (in relation to the U.S. dollar) has increased, the U.S. dollar value of each yen option contract has likewise increased. For instance, 20 contracts previously represented $1 million of yen; currently on 16 contracts represent $1 million of yen. This, in turn, results in greater risk associated with each option contract. As contract size increases, the risks of market making in these options are amplified. As a result, the Exchange believes that the quote spread parameter should be widened to offset the greater risk. The existence of high strike prices increases this risk.

The increase in the yen spot value has also resulted in wider spreads between the bid and the offer in the spot price. For example, a spot market of 101.50 (bid)—.60 (ask) yen in January 1995 represented $.009852—.009842 in American terms, which is ten ''ticks'' wide. Comparatively, a spot market of 85.10—.20 yen in May 1995 represents $.011751—.011737, which is 14 ticks wide. Thus, as the yen spot value has increased, a former ten tick wide market in European terms has widened to 14 ticks. Similarly, the spreads in Japanese yen futures and forward contracts have also widened. Thus, the Exchange believes that the wider spreads in the spot and futures markets necessitate wider quote spread parameters in yen options for competitive reasons.

The Exchange notes that the Japanese yen quote spread parameters were last amended in 1991[2] from $.000004, $.000008, and $.000012 to $.000004, $.000006, and $.000008. The spot value in American terms was 68.50 in July 1990 when the proposal was filed and 71.20 when it was approved. At that time, the Exchange cited the competitive implications of quote spread parameters, which do not exist in the over-the-counter market for foreign currency options (''FCOs''). Also, the Commission noted that remaining competitive with such markets is important to the depth and liquidity of Exchange-traded FCOs.

The Exchange believes that its proposal is consistent with Section 6 of the Act in general, and in particular,

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] Securities Exchange Act Release No. 28937 (March 4, 1991) 56 FR 10290.

with Section 6(b)(5), in that it is designed to promote just and equitable principals of trade, as well as to protect investors and the public interest, by providing a more efficient and competitive market for FCOs. Widening the Japanese yen quote spread parameters to reflect current volatility and wider spreads in competing markets should promote market depth and liquidity by allowing Phlx market makers to compete more effectively.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Phlx does not believe that the proposed rule change will impose any inappropriate burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change 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 self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange has requested that the Commission grant accelerated approval of its proposal.

IV. Solicitations of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to File No. SR–Phlx–95–47 and should be submitted by October 12, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[3]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–23473 Filed 9–20–95; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–21360; 812–9644]

Daily Money Fund, et al.; Notice of Application

September 14, 1995.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application for Exemption under the Investment Company Act of 1940 (the ''Act'').

APPLICANTS: Daily Money Fund, Daily Tax-Exempt Money Fund, Fidelity Advisory Annuity Fund, Fidelity Special Situations Fund, Fidelity Advisor Series I, Fidelity Advisor Series II, Fidelity Advisor Series III, Fidelity Advisor Series IV, Fidelity Advisor Series V, Fidelity Advisor Series VI, Fidelity Advisor Series VII, Fidelity Advisor Series VIII, Fidelity Beacon Street Trust, Fidelity California Municipal Trust, Fidelity California Municipal Trust II, Fidelity Capital Trust, Fidelity Charles Street Trust, Fidelity Commonwealth Trust, Fidelity Congress Street Fund, Fidelity Contrafund, Fidelity Court Street Trust, Fidelity Court Street Trust II, Fidelity Destiny Portfolios, Fidelity Deutsche Mark Performance Portfolio, L.P., Fidelity Devonshire Trust, Fidelity Exchange Fund, Fidelity Financial Trust, Fidelity Fixed-Income Trust, Fidelity Government Securities Fund, Fidelity Hastings Street Trust, Fidelity Hereford Street Trust, Fidelity Income Fund, Fidelity Institutional Cash Portfolios, Fidelity Institutional Tax-Exempt Cash Portfolios, Fidelity Institutional Investors Trust, Fidelity Institutional Trust, Fidelity Investment Trust, Fidelity Magellan Fund, Fidelity Massachusetts Municipal Trust, Fidelity Money Market Trust, Fidelity Mt. Vernon Street Trust, Fidelity Municipal Trust, Fidelity Municipal Trust II, Fidelity New York Municipal Trust, Fidelity New York Municipal Trust II, Fidelity Phillips Street Trust, Fidelity Puritan Trust, Fidelity School Street Trust, Fidelity Securities Fund, Fidelity Select Portfolios, Fidelity Sterling Performance Portfolio, L.P., Fidelity Summer Street Trust, Fidelity Trend Fund, Fidelity Union Street Trust, Fidelity Union Street Trust II, Fidelity U.S. Investments-Bond Fund, L.P., Fidelity U.S. Investments-Government Securities Fund, L.P., Fidelity Yen Performance Portfolio, L.P., Spartan U.S. Treasury Money Market Fund, Variable Insurance Products Fund, Variable Insurance Products Fund II, and Zero Coupon Bond Fund (each a ''Trust''); on behalf of themselves and all subsequently registered open-end investment companies advised by Fidelity Management & Research Company (''FMR'') (collectively, with the Trusts, the ''Funds''); and FMR.

RELEVANT ACT SECTIONS: Order requested (a) under section 6(c) of the Act for an exemption from sections 13(a)(2), 13(a)(3), 18(f)(1), 22(f), and 22(g) of the Act and rule 2a–7 thereunder; (b) under sections 6(c) and 17(b) of the Act for an exemption from section 17(a)(1) of the Act; and (c) pursuant to section 17(d) of the Act and rule 17d–1 thereunder.

SUMMARY OF APPLICATION: Applicants request an order that would permit each applicant investment company to establish deferred compensation plans for its trustees who are not interested persons of the company.

FILING DATES: The application was filed on June 27, 1995, and amended on August 24, 1995.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on October 10, 1995 and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, 82 Devonshire Street F5E, Boston, Massachusetts 02109–3614.

FOR FURTHER INFORMATION CONTACT: Sarah A. Buescher, Staff Attorney, at

[3] 17 CFR 200.30–3(a)(12) (1994).

(202) 942–0573, or C. David Messman, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. Each Trust is a registered open-end management investment company advised by FMR. Fidelity Distributors Corporation or National Financial Services Corporation (each a ''Distributor'') serve as the distributors of the Trusts' shares.

2. Each Fund has or will have a board of trustees, directors, or director general partners (''trustees''), a majority of whom are not ''interested persons'' of that Fund within the meaning of section 2(a)(19) of the Act. Each trustee, other than those who are ''interested persons'' of the Trusts, receives an annual fee. No trustee who is an affiliated person of FMR or a Distributor receives any remuneration from applicants.

3. The proposed deferred fee arrangements would be implemented by means of a Fee Deferral Plan (the ''Plan'') entered into by each Fund. The Plan would permit individual trustees of a Fund who are not ''interested persons'' of such Fund to elect to defer receipt of all or a portion of their fees. This would enable the trustees to defer payment of income taxes on such fees. The trustees may amend the Plan from time to time. Such amendments will be consistent with any relief granted pursuant to this application.

4. Under the Plan, the trustee's deferred fees will be credited to a book entry account established by each participating Fund (the ''Deferred Fee Account''), as of the date such fees would have been paid to a trustee. The value of the Deferred Fee Account will be periodically adjusted by treating the Deferred Fee Account as though an equivalent dollar amount had been invested and reinvested in certain designated securities (the ''Underlying Securities''). The Underlying Securities for a Deferred Fee Account will be shares of the Funds that a participating trustee designates. Each Deferred Fee Account shall be credited or charged with book adjustments representing all interest, dividends, and other earnings and all gains and losses that would have been realized had such account been invested in the Underlying Securities.

5. As a matter of risk management, each Fund intends, and with respect to any money market Fund that values its assets by the amortized cost method undertakes, to purchase and maintain Underlying Securities in an amount equal to the deemed investments of the Deferred Fee Accounts. Although a Fund's own shares may serve as an Underlying Security with respect to deferred fees earned by a trustee, it is not anticipated that a Fund will purchase its own shares. Rather, monies equal to the amount credited to the Deferred Fee Account will be invested as part of the general investment operations of that Fund.

6. The amounts paid to the trustees under the Plan are expected to be insignificant in comparison to total net assets of applicants. The Plan provides that a Fund's obligation to make payments from a Deferred Fee Account will be a general obligation of the Fund and payments made pursuant to the Plan will be made from the Fund's general assets and property. With respect to the obligations created under the Plan, the relationship of a trustee to a Fund will be that of a general unsecured creditor. A Fund will be under no obligation to the trustee to purchase, hold, or dispose of any investments but, if a Fund chooses to purchase investments to cover its obligations under the Plan, then any and all such investments will continue to be part of the general assets and property of the Fund.

7. Under the Plan, a trustee may specify that the trustee's deferred fees be distributed in whole or in part commencing on or as soon as practicable after a date specified by the trustee, which may not be sooner than the earlier of (a) a date five years following the deferral election, or (b) the first business day of January following the year in which the trustee ceases to be a member of the board of trustees of the Fund. Notwithstanding any elections by a trustee, his or her deferrals under the Plan shall be distributed (x) in the event of the trustee's death, or (y) upon the dissolution, liquidation, or winding up of the Fund, whether voluntary or involuntary; or the voluntary sale, conveyance or transfer of all or substantially all of the Fund's assets (unless the obligations of the Fund shall have been assumed by another Fund); or the merger of the Fund into another trust or corporation or its consolidation with one or more other trusts or corporations (unless the obligations of the Fund are assumed by such surviving entity and the surviving entity is another Fund.) In addition, upon application by a trustee and a determination by the Administrator that the trustee has suffered a severe and unanticipated financial hardship, the Administrator shall distribute to the trustee, in a single lump sum, an amount equal to the lesser of the amount needed by the trustee to meet the hardship, or the balance of the trustee's Deferred Fee Account. Payments will be made in a lump sum or in installations as elected by the trustee. In the event of the trustee's death, amounts payable under the Plan will be payable to the trustee's designated beneficiary. In all other events, the trustee's right to receive payments will be nontransferable.

8. The Plan will not obligate any Fund to retain the services of a trustee, nor will it obligate any Fund to pay any (or any particular level of) trustee's fees to any trustee. The proposed arrangements will not affect the voting rights of the shareholders of any of the Funds. If a Fund purchases Underlying Securities issued by another Fund, the purchasing Fund will vote such shares in proportion to the votes of all other holders of shares of such other Fund.

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act granting relief from sections 13(a)(2), 13(a)(3), 18(f)(1), 22(f) and 22(g) of the Act and rule 2a–7 thereunder to the extent necessary to permit the Funds to enter into deferred free arrangements with their trustees; under sections 6(c) and 17(b) of the Act granting relief from section 17(a)(1) to the extent necessary to permit the Funds to sell securities issued by them to participating Funds, and pursuant to section 17(d) of the Act and rule 17d–1 thereunder to permit the Funds to engage in certain joint transactions incident to such deferred fee arrangements.

2. Section 6(c) provides that the SEC may exempt any person, security, or transaction from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Section 18(f)(1) generally prohibits a registered open-end investment company from issuing senior securities. Section 13(a)(2) requires that a registered investment company obtain shareholder authorization before issuing any senior security not contemplated by the recitals of policy in its registration statement. Applicants state that the Plan possesses none of the characteristics of senior securities that led Congress to enact these sections. The Plan would not: (a) Induce speculative investments or provide opportunities for

manipulative allocation of any Fund's expenses or profits; (b) affect control of any Fund; (c) confuse investors or convey a false impression as to the safety of their investments; or (d) be inconsistent with the theory of mutuality of risk. All liabilities created under the Plan would be offset by equal amounts of assets that would not otherwise exist if the fees were paid on a current basis.

4. Section 22(f) prohibits undisclosed restrictions on the transferability or negotiability of redeemable securities issued by open-end investment companies. The Plan would set forth any restrictions on transferability or negotiability, and such restrictions are primarily to benefit the participating trustees and would not adversely affect the interests of the trustees or of any shareholder of any Fund.

5. Section 22(g) prohibits registered open-end investment companies from issuing any of their securities for services or for property other than cash or securities. These provisions prevent the dilution of equity and voting power that may result when securities are issued for consideration that is not readily valued. Applicants submit that the Plan would provide for deferral of payment of fees and thus should be viewed as being issued not in return for services but in return for a Fund not being required to pay such fees on a current basis.

6. Section 13(a)(3) provides that no registered investment company shall, unless authorized by the vote of a majority of its outstanding voting securities, deviate from any investment policy that is changeable only if authorized by shareholder vote. Any relief granted from section 13(a)(3) of the Act would extend only to existing Trusts with a fundamental investment restriction prohibiting investments in securities of investment companies, except in connection with a merger, consolidation, or acquisition of assets. Applicants submit that it is appropriate to exempt applicants as necessary from section 13(a)(3) so as to enable the existing Trusts to invest in Underlying Securities without a shareholder vote. Applicants will provide notice to shareholders in the statement of additional information of the deferred fee arrangements with the trustees. The value of the Underlying Securities will be *de minimis* in relation to the total net assets of the respective Trust, and will at all times equal the value of the Trust's obligations to pay deferred fees.

7. Rule 2a–7 imposes certain restrictions on the investments of ''money market funds,'' as defined under the rule, that would prohibit a fund that is a money market fund from investing in the shares of any other Fund. Applicants submit that the requested exemption would permit the Funds to achieve an exact matching of Underlying Securities with the deemed investments of the Deferred Fee Accounts, thereby ensuring that the deferred fee arrangements would not affect net asset value. Applicants further assert that the amounts involved in all cases would be *de minimis* in relation to the total net assets of each Fund, and would have no effect on the per share net assets value of the Funds.

8. Section 17(a)(1) generally prohibits an affiliated person of a registered investment company from selling any security to such registered investment company, except in limited circumstances. Funds that are advised by the same entity may be ''affiliated persons'' of one another under section 2(a)(3)(C0 of the Act by reason of being under the common control of their adviser. Applicants assert that section 17(a)(1) was designed to prevent sponsors of investment companies from using investment company assets as capital for enterprises with which they were associated or to acquire controlling interests in such enterprises. Applicants submit that an exemption from this provision would not implicate Congress' concerns in enacting section 17(a)(1), but would facilitate the matching of each Fund's liability for deferred trustees' fees with the Underlying Securities that would determine the amount of such Fund's liability.

9. Section 17(b) authorizes the SEC to exempt a proposed transaction from section 17(a) if evidence establishes that: (a) The terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching; (b) the transaction is consistent with the policy of each registered investment company concerned; and (c) the transaction is consistent with the general purposes of the Act. Because section 17(b) may apply only to a specific proposed transaction,[1] applicants also request an order under section 6(c) so that relief will apply to a class of transactions. Applicants believe that the proposed transactions satisfy the criteria of sections 6(c) and 17(b).

10. Section 17(d) and rule 17d–1 generally prohibit a registered investment company's joint or joint and several participation with an affiliated person in a transaction in connection with any joint enterprise or other joint arrangement on a basis different from or less advantageous than that of the affiliated person. Under the Plan, participating trustees would not receive a benefit that otherwise would inure to a Fund or its shareholders. When all payments have been made to a participating trustee, the participating trustee will be no better off (apart from the effect of tax deferral) than if he or she had received fees on a current basis and invested them in Underlying Securities.

[1] In the Matter of Keystone Custodian Funds, Inc., 21 SEC 295 (1945).

Applicants' Conditions

Applicants agree that the order granting the requested relief shall be subject to the following conditions:

1. With respect to the requested relief from rule 2a–7, any money market Fund that values its assets by the amortized cost method or the penny-rounding method will buy and hold Underlying Securities that determine the performance of Deferred Fee Accounts to achieve an exact match between such Fund's liability to pay deferred fees and the assets that offset that liability.

2. If a Fund purchases Underlying Securities issued by an affiliated Fund, the purchasing Fund will vote such shares in proportion to the votes of all other holders of shares of such affiliated Fund.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–23377 Filed 9–20–95; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–21361; 812–9630]

Janus Investment Fund, et al.; Notice of Application

September 14, 1995.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application for exemption Under the Investment Company Act of 1940 (the ''Act'').

APPLICANTS: Janus Investment Fund, Janus Aspen Series, Janus Service Corporation (''JSC''), and Janus Capital Corporation (''Janus Capital'').

RELEVANT ACT SECTION: Order requested under section 17(d) of the Act and rule 17d–1 thereunder.

SUMMARY OF APPLICATION: Applicants request an order to permit the series of certain investment companies and certain private accounts to deposit their uninvested cash balances in one or more joint accounts to be used to enter into short-term investments.

FILING DATES: The application was filed on June 19, 1995, and amended on August 31, 1995.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on October 10, 1995, and should be accompanied by proof of service on applicant in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicants, 100 Fillmore Street, Suite 300, Denver, CO 80206–4923.

FOR FURTHER INFORMATION CONTACT: James M. Curtis, Senior Counsel, at (202) 942–0563, or Robert A. Robertson, Branch Chief, (202) 942–0564 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. Janus Investment Fund and Janus Aspen Series are open-end management investment companies comprised of multiple series. Janus Investment Fund is organized as a Massachusetts business trust, and Janus Aspen Series is organized as a Delaware business trust. Janus Capital serves as investment adviser to each Fund and provides the Funds with certain administrative services. JSC is a wholly-owned subsidiary of Janus Capital and serves as shareholder servicing and dividend paying agent of Janus Investment Fund and Janus Aspen Series.

2. Applicants request that any relief granted also apply to any present or future registered investment companies that are advised by Janus Capital, or any entity controlling, controlled by, or under common control with Janus Capital (the ''Funds''); individual, corporate, charitable, and retirement accounts for which Janus Capital serves as investment adviser (the ''Private Accounts''); any entity controlling, controlled by, or under common control with JSC that serves as shareholder servicing agent or dividend paying agent for any of the Funds; and any entity controlling, controlled by, or under common control with Janus Capital that serves as investment adviser to any of the Funds. All Funds that currently intend to rely on the requested order are named as applicants.

3. At the end of each trading day, the Funds and Private Accounts have uninvested cash balances in their accounts at their respective custodian banks that would not otherwise be invested in portfolio securities by Janus Capital. Generally such cash balances are invested in short-term liquid assets such as commercial paper or U.S. Treasury bills. Cash balances may also be invested in shares of the money market series of Janus Investment Fund or Janus Aspen Series.[1]

4. JSC, in its capacity as shareholder servicing and dividend paying agent, maintains certain accounts in its name on behalf of the Funds at a variety of banks.

5. Applicants propose to deposit uninvested cash balances of the Funds and Private Accounts that remain at the end of the trading day, as well as cash for investment purposes, into one or more joint accounts (the ''Joint Accounts'') and to invest the daily balance of the Joint Accounts in: (a) Repurchase agreements collateralized by U.S. government securities (as defined in the Act) or by First Tier Securities (as defined in rule 2a–7 under the Act); (b) interest-bearing or discounted commercial paper, including dollar denominated commercial paper of foreign issuers; and (c) any other short-term money market instruments, including variable rate demand notes and other tax-exempt money market instruments, that constitute ''Eligible Securities'' (as defined in rule 2a–7 under the Act) (collectively, ''Short-Term Investments''). JSC, in its capacity as shareholder servicing and dividend paying agent, may also deposit cash in the Joint Accounts. JSC, Funds, and Private Accounts that are eligible to participate in a Joint Account and that elect to participate in such Account are collectively referred to as ''Participants.''

6. Janus Capital has discretion to purchase and sell securities for the Private Accounts in accordance with each Private Account's investment objectives, policies, and restrictions. At this time, no Private Account has determined whether it will be able or willing to participate in a Joint application.

7. A Participant's decision to use a Joint Account would be based on the same factors as its decision to make any other short-term liquid investment. The sole purpose of the Joint Accounts would be to provide a convenient means of aggregating what otherwise would be one or more daily transactions for some or all Participants necessary to manage their respective daily account balances.

8. Janus Capital will be responsible for investing funds held by the Joint Accounts, establishing accounting and control procedures, and ensuring fair treatment of Participants. Janus Capital will manage investments in the Joint Accounts in essentially the same manner as if it had invested in such instruments on an individual basis for each Fund or Private Account.

9. Any repurchase agreements entered into through the joint account will comply with the terms of Investment Company Act Release No. 13005 (February 2, 1983). Applicants acknowledge that they have a continuing obligation to monitor the SEC's published statements on repurchase agreements, and represent that repurchase agreement transactions will comply with future positions of the SEC to the extent that such positions set forth different or additional requirements regarding repurchase agreements. In the event that the SEC sets forth guidelines with respect to other Short-Term Investments, all such investments made through the Joint Account will comply with those guidelines.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 thereunder prohibit an affiliated person of a registered investment company, or an affiliated person of such a person, from participating in any joint enterprise or arrangement in which such investment company is a participant, without an SEC order.

2. The Participants, by participating in the proposed Joint Account, and Janus Capital, by managing the proposed Joint Account, could be deemed to be ''joint participants'' in a transaction within the meaning or section 17(d) of the Act. In addition, the proposed Joint Account could be deemed to be a ''joint enterprise or other joint arrangement'' within the meaning of rule 17d–1.

3. Although Janus Capital will realize some benefits through administrative convenience and some possible reduction in clerical costs, the Participants will be the primary beneficiaries of the Joint Accounts

[1] An SEC exemptive order permits Funds advised by Janus Capital to invest their cash balances in shares of certain affiliated money market series. See Janus Investment Fund, Investment Company Act Release Nos. 21042 (May 4, 1995) (notice) and 21103 (May 31, 1995) (order).

because the account may result in higher returns and would be a more efficient means of administering daily cash investments.

4. Applicants believe that no Participants will be in a less favorable position as a result of the Joint Accounts. Each Participant's investment in a Joint Account would not be subject to the claims of creditors, whether brought in bankruptcy, insolvency, or other legal proceeding, of any other Participant. Each Participant's liability on any Short-Term Investment will be limited to its interest in such investment; no Participant will be jointly liable for the investments of any other Participant.

5. Participants may earn a higher rate of return on investments through the Joint Accounts relative to the returns they could earn individually. Under most market conditions, it is generally possible to negotiate a rate of return on larger repurchase agreements and other Short-Term Investments that is higher than the rate available on smaller repurchase agreements and other Short-Term Investments. The Joint Account also may increase the number of dealers and issuers willing to enter into Short-Term Investments with such Participants and may reduce the possibility that their cash balances remain uninvested.

6. The Joint Accounts may result in certain administrative efficiencies and a reduction of the potential for errors by reducing the number of trade tickets and cash wires that must be processed by the sellers of Short-Term Investments, the Participants' custodians and Janus Capital's accounting and trading departments. For the reasons set forth above, applicants believe that granting the requested order is consistent with the provisions, policies, and purposes of the Act and the intention of rule 17d–1.

Applicants' Conditions

Applicants will comply with the following procedures as conditions to any other granted by the SEC:

1. The Joint Accounts will not be distinguishable from any other accounts maintained by Participants at their custodians except that monies from Participants will be deposited in the Joint Account on a commingled basis. The Joint Accounts will not have a separate existence and will not have indicia of a separate legal entity. The sole function of the Joint Accounts will be to provide a convenient way of aggregating individual transactions which would otherwise require daily management by Janus Capital of uninvested cash balances.

2. Cash in the Joint Accounts will be invested in one or more of the following, as directed by Janus Capital: (a) Repurchase agreements ''collateralized fully'' as defined in rule 2a–7 under the Act; (b) interest-bearing or discounted commercial paper, including dollar denominated commercial paper of foreign issuers; and (c) any other short-term money market instruments, including variable rate demand notes and other tax-exempt money market instruments, that constitute ''Eligible Securities'' (as defined in rule 2a–7 under the Act). Short-Term Investments that are repurchase agreements would have a remaining maturity of 60 days or less and other Short-Term Investments would have a remaining maturity of 90 days or less, each as calculated in accordance with rule 2a–7 under the Act.

3. All assets held in the Joint Accounts would be valued on an amortized cost basis to the extent permitted by applicable SEC releases, rules, or orders.

4. Each Participant that is a registered investment company valuing its net assets in reliance on rule 2a–7 under the Act will use the average maturity of the instruments in the Joint Account in which such Participant has an interest (determined on a dollar weighted basis) for the purpose of computing its average portfolio maturity with respect to its portion of the assets held in a Joint Account on that day.

5. In order to assure that there will be no opportunity for any Participant to use any part of a balance of a Joint Account credited to another Participant, no Participant will be allowed to create a negative balance in any Joint Account for any reason, although each Participant would be permitted to draw down its entire balance at any time. Each Participant's decision to invest in a Joint Account would be solely at its option, and no Participant will be obligated to invest in the Joint Account or to maintain any minimum balance in the Joint Account. In addition, each Participant will retain the sole rights of ownership to any of its assets invested in the Joint Account, including interest payable on such assets invested in the Joint Account.

6. Janus Capital will administer the investment of cash balances in and operation of the Joint Accounts as part of its general duties under its advisory agreements with Participants and will not collect any additional or separate fees for advising any Joint Account.

7. The administration of the Joint Accounts would be within the fidelity bond coverage required by section 17(g) of the Act and rule 17g–1 thereunder.

8. The Trustees of the Funds will adopt procedures pursuant to which the Joint Accounts will operate, which will be reasonably designed to provide that the requirements of the application will be met. The Trustees will make and approve such changes as they deem necessary to ensure that such procedures are followed. In addition, the Trustees will determine, no less frequently than annually, that the Joint Accounts have been operated in accordance with the proposed procedures.

9. Any Short-Term Investments made through the Joint Accounts will satisfy the investment criteria of all Participants in that investment.

10. Each Participant's investment in a Joint Account will be documented daily on the books of each Participant and the books of its custodian. Each Participant will maintain records (in conformity with Section 31 of the Act and the rules thereunder) documenting for any given day, its aggregate investment in a Joint Account and its *pro rata* share of each Short-Term Investment made through such Joint Account. Each Participant that is not a registered investment company or registered investment adviser will make available to the SEC, upon request, such books and records with respect to its participation in a Joint Account.

11. Every Participant in the Joint Accounts will not necessarily have its cash invested in every Short-Term Investment. However, to the extent that a Participant's cash is applied to a particular Short-Term Investment, the Participant will participate in and own its proportionate share of such Short-Term Investment, and any income earned or accrued thereon, based upon the percentage of such investment purchased with monies contributed by the Participant.

12. Short-Term Investments held in a Joint Account generally will not be sold prior to maturity except if: (a) Janus Capital believes the investment no longer presents minimal credit risks; (b) the investment no longer satisfies the investment criteria of all Participants in the investment because of a downgrading or otherwise; or (c) in the case of a repurchase agreement, the counterparty defaults. Janus Capital may, however, sell any Short-Term Investment (or any fractional portion thereof) on behalf of some or all Participants prior to the maturity of the investment if the cost of such transactions will be borne solely by the selling Participants and the transaction will not adversely affect other

Participants. Each Participant in a Joint Account will be deemed to have consented to such sale and partition of the investments in the Joint Account.

13. Short-Term Investments held through a Joint Account with a remaining maturity of more than seven days, as calculated pursuant to rule 2a–7 under the Act, will be considered illiquid and, for any Participant that is an open-end investment company registered under the Act, subject to the restriction that the fund may not invest more than 15% (or such other percentage as set forth by the SEC from time to time) of its net assets in illiquid securities, if Janus Capital cannot sell the instrument, or the fund's fractional interest in such instrument, pursuant to the preceding condition.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret M. McFarland,

Deputy Secretary.

[FR Doc. 95–23379 Filed 9–20–95; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

[License # 02/02–0478]

ASEA—Harvest Partners II; Notice of License Surrender

Notice is hereby given that ASEA—Harvest Partners II, (''ASEA''), 767 Third Avenue, New York, New York 10017, has surrendered its license to operate as a small business investment company under the Small Business Investment Act of 1958, as amended (''the Act''). ASEA was licensed by the Small Business Administration on October 9, 1984.

Under the authority vested by the Act and pursuant to the regulations promulgated thereunder, the surrender of the license was accepted on September 6, 1995, and accordingly, all rights, privileges, and franchises derived therefrom have been terminated.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: September 14, 1995.

Don A. Christensen,

Associate Administrator for Investment.

[FR Doc. 95–23476 Filed 9–20–95; 8:45 am]

BILLING CODE 8025–01–P

[License No. 02/02–0564]

Creditanstalt Small Business Investment Corporation; Notice of Issuance of a Small Business Investment Company License

On Friday, July 14, 1995, a notice was published in the Federal Register (Vol. 60, No. 135, FR 36325) stating that an application had been filed by Creditanstalt Small Business Investment Corporation, at 245 Park Avenue, 27th Floor, New York, NY 10167, with the Small Business Administration (SBA) pursuant to § 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1995)) for a license to operate as a small business investment company.

Interested parties were given until close of business Monday, July 31, 1995, to submit their comments to SBA. No comments were received.

Notice is hereby given that, pursuant to Section 301(c) of the Small Business Investment Act of 1958, as amended, after having considered the application and all other pertinent information, SBA issued License No. 02/02–0564 on August 25, 1995, to Creditanstalt Small Business Investment Corporation to operate as a small business investment company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: September 14, 1995.

Don A. Christensen,

Associate Administrator for Investment.

[FR Doc. 95–23477 Filed 9–20–95; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Aviation Proceedings; Agreements Filed During the Week Ended September 8, 1995

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C 412 and 414. Answers may be filed within 21 days of date of filing.

Docket Number: OST–95–601
Date filed: September 7, 1995
Parties: Members of the International Air Transport Association
Subject: COMP Meet/P 1060 dated August 18, 1995 Composite Resolutions r–1 to r–28
Proposed Effective Date: April 1, 1996

Docket Number: OST–95–602
Date filed: September 7, 1995
Parties: Members of the International Air Transport Association
Subject: COMP Reso/P 1063 dated August 29, 1995 Composite Resolutions r–1 to r–9
Proposed Effective Date: November 1, 1995

Paulette V. Twine,

Chief Documentary Services Division.

[FR Doc. 95–23401 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–62–P–M

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended September 8, 1995

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et. seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–95–586.
Date filed : September 6, 1995.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 4, 1995.
Description: Application of Sun Pacific International, Inc., pursuant to Section 401(d) of the Act and Subpart Q of the Regulations, applies for a certificate of public convenience and necessity, authorizing it to engage in interstate and overseas charter air transportation of persons, property and mail.

Docket Number: OST–95–588.
Date filed : September 6, 1995.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 4, 1995.
Description: Application of Capital Cargo International Airlines, Inc., pursuant to 49 U.S.C. Section 41102, and Subpart Q of the Regulations, requests a certificate of public convenience and necessity authorizing foreign scheduled air transportation.

Docket Number: OST–95–589.
Date filed : September 6, 1995.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 4, 1995.
Description: Application of Capital Cargo International Airlines, Inc., pursuant to 49 U.S.C. Section 41102 and Subpart Q of the Regulations, requests a certificate of public convenience and necessity authorizing it to engage in

foreign charter air transportation of cargo.

Docket Number: OST–95–590.

Date filed : September 6, 1995.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 4, 1995.

Description: Application of Capital Cargo International Airlines, Inc., pursuant to 49 U.S.C. Section 41103 and Subpart Q of the Regulations, for a certificate authorizing domestic charter all-cargo air transportation

Docket Number: OST–95–604.

Date filed : September 7, 1995.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 5, 1995.

Description: Application of Jet Express Corporation pursuant to Section 401(d)(1) of the Act and Subpart Q of the Regulations, requests a certificate of public convenience and necessity authorizing interstate and overseas scheduled air transportation.

Docket Number: OST–95–621.

Date filed : September 8, 1995.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 6, 1995.

Description: Application of United Air Lines, Inc., pursuant to 49 U.S.C. Section 41101, Part 210 of the Act and Subpart Q of the Regulations, applies for renewal of authority to serve London on segment 1 of its certificate of public convenience and necessity for Route 603. This authority is due to expire on March 13, 1996.

Paulette V. Twine,

Chief, Documentary Services Division.

[FR Doc. 95–23402 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–62–P

Office Of The Secretary

Notice

Pursuant to 49 U.S.C. 44907C, on June 8, 1995, I notified the Government of Colombia that I had determined the Eldorado International Airport, Bogota, Colombia, did not administer and maintain effective security measures. On September 5, 1995, 90 days elapsed since my determination, and I have found that Eldorado International Airport still does not administer and maintain effective security measures. My determination is based on Federal Aviation Administration assessments which reveal that security measures used at the airport do not meet the standards established by the International Civil Aviation Organization.

Pursuant to 49 U.S.C 44907D(1), I have directed that a copy of this notice be published in the Federal Register, that my determination be displayed prominently in all U.S. airports regularly being served by scheduled air carrier operations, and that the news media be notified of my determination. In addition, as a result of this determination, all U.S. air carriers and foreign air carriers (and their agents) providing service between the United States and Eldorado International Airport must provide notice of my determination to any passenger purchasing a ticket for transportation between the United States and Eldorado International Airport, with such notice to be made by written material included on or with such ticket.

Dated: September 15, 1995.

Federico Peña,

Secretary of Transportation.

[FR Doc. 95–23403 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–62–P

Federal Aviation Administration

Survivor Locator Lights

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability for public comment.

SUMMARY: This notice announces the availability of and request comments on a proposed revision to the technical standard order (TSO) pertaining to survivor locator lights. The proposed TSO revises the minimum performance standards that survivor locator lights must meet to be identified with the marking ''TSO–C85a.''

DATES: Comments must identify the TSO file number and be received on or before November 30, 1995.

ADDRESSES: Send all comments on the proposed technical standard order to: Technical Program and Continued Airworthiness Branch, AIR–120, Aircraft Engineering Division, Aircraft Certification Service—File No. TSO–C85a, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. Or deliver comments to: Federal Aviation Administration, Room 804, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Ms. Bobbie J. Smith, Technical Program and Continued Airworthiness Branch, AIR–120, Aircraft Engineering Division, Aircraft Certification Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, Fax No. (202) 267–5340, Telephone (202) 267–9546.

Comments Invited

Interested persons are invited to comment on the proposed TSO listed in this notice by submitting such written data, views, or arguments as they desire to the above specified address. Comments received on the proposed technical standard order may be examined, before and after the comment closing date, in Room 804, FAA Headquarters Building (FOB–10A), 800 Independence Avenue, SW., Washington, DC 20591, weekdays except Federal holidays, between 8:30 a.m. and 4:30 p.m. All communications received on or before the closing date for comments specified above will be considered by the Director, Aircraft Certification Service before issuing the final TSO.

Background

The proposed TSO–C85a would revise the original standard which became effective July 6, 1964, and prescribes the minimum performance standards for survivor locator lights. This proposed TSO references the standard set forth in the Society of Automotive Engineers (SAE), 4492, ''Survivor Locator Lights,'' dated January 1995, which would revise the original FAA standard. The proposed standard for survivor locator lights permits the use of steady or flashing type lights, defines the light characteristics, permits the use of white or yellow-green lights, requires automatic activation, and specifies upgraded environmental tests. The proposed TSO is intended for use on life preservers, life rafts, and slide/rafts.

How To Obtain Copies

A copy of the proposed TSO–C85a may be obtained by contacting ''For Further Information Contact.'' Copies of SAE AS 4492 may be purchased from the Society of Automotive Engineers, Inc., Department 331, 400 Commonwealth Drive, Warrendale, PA 15096. RTCA Document No. DO–160C, ''Environmental Conditions and Test Procedures for Airborne Equipment,'' may be purchased from the RTCA Inc., 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036.

John K. McGrath,

Manager, Aircraft Engineering Division, Aircraft Certification Service.

[FR Doc. 95–23426 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–13–M

National Highway Traffic Safety Administration

[Docket No. 95–06; Notice 2]

Denial of Petition for Import Eligibility Decision

This notice sets forth the reasons for the denial of a petition submitted to the National Highway Traffic Safety Administration (NHTSA) under 49 U.S.C. 30141(a)(1)(A) (formerly section 108(c)(3)(C)(i)(I) of the National Traffic and Motor Vehicle Safety Act (the Act)). The petition, which was submitted by J.K. Motors, Inc. of Kingsville, Maryland (J.K.), a registered importer of motor vehicles, requested NHTSA to decide that 1993, 1994, and 1995 Mitsubishi 3000GT and 3000GT VR–4 passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) They are substantially similar to the versions of 1993, 1994, and 1995 Mitsubishi 3000GT and 3000GT VR–4 passenger cars that were originally manufactured for importation into and sale in the United States and that were certified by their original manufacturer, Mitsubishi Motors Corporations, as complying with the safety standards, and (2) they are capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

NHTSA published a notice in the Federal Register on February 7, 1995 (60 FR 7266) that contained a thorough description of the petition, and solicited public comments upon it. One comment was received in response to this notice, from Mitsubishi Motors America Inc. (''Mitsubishi''), a U.S. subsidiary of the vehicle's original manufacturer.

In its comment, Mitsubishi stated that based upon its own evaluation of the vehicles involved, it believes that they are not capable of being readily altered to conform to all applicable Federal motor vehicle safety standards. In particular, Mitsubishi noted that non-U.S. certified versions of the 1993, 1994, and 1995 Mitsubishi 3000GT and 3000GT VR–4 do not have a seat belt telltale, as required by Standard No. 101, Controls and Displays, do not have a windshield wiper arm and blade that cover the area required by Standard No. 104, Windshield Wiping and Washing System, and have ABS symbols that do not conform to the lettering height requirements of Standard No. 105, Hydraulic Brake Systems. Additionally, Mitsubishi noted that the vehicles are equipped with ''pop-up'' headlamps that are part of an integrated system, and that this entire assembly does not comply with Standard No. 108, Lamps, Reflective Devices, and Associated Equipment. Mitsubishi also asserted that some of the vehicles involved would have to be retrofitted with a different occupant restraint system to conform to the requirements of Standard No. 208, Occupant Crash Protection. Mitsubishi additionally observed that this restraint system may have to be tested to assure compliance with the standard, and that the front seat assembly may have to be repositioned to withstand the standard's injury criteria, which are more stringent than those of the corresponding European standard. Mitsubishi further noted that the non-U.S. certified versions of the 1993, 1994, and 1995 Mitsubishi 3000GT and 3000GT VR–4 do not have knee bolsters or metal inserts in their glove compartments, as found on the U.S. certified versions of these vehicles, and have seat belts that are manufactured to manufactured to specifications that differ from those found in Standard No. 209, Seat Belt Assemblies. Finally, Mitsubishi noted that contrary to J.K.'s assertion, the bumpers on the non-U.S. certified versions of the 1993, 1994, and 1995 Mitsubishi 3000GT and 3000GT VR–4 differ from those found on the U.S. certified versions of these vehicles, and have not been tested to assure compliance with the Bumper Standard found in 49 CFR part 581.

NHTSA accorded J.K. an opportunity to respond to Mitsubishi's comments. As of the date of this notice, J.K. has failed to submit such a response. This has compelled NHTSA to conclude, from the state of the record, that the petition does not clearly demonstrate that the non-U.S. certified versions of the 1993, 1994, and 1995 Mitsubishi 3000GT and 3000GT VR–4 are eligible for importation. The petition must therefore be denied under 49 CFR 593.7(e).

In accordance with 49 U.S.C. 30141(b)(1) (formerly section 108(c)(C)(ii) of the Act), NHTSA will not consider a new import eligibility petition covering this vehicle until at least three months from the date of this notice.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.7; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: September 18, 1995.

Marilynee Jacobs,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 95–23485 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–59–M

Research and Special Programs Administration (RSPA), DOT

[Docket No. PS–142; Notice 1]

Risk Management and the Pipeline Industry, Notice of Public Conference

SUMMARY: Pipeline regulators, pipeline operators, and the public are invited to a conference, Risk Management and the Pipeline Industry, on November 6, 1995 from 6 p.m. to 9 p.m. and on Nov. 7 from 8 a.m. until 6 p.m. at the McLean Hilton at Tysons Corner in McLean, Virginia. Sponsoring the conference are the Office of Pipeline Safety (OPS), RSPA, U.S. Department of Transportation (DOT); the American Gas Association (A.G.A.); the American Petroleum Institute (API); the Interstate Natural Gas Association of America (INGAA); the Gas Research Institute (GRI); the American Public Gas Association (APGA); and the Association of Oil Pipe Lines (AOPL).

DATES: The conference will be held on November 6 through 9 at the McLean Hilton at Tysons Corner in McLean, Virginia. To register for the conference, please call up the Walcoff and Associates home page on the Internet, htpp://www.walcoff.com/ or fax, mail, or use the Internet to e-mail the registration printed at the end of this notice to Ms. Debra Banks, Walcoff and Associates, 12015 Lee Jackson Highway, Suite 500, Fairfax, Virginia, 22033, office: (703) 218–1449, fax: (703) 934–9866, Internet e-mail address: rspa@walcoff.com. The charge for the conference lunch on November 7 is $25. Checks should be made payable to and mailed to Walcoff and Associates. Walcoff also accepts MasterCard, Visa, and American Express.

Sponsors will have background material for participants to read before the conference. Background reading includes the Oil and Gas Risk Assessment Quality Team reports, the Harvard School of Public Health Center for Risk Analysis' Reform of Risk Regulation: Achieving More Protection at Less Cost, and the Gas Research Institute's Natural Gas Pipeline Risk Management Reports, Volumes One through Four.

To discuss the conference or to order reading material, please contact one of the sponsors: INGAA, Terry Boss, tdboss@ix.netcom.com, (202) 626–3234; API, Krista Mutch, (202) 682–8188; A.G.A., John Erickson, (703) 841–8450, jerick06@reach.com; GRI, Tina Thomas, (202) 662–8937, cthomas@gri.org; APGA, Bob Cave, (703) 352–3890; AOPL, Michele Joy, (202) 408–7970; or OPS, Melanie Barber, (202) 366–4560, barberm@rspa.dot.gov.

ADDRESSES: The conference will be held at the McLean Hilton at Tysons Corner Hotel, 7920 Jones Branch Drive, McLean, Virginia, 22102, phone: (703) 847–5000.

Send two copies of written comments on the eight questions to be discussed in the November 7 break-out sessions that are listed in the next to last paragraph of this notice to the Dockets Unit, Room 8421, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, S.W., Washington, D.C., 20590–0001. Identify the docket and notice numbers in the heading of this notice.

All comments and docketed material will be available for inspection and copying in Room 8421 between 8:30 a.m. and 4:30 p.m. each business day. A summary of the conference will be available from the Dockets Unit about two months after the conference.

SUPPLEMENTARY INFORMATION: The conference will focus on openly discussing how Government and pipeline industries may use risk management, learning how risk management may be used to invest resources more wisely in pipeline safety and environmental protection, and addressing how Government can oversee pipeline operations while allowing industry more latitude in choosing safety options.

Conference participants are encouraged to take part in the follow-on activities. On the morning of November 8, INGAA, GRI, and the Pipeline Research Committee are sponsoring a seminar on preventing, inspecting, identifying, and responding to third party damage to pipelines. Conferees are also invited to the Technical Pipeline Safety Advisory Committee meetings on November 8 and 9 at the McLean Hilton. The Technical Advisory Committee meeting agendas will be published in the Federal Register at least thirty days before the November 8 and 9 meetings.

The conference will begin with a risk management primer on methods and tools for practitioners on November 6 from 6 p.m. to 9 p.m. Gas Research Institute, Hartford Steam Boiler, and Chevron representatives will lead the primer. The November 7 session will start with an introduction to risk management principles and the value risk management brings to Government and industry. Keynote speakers will be Joe Martinelli, President, Chevron Pipe Line Company; John Riordon, President and CEO, MidCon Corporation; Robert Catell, President and CEO, Brooklyn Union Gas Company; Bruce Ellsworth, New Hampshire Public Utility Commissioner; and Richard Felder, Associate Administrator for Pipeline Safety, OPS, RSPA, DOT.

After risk management is explained, key risk management initiatives being developed will be explained. Government/Industry Oil and Gas Risk Assessment Quality Team (RAQT) members will discuss making the transition from prescriptive regulations to pipeline company specific risk management plans. Conferees will hear presentations from and ask questions of Federal, State, and Local Government officials and gas and liquid industry representatives expressing views and raising concerns about implementing risk management programs.

Among featured speakers on November 7 are William Burnett, Senior Vice President, GRI; Bernie Selig, Vice President, Hartford Steam Boiler; Don Stursma, Iowa Commerce Department; Ruth Kretschmer, Illinois Commerce Commission; Andy Drake, Panhandle Eastern; Mike Neuhard, Fairfax County Fire and Rescue Department; and Jim Thomas, OPS Southwestern Regional Director.

Following the perspective presentations and questions and answers, conferees will meet in break-out sessions to address issues raised in the presentations and the participants' concerns, including: (1) How can industry use resources more effectively to improve pipeline safety? (2) How can one determine if risk management equals or improves the current safety level? (3) Why is risk management good for a company? (4) How much flexibility will a company gain by developing an approved risk management program? (5) How much information are industry and Government comfortable sharing? (6) What are good benchmarks to judge the risk management demonstration projects? (7) How will standards be created and applied? (8) What roles do State and local agencies play?

After the break-out sessions, all participants will return to the main meeting room. The break-out session leaders will summarize each break-out group's concerns and issues for all conferees to discuss. The conference is designed (1) for all pipeline stakeholders to share concerns about and discuss issues inherent to implementing risk management and (2) for government and industry to respond to these concerns and issues with strong action.

Issued in Washington, D.C. on September 14, 1995.

Richard B. Felder,

Associate Administrator for Pipeline Safety.

BILLING CODE 4910–60–P

CONFERENCE REGISTRATION
RISK MANAGEMENT AND
THE PIPELINE INDUSTRY
NOVEMBER 6 THROUGH 9, 1995
MCLEAN HILTON AT TYSONS CORNER

NAME

_____

TITLE AND ORGANIZATION

_____

ADDRESS

_____

_____

PHONE NUMBER

_____

FAX NUMBER

_____

INTERNET E-MAIL ADDRESS

_____

1. The conference is being held at the McLean Hilton at Tysons Corner, McLean, Virginia. The conference rate for single and double rooms is $114.00. You will need to make reservations directly with the McLean Hilton by calling (800) HIL-TONS or (703) 847-5000.

2. The sponsors need to know how many people will take part in the conference and how many will be staying at the McLean Hilton as space is limited and we need to reserve enough meeting space and order enough material for all. Please list the number of rooms ____ and the dates you will need them, November _____.

3. The cost of the November 7 lunch is $25. I will __ will not ___ attend the November 7 lunch.

Please make checks payable to Walcoff and Associates. If you would like to pay with American Express ___, Visa ___, or MasterCard ___, please write your name as it appears on the credit card _____, the card number _____, and the expiration date _____.

4. Will you take part in the:

(a) Risk Management Primer on November 6 from 6 p.m. to 9 p.m.? Yes ____ No ___

(b) November 7 conference from 8 a.m. to 6 p.m.? Yes __ No ___

(c) External Damage Seminar that Gas search Institute, Interstate Natural Gas Association of America, and Pipeline Research Committee are sponsoring on the morning of November 8? Yes ___ No ___

d) November 8 and 9 Technical Pipeline Safety Advisory Committee meetings? Yes ___ No ___

You may register:

(1) on the Internet by completing this form on Walcoff and Associates' home page, htpp://www.walcoff.com/ or

(2) by mailing, faxing, or e-mailing this completed form to:

Ms. Debra Banks
Walcoff and Associates
12015 Lee Jackson Highway
Suite 500
Fairfax, Virginia, 22033
Fax: (703)934-9866
Office: (703) 218-1449
E-mail: rspa@walcoff.com.

Conference Sponsors:

American Petroleum Institute (API), American Gas Association (A.G.A.), Interstate Natural Gas Association (INGAA), American Public Gas Association (APGA), Gas Research Institute (GRI), Association of Oil Pipe Lines (AOPL), and Office of Pipeline Safety (OPS), U.S. Transportation Department.

List the risk management issues that interest you most:

_____
_____
_____
_____
_____

[FR Doc. 95–23350 Filed 9–20–95; 8:45 am]
BILLING CODE 4910–60–C

DEPARTMENT OF THE TREASURY

General Counsel

Appointment of Members of the Legal Division to the Performance Review Board, Internal Revenue Service

Under the authority granted to me as Chief Counsel of the Internal Revenue Service by the General Counsel of the Department of the Treasury by General Counsel Order No. 21 (Rev. 4), and pursuant to the Civil Service Act, I hereby appoint the following persons to the Legal Division Performance Review Board, Internal Revenue Service Panel:

1. Chairperson, Marlene Gross, Deputy Chief Counsel;
2. Neal S. Wolen, Deputy General Counsel;
3. Eliot D. Fielding, Associate Chief Counsel (Enforcement Litigation);
4. William F. Hammack, Acting Southwest Regional Counsel;
5. James A. Nelson, Los Angeles District Counsel;
6. Nancy J. Marks, Deputy Associate Chief Counsel (Employee Benefits and Exempt Organizations).

This publication is required by 5 U.S.C. 4314(c)(4).

Stuart L. Brown,

Chief Counsel.

[FR Doc. 95–23367 Filed 9–20–95; 8:45 am]

BILLING CODE 4830–01–U

Sunshine Act Meetings

Federal Register
Vol. 60, No. 183
Thursday, September 21, 1995

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL ELECTION COMMISSION

"FEDERAL REGISTER" NUMBER: 95–23005.

PREVIOUSLY ANNOUNCED DATE AND TIME: Thursday, September 21, 1995 at 10:00 a.m. Meeting Open to the Public.

THE FOLLOWING ITEMS WERE ADDED TO THE AGENDA:

Final Audit Report on Friends of Marc Little.

Draft Final Rules and Accompanying Explanation and Justification on Amendments to the communications Disclaimer Requirements (11 CFR 110.11). Continued from meeting of September 14, 1995.

DATE AND TIME: Tuesday, September 26, 1995 at 10:00 a.m.

PLACE: 999 E Street, N.W., Washington, D.C.

STATUS: This Meeting Will Be Closed to the Public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. Sc 437g.
Audits conducted pursuant to 2 U.S.C. Sc 437g, Sc 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration
Internal personnel rules and procedures or matters affecting a particular employee

DATE AND TIME: Thursday, September 28, 1995 at 10:00 a.m.

PLACE: 999 E Street, N.W., Washington, D.C. (Ninth Floor.)

STATUS: This Meeting Will Be Open to the Public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.
Advisory Opinion 1995–28: Dave Long, Vice President, American Health Care Association (AHCA)
Petition of the Bush-Quayle '92 Primary Committee, Inc., the Bush-Qualye '92 General Committee, Inc. and the Bush-Quayle '92 Compliance Committee, Inc. to Stay Repayment Pending Appeal (LRA #425)
Regulations:
Promulgation of final rules: Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures
Revised *MCFL* Regulations on Facilitation, Candidate Appearances, Endorsements, Voter Guides and Meeting Rooms (if not concluded at the meeting of September 21, 1995)
MCFL Regulations: Defining Restricted Class; Logos and Letterhead; Registration & Voting Information and Communications; GOTV Drives

CONTACT FOR INFORMATION: Mr. Ron Harris, Press Officer, Telephone: (202) 219–4155.

Delores Hardy,
Administrative Assistant.

[FR Doc. 95–23608 Filed 9–19–95; 3:09 pm]

BILLING CODE 6715–01–M

LEGAL SERVICES CORPORATION BOARD OF DIRECTORS

Provision for the Delivery of Legal Services, Committee Meeting, Changes

CITATION OF PREVIOUS "FEDERAL REGISTER" NOTICE: 60 FR 47977.

PREVIOUSLY ANNOUNCED TIME AND DATE: September 22, 1995 at 9 a.m.

PREVIOUSLY ANNOUNCED LOCATION OF MEETING: Legal Services Corporation, 750 1st Street, NE., Board Room, 11th Floor, Washington, DC 20002, (202) 336–8800.

CHANGES TO THE MEETING: The meeting has been canceled.

CONTACT PERSON FOR INFORMATION: Patricia Batie (202) 336–8800.

Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments.

Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 336–8800.

Date Issued: September 19, 1995.

Patricia D. Batie,
Corporate Secretary.

[FR Doc. 95–23631 Filed 9–19–95; 3:46 pm]

BILLING CODE 7050–01–M

LEGAL SERVICES CORPORATION BOARD OF DIRECTORS

Meeting Changes

CITATION OF PREVIOUS "FEDERAL REGISTER" NOTICE: 60 FR–47977.

PREVIOUSLY ANNOUNCED TIME AND DATE:

September 22, 1995 at 2:00 p.m.; and September 23, 1995 at 9:00 a.m.

PREVIOUSLY ANNOUNCED LOCATION OF MEETING: Legal Services Corporation, 750 1st Street, N.E., Board Room, 11th Floor, Washington, D.C. 20002, (202) 336–8800.

CHANGES TO THE MEETING: The meeting has been cancelled.

CONTACT PERSON FOR INFORMATION: Patricia Batie (202) 336–8800.

Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments.

Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 336–8800.

Dated Issued: September 19, 1995.

Patricia D. Batie,
Corporate Secretary.

[FR Doc. 95–23632 Filed 9–19–95; 3:46 pm]

BILLING CODE 7050–01–M

LEGAL SERVICES CORPORATION BOARD OF DIRECTORS

Finance Committee Meeting, Changes

CITATION OF PREVIOUS "FEDERAL REGISTER" NOTICE: 60 FR–47977.

PREVIOUSLY ANNOUNCED TIME AND DATE: September 22, 1995 at 9:00 a.m.

PREVIOUSLY ANNOUNCED LOCATION OF MEETING: Legal Services Corporation, 750 1st Street, N.E., Board Room, 11th Floor, Washington, D.C. 20002, (202) 336–8800.

CHANGES TO THE MEETING: The meeting has been cancelled.

CONTACT PERSON FOR INFORMATION: Patricia Batie (202) 336–8800.

Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments.

Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 336–8800.

Date Issued: September 19, 1995.

Patricia D. Batie,
Corporate Secretary.

[FR Doc. 95–23633 Filed 9–19–95; 3:46 am]

BILLING CODE 7050–01–M

NATIONAL COUNCIL ON DISABILITY

Quarterly Meeting

SUMMARY: This notice sets forth the schedule and proposed agenda of the forthcoming quarterly meeting of the National Council on Disability. Notice of this meeting is required under Section 522b(e)(1) of the Government in the Sunshine Act, (P.L. 94–409).

DATES: November 5–7, 1995, 8:30 a.m. to 5:00 p.m.

LOCATION: Sheraton City Centre Hotel, 1143 New Hampshire Avenue NW, Washington, DC 20037; (202) 775–0800.

FOR INFORMATION CONTACT: Mark S. Quigley, Public Affairs Specialist, National Council on Disability, 1331 F Street NW, Suite 1050, Washington, DC 20004–1107; (202) 272–2004 (Voice), (202) 272–2074 (TT), (202) 272–2022 (Fax).

AGENCY MISSION: The National Council on Disability is an independent federal agency led by 15 members appointed by the President on the United States and confirmed by the U.S. Senate. The overall purpose of the National Council is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, regardless of the nature of severity of the disability; and to empower people with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

ACCOMMODATIONS: Those needing interpreters or other accommodations should notify the National Council on Disability by October 27, 1995.

ENVIRONMENTAL ILLNESS: People with environmental illness must reduce their exposure to volatile chemical substances in order to attend this meeting. In order to reduce such exposure, we ask that you not wear perfumes or scents at the meeting. We also ask that you smoke only in designated areas and the privacy of your room. Smoking is prohibited in the meeting room and surrounding area.

OPENING MEETING: This quarterly meeting of the National Council shall be open to the public.

AGENDA: The proposed agenda includes:

Reports from the Chairperson and the Executive Director.

Committee Meetings and Committee Reports.

National Disability Policy: A Progress Report Update.

National Summit on Disability Policy Update.

Unfinished Business.

New Business.

Announcements.

Adjournment.

Records shall be kept of all National Council proceedings and shall be available after the meeting for public inspection at the National Council on Disability.

Signed in Washington, DC, on September 19, 1995.

Ethel D. Briggs,

Executive Director.

[FR Doc. 95–23609 Filed 9–19–95; 8:45 am]

BILLING CODE 6820–BS–M

Corrections

Federal Register

Vol. 60, No. 183

Thursday, September 21, 1995

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 95-041-2]

Availability of Determination of Nonregulated Status for Genetically Engineered Corn

Correction

In noitce document 95–21847 beginning on page 47107 in the issue of Tuesday, September 5, 1995, make the following corrections:

1. On page 46107, in the second column, under Analysis, in the third line, ''CryCIA(b)'' should read ''CryIA(b)''.

2. On the same page, in the third column, in the first and fifth lines, ''CryCIA(b)'' should read ''CryIA(b)''.

BILLING CODE 1505–01–D

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion of Native American Human Remains in the Possession of the Utah Field House of Natural History State Park, Vernal, UT

Correction

In notice document 95–22375 appearing on page 47181 in the issue of Monday, September 11, 1995, make the following correction:

On page 47181, in the second column, second full paragraph, in the sixth line from the bottom ''[*thirty days after publication of this notice in the* Federal Register].'' should read ''October 11, 1995.''

BILLING CODE 1505–01–D

federal register

Thursday
September 21, 1995

Part II

Department of Transportation

Research and Special Programs Administration

49 CFR Part 171, et al.

Crashworthiness Protection Requirements for Tank Cars; Detection and Repair of Cracks, Pits, Corrosion, Lining Flaws, Thermal Protection Flaws and Other Defects of Tank Car Tanks; Final Rule

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 172, 173, 179, and 180

[Docket Nos. HM–175A and HM–201; Amdt Nos. 171–137, 172–144, 173–245, 179–50, and 180–8]

RIN 2137–AB89 and 2137–AB40

Crashworthiness Protection Requirements for Tank Cars; Detection and Repair of Cracks, Pits, Corrosion, Lining Flaws, Thermal Protection Flaws and Other Defects of Tank Car Tanks

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: RSPA is amending the Hazardous Materials Regulations (HMR) to: Require facilities that build, repair, and ensure the structural integrity of tank cars, to develop and implement a quality assurance program (QAP); allow the use of non-destructive testing (NDT) techniques, in lieu of currently prescribed periodic hydrostatic pressure tests, for fusion welded tank cars; require thickness measurements of tank cars; allow the continued use of tank cars, with limited reduced shell thicknesses, for certain hazardous materials; increase the frequency for inspection and testing of tank cars for added safety; clarify tank car pretrip inspection requirements; expand the use of thermal protection systems and head protection on tank cars to include certain other high hazard materials; add new requirements for bottom-discontinuity protection; require the use of protective coatings on insulated tank cars; prohibit the use of self-energized manways located below the liquid level of the tank; remove ''grandfather'' provisions allowing certain uses of tank cars; and improve the puncture resistance of tank cars used for certain high hazard materials, including those that are poisonous-by-inhalation (PIH) and those determined by the Environmental Protection Agency (EPA) to pose health and environmental risks.

These actions are being taken to enhance the safe transportation of hazardous materials in tank cars. The intended effects of these actions are to improve the crashworthiness of tank cars and to increase the probability of detecting critical tank car defects.

DATES: *Effective date.* The effective date of these amendments is July 1, 1996.

Compliance date. Voluntary compliance with the regulations, as amended herein, is authorized November 1, 1995.

Incorporation by reference date. The incorporation by reference of certain publications listed in these amendments is approved by the Director of the Federal Register as of July 1, 1996.

FOR FURTHER INFORMATION CONTACT: Ed Pritchard (telephone 202–366–0509) and James H. Rader (telephone 202–366–0510), Hazardous Materials Division; or Thomas A. Phemister (telephone 202–366–0635), Office of Chief Counsel, Federal Railroad Administration, 400 Seventh Street, S.W., Washington, D.C. 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Introduction

This final rule consolidates two related notices of proposed rulemaking published under Docket HM–175A [58 FR 52574, October 8, 1993] and Docket No. HM–201 [58 FR 48485 September 16, 1993], that address the safe performance of tank cars used to transport hazardous materials. RSPA believes that, by consolidating these two rulemakings, changes to sections that are affected by both rules will be more easily understood by readers. This preamble discusses separately, for each rulemaking, the notices of rulemaking and comments received in response to these notices. A consolidated ''Review by Section Summary'' summarizes the changes made under this final rule.

The Federal Railroad Administration (FRA) has enforcement authority for tank cars and rail transportation. FRA developed these rulemakings jointly with RSPA.

II. Docket HM–175A—Crashworthiness Protection Requirements for Tank Cars

A. Background

Based on research and on the FRA's continuing review of serious accidents, involving the transportation of hazardous materials in tank cars in the United States and Canada, RSPA issued a number of regulations to improve the survivability of tank cars in accidents.[1] In these rulemakings, RSPA required the installation of a tank-head puncture-resistance system (head protection), a coupler vertical restraint system (shelf couplers), insulation, and a thermal protection system for certain high-risk hazardous material ladings. The difference between a ''thermal protection system'' and ''insulation'' is that a ''thermal protection system'' protects a tank from a pool or torch-fire environment. In contrast, ''insulation'' protects the lading inside the tank from ambient, temperature differentials, much like home insulation. The record shows that these systems, working in combination, have greatly reduced the potential harm to human health and the environment when tank cars are involved in accidents.

On October 8, 1993, RSPA published a notice of proposed rulemaking (NPRM) under Docket HM–175A (58 FR 52574) based, in part, on recommendations issued by the National Transportation Safety Board (NTSB) and comments received in response to an advance notice of proposal rulemaking published on May 15, 1990 [55 FR 20242], and a supplemental advance notice of proposed rulemaking published on August 29, 1990 [55 FR 35327]. The NPRM solicited comments on the costs and safety benefits that would be derived should the HMR be amended in the following areas: (1) Tank-head protection; (2) thermal protection; (3) self-energized manways below the tank liquid level; (4) non-pressure tank cars for PIH materials; (5) grandfather provisions allowing use of certain tank cars conforming to former standards; (6) bottom discontinuity protection on tank cars; (7) protective coatings on insulated tanks; and (8) tank cars of limited and designated specifications, with greater protection in accidents for transporting materials determined by EPA to pose health and environmental risks.

On January 6, 1994, FRA and RSPA held a public hearing to solicit information to assist in deciding what actions, if any, should be taken to improve the survivability of tank cars involved in hazardous materials accidents. Twelve persons made presentations at the public hearing. In addition, RSPA received 37 written comments in response to the NPRM from representatives of trade associations and the various industries that own, lease, transport, or use tank

[1] The discussions in the following rulemakings provide greater detail about each of these safety system requirements: *Interlocking Couplers and Restrictions of Capacity of Tank Cars,* Docket HM–38, 35 FR 14215 (September 9, 1970); *Tank Car Tank Head Protection,* Docket HM–109, 41 FR 21475 (May 26, 1976); *Shippers; Specifications for Pressure Tank Cars,* Docket HM–144, 42 FR 46306 (September 15, 1977); *Shippers, Specifications for Tank Cars,* Docket HM–174, 49 FR 3473, (January 27, 1984); *Specifications for Railroad Tank Cars Used to Transport Hazardous Materials,* Docket HM–175, 49 FR 3468 (January 27, 1984); *Transportation of Hazardous Materials, Miscellaneous Amendments,* Docket HM–166W, 54 FR 38790 (September 20, 1989); and *Performance-Oriented Packaging; Changes to Classification, Hazard Communication, Packaging and Handling Requirements Based on UN Standards and Agency Initiative,* Docket HM–181, 55 FR 52402 (December 21, 1990).

cars. All written and oral comments were given full consideration.

B. Tank Cars Transporting ''Thermally Reactive Materials'' (Materials That May Violently Decompose or Polymerize When Exposed to Fire)

In the NPRM, RSPA proposed to require the use of full-head protection and thermal protection on tank cars used for certain materials termed, ''thermally reactive.'' These materials, listed by name, are thought by many to be capable of a violent decomposition or polymerization reaction when exposed to fire. For these materials, the critical temperature for the tank car, and its thermally reactive lading, may be the heat at which the material undergoes decomposition or polymerization—as opposed to the temperature at which the steel of the tank becomes so plastic, it begins to lose tensile strength.

The proposal was based on several accidents involving thermally reactive materials. For example, on August 2, 1988, at 9:00 p.m., in Brazoria, Texas, 13 cars of a Union Pacific freight train derailed.[2] Seven of the derailed tank cars contained acetaldehyde, and none of these tank cars had a thermal protection system, which was not required. Two acetaldehyde tank cars sustained coupler punctures and released their contents, which ignited. The resulting fire engulfed four other acetaldehyde tank cars, and each of them had a total failure or rupture of the tank shell within 5 to 10 minutes after the derailment. Witnesses reported 3–4 explosions between 9:05 p.m. and 9:10 p.m.

In another accident, NTSB found that the puncture of a tank car containing hydrogen peroxide resulted in a release of lading and, when the hydrogen peroxide combined with contaminants on the ground, a chemical reaction occurred causing a fire.[3] The fire heated and ignited nearby polyethylene pellets, causing an explosion of the hydrogen peroxide tank car and releasing a force equivalent to an explosion of 10 tons of TNT (trinitrotoluene).

Most commenters opposed the requirement for full-head protection or thermal protection on tank cars used for thermally reactive materials. In clarifying its comments on the NPRM, the Association of American Railroads (AAR) stated that full-head protection is not necessary for tank cars used for these materials, unless the materials pose another hazard that warrants such protection. Other commenters, such as American Petroleum Institute (API), Chemical Manufacturers Association (CMA), and the Compressed Gas Association, Inc. (CGA), suggested that RSPA open a new ANPRM to address these materials. A commenter stated—

> the creation of this category has ramifications that reach far beyond this particular rulemaking, which deals with one mode of transportation (rail) and one type of packaging (tank cars). We are concerned with the likelihood that, in the future, the Department will expand the regulation of TRMs to affect other modes of transportation and types of packaging.

Other commenters objected to the proposal to identify by list, rather than by definition, certain existing hazardous materials that would be designated ''thermally reactive.'' CMA challenged the placement of several chemicals on the list, such as ''styrene, monomer inhibited,'' ''vinyl toluene,'' ''vinylidene chloride,'' ''sulfur trioxide,'' and ''hydrogen peroxide.'' CMA further stated that—

> [s]tyrene, for example, is flammable and can polymerize in an accident but solidifies causing little or no harm to the environment. For hydrogen peroxide tank cars, the proposed rule would create a safety hazard by requiring thermal protection.

Another commenter stated that ''[s]ome of the materials on the list react violently when exposed to heat differentials and may decompose with explosive force * * * Other materials, however, decompose through polymerization into substances of relatively little hazard.'' The commenter further explained that the key to the polymerization of styrene is the absence of the inhibitor. Styrene is typically shipped with inhibitor concentrations great enough to cover fairly lengthy, unexpected delays in transportation. If a tank car of styrene is exposed to extreme external heat, disregarding its flammable nature, the inhibitor will dissipate rapidly as the temperature of the material rises above 125 °F., which will allow the polymerization process to begin. As a result of the polymerization, the internal heat of the product will increase, and, with increasing temperature, the process will accelerate.

Several commenters opposed the requirement for a thermal protection system on tank cars used to transport ''hydrogen peroxide.'' One of the commenters stated that hydrogen peroxide does not polymerize or burn, and the products of decomposition—water and oxygen—are not toxic.

Two commenters, Eka Nobel and FMC Corporation (FMC), furnished independent analyses of the fire effects on tank cars containing ''hydrogen peroxide.'' Eka Nobel contracted with the IIT Research Institute (IITRI), which used FRA's computer model to analyze the fire effects on a tank car containing hydrogen peroxide.[4] The results of IITRI's analysis indicate that a tank car constructed from stainless steel will meet the thermal protection criterion for withstanding the effects of a pool fire.

FMC furnished a detailed, mathematical heat transfer model using a correlation contained in a National Fire Protection Association (NFPA) publication, ''NFPA Pamphlet No. 30.'' FMC stated that for materials that decompose exothermically, such as hydrogen peroxide, thermal stability requires that the heat losses to the surroundings balance the heat generated by the decomposition. Failure to remove the heat of reaction could lead to runaway decomposition, and if the increased pressure exceeds the burst pressure of the tank, the tank will fail. Furthermore, heat input causes oxygen generation from thermal decomposition of peroxide and vapor generation, by boiling off the water-peroxide mixture. FMC further stated that because water is more volatile than peroxide, the hydrogen peroxide concentration in the tank will increase (although this may be compensated by water formation and peroxide loss from thermal decomposition). If the peroxide concentration reaches 74 percent by weight, the vapors in equilibrium with the liquid (40 percent by weight of peroxide) can detonate, if ignited, causing the tank car to fail.

The results of FMC's mathematical heat transfer model show that tank cars containing hydrogen peroxide (having no less than a 7-percent outage) will not fail and such tank cars will meet the thermal protection criterion in § 179.18 of this final rule for withstanding the effects of a pool-fire. Readers who are interested in a detailed discussion of Eka Nobel or FMC's fire studies on tank cars containing hydrogen peroxide, should refer to the comments filed in the RSPA Dockets Unit.

Many commenters suggested a performance-based definition as a means to ensure the proper identification and packaging of thermally reactive materials, because, with increasing temperature, all materials will reach a stability limit.

[2] *Union Pacific Derailment at Brazoria, Texas,* FRA Accident Investigation No. 137–88, Railroad Report No. 0888H0200, August 2, 1988.

[3] *Collision and Derailment of Montana Rail Link Freight Train with Locomotive Units and Hazardous Materials Release, Helena, Montana, February 2, 1989,* National Transportation Safety Board Report NTSB/RAR–89/05, National Transportation Safety Board, Washington, D.C.

[4] *''Temperatures, Pressures and Liquid Levels of Tank Cars Engulfed in Fires,''* NTIS DOT/FRA/OR&D–84/08.11, (1984), Federal Railroad Administration, Washington, DC.

These commenters suggested a performance-based definition that would include the polymerization potential; the rate of the chemical reaction (reaction kinetics); any highly exothermic reaction; the formation of gases, vapors, or fumes in a quantity sufficient to present a danger to human health and the environment; and any reactive by-products that could lead to over-pressurization of the tank. Commenters stated that a performance-based definition was the best way to ensure that the proper packaging requirements are attached to the appropriate hazardous materials.

As evidenced from the comments, there is no single agreement on the best approach to identify these materials, nor to ensure the proper packaging requirements are assigned to these materials. Because of the multiplicity of these yet unresolved issues, the packaging requirements proposed in the NPRM for thermally reactive materials have not been adopted in this final rule.

C. Tank-Head Protection

In the NPRM, RSPA proposed several changes relating to tank-head protection. The proposal would require tank-head protection on tank cars, used for all Class 2 materials and for tank cars constructed from aluminum or nickel plate, when used to transport a hazardous material. RSPA included Division 2.2 in its proposal to reduce the violent rupture hazard and the asphyxiation potential to railroad workers or bystanders exposed to the product if these tank cars are punctured. The proposal to require full-head protection for tank cars constructed from aluminum or nickel plate is based on the vulnerability of the tank head to a puncture. The top-half of the tank head is vulnerable to puncture in a derailment. Existing tank cars with half-head protection were excluded, based on RSPA and FRA's regulatory analysis discussed later in this preamble. Consistent with these proposed changes, RSPA also proposed to eliminate a grandfather provision, in place since 1984, following publication of a final rule under Docket HM–175, that permits certain tank cars, with a capacity of less than 70 kiloliters (kl; 18,500 gallons), to continue in service without head protection.

RSPA first introduced tank-head protection requirements after a series of railroad accidents in the late 1960s and early 1970s involving head punctures of tank cars (39 FR 27572 and 41 FR 21475). The requirements of, and criteria for, head protection were based on tests performed by FRA, the AAR, and the Railway Progress Institute (RPI) Tank Car Safety Research and Test Project in the early 1970s. In summary, these tests showed that head punctures, caused by over-speed impacts in railroad classification yards, generally occurred at speeds above 12 mph and often happened when a loaded tank car struck a standing empty tank car, causing the empty car to ''jump'' and ram its coupler into the head of the oncoming tank. A recent informal staff analysis of data on main-line accidents showed that objects, such as broken rails and couplers, may penetrate the top half of the tank head, indicating that head protection is essential, even though not 100 percent effective, in a train derailment.

The NPRM referenced the recent FRA research on puncture resistance, which shows that puncture resistance is strongly influenced by impact location, head and jacket thickness, and insulation thickness.[5] Stated differently, research demonstrates that puncture resistance is an inter-related function of head thickness, insulation thickness, and jacket thickness, and that the concept of ''head protection'' must include more than just traditional ''head shields.'' Based on the results of this research, FRA expects that certain tank cars may meet the 29 kilometers per hour (18-mph) threshold for puncture-resistance, prescribed in § 179.16 of this final rule, without further modification.

Tank cars currently equipped with half-head protection. Most commenters agreed that there is no need to require full-head protection on existing tank cars having only half-head protection.

In comments filed in this docket, NTSB stated that the NPRM addressed many of their concerns, but noted the proposal failed to require existing tank cars used to transport Division 2.1 (flammable gas) materials, or other materials with extreme hazards, to be modified with full-head protection. Thus, these materials could be transported indefinitely in tank cars without full-head protection modifications.

While we appreciate the concerns of NTSB, we are not able to establish a positive benefit/cost ratio by requiring modification of the existing tank car fleet, primarily because the half-head protection on existing cars is already about 95-percent effective. It is not credible to argue that greater safety gains are realized by mandating safety improvements on tank cars that currently have a 95-percent effective protection system, than by requiring improvements on tank cars without a head-protection system. The regulatory evaluation considered both approaches, with emphasis being placed on choosing the alternative offering maximum potential benefit to society, while imposing the least net cost. Based on the regulatory evaluation, this final rule does not require that existing half-head protection be removed and replaced with full-head protection.

Head protection systems for existing tank cars with capacities less than 70 kl (18,500 gallons). RSPA received diverse comments in response to this proposal in the NPRM. One commenter agreed that class DOT 105 tank cars having capacities less than 70 kl (18,500 gallons) and transporting Division 2.1, 2.2, and 2.3 materials, should have full-head protection, unless already equipped with half-head protection.

CMA supported the proposal to require full-head protection on newly built class DOT 105A tank cars, regardless of tank capacity, when used to transport a Division 2.1 or 2.3 material. The Reebie Associates report, submitted as part of CMA's comments, assumed that all tank cars would require head protection, except those that have a tank test pressure of 41.4 Bar (600 pounds per square inch [psi]).

The Chlorine Institute agreed that head protection systems are now warranted for the transportation of chlorine, but recognized, based on FRA research and the accident history, that many tank cars currently used to transport chlorine meet the performance standard by virtue of a thick tank-head and a tank jacket.

NTSB commented that RSPA should require tank-head protection, within 5 years, for all class 105 tank cars having capacities of less than 70 kl (18,500 gallons) when used to transport a Division 2.1 (flammable gas) material as proposed in Option B of the NPRM.

RPI commented that, except for the nominal 41 kl (11,000-gallon) capacity tank cars, existing tank cars of less than 70 kl (18,500-gallon) capacity, transporting Division 2.1 materials or anhydrous ammonia, should have head-protection, but only half-head protection. RPI further commented that RSPA should exclude tank cars having a nominal capacity of 41 kl (11,000 gallons) from any head protection modification program, because most tank cars in this category are near or exceed 30 years of age; consequently, the economic life of the tank is nearing an end.

RSPA and FRA believe that there is no longer a justification for excluding tank cars having a capacity less than 70

[5] Coltman, M., & Hazel, M., Jr., *Chlorine Tank Car Puncture Resistance Evaluation* (1992), Federal Railroad Administration, Washington, DC (NTIS DOT/FRA/ORD–92/11).

kl (18,500 gallons) from the modification requirements. While CMA's report is not so optimistic on the use of DOT 105A500W specification tank cars, RSPA and FRA believe that most of these tank cars will meet the performance standard by virtue of their increased head thickness, insulation, and metal jacket. Because of the small number of tank cars in this category, and the small incremental cost to make such head protection modifications for those tank cars that do not otherwise meet the performance standard mandated by this rule, in this final rule RSPA is removing the 70 kl (18,500-gallon) exception for existing tank cars in current §§ 173.314(c) and 173.323(c)(1).

Further, while most commenters supported the 10-year modification program for existing tank cars, we agree with NTSB, that when these tank cars are used to transport Division 2.1 materials, a 5-year modification program (as proposed in Option B of the NPRM) will ensure that those cars presenting the greatest risk are modified first.

Tank cars transporting materials in Division 2.2. A commenter stated that the proposal to require full-head protection for Division 2.2 gases is sound and should be finalized. Several other commenters disagreed with the proposal to require full-head protection for Division 2.2 materials. The Reebie Associates report, submitted by CMA, identified 467 Class 2 materials affected by the proposed rule, 11 of which are Division 2.2 materials. The report shows that shippers used 1,448 tank cars in 1992 to transport these Division 2.2 materials, as follows:

Commodity	Population
Argon, refrigerated liquid	2
Ammonia solutions	28
Bromotrifluoromethane	1
Carbon dioxide, refrigerated liquid	1,016
Chlorodifluoromethane	145
Chlorotetrafluoroethane	26
Chloropentafluoroethane	37
Dichlorotetrafluoroethane	164
Fertilizer, ammoniating solutions	4
Trifluoromethane	1
Xenon, refrigerated liquid	24
Total	1,448

CGA opposed the full-head protection requirement for tank cars transporting carbon dioxide. CGA referenced the testimony presented by RPI at the January 6, 1994 public hearing concerning recent head impact tests that verified the adequacy of the current head protection system on DOT 105A500W specification tank cars.

With regard to CMA's and CGA's comments, RSPA and FRA believe that most tank cars used for ''carbon dioxide, refrigerated liquid,'' meet the performance standard for head protection by virtue of their tank head thickness and metal jacket. Tank cars used for ''argon, refrigerated liquid,'' and ''xenon, refrigerated liquid,'' also meet the head performance standard by virtue of the authorized class DOT 113 tank car specification. These tank cars must have a minimum outer jacket tank head of not less than ½-inch thick steel. See § 179.400–8(d). A total of 1,042 tank cars, or 72 percent of the total Division 2.2 tank car population, are used to transport these three commodities.

A commenter opposed tank-head protection for Division 2.2 materials stating, ''heavy walled tank and protective housing for the fittings is adequate for the transportation environment.'' The commenter also provided an in-house report using a computer model that claims the asphyxiation potential from a punctured Division 2.2 refrigerant gas tank car to be very low.'' Another commenter opposed applying head protection to tank cars transporting Division 2.2 refrigerant gases. This commenter stated that, in the past, DOT had judged a material based on its hazards under normal conditions of transport, and that in this rulemaking, DOT was over-assessing the potential for harm in a low-probability event. RPI supported full-head protection on new, insulated tank cars transporting Class 2 materials, but it opposed full-head protection for new non-insulated tank cars or for existing tank cars transporting these materials.

We believe that even though the probability of an event occurring with these materials is low, safety concerns still need to be addressed, because the event may lead to high consequences, such as a large scale evacuation or an oxygen deficient atmosphere in a concentrated populated area. Taking the safety steps adopted in this final rule will mitigate these hazards.

We also believe that the transportation risks associated with Division 2.2 gases are sufficient to require full-head protection for new tank cars, and for existing tank cars without head protection, when used to transport Division 2.2 materials. As noted above, this rule does not require existing tank cars equipped with half-head protection to be modified with full-head protection. RSPA and FRA are aware of industry concerns that the attachment of full-head protection to non-jacketed cars is a feature not yet proven by long service. Similar arguments were raised when head protection was first required almost two decades ago [HM–144; 42 FR 46306, September 15, 1977]. FRA is aware of companies with plans to attach full-head protection to their non-jacketed tank cars. As discussed later in this preamble, a phased-in 10-year modification program is provided for existing tank cars.

Existing tank cars without head protection. Most commenters to the NPRM supported the need to modify existing tank cars to meet the current safety requirements. One commenter supported the need to modify existing tank cars constructed from aluminum plate with half-head protection, but believed full-head protection should be required when a proven full-head shield design is available. Another commenter suggested that DOT should specifically recognize that tank cars used in ''chlorine'' service meet the performance requirements for head protection and that DOT should not require any additional head protection for these tank cars.

As stated in the NPRM, the benefits of head protection are real, predictable, and quantifiable. RSPA disagrees with commenters who state that full-head protection is not warranted. Where earlier rules required head protection on tank cars, it was a matter of recognizing the highest priority needs first. The question is not one of demanding low-priority, safety benefits, but the need to expand the safety base of hazardous materials transportation in tank cars. Further, the small additional cost of installing full-head protection on cars that now have no head protection system, as compared with adding only half-head protection, is justified on the basis of increased safety (see Chapter V of the Economic Impact Assessment and Regulatory Flexibility Analysis). In this final rule, RSPA requires existing tank cars that currently have no head protection, to have full-head protection installed when used to transport a Class 2 material. As explained below, RSPA is also requiring full-head protection for tank cars constructed from aluminum or nickel plate when used to transport hazardous material.

Tank cars constructed from aluminum and from nickel plate. Commenters supported the need for head protection on tank cars constructed from aluminum or nickel plate, but not the full-head protection requirement proposed in the NPRM. Most commenters stated that there is no design available for the securement of full-head protection on tank cars without metal jackets.

One commenter stated that his company's new aluminum tank cars, constructed with greater tank shell and head dimensions than standard tank cars, offer greater protection without head protection. The commenter stated that further testing should be done and suggested that RSPA and FRA submit more evidence to support the need for this requirement.

CMA supported requiring half-head protection for new tank cars constructed from aluminum or nickel plate, and requiring half-head protection for existing tank cars for certain hazardous materials. Several commenters requested that RSPA consider the characteristics of an individual Division 2.2 material, and that materials not subject to the HMR, and low hazard materials should be excluded.

We realize that the use of good engineering practice and design specifications are needed to secure full-head protection to tank cars without metal jackets. Although there is no service experience for a full-head protection design on non-insulated tank cars, such designs are certainly not unreachable within the years ahead. In rulemaking proceedings under another docket [HM–144; 42 FR 46306, September 15, 1977] introducing half-head protection, commenters offered similar arguments regarding head protection, for which solutions were later found as a result of technological innovation. Currently, FRA is aware of several companies that are nearing completion on their full-head protection designs for aluminum and nickel tank cars. We, therefore, believe that the introduction of this requirement will not adversely affect industry. In this final rule, the use of full-head protection for all tank cars constructed from aluminum or nickel plate is required when used to transport a hazardous material. As discussed later in this preamble, RSPA has provided for a phased-in 10-year modification program.

D. Thermal Protection Systems

In the NPRM, RSPA proposed to require a thermal protection system for a Class 2 material when a thermal analysis of the tank car and lading shows that a release will occur other than through the safety relief valve when the tank car is subjected to either a 100-minute pool fire or a 30-minute torch fire. The current HMR require thermal protection for Division 2.1 (flammable gas) materials (with limited car capacity restrictions) and certain Division 2.3 (poison gas) materials. RSPA proposed to expand the thermal protection requirements to include Division 2.2 materials because, as stated by AAR, ''[a]t a chemical accident, there are generally two reasons for an evacuation, one is to protect the public from any toxic, poisonous, or noxious vapors or fumes generated by the product itself . . ., the second is to protect the public from thermal ruptures and the container debris that may be hurled from an incident site'' [*Emergency Action Guides*, p. VII]. RSPA also proposed to expand the thermal protection requirement to include all Division 2.3 materials.

RSPA began to require the application of a thermal protection system on tank cars transporting Division 2.1 materials (flammable gases) or ''ethylene oxide'' (Division 2.3) after a series of major railroad accidents involving fires and ruptures of non-insulated pressure tank cars. The design of and criteria for thermal protection systems were based on tests performed by FRA at the U.S. Army Ballistics Research Laboratory in White Sands, New Mexico, and at the Transportation Test Center in Pueblo, Colorado. These tests revealed that a 127.2 kl (33,600 gallon) non-protected tank car filled with propane (Division 2.1) will rupture, with 40 percent of the lading remaining in the tank car, within 24 minutes after exposure to a pool-fire. Rupture occurs when the residual strength of the tank shell falls below the force generated by the vapor pressure of the lading exerted on the inside surface of the tank shell. Further testing by FRA demonstrated that a tank car filled with propane and equipped with a thermal protection system delayed the thermal rupture of the tank car for 94.5 minutes, by maintaining the shell temperature low enough to vent 98 percent of the lading through the safety relief valve. The current performance standard, requiring exposure to a 100-minute pool fire and a 30-minute torch fire, was chosen because it provides emergency response personnel time to assess the accident and to initiate remedial actions, such as evacuating an area.

Division 2.1 (flammable gas) and 2.3 (poisonous gas) materials: Several commenters supported the need for a thermal protection system on tank cars transporting Division 2.1 or 2.3 materials, regardless of tank car capacity. The AAR and another commenter supported a thermal protection system for all Class 2 materials, unless a shipper could show that a release will not occur, other than through the safety relief valve, when the tank and lading are subject to a fire. RPI also concurred on the need for thermal protection for all Class 2 materials, but, except for Division 2.1, but did not support the high-temperature performance standard proposed in § 179.18. RPI stated that most insulation materials (e.g., 4 inches of glass-fiber insulation) are adequate.

In this regard, RSPA stated in the NPRM that many insulation materials also provide good thermal protection. These insulation materials, when analyzed with the tank and the lading, may show that nothing further needs to be installed on the tank car to achieve passage of the pool- and torch-fire performance tests. Research sponsored by FRA on urethane-foam and glass-fiber insulation systems show that urethane-foam insulation will pass the pool- and torch-fire requirements and that glass-fiber insulation will also pass both tests, provided the insulation is held in place with a plastic or wire scrim. Owners of tank cars with either of these systems, or another comparable system, may find that their thermal analysis of the tank car shows the presence of sufficient thermal protection to meet the performance standard. In this case, the tank car owner would have to verify only that the insulation material installed on the tank car is capable of passing the pool- and torch-fire verification or ''proof'' tests in Appendix B to Part 179 of this final rule. Owners may find that a tank car will pass the performance standard with only minor modifications, such as applying a thermal protection system to the manway nozzle.

Also in the NPRM, RSPA stated that, in 1981, a joint effort between the Chlorine Institute and RPI-AAR Tank Car Safety Research and Test Project resulted in the development of an insulation system to protect a chlorine tank car involved in a fire. The insulation system developed maintains back plate (inside surface of the tank car shell) temperatures below 250.56 °C (483 °F). After reviewing the thermal resistance capabilities of the insulation system used on chlorine tank cars, RSPA incorporated it into the HMR in 1987. Readers should refer for more information to Docket HM–166U, entitled ''*Transportation of Hazardous Materials; Miscellaneous Amendments*'', 52 FR 13034, (April 20, 1987).

Division 2.2 (nonflammable gas) materials. As noted earlier in the preamble discussion on tank-head protection for Division 2.2 materials, CMA commented that there were 1,448 tank cars allocated to Division 2.2 materials that had not already been captured in another service, such as PIH. Of those, ''argon, refrigerated liquid,'' ''carbon dioxide, refrigerated liquid,'' and ''xenon, refrigerated liquid,'' represent 1,042 tank cars, or 72 percent. CMA further commented that

almost 100 percent of the total would need retrofitting and that the overall economic impact of the new regulations on this group of tank cars amounts to $26.0 million for retrofitting and $2.59 million for higher lease rates and additional cars in the tenth year of the implementation period.

With regard to the issues raised by CMA, this final rule does not contain any new thermal protection requirements for ''argon, refrigerated liquid,'' ''carbon dioxide, refrigerated liquid,'' or ''xenon, refrigerated liquid.'' Carbon dioxide is transported in DOT 105A500W tank cars equipped with two regulator valves, a reclosing pressure-relief device, a frangible disc, and an insulation system with good thermal performance (a thermal conductance of 0.03 British Thermal Units [B.t.u.] per square foot per degree Fahrenheit differential). Consequently, existing and new tank cars in carbon dioxide service have sufficient thermal resistance when exposed to fire. Likewise, because with argon and xenon, refrigerated liquids are packaged under the exceptions for atmospheric gases in § 173.320, this final rule does not impose any new thermal protection requirements. This section exempts cryogenic atmospheric gases from the packaging requirements when the packagings are designed to maintain pressures below 1.74 Bar (25.3 psi) under ambient temperature conditions.

Another commenter opposed the use of thermal protection for Division 2.2 materials on the basis that the hazards they pose do not equate to those of Division 2.1 and 2.3 materials. The commenter further stated that the thermal protection requirements proposed for Division 2.2 materials do not appear to be justified by the hazards posed, because, in many cases, these materials dissipate naturally with little risk to the surroundings.

A commenter, primarily addressing refrigerant gases, noted that an analysis of each Division 2.2 material, to predict the behavior of a tank car in a 100-minute pool-fire, seemed an unnecessary precaution because the calculations, required by the current regulations, for sizing safety relief valves accomplish the same purpose and meet this same standard. RSPA and FRA disagree with this commenter's position that the current regulations for sizing safety relief valves accomplish the same purpose as the proposed Division 2.2 thermal protection performance standard. The current safety relief valve-sizing requirements make several assumptions. First, the valve sizing formula assumes the exposure factor, that portion of the tank car exposed to fire (represented as $A^{0.82}$), is about one-fourth of the tank. The pool-fire computer model in this final rule assumes total engulfment. Second, the safety relief valve sizing formula assumes that flame temperatures will reach approximately 650 °C (1,200 °F.). The pool-fire standard assumes flame temperatures will reach 871 °C (1,600 °F) for a pool-fire and 1,204 °C (2,200 °F) for a torch fire at 40 miles per hour.[6] Third, the safety relief valve-sizing formula does not take into consideration either an overturned tank car venting liquid or a liquid-gas mixture (two phase flow) or the diminished burst strength of the heated tank shell in the non-wetted area, after prolonged fire exposure.

The Fertilizer Institute did not support the requirement for thermal protection on tank cars transporting ''anhydrous ammonia''. It stated that the likelihood of a fire-induced rupture of a tank car carrying anhydrous ammonia has significantly decreased since 1980 because of added safety devices, safer placement in trains, and improved emergency response procedures. Thus, there is little, if any, increase to public safety by imposition of the proposed thermal protection requirements on these tank cars.

While RSPA and FRA agree with The Fertilizer Institute that the safety record for tank cars transporting ''anhydrous ammonia'' is good, these cars have a potential for violent rupture similar to compressed gas tank cars, which received thermal protection many years ago. As The Fertilizer Institute notes, the threat of a fire-induced violent rupture of an anhydrous ammonia tank car is more than just a theoretical potential. Since 1990, according to figures from the AAR, ''anhydrous ammonia'' has been the sixth highest volume hazardous material transported by railroad.

AAR and two other commenters supported the need for thermal protection for Class 2 materials, including Division 2.2. One of these commenters stated: ''thermal protection systems are a good, simple idea whose time has come. The purpose of the system is to prevent rupture of the tank car in a fire with the release of its hazardous materials contents to the environment. Uncontrolled release of almost any hazardous material to the environment is objectionable whether due to toxicity, flammability, or simply clean-up costs.'' This commenter further stated that there can be little basis for exempting anhydrous ammonia from the thermal protection requirements simply because it is not likely to catch fire once released. Its PIH characteristic remains, and the potential for rupturing in a non-insulated tank car is high.

Although not all commenters agree on the need for thermal protection for Division 2.2 materials, in this final rule RSPA requires such a system if, after an analysis of the effects of a 100-minute pool fire and a 30-minute torch fire, there will be a release of the tank car lading other than through the safety relief valve. Because tank cars may transport different ladings, and because changing ladings may affect the whole system, owners or shippers may choose to perform a ''worst case'' analysis based on all the commodities the car is likely to carry.[7]

Based on these comments and FRA's research, this final rule requires the owner or the shipper of a Class 2 material, with the exception of ''carbon dioxide, refrigerated liquid,'' ''chlorine,'' and ''nitrous oxide, refrigerated liquid'' as explained above, to perform an analysis of the characteristics of the material and of the thermal resistance capabilities of the tank car, taking into consideration the safety relief valve start-to-discharge pressure setting and relief capacity and all areas of the tank car that are not afforded protection from fire (such as stub sills, bolsters, and protective housings).

Tank cars constructed from aluminum and nickel plate. Most commenters said that the lading within a tank car constructed from aluminum or nickel plate should determine the need for a thermal protection system.

We agree. The NPRM proposed to require a thermal protection analysis for aluminum and nickel plate cars carrying Class 2 materials. Based on the comments received, we believe that all such tank cars will need protection and that such protection is essential.

This final rule requires the owner of an aluminum or nickel plate tank car used to transport a Class 2 material to perform an analysis of the tank car in a 100-minute pool fire and in a 30-minute torch fire using FRA's Tank Car Fire model. If the analysis shows that a release of the lading from the tank car,

[6] The pool-fire computer model assumes an average heat flux over the entire tank surface, equivalent to complete engulfment in a fire, where the flame temperature is 815.5 °C (1,500 °F). If a higher or lower flame temperature were assumed, the parametric analyses in the computer model would not match the actual field test data.

[7] Owners are reminded that 49 CFR 173.31(a)(4) limits the use of tank cars to those commodities for which they are authorized. Authorized (or approved) commodities are those listed on the certificate of construction or an AAR R–1 form. (*See* the AAR Specifications for Tank Cars Section 1.4.3.1 and Appendix R, Section R4.04.)

will occur, other than through the safety relief valve, a thermal protection system will be required. This final rule adopts a 10-year phase-in period for those existing tank cars required to have thermal protection.

E. Shell Protection

For tank cars transporting of a material poisonous by inhalation (PIH), RSPA proposed that they have ''shell protection conforming to § 179.100–4.'' That is, the optional use of an insulated DOT 105S tank car or a non-insulated, but thermally protected, DOT 112J or 114J tank car having a metal jacket. Although RSPA used the term ''shell protection'' to identify these systems, the intent of the NPRM was to require tank cars transporting a PIH *gas* (Division 2.3) to conform to the same requirements as tank cars transporting a PIH *liquid*. For a complete discussion, see *Performance-Oriented Packaging Standards; Miscellaneous Amendments,* Docket HM–181F, 58 FR 50224 (September 24, 1993). In the final rule issued under that docket, RSPA authorized the optional use of an insulated DOT 105S tank car or a non-insulated, but thermally protected, DOT 112J or 114J tank car for poisonous liquids having a PIH hazard.

In its comments to the NPRM, one commenter supported the need for shell protection for PIH materials. Another commenter suggested that, in lieu of a metal jacket, RSPA should establish a performance standard, as with thermal and head protection. Until a performance standard is established, shell-protection resistance should be equivalent to a tank car having a tank test pressure of 20.7 Bar (300 psi) constructed from carbon steel and with a 1/8-inch carbon steel jacket. The commenter stated that the shell-puncture resistance should be based on either a total metal thickness, or an approved calculation. We agree with this commenter that a performance-based standard for shell-puncture resistance may have merit over specification-based standard adopted in this final rule. However, such performance based standards have not been proposed.

Another commenter opposed the use of a metal jacket on pressure tank cars transporting a PIH material on the basis that the FRA's proposal did not support the conclusion that jacketing improves puncture resistance. The commenter further questioned the use of a tank jacket over thicker tank shells, since ''jackets provide thermal not puncture protection.''

In response to similar remarks, RSPA discussed in the NPRM a 1987 RPI report on the vulnerability of pressure tank car shells to puncture.[8] RPI found that shelf couplers, hardboard insulation (cork), increased shell thickness, thermal protection, small tank car size and increased jacket thickness proved effective towards reducing the frequency of shell punctures. The RPI report summarizes a 20½-year history of accident data on shell punctures of pressure tank cars and concludes that the 11-gauge steel jacket provides a measure of shell protection. In addition to RPI's report, FRA also found, in a research contract awarded to the AAR, that puncture resistance is strongly influenced by impact location, by head and jacket thickness and by insulation thickness.[9]

RSPA explained earlier, in Docket HM–181, that the purpose of a metal jacket is to provide ''both accident damage and fire protection'' for certain [liquid] PIH materials.[10] This final rule expands that philosophy to all PIH materials [including compressed gases] and authorizes the use of an insulated class DOT 105S tank car or a non-insulated, but thermally protected, class DOT 112J or 114J tank car.

F. Self-Energized Manways Located Below the Liquid Level of the Lading

RSPA proposed in the NPRM to prohibit the use on tank cars of a self-energized manway located below the liquid level of the lading. The proposal was based on a September 8, 1987 railroad yard incident in New Orleans, Louisiana.[11] In this incident, a tank car equipped with a self-energized bottom manway and loaded with butadiene developed a leak and caught fire. At one point during the incident, the flames were large enough that both spans of a bridge on Interstate 10 were engulfed. After the investigation, NTSB concluded that ''it is unlikely that a hazardous material leak through a bottom manway during transportation could be stopped.'' NTSB urged FRA to prohibit the transportation of tank cars that have a manway opening located below the liquid level of the lading in hazardous materials service. Because the design of bottom manways depends in part on the weight of the product and the pressure in the tank to make the seal fully effective, this type of closure system becomes vulnerable to releasing product when the lading is displaced within the tank. Therefore, we agree with NTSB's conclusion.

In its comments to the NPRM, the AAR, RPI, and several other commenters supported the proposal to remove self-energized manways located below the liquid level of the lading. A commenter stated that their design incorporates an externally elliptically shaped ring clamp which is bolted to the manway closure plate with numerous closely-spaced studs around the circumference of the ring. This commenter holds two DOT exemptions (DOT-E 5493 and DOT-E 6117) to operate tanks cars in hydrogen sulphide service with this design. RSPA and FRA believe that this design is certainly preferable to that used on the car that leaked and burned in New Orleans and is similar to a more conventional external flange, however, we believe this design still remains a potential source of leaks since it is located below the liquid level of the lading. Based on these reasons, RSPA will grant the exemption holder a reasonable amount of time to phase out the use of these tank cars.

While some commenters agreed with a 2-year phase out program of self-energized manways, NTSB stated that RSPA should immediately prohibit such manways, and the AAR suggested a one-year phase-out program.

Based on these comments, this final rule prohibits the construction of new tank cars having an internal self-energized manway located below the liquid level of the lading. This prohibition is added in § 179.103–5. Based on NTSB's comments, compliance with this provision is required beginning on the effective date of this final rule.

G. Non-Pressure Tank Cars for Materials Poisonous by Inhalation

In the NPRM, RSPA proposed to prohibit the use of non-pressure tank cars (e.g., class DOT 111A) for materials poisonous by inhalation.

In a recent research report, FRA found that, in a single-car national risk profile, the transportation of ethylene oxide in a DOT 111A100W4 tank car involves significantly greater risk than transportation of the same material in a

[8] Phillips, E.A., *Review of Pressure Car Shell Puncture Vulnerability,* RA–09–6–52, (1987), AAR-RPI Railway Tank Car Safety Research and Test Project, AAR Technical Center, Chicago, Illinois.

[9] [Coltman, M., & Hazel, M., Jr., *Chlorine Tank Car Puncture Resistance Evaluation,* (1992) Federal Railroad Administration, Washington, D.C. (NTIS DOT/FRA/ORD–92/11).

[10] *See* the final rule on *Performance-Oriented Packaging Standards; Miscellaneous Amendments,* Docket HM–181F, 58 FR 50224 (September 24, 1993), and the NPRM, 58 FR 37612 (July 12, 1993).

[11] *Butadiene Release and Fire from GATX 55996 at the CSX Terminal Junction Interchange, New Orleans, Louisiana, September 8, 1987,* National Transportation Safety Board Report NTSB/HZM–88/01, National Transportation Safety Board, Washington, D.C.

DOT 105J500W tank car.[12] Characteristics and parameters evaluated in this assessment included the toxicity, fire hazard, and explosion hazard. In comments to the ANPRM, RPI reported that, during the time period of 1965 through 1986, class DOT 111A tank cars involved in accidents and damaged were slightly more than three times as likely to lose lading as were class DOT 105 cars in similar situations.[13]

The Raj/Turner report amply demonstrates (and AAR/RPI Tank Car Safety Test and Research Project data support) that it is ''improbable'' to assume that any single tank car (e.g., DOT 111A or DOT 105) would be involved in an accident. However, based on FRA accident data referenced earlier regarding DOT 111A and DOT 105 tank cars, a significant number of such cars will be involved in accidents during their service life.

Several commenters supported disallowing the use of non-pressure tank cars for the transportation of PIH materials. Because of the hazards associated with PIH materials and the performance superiority of the so-called ''pressure'' tank cars for this service, RSPA agrees with the commenters. This final rule removes the class DOT 111A tank car as an authorized packaging for Division 2.3 materials on the effective date of this final rule.

H. Phasing Out of Various ''Grandfather'' Provisions

In the NPRM, RSPA proposed to remove from the HMR several grandfather provisions that affect tank cars. The grandfather provisions allow tank cars built before a certain date to remain in service without modification. As an example, in § 173.314(c), Notes 23 and 24 allow the continued use of class DOT 105A tank cars for certain compressed and flammable gases if they were built before September 1, 1981, while tank cars built after that date must meet a more stringent class DOT 105S or 105J standard.

NTSB stated, in a March 1, 1988 letter to RSPA, that tank cars failing to meet current minimum safety requirements should no longer be used for transportation of hazardous material under grandfather provisions. NTSB stated that these grandfather provision could result in a reduced level of safety. The AAR also petitioned RSPA to amend § 173.314(c) Note 30 (P–1138), stating that it does not provide any assurance that tank cars with head protection will be used for PIH gas service in the foreseeable future because companies will be able to use tank cars without head protection for PIH compressed gas service for the next 30 years. Other commenters agreed that the grandfather provisions proposed for removal in the NPRM are no longer compatible with the needs of safety.

Based on these comments, RSPA is removing certain grandfather provisions. In § 171.102, special provision ''B63'' is removed to disallow the use of DOT 105A100W, 111A100W4, 112A200W, and 114A340W tank cars for ''ethyl chloride'' and ''ethyl methyl ether.'' Prior to the issuance of Docket HM–181, these two materials were classed as flammable liquids. Because these tank cars do not have head protection or thermal protection systems, they do not provide an equivalent level of safety compared to other tank cars used for Division 2.1 materials. Also, special provision ''B63'' is removed from column 7 of the § 172.101 table entries for these two hazardous materials, thereby prohibiting the use of non-protected tank cars.

Other changes are made to disallow the use of class DOT 111A non-pressure tank cars for Class 2 (compressed gas) materials, such as ''ammonia solutions,'' ''ethylamine,'' ''ethyl chloride,'' and ''ethyl methyl ether.'' This final rule also removes the DOT 111A100W4 car as a packaging for ''ethylene oxide'' in § 173.323(c)(1).

I. Bottom-Discontinuity Protection for Bottom Outlets

In the NPRM, RSPA proposed to require bottom-discontinuity protection (e.g., for bottom outlets) on tank cars. The proposed requirements were intended to simply adopt the requirements published by the AAR. In July of 1979, the AAR required bottom-discontinuity protection for new tank car construction. Over a period of years, these requirements were extended to existing tank cars on a priority schedule determined by the nature of the commodity transported. The AAR's program for bottom-discontinuity protection consists of either a metal ''skid'' protecting the portion of the bottom outlet that protrudes beyond the shell or the machining of a ''breakage groove'' in the valve assembly.

AAR, the Chlorine Institute, CMA, and several other commenters supported the adoption of bottom-discontinuity protection for tank cars, provided such protection was consistent with the AAR requirements. API asked RSPA to clarify the requirements for bottom-discontinuity protection in this final rule. API and several other commenters stated that the proposed rule would require the modification of a number of tank cars, built before July 1, 1979, because most were modified according to Appendix Y and not paragraphs E9.00 or E10.00 of the AAR Specifications for Tank Cars. Appendix Y permits three levels of protection for allowing the types of discontinuity: bottom outlets that extend 1 inch or more; blind flanges and washouts that extend 2 and 5/8 inches or more; and sumps and internally closed washouts that extend 5 inches or more. Paragraphs E9.00 and E10.00 generally require the protection of each valve and fitting from mechanical damage by the tank, an another protective device, or the underframe.

Several other commenters stated that the proposed rule would also require the modification of all existing tank cars, including those that do not transport hazardous materials. The Sulphur Institute and another commenter opposed the need to add bottom-discontinuity protection to existing tank cars that transport sulfur, molten, claiming that such protection has little practical benefit.

In the public hearing held on January 6, 1994, in Washington, D.C., FRA stated that it was not the Department's intention to require the modification of previously modified tank cars, nor to require bottom-discontinuity protection for tank cars that transport materials not subject to the HMR.

In this final rule, RSPA requires bottom-outlet protection that conforms to paragraphs E9.00 and E10.00 of the AAR Specifications for Tank Cars, M–1002, for all new tank cars equipped with bottom unloading devices. Existing tank cars, without bottom-discontinuity protection, used for the transportation of hazardous materials must conform to the above paragraphs no later than 10 years after the effective date of this final rule. Existing tank cars that conform to the bottom-discontinuity protection requirements of Appendix Y of the AAR Specifications for Tank Cars, M–1002 may continue in use after the effective date of this final rule. This final rule does not require the modification of existing tank cars that transport materials not subject to the HMR.

J. Protective Coatings on Insulated Tank Cars

In the NPRM, RSPA proposed use of protective coatings on the exterior of a

[12] Raj, P.K., and Turner, C.K., *Hazardous Materials Transportation In Tank Cars/Analysis of Risks—Part 1*, NTIS DOT/FRA/ORD–92/34, (1993), Federal Railroad Administration, Washington D.C.

[13] Phillips, E.A., *Analysis of Tank Cars Damaged in Accidents 1965 through 1986*, RA–02–6–55, (1989), AAR-RPI Railway Tank Car Safety Test and Research Project, AAR Technical Center, Chicago, Illinois.

tank car and the interior of a tank car jacket to retard rust or corrosion. The proposal was in response to an AAR petition (P–1050) and FRA's findings of severe corrosion or pitting on the outer surface of the tank shell, or the inner surface of the tank jacket, of insulated tank cars. It is not known whether the corrosion stems from the physical properties of the insulation itself or whether the corrosion develops when insulation becomes impregnated or contaminated with water or a chemical from the atmosphere in which the tank car operates. Research within the industry has led to the development of protective coating materials.

Most commenters supported the proposal. One commenter stated that acid-resistant protective coatings should be applied. The commenter further stated that several manufacturing and repair shops are using non-acid resistant latex coatings under polyurethane-foam insulations. Another commenter suggested that the rule should be clarified to exclude tanks or jackets manufactured with self-protective materials such as stainless steel. Still another commenter asked RSPA to consider adopting a recommended practice for applying protective coatings on tank cars that is now under development by the National Association of Corrosion Engineers.

With regard to these comments, this final rule simply modifies §§ 179.100–4 and 179.200–4 by removing the exception for polyurethane-foam insulations. Each of the current sections, and the proposed rule, only require a protective coating on a carbon steel tank shell and tank jacket. Concerning the comment on acid-resistant coatings, RSPA agrees that applied coatings should prevent any corrosive attack to the tank metal. RSPA and FRA will explore, in cooperation with the AAR, CMA, and RPI, the need for and development of acid-resistant coating standards.

NTSB commented that the proposed rule does not sufficiently address the potential problem of existing tank cars. NTSB further noted that a requirement to apply a protective coating on an existing tank car, only when the jacket is removed to repair a tank, cannot ensure that corrosion problems will be detected before the tank corrodes through and releases its lading. NTSB stated that, at a minimum, tank cars currently in use without protective coatings should be inspected periodically for corrosion damage and tank cars found with corrosion damage should be required to have appropriate repairs.

We agree with NTSB, and in this final rule require, under Docket HM–201, new inspection intervals for materials that are corrosive to the tank and a thickness performance measurement to ensure that the tank shell is not corroded below the minimum shell thickness as prescribed by the AAR. RSPA and FRA believe that HM–201 is responsive to NTSB's concerns.

In this final rule, RSPA is requiring protective coatings for all new tank cars and for existing tank cars when a repair to the tank car requires the complete removal of the jacket, as suggested by commenters.

K. Halogenated Organic Compounds (HOC)

To address a 1991 NTSB safety recommendation,[14] RSPA proposed in the NPRM to require the use of a tank car with enhanced puncture resistance if the tank is used to transport one or more of the 100 HOC compounds listed in 40 CFR Part 268 Appendix III. The Appendix III list was developed by EPA pursuant to statute (42 U.S.C. 6924) in order to prohibit the land disposal of certain compounds having a carbon-halogen bond, and that have the potential to harm human health and the environment (these EPA compounds were identified as the ''California List'' under the statute [*See also* 40 CFR 268.32]).

Many commenters opposing regulation of the EPA compounds suggested that RSPA should continue to only regulate the compounds identified as hazardous substances in Appendix A to Part 172. Commenters further suggested that DOT should not consider the HOC concentration threshold for those compounds. Several commenters stated that the regulatory action proposed by RSPA is unnecessary, that RSPA should discontinue its efforts to regulate these EPA compounds, and that RSPA should not consider extending enhanced tank car standards to those carrying the more than 1,000 chemicals prohibited from land disposal.

API, CMA, and several other commenters suggested that the threshold quantities for the EPA compounds are too low for transportation purposes. The EPA threshold in 40 CFR 268.32 is 1,000 milligrams per liter (mg/l) for liquids and 1,000 milligrams per kilogram (mg/kg) for solids.

CMA furnished a benefit/cost analysis, prepared by Reebie Associates, that used 1992 TRAIN II data; thereby updating the previous work performed by AAR, CMA, and RPI addressed in the NPRM. The CMA report shows that a total of 3,893 tank cars transported an EPA compound. CMA's list and the number of tank cars used for such compounds follows:

Hazardous substances	CMA's 1992 population	AAR/CMA/RPI agreement (based on 1988 data)	Currently in pressure tank cars	Remaining
1,1-Dichloroethylene	1			1
1,2-Dichloroethane	236	236		
1,2-Dichloropropane	31			31
Carbon tetrachloride	312	312		
Chlordane	10			10
Chlorobenzene	105	105		
Chloroethane (ethyl chloride)	106		106	
Chloroform	227	227		
Chloropropene	7			7
CIS 1,3-dichloropropane	42			42
Dichlorodifluoromethane	224		224	
Dichlorofinroromethane	2			2
Dichlorofluoromethane	1			1
Hexachlorocyclopentadiene	8		8	

[14] *Transportation of Hazardous Materials by Rail,* National Transportation Safety Board Safety Study, Report NTSB/SS–91/01, National Transportation Safety Board, Washington, D.C. (Safety Recommendations R–91–11 and R–91–12).

Hazardous substances	CMA's 1992 population	AAR/CMA/RPI agreement (based on 1988 data)	Currently in pressure tank cars	Remaining
Methylene chloride	2	2		
o-Dichlorobenzene	15	15		
p-Dichlorobenzene	82	82		
Pentachlorophenol	10			10
Tetrachloroethane	13	13		
Trichlorobenzene	6			6
Trichloromonofluoromethane	4		4	
Vinyl chloride	2,449		2,449	
Totals	3,893	992	2,791	110

Commenters stated that RSPA should not include materials that are transported as a solid because, when released, the clean up of these materials is easily achieved. This statement assumes that accidents will not occur near lakes, rivers or streams, or that rainfall will not carry solid residue to such water sources. It is RSPA's and FRA's experience that these types of accidents can occur as evidenced by the metam sodium spill in the Sacramento River in California.

As discussed in the NPRM, these materials were also evaluated by the AAR in an effort to identify materials that have the potential to harm human health and the environment. The AAR analyzed the EPA compounds using a computer model based on EPA and standard chemical dispersion equations. The AAR model describes a method of evaluating the relative environmental hazard of chemicals shipped in tank cars.[15] In addition to the computer model, the AAR surveyed the railroad industry for the clean-up costs associated with a spill of an EPA compound. The AAR considered in their analysis: (1) Compounds that were permitted in non-pressure tank cars by the DOT in 1988; (2) at least one shipment of the compound reported to TRAIN II[16] in 1988; (3) the compounds with an EPA reportable quantity (RQ) of less than 1,000 pounds in 1988; (4) the compounds prohibited from land disposal by the EPA; and (5) the compounds suggested by the railroads' hazardous materials or environmental staff, or the AAR contractor on the project. The results of the 1988 survey identified 10 compounds, transported in class DOT 111A tank cars at that time, that pose a potential threat to human health and the environment. These compounds were:

Carbon tetrachloride
Chlorobenzene
Chloroform
Dichlorobenzene
Ethylene dibromide (1,2-Dibromomethane)
Ethylene dichloride (1,2-Dichloroethane)
Methyl chloroform (1,1,1-Trichloroethane)
Methylene chloride (Dichloromethane)
Perchloroethylene (Tetrachloroethene)
Trichloroethylene (Trichloroethene)

The results of AAR's analysis show that, within the last 10 years, the release of these compounds in railroad accidents has resulted in environmental clean-up costs exceeding $50 million. Even though these materials accounted for less than one percent of the total volume of hazardous materials, their releases accounted for 60 percent of all railroad environmental clean-up costs. Based on the results of the analysis, the AAR, CMA, and RPI have agreed that by January 1, 2000, these 10 compounds should be transported only in a DOT 105S200W or a DOT 112S200W tank car manufactured from AAR TC–128 normalized steel. One of the 10 compounds, ''ethylene dibromide,'' is a compound that is poisonous by inhalation (Zone B).

As shown by CMA, 3,893 tank cars were used to transport these ''EPA compounds''; of that total, ''chloroethane,'' ''dichlorodifluoromethane,'' ''hexachlorocyclopentadiene,'' ''trichloromonofluoromethane,'' and ''vinyl chloride'' represent 2,791 tank cars, or 72 percent of the total. Because the packaging authorizations for these compounds currently require the use of classes DOT 105J, 112J, 112T, 114J, 114T tank cars, these tank cars currently meet the proposed standard.

As noted above, AAR, CMA, and RPI agreed to use only DOT 105S200W and 112S200W (or better) tank cars: These compounds are transported in 992 dedicated tank cars. CMA identified an additional 110 tank cars that are used to transport an EPA compound, but lie outside of the industry agreement. Because these 110 additional tank cars represent a potential risk to human health and the environment, RSPA believes it is reasonable to require the same level of protection for the additional tank cars identified by CMA, based on the 1992 TRAIN II data, as those identified by the AAR, CMA, and RPI, based on the 1988 TRAIN II data. It simply cannot be argued that the shipment of an EPA compound identified after 1988 poses less risk in transportation than if the EPA compound would have been identified by the AAR, CMA, and RPI in 1988. Furthermore, because the AAR, CMA, and RPI agreement does not preclude the use of a non-protected tank car in transportation by any one member or nonmember of the agreement, such cars may still be used.

After considering each of the comments, RSPA agrees it should only regulate those EPA compounds listed in the HMR. After reviewing the 100 EPA compounds (*listed in 40 CFR 268 Appendix III*), RSPA found that all but 16 of the compounds are currently identified as a hazardous substance. The 16 compounds are:

Bis(2-chloroethoxy)ethane
Bis(2-chloroethyl)ether
Bromomethane
2-Chloro-1,3-butadiene
3-Chloropropene
1,2-Dibromomethane
Dibromomethane
Hexachlorodibenzo-p-dioxins
Hexachlorodibenzofuran
Iodomethane
Methylene chloride
Pentachlorodibenzo-p-dioxins

[15] Löwenbach, William, A., *Consequence Models of Hazardous Materials Releases on Railroads*, Association of American Railroads (1989), Washington, D.C.

[16] The Association of American Railroads (AAR) data network, Tele-Rail Automated Information Network (TRAIN II), collects information on approximately 90 percent of the rail traffic originating and terminating in the United States. Users of the network can trace individual car movements or gather information on a particular cargo moving by rail. The AAR uses the data to develop statistical trends in both car movement and commodity flow.

Pentachlorodibenzofuran
Tetrachlorodibenzofuran
Tribromomethane
1,2,3-Trichloropropane

More than 30 of the compounds are listed by proper shipping name in the § 172.101 Table. As a group, the EPA compounds include: volatiles (35 compounds); semivolatiles (33 compounds); organochlorine pesticides (20 compounds); phenoxyacetic acid herbicides (3 compounds); PCBs (all PCBs); and dioxins and furans (7 compounds).

Based on this review, this final rule requires that, when the EPA compounds listed in the HMR are transported in large capacity tank cars, the tank cars must conform to a limited and designated specification with greater protection in accidents. Also, to ensure the proper identification and packaging of these materials, RSPA is listing (with the exception of Class 2 materials [compressed gases], PIH materials, and the 16 materials not now identified as hazardous substances) in § 173.31(f), all EPA compounds listed in 40 CFR Part 268, Appendix III. As explained elsewhere in the preamble, RSPA is no longer authorizing Class 2 materials or PIH materials in low-pressure tank cars, e.g., class DOT 111A.

Because RSPA is listing the EPA halogenated-organic compounds as hazardous substances, in this final rule, the threshold quantity is the reportable quantity of the hazardous substance. As an example, if the material in the tank car (including its mixtures and solutions) (1) is listed in Appendix A to § 172.101, (2) *is in a quantity that equals or exceeds the reportable quantity (RQ) of the material listed in Appendix A,* and (3) is listed in § 173.31(f), it must be transported in a tank car of limited and designated specification to offer greater protection in the event of an accident.

In the NPRM, RSPA proposed that any of the halogenated organic compounds identified by EPA must be transported in a tank car meeting DOT 105S200W, DOT 112S200W with an 11-gauge metal jacket, or DOT 112S340W without a metal jacket. RSPA stated that the metal jacket and head protection on these tank cars blunt the impacting forces from couplers, wheels, track, and other objects along the carrier's right-of-way. According to FRA research, this blunting effect is directly proportional to the thickness of the tank jacket or head shield and is effective in preventing tank punctures.[17] The NPRM would have allowed the use of any class DOT 105 or DOT 112 tank car regardless of its date of construction. Older tank cars would be allowed, including those constructed with an older steel specification, such as ASTM A212 Grade B. Because the older steels have less puncture resistance than the steels currently in use, the NPRM proposed the use of an external metal jacket to help blunt any impacting force, as a result of an accident, to the tank shell.

At the January 6, 1994, public hearing, a commenter asked RSPA to consider the use of a non-jacketed DOT 112S200W tank car, provided that the tank car was constructed from an AAR normalized high-strength steel specification, AAR TC–128. This steel specification has high tensile and yield strength. In addition to the higher tensile and yield strengths, commenters stated that normalization of the steel adds extra puncture resistance. A commenter further stated that a tank car constructed from the AAR's TC–128 steel specification would provide a level of puncture resistance comparable to that of tank cars proposed for use in the NPRM, and would also render a indisputable benefit/cost ratio. Upon further review, RSPA agrees that a tank car constructed from AAR TC–128, normalized, would provide a level of puncture resistance equivalent to a tank car constructed from any steel specification proposed in the NPRM. In this final rule, RSPA has provided for the use of a DOT 112S200W (non-jacketed tank car) constructed from AAR TC–128 normalized steel as an authorized packaging, as suggested by the commenter.

L. Implementation of New Requirements

In the NPRM, RSPA proposed two implementation dates. Under ''Option A,'' most of the compliance dates were set at 10 years from the effective date of this final rule. This is a period that also coincides with the duration frequently specified in typical full-term tank car leases, whether a true lease or a financing vehicle; and with the ''thorough inspection'' interval for tank cars in Interchange Rule 88.B.2.[18] Under ''Option B,'' RSPA proposed that certain tank car types and car/commodity combinations be considered for shorter retrofit periods, with 5 years given to bring existing cars into compliance. For instance, aluminum and nickel tank cars are more vulnerable to puncture, and tanks used for transporting PIH materials present special hazards.

Option A was supported by commenters. Although urging RSPA to adopt the 10-year time limit, RPI stated that, because of start-up complexities, it will not be reasonable to accomplish this on a 10-percent per year basis. Instead, RPI suggested that its members were willing to modify 50 percent of the fleet in the first 5 years and 50 percent in the second 5 years. This accomplishes the desired goal while minimizing scheduling problems and maximizing efficiency.

Option B was supported by NTSB who stated that RSPA should require tank-head protection, within 5 years, for all class DOT 105 tank cars having capacities of less than 70 kl (18,500 gallons) when used to transport a Division 2.1 material (flammable gas).

Most commenters supported the 10-year modification program for existing tank cars. RSPA believes, however, that a 5-year modification program is more appropriate for class DOT 105 tank cars that have a capacity less than 70 kl (18,500 gallons) when used to transport a Division 2.1 material. Mandating an accelerated modification program for these particular tank cars will ensure that those cars presenting the greatest risk are modified first. Therefore, this final rule requires that each tank car built on or after the effective date of this final rule conform to this final rule. For tank cars built prior to the effective date, the phase-in period is 10 years: at least 50 percent of the fleet in the first 5 years and the balance in the second 5 years. The phase-in-period for tank cars transporting a Division 2.1 material is 5 years, with at least 50 percent within 2½ years and the balance in the second 2½ years. For existing tank cars constructed with an internal self-energized manway located below the liquid level of the lading, the compliance date is the effective date of this final rule.

III. Docket HM–201—Detection and Repair of Cracks, Pits, Corrosion, Lining Flaws and Other Defects of Tank Car Tanks

A. Background

On September 16, 1993, RSPA published in the Federal Register a NPRM under Docket HM–201; Notice No. 93–15 [58 FR 48485]. The NPRM contained proposals to: (1) require the development and implementation of a quality assurance program (QAP) at each facility that builds, repairs, or ensures the structural integrity of tank

[17] Coltman, M., & Hazel, M., Jr., *Chlorine Tank Car Puncture Resistance Evaluation,* Report DOT/FRA/ORD–92–11, Federal Railroad Administration (1992), Washington, D.C.

[18] *Field Manual of the Interchange Rules,* adopted by the Association of American Railroads, Mechanical Division, Washington, D.C., 1992. At intervals not to exceed 10 years, major components of the car must be inspected, including body bolsters and center plates, center sills, crossbearers, crossties, draft systems and components, end sills, side sills, and trucks.

cars; (2) require the use of non-destructive testing (NDT) techniques in lieu of the current periodic hydrostatic pressure tests for fusion welded tank cars to more adequately detect cracks in principal structure elements (PSE), the failure of which could cause catastrophic failure of the tank; (3) require thickness measurements of tank cars; (4) allow for the continued use of tank cars with limited reduced shell thicknesses; (5) increase the inspection and test intervals for tank cars; and (6) clarify the tank car pretrip inspection requirements. Readers are referred to the NPRM preamble for a complete background, including a more extensive discussion of issues and citations to research data summarized in the final rule.

RSPA received 31 comments in response to the NPRM from members of the various industries that own, lease, transport, or use tank cars. RSPA and FRA have given full consideration to all comments in the development of this final rule. Following is a summary of the written comments, a summary of the final rule, and the actions taken by RSPA and FRA in this final rule:

B. Damage-Tolerance Fatigue Evaluations

In 1992, the NTSB issued a report on the inspection and testing of tank cars. The report disclosed that many tank car defects are not routinely detected. These defects may suddenly grow to a critical size resulting in failure of the tank car. The NTSB recommended that FRA and RSPA develop requirements for the periodic inspection and tests of tank cars to help ensure the detection of cracks before the cracks propagate to a critical length. Such requirements would establish inspection and test intervals based on the defect size detectable by the inspection and test method used and on the stress level and crack propagation characteristics of the PSE based on a ''damage-tolerance'' approach. The Federal Aviation Administration (FAA) defines a structure as damage tolerant if the structure has been evaluated to ensure that, should serious fatigue, corrosion, or accidental damage occur within the operational life of the structure, the remaining structure can withstand reasonable loads without failure or excessive structural deformation until the damage is detected (FAA Advisory Circular AC No. 25.571–1A). Damage-tolerance assumes that flaws exist in the structure and that the design of the structure is such that these flaws will not grow to a critical size and cause catastrophic failure to the structure within a specified damage detection period. The damage detection period depends on the characteristics of each PSE, each element's susceptibility to severe corrosive environments, the inspectability of each element, the inspection method, and procedures used and maintenance practices.

In the NPRM, RSPA proposed to allow tank car owners to use an alternative inspection and test procedure or interval based on the completion of a damage-tolerance fatigue evaluation. The evaluation procedures would be reviewed by the AAR and approved by the Associate Administrator for Safety, FRA. As stated in the NPRM, FRA believes that some tank car owners may be able to reduce inspection and test costs by using damage-tolerance fatigue evaluation procedures that incorporate: (1) In-service inspection and test using techniques such as ultrasonic or acoustic emission; (2) sampling of individual designs with a 100 percent inspection and test of the design if a crack is found; (3) inspection and test intervals unique to each tank car component; and, (4) inspection and test intervals based on the degree of risk a material poses (i.e., high risk materials have shorter inspection and test intervals than those with low risks).

Most commenters stated that the damage-tolerance approach is a significant step toward advancing the detectability of defects and well suited to a tank car and its associated structure. They suggested that RSPA and FRA expand the damage-tolerance approach, for fatigue, to include other types of damage mechanisms, such as corrosion, corrosion fatigue, original fabrication defects, stress corrosion cracking, impact damage, and damage caused by an accident.

RSPA and FRA agree that the use of a damage-tolerance approach to periodic inspection and test of tank cars would substantially increase the likelihood of the detection of cracks and crack-like defects before such defects propagate to a critical size. RSPA and FRA also believe that the inspection interval for each PSE should be based on the inspection method used, the stress level in each PSE, and the crack propagation characteristics of each PSE.

The agencies realize, however, that in order to fully implement a damage-tolerance program, it will take years for each owner or manufacturer of a tank car to analyze each element on the tank car, and to support the results of such analysis with test evidence and service experience. FRA is currently working with the AAR Tank Car Committee, the RPI, tank car owners, lessors, and manufacturers to develop acceptable non-destructive testing techniques, and to develop an inspection and test program based on damage-tolerance principles. These programs include finite element analysis of the stub sill and its attachment to the tank shell to identify the PSE on the tank car that should be examined, over-the-road tests to define the typical environmental loading spectrum expected in service, and a damage-tolerance evaluation of the structure.

In this final rule, RSPA is revising the regulatory text for the damage-tolerance fatigue evaluation proposed in § 180.509(k). This revised requirement provides that an acceptable damage-tolerance and fatigue evaluation include other types of damage mechanisms and is supported by test evidence and, if available, by service experience.

C. Inspection and Test Intervals

FRA found that cracks may reach a critical size in a PSE within about 400,000 miles of railroad service [*see* ''Owners of Railroad Tank Cars; Emergency Order Requiring Inspection and Repair of Stub Sill Tank Cars,'' (Emergency Order Number 17) 57 FR 41799, September 11, 1992]. To ensure against premature failure, common procedures for NDT allow for two opportunities to inspect an item before predicted failure. Because tank cars travel an average of about 18,000 miles per year and most cracks become critical at about 400,000 miles of railroad service, in the NPRM, RSPA proposed an inspection and test interval, based on a simplified damage-tolerance evaluation, of 10 years to allow for two opportunities to inspect an item before predicted failure.

For the sake of efficiency, and to increase safety margins for most cars, RSPA proposed to implement the 10-year inspection and test interval starting at what would otherwise be the next scheduled tank hydrostatic pressure test. For tank cars within a 20-year test cycle, RSPA proposed that the next inspection and test date be the publication date of this rule plus one half of the remaining years to what would otherwise be the next scheduled tank hydrostatic test. After that the tank would require an inspection and test on a 10-year interval.

For materials corrosive to the tank and shipped in non-lined or non-coated tank cars, RSPA proposed an inspection and test interval based on the lower of (1) the corrosion rate of the material on the tank shell or (2) the fatigue life of the tank structure as discussed above. RSPA and FRA developed a test interval to ensure that the calculated thickness of the tank at the next inspection and

test will not fall below the proposed allowable minimum wall thickness. The inspection and test interval in this case is calculated by subtracting the actual thickness (measured at the time of construction or any subsequent inspection and test) from the allowable minimum thickness and then dividing that difference by the corrosion rate of the hazardous material on the tank. Consequently, as the shell thickness corrodes throughout the service-life of the tank, the tank must receive an inspection and test more frequently.

Commenters supported the proposed inspection and test program for most tank cars. They suggested, however, that RSPA consider the availability of tank car facility space and the practicality of implementing the new inspection and test and quality assurance programs without immobilizing a large number of tank cars. In particular, commenters suggested that RSPA not reduce the inspection and test intervals for tank cars constructed during the 1975–1979 period that are now subject to a 20-year hydrostatic pressure test interval. As proposed, these particular tank cars become due for inspection and test during the years 1995 through 1997. A major oil company stated that these particular tank cars represent at least 20 percent of its tank car fleet.

Several commenters stated tank cars used to transport chlorine, unlike other tank cars, are currently tested every two years. As such, all 8,000 tank cars in chlorine service would have to be brought in conformance with the new inspection and test requirements within two years. One company stated that it maintains 3,000 tank cars in chlorine service and it would have to inspect 5.7 tank cars per day, which may not be feasible because companies must first determine efficient inspection techniques and provide training to inspection personnel. Commenters further argue that because tank cars that transport chlorine have an insulation system and a metal jacket, the inspectability of certain PSE on these tank cars is difficult; accordingly, RSPA should not mandate the new requirements in the short-term until the industry and the government specify the acceptable NDT techniques for inspecting tank cars that have metal jackets.

The RPI suggested that RSPA phase in the new procedures slowly by beginning with tank cars without a metal jacket and then tank cars having a metal jacket when appropriate inspection techniques are developed. Although RPI did not explain the basis for its comment, RSPA and FRA assume that the reason behind RPI's comment is the difficulty of inspecting PSE on a tank car having an insulation system covered by a metal jacket or a thermal protection system; consequently, tank car facilities will need time to develop the inspection methods and to train inspection personnel on the use of those methods. Only after identifying the appropriate inspection method and by training inspection personnel, will there be a high probability of defect detection.

Several commenters requested that RSPA not require, in proposed § 180.509(b)(3), an inspection and test [requalification] of the tank each time it is transferred into or out of a service that is corrosive to the tank, which one commenter stated could occur 4 times per month. Another commenter stated that the program is redundant with proposed § 180.509(c)(3)(ii) and, therefore, the section should be deleted. The Chemical Manufacturers Association (CMA) suggested that RSPA amend the proposal to allow for routine transfers, so long as the tank car is within the established intervals for the periodic inspection requirements. A commenter suggested that localized modifications to a tank, such as modifying nozzles or bottom outlets, should not subject the tank to a complete requalification.

Based on the comments received, RSPA is not adopting proposed paragraphs (b) (3) and (4). Paragraphs (b) (5) and (6) are renumbered accordingly.

RSPA and FRA also agree that local repairs or modifications should not subject the tank to the full inspection and test program, because the repair or modification must be done according to Appendix R of AAR's Specifications for Tank Cars. Appendix R specifies the procedures for repairs, alterations, and conversions of tank cars and the appropriate non-destructive testing method to ensure that the repairs, alterations, or conversions were performed correctly.

RSPA and FRA agree that the new inspection and test methods, combined with other FRA mandated inspection programs, may cause a tremendous backlog of tank cars awaiting inspection. Therefore, to maintain an acceptable level of safety, but also to allow for an orderly and acceptable phased-in NDT inspection and test program, RSPA will delay the compliance date of this final rule for 24 months for tank cars without metal jackets and 48 months for tank cars having a metal jacket or a thermal protection system. Before the compliance date, tank cars may be given an inspection and hydrostatic test in accordance with the current requirements or the requirements contained in this final rule. After the compliance date, each tank car must be given an inspection and test according to the requirements contained in this final rule on or before the next scheduled tank hydrostatic pressure test date.

D. High-Mileage Tank Cars

FRA realizes that some tank cars can travel in excess of 18,000 miles each year and, by doing so, the tank cars may reach 200,000 miles of railroad service before their first periodic inspection and 400,000 miles before their second.

The NTSB expressed its concerns that the proposed regulations recommend, but do not require, more frequent inspections and tests for tank cars with mileage rates that exceed the average. Further, because there is no requirement to maintain cumulative mileage on individual tank cars, the NTSB expressed concern that high-mileage tank cars would not be identified for the more frequent inspections and tests, thereby increasing the possibility of a non-detected fatigue crack propagating and causing a structural failure within the 10-year inspection and test cycle.

RSPA and FRA agree with the NTSB that high-mileage tank cars should receive an inspection and test prior to reaching 200,000 miles of railroad service. However, no requirement for the maintenance or retention of car mileage records was proposed. Because car owners keep records of car mileage, the owners can ensure that tank cars having high-mileage are inspected more frequently than the inspection and test intervals adopted in this final rule. Current § 173.24(b) provides that each package used for the shipment of hazardous materials shall be so designed, constructed, and maintained . . . so that under conditions normally incident to transportation—the effectiveness of the package will not be substantially reduced. Thus, an owner has an obligation to ensure the continuing effectiveness of a tank car. This duty is not unlike that of an owner of an automobile who replaces the tires on his or her car when worn and not based on the warranty period. FRA will, during its inspection activities, assess the need for a rulemaking (1) to require owners to retain car mileage records and (2) to inspect their tank cars before the cars accumulate more than 200,000 miles of railroad service.

E. NDT Techniques

In the NPRM, RSPA proposed to require that the bottom shell of fusion welded tank cars be inspected periodically by appropriate NDT techniques, such as optically aided visual inspections, ultrasonic,

radiographic, magnetic particle, and dye penetrant testing methods, in lieu of hydrostatic pressure tests.

All commenters supported the use of NDT techniques to assess the integrity of a tank car in lieu of a hydrostatic pressure test. Several commenters stated that the use of qualification procedures will require formal NDT techniques in defined areas where no previous requirements existed and will improve the overall safety of tank cars.

Several commenters suggested that RSPA should authorize the use of acoustic emission testing to qualify tank cars for further use. One commenter stated that acoustic emission testing is widely used in the chemical process industry to assure the integrity of pressure vessels, tanks, and piping. The commenter further stated that the overall reliability of a series of local tests (ultrasonic, dye penetrant, radiography, etc.) is incorrectly compared with the reliability of a single global test (hydrostatic, acoustic emission) and that substitution of multiple local tests for a single global test may endanger, rather than enhance the safe transportation of hazardous materials.

RSPA and FRA do not agree with the commenters's conclusion about the potential danger of multiple local tests as compared with a single global test. RSPA and FRA believe that multiple local tests, focusing on known areas of tank car stress, have a safety advantage over single global tests, at least with the current state of development of acoustic emission testing in the tank car industry. The NDT methods mandated by this rule are a safety improvement. As noted immediately below, the agencies have underscored their belief in the potential benefits acoustic emission testing offers by granting an exemption that will permit its development and refinement in a railroad industry context.

Outside the scope of this rulemaking, but related to it by means of subject matter, Monsanto Chemical Company applied for a DOT exemption to use acoustic emission technology, in lieu of the current hydrostatic retest, for the tank cars it owns. The procedures developed by Monsanto to support its exemption were recently evaluated under a research contract administered by the government of Canada. (McBride, S. L., *Acoustic Emission Tank Car Test Method Review & Evaluation*, Transport Canada Report No. TP 12140E (1994) Montreal, Quebec). The results of that research show that Monsanto's acoustic emission testing procedures appear to be sound. The report suggests, however, minor refinements in the acoustic emission procedures. Taking this into account, RSPA issued Monsanto an exemption on September 9, 1994 (DOT–E 10589). The following companies were granted ''party to'' status on the Monsanto exemption: Union Tank Car Company, Testing Associates, and Physical Acoustics Corporation.

This final rule does not include acoustic emission testing as an authorized NDT technique. RSPA and FRA are committed, however, to explore new technologies for inspecting and testing tank cars and will continue to evaluate the possibly of authorizing the acoustic emission testing procedure in the future. In support of this commitment, FRA issued a research contract to further explore and refine the use of acoustic emission testing procedure and other NDT techniques in determining the integrity of insulation and lining covered welds of tank cars.

F. Leakage Test

In the NPRM, RSPA proposed a leakage test that would include all product piping with all valves and accessories in place and operative, except that during the test the tank car facility would remove or render inoperative any venting devices set to discharge at less than the test pressure. As proposed, the test pressure would be maintained for at least 5 minutes at a pressure of not less than 50 percent of the tank test pressure.

Most commenters opposed the proposed change to use 50 percent of the tank test pressure as the standard, because these pressures, some as high as 300 psig, would constitute an unsafe maintenance practice. RSPA proposed the leak test to ensure that when valves, fittings, and manway cover plates are replaced on a tank car after an inspection and test, that valves and fittings are securely applied and in a ''leak-free'' condition under normal operating pressures. This will help ensure against product leakage from a valve, fitting, or manway cover plate should the vapor pressure of the commodity rise after the shipper loads the tank car, normally on its first trip after an inspection and test at a tank car facility.

Berwind Railway Service Company suggested conducting the leak test at 30 psig for tank cars having a test pressure less than or equal to 200 psig and 50 psig for tank cars having a tank test pressure greater than 200 psig. AAR and RPI supported similar pressures. In the commenters experience, pressures of this magnitude are effective in ensuring that tank cars are released from tank car facilities in a leak free condition.

The suggested leak test pressures are similar to the leak test pressures currently used to qualify highway cargo tanks. For example, the leak test for a cargo tank may not be less than 80 percent of the tank design pressure (or its maximum allowable working pressure [MAWP]); or, the maximum normal operating pressure when the cargo tank has a MAWP equal to or greater than 6.9 Bar (100 psig); or, 4.1 Bar (60 psig) when the cargo tank is used to transport liquefied petroleum gas. After considering the comments, RSPA and FRA agree that a lower leak test pressure would provide an adequate leak test with less risk to persons performing the test. In this final rule, RSPA is requiring a leak test at 30 psig for tank cars having a test pressure less than or equal to 200 psig and a leak test at 50 psig for tank cars having a tank test pressure greater than 200 psig.

G. Bottom Shell

FRA has found that principal structural elements (PSE) located within four feet of the bottom longitudinal centerline are susceptible to fatigue cracking due to repeated loading conditions. Stress concentrations in these areas may cause the formation of small cracks that may not be detected under the current inspection and test procedures. Because some defects may lie outside the area currently defined as the bottom shell, such as those in the attachment welds of bottom discontinuities, RSPA proposed, based on FRA's findings, to revise the current definition of the bottom shell by enlarging the area from 60.96 cm (two feet) to 121.92 cm (four feet) on each side of the bottom longitudinal center line of the tank.

The Chlorine Institute, CMA, and others agreed that experience has shown that the bottom shell is prone to fatigue cracking. However, all known fatigue-related defects have originated within two feet of the bottom longitudinal centerline of the tank, which is the area most highly stressed in train operation.

RPI's comments referenced a report, ''Final Phase 14 Report on the Stub Sill Buckling Study,'' that shows, when stub sill tank cars are subjected to static and dynamic (impact) loads, a complex biaxial stress field results in the shell area between the stub sills. The report shows that measured strains are due to a combination of axial compression and bending components and at high loads, high magnitude strains occur over certain localized areas. The results of the RPI report show that the stresses on the bottom longitudinal centerline of the tank are about 1.8 times the magnitude of the stresses occurring from two to

four feet from the bottom longitudinal centerline.

RPI further stated that fatigue damage increases exponentially with the ratio of stress ranges and that crack initiation and propagation within the area of two feet from the bottom longitudinal centerline is much faster than the area two to four feet from the bottom longitudinal centerline. Based on the Phase 14 report, RPI suggests that the bottom shell definition should encompass an area that lies below the horizontal plane of two longitudinal parallel lines extending two feet on each side from the bottom longitudinal centerline, through the tank heads. K & K Consultants, Incorporated, who also commented on the Phase 14 report provided a summary of the data and explained that the principal stresses in the tank are approximately parallel to the bottom longitudinal centerline, and that the stresses tend to decrease circumferentially away from the bottom longitudinal centerline.

After consideration of the comments, RSPA and FRA agree that four feet on each side of the bottom longitudinal centerline is overly restrictive. Therefore, the current definition of bottom shell in § 171.8 is retained.

H. Structural Integrity Inspections

In the NPRM, RSPA proposed a structural integrity inspection and test on all circumferential and longitudinal welds and welded attachments on the bottom of the tank, within 121.92 cm (4 feet) on each side of the bottom tank centerline, using one or more non-destructive test methods. As explained above under the heading ''bottom shell,'' several commenters stated that this area is more appropriately defined as within 60.96 cm (2 feet) on each side of the bottom tank centerline.

FRA has learned that some high-stressed areas lie outside of the 60.96 cm (2 feet) bottom longitudinal centerline area. Brake pipe supports, body stiffeners, tank anchors, and other attachments and structures having large welds are examples of high-stressed areas that may lie outside of this area. As a general matter, the HMR require reinforcing pads for these high-stressed areas between external brackets and tank shells if an attachment weld exceeds 6 linear inches of 0.64 cm (0.25 inch) fillet weld per bracket or bracket leg (§§ 179.100–16 and 179.200–19). In its Tank Car Manual, AAR requires the use of a reinforcing pad if a bracket or attachment welded directly to the tank could cause damage to the tank, either through fatigue, over-stressing, denting, or puncturing in the event of an accident. If a reinforcing pad is used under a bracket or attachment, AAR specifies that the pad shall not be less than 0.64 cm (0.25 inch) thick. For further information, see sections E15.01 and E15.02 of AAR Tank Car Manual.

Further, in an investigation of tank shell cracking, FRA found that local areas of the tank shell near tank discontinuities are subjected to the combination of live-load stress in addition to the residual stress induced by reinforcement pad welds, and that this combination makes the sensitivity of the welded area near the discontinuity and reinforcing pad weld susceptible to fatigue crack propagation. After performing residual stress measurements of retro-fitted tank car weldments, AAR confirmed FRA's findings that significant tensile stresses (on the order of 30,000 psi) occur in the vicinity of the fillet welds having a throat size (weld depth) greater than 0.64 cm (0.25 inch). In general, fillet welds larger than 0.635 cm (0.25 inch) are considered structural welds, and AAR requires post weld heat treatment when these welds, such as interior brackets, supports, and reinforcement bar pads, have a throat thickness exceeding 0.635 cm (0.25 inch). For further information see R17.01 of AAR Tank Car Manual.

In its comments to the NPRM, the Sulphur Institute stated that stress type defects may originate in some attachment fillet welds, such as those greater than 0.64 cm (0.25 inch) that are currently located outside of the current bottom shell definition. Examples given were body stiffener and brake pipe support fillet welds.

RPI gave similar comments by suggesting that the inspection of attachment welds on the bottom of the tank should be limited to structure welds, such as transverse fillet welds larger than 0.64 cm (0.25 inch), the terminations of longitudinal fillet welds larger than 0.64 cm (0.25 inch), and tank shell butt welds within 60.96 cm (24 inches) of the bottom longitudinal center line and between the body bolsters. When asked to clarify its comments, RPI told FRA that a 0.64 cm (0.25 inch) fillet weld refers to the leg-length (see also the definitions of ''Size [fillet]'' and ''Full Fillet Weld'' in Section W2.00 of AAR Tank Car Manual). Furthermore, RPI stated that limiting the inspection and test requirements to fillet welds greater than 0.64 cm (0.25 inch), would exclude non-structural fillet welds, such as those used to attach exterior heater coils.

RSPA and FRA agree that the stress concentration effects around structural attachments will cause the formation of fatigue cracks and, if these cracks are not detected and repaired during routine maintenance of the tank car, such cracks will grow to failure. In this final rule, RSPA requires a structural integrity inspection and test in those areas known to develop cracks. Such an inspection and test includes transverse fillet welds greater than 0.64 cm (0.25 inch) within 121.92 cm (48 inches) of the bottom longitudinal center line, the termination of longitudinal fillet welds greater than 0.64 cm (0.25 inch) within 121.92 cm (4 feet) of the bottom longitudinal center line, and all tank shell butt welds within 60.96 cm (2 feet) of the bottom longitudinal center line. By limiting the required inspection to known areas of crack initiation, RSPA and FRA can expect an increase in the probability of defect detection, as well as an improvement in the reliability of the inspection results and a reduction in inspection costs.

The Sulphur Institute commented that if the integrity of the coatings or linings applied to protect tank car tank metal remains acceptable, there should be no need to remove the coating or lining to inspect the tank for structural integrity. The purpose of the structural integrity inspection is to ensure the detection of fatigue cracks before the cracks progress to a dangerous size, thereby reducing the residual strength of the tank. In order to inspect each PSE to confirm structure integrity, tank car facilities may need to remove portions of the lining or coating. Owners may choose, however, to use a non-destructive testing method that interfaces between different materials, with effective penetration, so that there will be no need to remove the coating or lining. Such non-destructive testing methods include radiography and ultrasonics.

I. Minimum Shell Thickness

Recognizing that a tank car shell tends to decrease in thickness over time, RSPA proposed in the NPRM a definite service-life shell thickness requirement for all areas of the tank shell and heads. The proposed minimum in-service shell thickness requirement was based, in part, on an AAR–RPI report, ''Allowable Thickness Reduction from Minimum Prescribed Thickness of Carbon Steel Tank Car Tanks,'' that discussed the investigation of shell thickness below the Part 179 construction standard in certain areas. The RPI–AAR report considered the effects of an overall or localized reduction in the tank wall thickness from a principal mode of failure—failure of a tank car due to the effects of fire, fatigue crack growth leading to fracture, and failure of the tank due to puncture of the heads. The results of the RPI–AAR report show that

the effects of a slightly reduced shell thickness on tank cars used to transport ''ethylene oxide,'' ''butadienes, inhibited,'' ''vinyl chloride,'' ''propane,'' and ''propylene'' will not have a significant effect on safety. The NPRM also proposed to allow localized areas of thickness reduction to have a total cumulative surface perimeter not exceeding 182.88 cm (72 inches), consistent with the current provisions in § 173.31(a)(11)(iv).

In its comments to the NPRM, RPI suggested that the 72-inch cumulative perimeter should apply to the bottom shell only. RPI further stated that RSPA should allow the rest of the tank shell, excluding the tank heads, to have an unlimited number of two foot perimeter reductions, provided such areas of reduction are separated by at least 16 inches (twice the diameter of a circle having a 24 inch circumference).

AAR also suggested that the permitted local thickness reductions for non-pressure tank cars should depend on cause. AAR thickness reduction tables, endorsed by many commenters under an earlier rulemaking, differentiated between corrosion and mechanical damage for non-pressure tank cars (see ''Shippers Use of Tank Cars with Localized Reductions in Shell Thickness,'' 54 FR 8336, 8337, February 28, 1989). AAR further commented that there is no need to make a distinction between the cause of damage for pressure tank cars because of the stricter limits imposed on such cars. AAR proposed that, for non-pressure tank cars, RSPA should permit a 0.48 cm (0.188 inch) local thickness reduction in the top shell and 0.32 cm (0.125 inch) local thickness reduction in the bottom shell for corrosive damage. For mechanical damage, RSPA should permit 0.32 cm (0.125 inch) local thickness reduction in the top shell and a 0.16 cm (0.063 inch) local thickness reduction in the bottom shell. AAR asserts that the stresses from a given thickness reduction attributed to mechanical damage can be greater than the same reduction attributed to corrosion damage, because mechanical damage causes a more abrupt change in the thickness.

After full consideration of the merits of these comments, RSPA and FRA agree that there should be no overall limit on the amount of surface area with localized reduced shell thicknesses, provided such limitations apply only to the top shell of the tank and such areas are separated by at least 16 inches. Also, RSPA is modifying the thickness reduction table, as recommended by AAR, and endorsed by several commenters, to differentiate between corrosion and mechanical damage.

AAR commented that RSPA proposed, in § 180.509(g), maximum thickness reductions from the original thickness of the tank and not the required thickness of the tank: a thickness specified in a chart summarizing specification requirements (e.g., § 179.101–1(a)), or the result of a calculation (e.g., § 179.100–6(a)). RSPA disagrees. The proposed section in the NPRM states that—

> [a] tank car found with a thickness below the *required* minimum thickness after forming for its specification, as stated in Part 179 of this subchapter, may . . . [emphasis added]

AAR further stated that RSPA should include an explicit provision enabling the owner of a tank car to ''downgrade'' [downrate] the car to the point where the loss of thickness exceeds the maximum allowed by the regulation. As RSPA stated in the NPRM under the preamble heading, ''Safety System Inspections,''

> [n]othing in the regulations would preclude a tank car owner from marking a tank as meeting a less stringent specification, such as re-marking a specification DOT 112J tank car to a DOT 112S or 112J400W tank specification to a DOT 112J340W tank specification when the tank car no longer conforms to the marked specification.

Downrating is permissible and a tank car owner may mark a tank as meeting a less stringent specification, such as marking a specification 112A340W tank car to a DOT 111A100W1 tank car when the tank, because of its shell thickness, no longer conforms to the marked specification. Owners are reminded that changing the marked specification also changes the certificate of construction and, when so doing, they must follow the procedures in Appendix R of AAR's Specifications for Tank Cars (*see* § 173.31(a)(4) and (f), and § 179.6).

In its comments, RPI proposed a standardized minimum inspection pattern for conducting thickness tests. RPI suggests that thickness readings should be taken at the bottom, one side (90°), and the top within 6-inches of each circumferential weld for each plate. RPI further states that corresponding readings should also be taken along the head circumferential weld seam and another reading at the center of the tank head. This would result in 32 thickness readings for a four-ring tank. In addition to the tank shell, two readings would be taken on the manway nozzle, the top unloading nozzle, and the sump. According to RPI, if an inspector finds corrosion or other damage that reduces the shell thickness, additional readings must be taken to more specifically identify the damaged area.

RSPA is not incorporating a written procedure for conducting thickness measurements throughout the tank shell to increase the probability of defect or corrosion detection. RSPA and FRA believe that such procedures belong in the tank car owner's written maintenance plans or AAR Specifications for Tank Cars. Throughout this rulemaking, RSPA and FRA have developed a course of action that outlines where and what to inspect, but not how to inspect. This approach allows each tank car owner the flexibility to develop inspection and test procedures appropriate for each unique tank car, or a series of unique tank cars based on operating and maintenance experience.

J. Lining and Coating Inspections and Tests

In the NPRM, RSPA proposed an inspection and test requirement for tank cars with linings and coatings. This would ensure that the lining or coating is in proper condition for the transportation of hazardous materials. As proposed, owners of lined or coated tank cars must determine the periodic inspection interval and inspection technique for the lining and coating, based on the owner's knowledge of the material used. The owner would also maintain all supporting documentation used to make such a determination, such as the lining or coating manufacturer's recommended inspection interval and inspection technique, at the owner's principle place of business. Further, the supporting documentation used to make such inspection interval determinations and the inspection technique would have to be made available to FRA upon request.

All commenters supported RSPA's proposed inspection and test requirement for tank cars with linings and coatings. RPI suggested that RSPA should specify ''owners of linings and coatings,'' as opposed to the ''tank car owner,'' to determine the inspection and test technique and interval—since most shippers own the tank car lining or coating as opposed to the tank car owner. Mobil Oil Corporation and others suggested that the regulation should only apply to linings and coatings installed to protect the tank shell, as opposed to those applied for lading integrity or quality.

RSPA and FRA agree with RPI and are revising the proposed requirements to incorporate RPI's suggestions. In this final rule, owners of linings and coatings in tank cars must determine the

periodic inspection interval and inspection technique for the lining and coating, based on the owner's knowledge of the material used. This will ensure that the lining or coating is in proper condition for the transportation of hazardous materials. The owner must also maintain all supporting documentation used to make such a determination, such as the lining or coating manufacturer's recommended inspection interval and inspection technique, at the owner's principle place of business. The supporting documentation used to make such inspection interval determinations and the inspection technique must be made available to FRA upon request.

Further, in § 180.509, RSPA is revising paragraphs (c)(3)(i) and (iii)(A) to require an inspection and test of the lining or coating *only when the lining or coating is applied to protect the tank shell* from a lading such as hydrochloric acid.

K. Safety System Inspections

In the NPRM, RSPA proposed to add explicit requirements for the inspection of thermal protection systems, tank head puncture resistance systems, coupler vertical restraint systems, and devices used to protect discontinuities. If, after an inspection, one or more of these systems do not conform to the applicable specification requirements contained in Part 179, renewal or repair of the system is necessary to continue the qualification of the tank car. RSPA received two comments on this proposal, both indicating support.

In this final rule, RSPA is adopting the requirements for the inspection of these safety systems.

L. Quality Assurance Program (QAP)

In the NPRM, RSPA proposed to require that each tank car facility establish a Quality Assurance Program (QAP) to detect non-conformities during the manufacturing, repair, or inspection and test process. A tank car facility means an entity that manufactures, repairs, inspects, or tests tank cars to ensure that the tank cars conform to Parts 179 and 180, that alters the certificate of construction of the tank car, or that verifies that the tank car conforms to the specification.

All commenters endorsed the QAP proposal; however, several commenters suggested that RSPA delay the effective date for at least 18 months so that tank car repair facilities will have the opportunity to develop a QAP. In its comments, AAR supported RSPA's QAP requirements and further stated that the QAP developed by RSPA is consistent with AAR's quality assurance requirements.

Several commenters asked RSPA to clarify whether or not a tank car facility includes a shipper's loading facility where items such as gaskets and manway bolts are normally inspected and replaced as part of a ''pre-trip'' inspection. It is not the intention of RSPA to include within the definition of a tank car facility a shipper's facility where pre-trip inspections are performed. Generally, a tank car facility evaluates the tank structure to ensure that, if serious fatigue, corrosion, or accidental damage occurs within the inspection and test interval, the remaining structure can withstand reasonable loads without failure or excessive structural deformation. A shipper, on the other hand, ensures by inspection that the tank is in proper condition for transportation from point of origin to destination.

Based on the comments received, RSPA is requiring each tank car repair facility to develop a QAP that has the means to detect any nonconformity in the manufacturing, maintenance, or repair process and that has the means to prevent its recurrence. Furthermore, the QAP must ensure that the finished product conforms to the requirements of the applicable specification and the regulations in the HMR. RSPA is also clarifying the definition of a tank car facility to mean an entity that manufactures, repairs, inspects, or tests tank cars to ensure that the tank cars conform to Parts 179 and 180, that alters the certificate of construction of the tank car, that ensures the continuing qualification of a tank car by performing a function prescribed in Parts 179 or 180, or that makes any representation indicating compliance with one or more of the requirements of Parts 179 or 180. This language mirrors that for the qualification of highway cargo tanks (*see* § 180.2). A shipper that inspects a tank car solely to ensure that the tank car is safe for transportation is not performing a periodic qualification function. On the other hand, a shipper who continues the qualification of a tank car, by performing a function described in Parts 179 or 180, meets the definition of a tank car facility.

M. Inspection Requirements Prior to Transportation

The current regulations, at § 173.31(b)(3), require that the shipper inspect a tank car before releasing it into transportation to ensure that, among other things, the closures are in a ''tool-tight,'' secure condition. Further, closures on the tank (under § 173.24(f)(1)(ii)) must be so designed and closed that ''under conditions (including the effects of temperature and vibration) normally incident to transportation . . . the closure is secure and leakproof.''

RSPA and FRA proposed in § 174.68 that tank cars be inspected prior to transportation as an amendment to the current requirements because of their concerns about tank cars in transportation with loose closures. Since 1989, FRA inspectors have found loose closures on tank cars containing hazardous materials more than 23,000 times. In that same period, RSPA has received about 1,100 to 1,200 incident reports each year on tank cars that had released product, often as a result of a loose closure. Those releases resulted in injury to 85 railroad employees. This history shows that more needs to be done to ensure that tank cars conform to the regulations when offered for transportation. It is FRA's experience that properly designed and secured closures (closures meeting the standards of §§ 173.24 and 173.31) do not become loose during transportation and that most of the incidents reported to RSPA reflect poor pre-trip preparation of the tank car prior to offering it for transportation. In order to clearly state the offerors responsibility for pre-trip inspection of a tank car, § 174.68 in the NPRM proposed a rebuttable presumption against a proper pre-trip inspection if unsecured closures were found in transit.

RSPA and FRA believe that aligning the inspection requirements in current § 173.31(b) with the design and operations requirements in § 173.24 will clarify their full intent, foster compliance with safety standards, and improve hazardous materials transportation safety. Comments on the proposed § 174.68 came from most of those filing responses to the NPRM and they covered five aspects of the proposal. First, several commenters argued that § 174.68 was the wrong place for pre-trip inspection requirements, that, as shipper responsibilities, they belonged in Part 173. RSPA and FRA agree and the final rule includes pre-trip inspection in § 173.31.

Second, several commenters said that the proposal raised the duty of care for pre-trip car preparation to an all but impossible level. Current § 173.31(b)(1) requires that ''the shipper must determine *to the extent practicable*, that . . . fittings are in proper condition. . . .'' [emphasis added] The origin of the phrase ''to the extent practicable'' in § 173.31(b) has its roots in the Interstate Commerce Commission's (ICC) regulations prior to 1960. In those

regulations, the ICC required shippers, before loading the tank car, to examine the tank and each appurtenance to see that the safety and outlet valves, safety vents, the excess flow valves (if any), the closures of all openings, and the protective covers of all appurtenances were in proper condition.

In a letter dated July 10, 1959, to AAR, the Manufacturing Chemists' Association (MCA) stated that the addition of the words ''to the extent practicable'' in the tank car loading section was to clarify the purpose of the regulations and to make the regulation more realistic and to eliminate from the regulation items which were either very difficult to inspect or very expensive to inspect such as a full inspection of safety relief valves or excess flow valves. Read literally, the regulation at that time would impose a duty on the shipper to disassemble and inspect safety valves and excess flow valves prior to each trip.

As a result of the MCA letter in 1959, AAR petitioned the ICC to amend the current regulations by inserting the phrase ''to the extent practicable'' in the tank car loading section. The ICC agreed and the new phrase went into the regulations on March 23, 1960, under Order Number 42. From the beginning, this phrase was meant to reflect the practical impossibility of, for instance, taking the valves apart before each trip; the additional language was not intended to excuse poor pre-trip preparation. This final rule does not enlarge the ''to the extent practicable'' standard.

Third, several commenters seemed to confuse the essential elements of the loose closure violation by arguing that evidence of a leak (or release of product) in transit does not necessarily prove the lack of a pre-trip inspection. They mistakenly believed that the proposal focused on *releases* of hazardous materials rather than the broader fault: *loose fittings and closures*. FRA and RSPA agree that leaks can develop in transit from sources other that insecure closures, the failure of a rubber lining and the failure of a frangible disc are two possible examples. This provision was developed from the requirement in the current § 173.31(b) that closures must be secured in place with an appropriate tool, and the final rule makes no changes in that requirement.

Fourth, many commenters argued that the condition of tank cars in transit is the responsibility of the railroads, that it is their duty to ensure that the closures are, and remain, tight. RSPA and FRA note that current § 173.31(b)(3) requires the shipper to make closures ''tool tight'' prior to shipping and that § 173.24(b) and (f) require closures to be designed, maintained, and closed so that ''under conditions (including the effects of temperature and vibration) normally incident to transportation'' they will remain secure. Responsibility for tight closures must rest primarily with the offeror. The railroads' duty to inspect a tank car is aimed at detecting obvious leaks and defects in the running gear of the vehicle. FRA's pre-departure inspection requirements—applicable to all trains whether or not carrying hazardous materials—are found at 49 CFR 215.13. Appendix D to Part 215 describes the inspection to be performed by a train crew, ''At each location where a freight car is placed in a train and [designated inspectors] are not on duty. . . .'' Appendix D requires the train crew to reject a placarded hazardous materials tank car from which lading is leaking. As the National Industrial Transportation League said in its comments, ''The key issue in determining the regulatory responsibilities under the HMR should be to determine which functions parties actually performed, or should have performed.'' This final rule is not intended to, nor does it, change these essential relationships.

Fifth, several commenters argued that the proposed rebuttable presumption will be impossible to meet. The proposed rule states examples (derailment and vandalism) that will rebut the presumption, but they are not intended to be exclusive. In FRA's experience in discussing alleged violations with shippers over the past few years, the following circumstances have led to either termination or a penalty amount significantly reduced from that originally proposed, depending on the facts and circumstances of each case:

- Delivery to a mistaken destination and subsequent rerouting to the original destination,
- Erroneous spotting at a repair facility,
- Actual delivery to the consignee prior to inspection,
- Abnormally rough handling by a railroad,
- Gaskets, otherwise secure at the start of the trip, deteriorating enroute in a manner the offeror could not have foreseen.

One commenter cited case law on irrebuttable presumptions. RSPA and FRA agree with the commenter that a presumption impossible to rebut would not be proper; for the reasons given, RSPA and FRA do not view the presumption in the regulation published today as impossible to rebut.

In some cases, FRA has seen pre-trip inspection check lists that were at obvious odds with the conditions discovered on the car. The rebuttable presumption stated today is not designed to make enforcement ''easier,'' it is designed to make responsibility more certain. For most shippers of hazardous materials, today's rule will not mean a change in the regulator/regulated relationship.

When FRA issues a Notice of Proposed Violation for an alleged violation of the HMR, the respondent (railroad, shipper, or manufacturer) is afforded the opportunity to investigate the charges and to collect factual evidence to mitigate or dismiss the case. Respondent has the opportunity for a hearing. FRA, or an Administrative Law Judge, considers respondent's submissions, together with the factors in 49 U.S.C. § 5123(c), before reaching a decision. The standard in this final rule does not change the process by which FRA enforces railroad related hazardous materials violations. FRA expects that, by clarifying the responsibility of the shipper, there will be fewer loose closures on tank cars and fewer injured railroad employees.

Several commenters mentioned mishandling, even abusive handling, by the railroads. FRA's own studies have demonstrated that overspeed impacts in railroad switching operations are far from a rarity, but FRA is not aware that overspeed impacts will loosen the threaded fasteners securing lading retention fittings on a tank car. Overspeed impacts can cause severe structural damage, lessen the service life of the car, and cause frangible safety vent discs to rupture. In such cases, enforcement actions against the railroads are appropriate, and FRA pursues them. One shipper, PPG Industries, Inc., put impact recorders on a test fleet of 50 tank cars operated out of its Lake Charles, Louisiana plant. The impacts in excess of 6G's (about 8 miles per hour) between July 1992 and December 1993 are documented in PPG's comments in this docket. Because they are limited in geographic scope, RSPA and FRA cannot say that this data presents a typical picture, nation-wide, but PPG's charts are graphic evidence, arranged by railroad and by terminal, that railroad tank cars are subject to stresses well above their optimum operating environment.

In the final rule, RSPA is articulating a rebuttable presumption standard aimed specifically at loose closures on tank cars. The statement of this presumption in § 173.31(d)(2) does not mean, however, that there is a different standard for railroad tank cars than for

other packagings used to transport hazardous materials. The ''secure and leakproof'' standard established in § 173.24(f) applies to closures on all packagings used for transportation. If a hazardous materials package is discovered with loose closures, either the closures were not designed properly or they were not tightened properly. Neither RSPA nor FRA are aware of hazardous materials packagings designs that allow closures to loosen in transit. Hence the presumption that, when an inspector discovers a loose closure, it was not tightened properly. RSPA has made the presumption explicit for railroad transportation because FRA's enforcement experience, discussed earlier, proves the need to focus responsibility on those who prepare hazardous materials for transportation.

The following table lists the adopted paragraphs or sections and, where applicable, the corresponding paragraph or section contained in the current HMR. In some cases, the cross-references are to provisions which are similar to, but not identical with current provisions.

New section	Old section
173.31(a)(2)	173.31(a)(4) [except 4th and 5th sentence].
173.31(a)(3)	
173.31(a)(4)	173.31(a)(7) [1st sentence after ''Effective July 1, 1991...'' and preceding ''..., as in effect on November 16, 1990'']
173.31(a)(5)	
173.31(a)(6)	173.31(a)(3) [1st sentence].
	173.31(a)(3)(i).
173.31(b)(1)	173.31(a)(5) [except last sentence].
173.31(b)(2)	173.31(a)(12).
	173.31(a)(15) [1st sentence preceding ''...nonreclosing pressure relief devices.''] [2nd preceding ''...provided that the liquid...''] [3rd sentence preceding ''...breather holes are not...'']
173.31(b)(3)	
173.31(b)(4)	
173.31(b)(5)	
173.31(b)(6)	
173.31(c)	173.31(a)(14) [1st sentence preceding ''...equal to or greater than...'']
	173.31(a)(14)(i) [1st sentence preceding ''...ullage space or dome of tank.'']
	173.31(a)(14)(ii).
	173.31(a)(14)(iii).
173.31(d)(1)	
173.31(e)(1)	173.31(a)(17).
173.31(e)(2)	
173.31(f)	
173.314(c), Note 2	173.314(c), Note 25.
173.314(c), Note 3	173.314(c), Note 21.
173.314(c), Note 4	173.314(c), Note 20.
173.314(c), Note 6	173.314(c), Note 12 [except 1st and last sentence].
173.314(c), Note 7	173.314(c), Note 18 [1st sentence preceding ''...g, when offered for transportation.'']
173.314(c), Note 8	173.314(c), Note 19 [1st sentence preceding ''...g, when offered for transportation.'']
179.7	
179.16	179.100–5.
179.18	179.100–4.
179.20	
179.22	179.100–21.
	179.105–8.
	179.200–25.
	179.203–3.
Appendix A to Part 179	179.105–5 (b) and (c).
Appendix B to Part 179	179.105–4 (d) and (e).
Subpart F to Part 180	
180.501	
180.503	
180.505	
180.507	
180.509	
180.511	
180.513	
180.515	
180.517	
180.519	

IV. Review by Section Summary

Part 171

Section 171.7(a)(3). The 49 CFR reference sections for the Association of American Railroads standards and for a Compressed Gas Association standard are added, revised or removed, as appropriate, to reflect the changes in this rulemaking.

Part 172

Section 172.101. In the HMT, three special provisions are removed. Special Provision ''B41,'' appearing in column (7) of the entries for benzyl chloride, fluorosulfonic acid, and titanium tetrachloride is no longer necessary due to the new inspection and test intervals adopted in this final rule. Special Provision ''B43,'' appearing in column (7) of the entries for carbon dioxide, refrigerated liquid, hydrogen chloride, refrigerated liquid, and vinyl fluoride,

inhibited, also is no longer necessary because of the new inspection and test requirements. For the Division 2.1 (flammable gas) entries ethyl chloride and ethyl methyl ether, Special Provision ''B63'' is removed, thus prohibiting the use of tank cars without head protection or thermal protection.

Section 172.102. As discussed above, Special Provisions ''B41'' and ''B43'' are removed. The inspection and test intervals (i.e., 5–3–1) specified in Special Provision ''B41'' and the nondestructive test requirements specified in Special Provision ''B43'' are incorporated into Subpart F of Part 180. Special Provision ''B63'' appears only in the entries ethyl chloride and ethyl methyl ether and, therefore, in paragraph (c), is removed. Special Provision ''B64'' is amended by changing the head-protection section reference ''§ 179.105–5'' to read ''§ 179.16,'' and Special Provision ''B79'' is amended by changing the head- and thermal-protection section references ''§§ 179.105–4 and 179.105–5'' to read ''§ 179.16 and 179.18''.

Part 173

Section 173.31. The section heading is revised to read ''Use of Tank Cars.'' This section also is completely revised and reorganized for clarity.

New paragraph (a)(1) corresponds to the language in the HMR for cargo tanks and portable tanks (*see* §§ 173.32c(a) and 173.33(a)). The section also includes reference to certain ''AAR'' specification tank cars that are authorized for hazardous materials service in the HMR (*see* §§ 173.241 and 173.242). When these tank cars are used for the transportation of hazardous materials, the tank cars must meet the minimum specification for new construction as required by AAR.

New paragraph (a)(2) is essentially current § 173.31(a)(4). The first, second, and third sentences are revised to clarify the use of the term ''authorized.'' Prior to December 19, 1957 (ICC Order No. 33), the regulations stated that:

> [T]ank cars and appurtenances may be used for the transportation of any commodity for which they are authorized, as indicated on the certificate of construction. When a car is to be used for the transportation of a commodity other than those approved on the certificate of construction, it must be approved for such loading by the A.A.R. Tank Car Committee. Changes in fittings or commodity stencilling required to transfer a car from one service to another as authorized on the certificate of construction, may be made only be the owner or owner's authorized agent * * *.

As evidenced by the language above, the term ''authorized'' means those commodities designated on the certificate of construction and approved by the AAR Tank Car Committee. Order No. 33 changed the regulation by removing the phrase ''as indicated on the certificate of construction'' because many car owners did not have a certificate for older Class ARA-II (built prior to 1917), ARA-III (built prior to 1927), and some ICC–103 (built after 1927) tank cars. Because this final rule requires that the original and subsequent tank car certificates must be maintained for the life of the car and transferred with ownership, RSPA is clarifying the purpose of this paragraph by inserting the phrase ''in this part and specified on its certificate of construction'' at the end of the first sentence. See § 180.517. The second and third sentences are modified accordingly. Provisions contained in the fourth and fifth sentences of current § 173.31(a)(4), stating that DOT 105A-W, 109A-W, 111A100W4, 112A-W, and 114A-W tank cars may be used for any commodity for which it is approved and may be stencilled accordingly, and that a tank car stencilled to indicate that it is authorized for one commodity may not be used for any other service, are removed. The stencilling requirement for these cars is optional and, therefore, not enforceable.

New paragraph (a)(3) provides that no person may fill a tank car with a hazardous material when the tank car is overdue for periodic inspection and test. This provision allows the movement of tank cars containing hazardous material residue to a tank car facility for inspection and testing.

New paragraph (a)(4) is current § 173.31(a)(7). It removes reference to a compliance date, now past, and establishes that air brake equipment support attachments must be welded to pads instead of directly to the tank shell in conformance with §§ 179.100–16 and 179.200–19.

New paragraph (a)(5) prohibits the use of an internal self-energized manway that is located below the liquid level of the lading on a tank car, beginning on the effective date of this final rule. After the effective date of this final rule, an exemption would be required in order to continue to operate such a tank car. This provision was proposed paragraph (a)(22) in HM–175A.

New paragraph (a)(6) is current § 173.31(a)(3). It removes specific ''DOT'' class references and explains that any tank car of the same class with a higher tank test pressure than the tank car authorized in the HMR may be used. The paragraph is also simplified by specifying the hierarchy of the letters in the specification marking that describe special protective systems (e.g., ''J'' for thermally protected, jacketed cars; ''T'' for thermally protected, non-jacketed cars; ''S'' for cars with head shields but without thermal protection; and ''A'' for cars without protective systems).

New paragraph (b)(1), concerning the use of coupler vertical restraint systems, is current § 173.31(a)(5). It is revised to require all DOT specification tank cars and any other tank car used to transport hazardous material to be equipped with a coupler vertical restraint system. This revision also removes reference to a compliance date, now past, excepting DOT specification tank cars in nonhazardous materials service from being equipped with a coupler vertical restraint system.

New paragraph (b)(2), concerning pressure relief devices, is current §§ 173.31(a)(12) and 173.31(a)(15). This revision is simplified by using the term ''poisonous by inhalation'' (see § 171.8) in place of the defining criteria.

New paragraph (b)(3) requires head protection for all tank cars transporting Class 2 materials and tank cars constructed from aluminum or nickel plate. Tank cars currently equipped with half-head protection are excluded. The compliance period is 10 years from the effective date of this rule, except for class DOT 105 tank cars with less than 70 kl (18,500 gallon) capacity when used to transport a Division 2.1 material, which have a compliance period of 5 years. This provision was proposed paragraph (a)(19) in HM–175A.

New paragraph (b)(4) requires tank cars transporting Class 2 materials to have thermal protection. Exceptions from the thermal protection standard are granted for ''chlorine,'' ''carbon dioxide, refrigerated liquid,'' and ''nitrous oxide, refrigerated liquid,'' and for tank car tank classes DOT 106, 107A, 110, and 113. This provision was proposed paragraph (a)(20) in HM–175A. In the NPRM, RSPA did not propose thermal protection for the commodities identified above (see proposed § 173.314(k) and (o)). The compliance period is 10 years from the effective date of this final rule.

New paragraph (b)(5) requires bottom-discontinuity protection for all existing tank cars transporting a hazardous material. The new protection requirements conform to paragraphs E9.00 and E10.00 of the AAR Specifications for Tank Cars, M–1002. Existing tank cars that conform to Appendix Y of the AAR Specifications for Tank Cars, M–1002, may continue in use. The compliance period is 10 years from the effective date of this final rule.

This provision was proposed paragraph (a)(23) in HM–175A.

New paragraph (b)(6) is added to require tank car owners to implement measures to ensure the phased-in completion of the modifications on each tank car subject to this final rule. As discussed earlier in this preamble, RSPA and FRA have several programs in place to improve the tank car fleet. Owners, therefore, should develop careful plans, procedures, and schedules to assure completion of the modifications before the regulatory compliance date. Paragraph (b)(6) also requires submission of a yearly progress report to FRA that shows the reporting mark of each tank car requiring modification, the type of modification required for each tank car during the previous year, and the total number of tank cars modified the previous year.

New paragraph (c) was proposed as paragraph (d) in HM–201. This final rule revises the terms ''un-insulated'' to ''non-insulated,'' ''ullage space or dome'' to ''vacant,'' and clarifies that this provision applies to cars in hazardous materials service only. A new provision is added in paragraph (c)(3) to require all tank cars transporting a PIH material to have a tank test pressure of at least 20.7 Bar (300 psi). This provision is consistent with other regulations adopted under Docket HM–181 for PIH liquids.[19] Also, several shipping names appearing in the opening paragraph are revised for consistency with the proper shipping name as shown in the § 172.101 table.

New paragraph (d) reinforces the inspection requirements that must be fulfilled before a tank car of hazardous materials is offered for transportation. These provisions were proposed paragraph (a)(4) and § 174.68 in HM–201. These proposed requirements were revised and combined based on suggestions made by the commenters.

In new paragraph (e), to clarify that the paragraph applies to materials that are poisonous by inhalation, the paragraph heading is revised to read ''Special requirements for materials poisonous by inhalation.''

New paragraph (e)(1) concerns the use of heater coils. This provision is essentially current paragraph § 173.31(a)(17). This provision was proposed paragraph (e) in HM–201.

New paragraph (e)(2) requires that tank cars used for materials poisonous by inhalation must conform to at least a DOT 105S300W, 105S300ALW, 112J340W, or 114J340W. This provision was proposed paragraph (a)(21) in HM–175A. It is made consistent with Special Provision B74 for liquid PIH materials in Zone B. The compliance period is 10 years from the effective date of this final rule.

New paragraph (f) requires the use of a DOT 105S200W; a DOT 112S200W with an 11-gauge steel jacket conforming to § 179.100–4; a DOT 112S340W; or a DOT 112S200W tank car constructed from AAR steel specification TC–128, normalized, for the transportation of certain listed hazardous substances in § 173.31(f) that pose a potential threat to human health and the environment. This provision was proposed paragraph (a)(24) in HM–175A.

Section 173.314. In the table in paragraph (c), the entries are amended by removing references to the individual tank car *specifications* and adding references to the authorized tank car *classes*. This change ensures that § 173.314 does not authorize a tank car having a tank test pressure below the regulatory minimum in § 173.31(c). The current notes following the table are amended by redesignating, revising, or removing all tank car ''design requirements'' as follows (notes that apply to filling limits are retained):

Note 1, no change.

Note 2 is restated without substantial change and moved to § 173.314(n).

Note 3 and *Note 4* are restated without substantial change and moved to § 173.314(j), which is applicable to all materials having a primary or secondary Division 2.1 (flammable gas) hazard.

Note 5 is restated without substantial change for clarity.

Note 6 is restated without substantial change and moved to § 173.314(o).

Note 7, which restricts the transportation of multi-unit tank cars tanks (ton containers) to rail and highway only, is removed. RSPA believes no valid reason exists to restrict the transport of these units by water. A provision restricting the transport of multi-unit tank car tanks by air is unnecessary because all multi-unit tank car tanks exceed the maximum quantity limitations allowed by air.

Note 8 is restated without substantial change and moved to § 173.314(l).

Note 9 is moved to § 173.314(j) and made applicable to all materials with a primary or secondary Division 2.1 (flammable gas) hazard.

Note 10 is restated without substantial change and moved to § 173.314(m).

Note 11 is restated without substantial change and included in § 173.314(m).

Note 12 is restated without substantial change. The filling density requirements are moved to Note 6, and the design requirements are moved to § 173.314(k).

Note 13 is removed to eliminate duplication of the marking requirements prescribed in Special Provision B12, §§ 173.314(a)(5) and 172.330(a)(1)(i).

Note 14 is removed because it is not referenced in the table.

Note 15 is removed since it is included with the other design requirements applicable to tank cars used for materials having a primary or secondary Division 2.1 (flammable gas) hazard in § 173.314(j).

Note 16, which is currently reserved, is removed.

Note 17, which references § 173.314(g) is removed.

Note 18 is restated without substantial change and moved to Note 7.

Note 19 is restated without substantial change and moved to Note 8.

Note 20 is restated without substantial change and moved to Note 4.

Note 21 is restated without substantial change and moved to Note 3.

Note 22, referencing the requirements in § 173.245, is incorporated into the table under the entry ''Division 2.3, Zone A materials.''

Note 23 and *Note 24* are removed based on other changes in this final rule concerning the elimination of grandfather provisions.

Note 25 is restated without substantial change and moved to Note 2.

Note 29 and *Note 30* are removed based on other changes in this final rule concerning the elimination of grandfather provisions.

In addition, the table in § 173.314(c) will reflect the tank car classes and not the specifications.

Section 173.319. Paragraph (a)(4)(iii) is revised by removing a parenthetical reference to current § 173.31(c)(13). A requirement contained in § 173.31(c)(13) prescribing special retest requirements for class DOT–113 tank cars is revised and moved to new paragraph § 173.319(e).

Section 173.323. Paragraph (c)(1) is revised to require a tank test pressure of at least 20.7 Bar (300 psi) for ethylene oxide no later then 10 years after the effective date of this final rule. Authorization for the use of a DOT 111A100W4 and 111J100W4 tank car is removed.

Part 179

Section 179.1. In paragraph (c), the section reference ''§ 173.31'' is revised to read ''§ 180.507''.

[19] For further information see *Performance-Oriented Packaging,* Docket HM–181, 55 FR 52402 (December 21, 1990). In general, liquid materials PIH in Hazard Zone A are assigned Special Provision B72 and those in Hazard Zone B are assigned Special Provision B74. These two special provisions require the use of a 105S, 112J, or a 114J tank car having a tank test pressure greater than 18 Bar (300 psi).

Section 179.2. This section is amended by adding a definition for ''Tank car facility.''

Section 179.7. This section requires tank car facilities to have a Quality Assurance Program (QAP). Paragraph (a) sets forth performance standard for the program. Paragraphs (b)(1) through (b)(13) require that the QAP have certain minimum requirements. The term ''Enhanced visual imagery'' in paragraph (b)(10) is changed to read ''Optically-aided visual inspection'' to correctly identify that the visual inspection method is ''optically aided.'' Optically-aided visual methods include the use of magnifiers, borescopes, fiberscopes, and machine vision technology (e.g., a video digitizer that converts images into digital form, and through image enhancement, image segmentation, and feature extraction, the computer classifies objects within the image). Paragraph (c) requires tank car facilities to ensure that only personnel qualified to perform a particular nondestructive inspection and test perform that operation. Paragraph (d) requires each tank car facility to have written procedures, covering inspection, fabrication, and repair operations as appropriate, for their employees. Paragraph (e) cross-references the training requirements in Subpart H of Part 172. (Section 172.702 requires that a hazmat employer train each of its hazmat employees.) Paragraph (f) specifies the compliance date by which tank car facilities must have a QAP and written procedures in effect.

Section 179.16. This new section contains the tank-head puncture-resistance requirements found in current §§ 179.100–23 and 179.105–5.

Section 179.18. This new section contains the thermal protection requirements found in current § 179.105–4(a), (b), and (c). A requirement that the exterior of the tank car must be painted white in proposed § 179.18(d) is moved to § 179.101–1, Note 4 in this final rule. Editorial revisions are made to these requirements for clarity and for consistency with other changes in this final rule.

Section 179.20. This new section contains bottom-discontinuity protection requirements. For new tank cars, bottom-discontinuity protection must conform to paragraphs E9.00 and E10.00 of the AAR Specifications for Tank Cars, M–1002.

Section 179.22. New section 179.22 consolidates the marking requirements contained in current §§ 179.100–21, 179.105–8, 179.200–25, and 179.203–3. Based on this consolidation, §§ 179.100–21, 179.105–8, 179.200–25, and 179.203–3 are removed.

Section 179.100–4. This section is amended by removing the phrase ''except that a protective coating is not required when foam-in-place insulation that adheres to the tank or jacket is applied'' at the end of the first paragraph. This change is based on an AAR petition (P–1050) to require protective coatings on the outside surface of the tank shell and the inside surface of the jacket.

Section 179.100–21. The marking requirements contained in this section are consolidated with other marking requirements in new § 179.22 and, as discussed earlier, § 179.100–21 is removed.

Section 179.100–23. The head protection requirements contained in this section are moved to § 179.16(b), and, as discussed earlier, § 179.100–23 is removed.

Section 179.101–1. Certain editorial changes are made in § 179.101–1, Note 4, for clarity and consistency with other changes made in this final rule. In the first sentence in Note 4, the section reference ''§ 179.100–4,'' which addresses insulated tank cars, is removed because Note 4 applies to non-insulated cars only. Note 4 is revised to clarify that there is no need to paint the tank white when a ''thermal protection'' system is applied (consistent with current § 179.105–4(g) and proposed § 179.16 (d)), and to remove a requirement that tank cars in hydrogen fluoride service need to have a dark colored band in the top platform and fitting area because hydrogen fluoride is not a Class 2 (compressed gas) material. The last sentence is also removed because it is not a mandatory requirement.

Section 179.103–1. Current paragraph (c), providing that a manway may be located other than at the top of the tank is no longer valid and, therefore, is removed and reserved.

Section 179.103–2. Current paragraph (a) containing manway cover plate requirements is revised by removing the phrase ''may be of the self-energizing type and''. This change would prohibit the construction of tank cars with a self-energized manway located below the liquid level of the lading.

Section 179.103–5. In current paragraph (a)(1), the first two sentences authorizing the location of a self-energizing manway below the liquid level of the tank is no longer valid and, therefore are removed.

Section 179.105. Current §§ 179.105 through 179.105–8 containing special requirements for class DOT 105S, 105J, 111J, 112S, 112J, 112T, 114S, 114J, and 114T specification tank cars are removed because they are unnecessary. The applicable requirements concerning head protection and thermal protection are moved to §§ 179.16, 179.18, and Appendices A and B to Part 179, as appropriate. The marking requirements are consolidated into § 179.22. The requirement for exterior tank color was moved to footnote 4 of the § 179.101–1 table.

Section 179.200–4. This section is amended by removing the phrase ''except that a protective coating is not required when foam-in-place insulation that adheres to the tank or jacket is applied'' at the end of the first paragraph. This change is based on an AAR petition (P–1050) to require protective coatings on the outside surface of the tank shell and the inside surface of the jacket.

Section 179.200–25. The marking requirements contained in this section are consolidated with other marking requirements in § 179.22, and, as discussed earlier, § 179.200–25 is removed.

Section 179.200–27. The head protection requirements are consolidated into § 179.16. Therefore, current § 179.200–27 is removed.

Section 179.203. Current §§ 179.203, 179.203–1, 179.203–2, and 179.203–3 containing special requirements for class DOT 111 tank cars are unnecessary and are removed. The restriction in paragraph (c) against the use of class DOT 111 tank cars built after March 1, 1984, for the transportation of flammable gases or ethylene oxide is incorporated into §§ 173.314 and 173.323. The applicable head-protection and thermal-protection requirements are consolidated into §§ 179.16 and 179.18, respectively. The marking requirements are consolidated into § 179.22.

Appendix A. The tank-head puncture-resistance test verification requirements in § 179.105–5 paragraphs (b) and (c) are moved to this Appendix.

Appendix B. This appendix contains the thermal-protection test-verification requirements found in current § 179.105–4(d), (e) and (f). These requirements are editorially revised for clarity.

Part 180

Subpart F of Part 180. This subpart contains the qualification and maintenance requirements for tank cars.

Section 180.501. Paragraph (a) specifies the applicability of the Subpart. Paragraph (b) specifies that any person who performs a function required by Subpart F of Part 180 must perform that function according to the regulations.

Section 180.503. This section defines certain terms used throughout the subpart.

Section 180.505. This section requires each tank car facility performing repair work to have a QAP based on requirements in § 179.7 for new car construction.

Section 180.507. This section contains the continuing qualifications for existing tank cars that are no longer authorized for new construction, such as a class DOT 113A175W tank car. Paragraph (a) is essentially current § 173.31(a)(1) except that it is revised to include non-specification tank cars that are currently authorized for the transportation of hazardous materials. Paragraphs (b)(1), (2), (3), and (4) are current § 173.31(a)(2), (8), (9), and (10).

Section 180.509. This section specifies the requirements for the periodic inspection and testing of tank cars. Paragraph (a)(1) requires each tank car facility to evaluate the tank car according to the ''*Acceptable results of inspections and tests*'' as prescribed in § 180.511. Paragraph (a)(2) requires marking each tank car passing a periodic inspection and test to indicate the date it passed this review and the due dates for the next inspection and test required in the new § 180.515. Paragraph (a)(3) requires a written report for each tank car after it successfully passes an inspection and test. Paragraph (b) specifies unusual conditions that may require an inspection and test of tank cars. Paragraph (b)(1) requires an inspection and test if the tank shows evidence of abrasion, corrosion, cracks, dents, distortions, defects in welds, or any other condition unsafe for transportation. Paragraph (b)(2) requires an inspection and test if the tank car was in an accident and damaged to the extent that may adversely affect its capability to retain its contents (e.g., large dent or gouge in the tank shell). Paragraph (b)(3) requires an inspection and test if the tank was involved in a fire. Paragraph (b)(4) requires an inspection and test of either a single tank car or a design of tank cars operating in an unsafe condition, if required by FRA, based on the existence of a probable cause. Probable cause may include an inspection and test where FRA discovers a crack in a welded area, a wheel burn, or a large dent or bulge in the tank shell; it may also include a group of cars of a given design if FRA discovers problems apparently related to cars of that design.

Paragraph (c) specifies the frequency with which inspections and tests must be performed on tank cars. Paragraph (c)(1) specifies the requirements for the inspection and hydrostatic test of class DOT 107 tank cars and riveted tank cars. As noted above, the hydrostatic test is still effective for these tank cars since it will detect loose rivets and areas of metal distress. Paragraph (c)(2) requires an inspection for thermal integrity of class DOT 113 tank cars in place of the inspection and testing requirements in Subpart F of Part 180. This paragraph cross-references the requirements in § 173.319(e). Paragraph (c)(3) specifies the inspection and test requirements for fusion welded tank cars. The intervals would vary depending upon whether or not the tank car was lined or coated and upon whether or not the car was transporting materials corrosive to the tank. For linings and coatings, this final rule requires a tank car facility to inspect the lining or coating based on the inspection and test intervals and techniques established by the lining or coating owner. The owner must establish an inspection interval and test technique based on the manufacturer's recommendations or the owner's knowledge of the life-expectancy of the lining or coating.

Paragraph (d) specifies the manner for conducting a visual inspection for each tank car. Paragraph (d)(1) requires an inspection of the tank car internally and externally for abrasion, corrosion, cracks, dents, distortions, defects in welds, or any other conditions unsafe for transportation. Paragraph (d)(2) requires the inspection of all piping, valves, fittings, and gaskets for corrosion and any other condition unsafe for transportation. Paragraph (d)(3) requires an inspection of the tank cars for missing or loose bolts, nuts, or other elements. Paragraph (d)(4) requires an inspection of all closures on the tank car for proper securement. The tank car facility would also inspect the protective housings for proper securement. Paragraph (d)(5) requires an inspection of the seats on excess flow valves. Paragraph (d)(6) requires an inspection of the markings on the tank car for legibility.

Paragraph (e) requires that a structural integrity inspection and test shall include all transverse fillet welds greater than 0.64 cm (0.25 inch) within four feet of the bottom longitudinal center line; the termination of longitudinal fillet welds greater than 0.64 cm (0.25 inch) within four feet of the bottom longitudinal center line; and all tank shell butt welds within two feet of the bottom longitudinal center line using one or more nondestructive test methods. The term ''Enhanced visual imagery'' is changed to read ''Optically-aided visual inspection'' to correctly identify that the visual inspection method is ''optically aided.''

Paragraph (f) requires thickness measurements to determine that the tank car is not below the minimum shell thickness.

Paragraph (g) specifies the allowable shell thickness reductions. Paragraph (g)(1)(i) allows thickness reductions on carbon steel, stainless steel, aluminum, nickel, and manganese-molybdenum steels. Paragraph (g)(1)(ii) specifies the minimum shell and head thickness reductions for uniform and localized areas and Note 5 of the table is removed to disallow any reduction in the shell thickness for class DOT 111A tank cars transporting ethylene oxide. As discussed earlier, this final rule prohibits the transportation of ethylene oxide in a class DOT 111 tank car.

Paragraph (h)(1) requires the inspection of the safety systems on the tank, such as thermal protection systems, tank-head puncture-resistance systems, and coupler vertical restraint systems, to ensure their integrity. Paragraph (h)(2) requires the inspection and test of re-closing pressure relief devices (safety valves).

Paragraph (i) requires an inspection and test of tank cars with a lining or coating on the tank car. The inspection interval is determined by the owner based on the type of testing technique used, and knowledge of the material and tank car, but cannot exceed 10 years.

Paragraph (j) requires a leakage pressure test of the tank car and appurtenances.

Paragraph (k) allows the use of an alternative inspection and test procedure provided the procedure is based on a damage-tolerance evaluation, examined by the AAR Tank Car Committee, and approved by the Associate Administrator for Safety FRA.

Paragraph (l) specifies the compliance date for the new inspection and test requirements.

Section 180.511. This section specifies the acceptable results of inspections and tests. Paragraph (a) establishes that an acceptable visual inspection as one that shows no structural defect that may cause the tank car to fail (including leak) before the next inspection and test interval.

Paragraph (b) establishes that an acceptable structural integrity inspection and test is one that shows no structural defect that may initiate cracks or propagate cracks and cause the tank car to fail before the next inspection and test interval.

Paragraph (c) establishes that an acceptable service life shell thickness is one that shows no areas of the tank car

below the minimum shell or head thickness allowed in § 180.509(g).

Paragraph (d) establishes that an acceptable safety system inspection is one that shows the systems (e.g., a thermal protection system) conform to Part 179.

Paragraph (e) establishes that an acceptable inspection and test for lining and coatings as one that shows no holes or degraded areas.

Paragraph (f) establishes that an acceptable inspection and test for a leakage pressure test as one that shows no indications of leakage in any product piping, fitting, or closure.

Paragraph (g) establishes that an acceptable hydrostatic test, for class DOT 107 tank cars and riveted tank cars, is one that shows no leakage or deformations (i.e., distress) in the tank.

Section 180.513. This section specifies that tank car repairs must conform to the requirements of Appendix R of AAR Specifications for Tank Cars. As proposed in HM–175A, the introductory text becomes paragraph (a), and § 173.31 paragraph (f)(3) becomes § 180.513 paragraph (b). Section 180.513(b) requires that, unless the exterior tank car shell or interior tank car jacket has a protective coating, when the complete tank car jacket is removed to effect a repair, the exterior tank car shell and the interior tank car jacket must have a protective coating applied to prevent the deterioration of the tank shell and tank jacket.

Section 180.515. This section specifies the marking requirements for tank cars after a successful tank inspection and test.

Section 180.517. This section specifies the reporting and record retention requirements after a tank car has successfully completed its required inspection and test. Paragraph (a) requires the tank car owner to retain the certificate of construction of the tank car (AAR Form 4–2) and related documentation certifying that the tank car conforms to the specification. The owner shall retain the documents for the period of ownership. Upon a change in ownership, Section 1.3.15 of AAR Specifications for Tank Cars requires the transfer of these documents to the new owner. Paragraph (b) specifies the inspection and test reporting requirements.

Section 180.519. This section specifies the periodic test and inspection requirements for multi-unit tank cars (e.g., class DOT 106 and 110 multi-unit tank cars).

V. Regulatory Analysis and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is considered a significant regulatory action under section 3(f) of Executive Order 12866 and was reviewed by the Office of Management and Budget. The rule is considered significant under the Regulatory policies and Procedures of the Department of Transportation (44 FR 11034) because it affects a significant segment of the tank car industry. A regulatory evaluation is available for review in the docket.

B. Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 (''Federalism''). Federal law expressly preempts State, local, and Indian tribe requirements applicable to the transportation of hazardous material that cover certain subjects and are not ''substantively the same'' as the Federal requirements. 49 U.S.C. 5125(b)(1). These covered subjects are:

(A) the designation, description, and classification of hazardous material;

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material;

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements respecting the number, contents, and placement of those documents;

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or

(E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container which is represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This final rule addresses the design, manufacturing, repairing, and other requirements for packages represented as qualified for use in the transportation of hazardous material. Therefore, this final rule preempts State, local, or Indian tribe requirements that are not ''substantively the same'' as Federal requirements on these subjects. Section 5125(b)(2) of Title 49 U.S.C. provides that when DOT issues a regulation concerning any of the covered subjects after November 16, 1990, DOT must determine and publish in the Federal Register the effective date of Federal preemption. The effective date may not be earlier that the 90th day following the date of issuance of the final rule and no later than two years after the date of issuance. RSPA has determined that the effective date of Federal preemption of this final rule will be 90 days after publication in the Federal Register.

Because RSPA lacks discretion in this area, preparation of a federalism assessment is not warranted.

C. Regulatory Flexibility Act

I certify that this final rule will not have a significant economic impact on a substantial number of small entities. The entities affected by the rule are involved in tank car leasing, maintenance, repair and use. There are no direct or indirect adverse economic impacts for small units of government, businesses, or other organizations.

D. Paperwork Reduction Act

The requirements for information collection have been approved by the Office of Management and Budget (OMB) under the provision of the Paperwork Reduction Act of 1980 (Pub. L. 95–511) under OMB control number 2137–0559.

E. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN numbers contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

49 CFR Part 172

Hazardous materials transportation, Hazardous waste, Labels, Markings, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Incorporation by reference, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 179

Hazardous materials transportation, Incorporation by reference, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 180

Hazardous materials transportation, Incorporation by reference, Motor carriers, Motor vehicle safety, Packaging and containers, Railroad safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR Chapter I is amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for part 171 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 171.7 [Amended]

2. In § 171.7, in paragraph (a)(3) Table, the following changes are made:

a. Under the *Association of American Railroads,* for the entry ''AAR Manual of Standards and Recommended Practices, Section C–Part III, Specifications for Tank Cars, Specification M–1002, September, 1992'' in column 2, the references are revised to read ''173.31; 174.63; 179.6; 179.7; 179.12; 179.16; 179.20; 179.22; 179.100; 179.101; 179.102; 179.103; 179.200; 179.201; 179.220; 179.300; 179.400; 180.509; 180.513; 180.515; 180.517.''.

b. Under the *Association of American Railroads,* for the entry ''AAR Specifications for Design, Fabrication and Construction of Freight Cars, Volume 1, 1988'' in column 2, the reference is revised to read ''179.16.''.

c. Under the *Compressed Gas Association, Inc.,* for the entry ''CGA Pamphlet C–6, Standards for Visual Inspection of Compressed Gas Cylinders, 1984'' in column 2, the reference is revised to read ''173.34; 180.519.''.

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

3. The authority citation for part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 172.101 [Amended]

4. In § 172.101, in the Hazardous Materials Table, the following changes are made:

a. For the entries ''Benzyl chloride'', ''Fluorosulfonic acid'', and ''Titanium tetrachloride'', in Column (7), Special Provision ''B41,'' is removed.

b. For the entries ''Carbon dioxide, refrigerated liquid'' and ''Vinyl fluoride inhibited'', in Column (7), Special Provision ''B43'' is removed.

c. For the entry ''Hydrogen chloride, refrigerated liquid'', in Column (7), Special Provision '', B43'' is removed.

d. For the entry ''Ethyl methyl ether'', in column (7), Special Provision ''B63'' is removed.

e. For the entry ''Ethyl chloride'', in column (7), Special Provision ''B63,'' is removed.

§ 172.102 [Amended]

5. In § 172.102, in paragraph (c)(3), the following changes are made:

a. Special Provision ''B41'' is removed.

b. Special Provision ''B43'' is removed.

c. Special Provision ''B63'' is removed.

d. Special Provision ''B64'' is amended by revising the section reference ''§ 179.105–5'' to read ''§ 179.16''.

e. Special Provision ''B79'' is amended by revising the section references ''§§ 179.105–4 and 179.105–5'' to read ''§§ 179.16 and 179.18''.

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

6. The authority citation for part 173 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

7. Section 173.31 is revised to read as follows:

§ 173.31 Use of tank cars.

(a) *General.* (1) No person may offer a hazardous material for transportation in a tank car unless the tank car meets the applicable specification and packaging requirements of this subchapter or, when this subchapter authorizes the use of an non-DOT specification tank car, the applicable specification to which the tank was constructed.

(2) Tank cars and appurtenances may be used for the transportation of any commodity for which they are authorized in this part and specified on the certificate of construction (AAR Form 4–2 or by addendum on Form R–1). See § 179.5 of this subchapter. Transfer of a tank car from one specified service on its certificate of construction to another may be made only by the owner or with the owner's authorization. A tank car proposed for a commodity service other than specified on its certificate of construction must be approved for such service by the AAR's Tank Car Committee.

(3) No person may fill a tank car overdue for periodic inspection with a hazardous material and then offer it for transportation. Any tank car marked as meeting a DOT specification and any non-specification tank car transporting a hazardous material must have a periodic inspection and test conforming to Subpart F of Part 180 of this subchapter.

(4) No railroad tank car, regardless of its construction date, may be used for the transportation in commerce of any hazardous material unless the air brake equipment support attachments of such tank car conform to the standards for attachments set forth in §§ 179.100–16 and 179.200–19 of this subchapter.

(5) No railroad tank car, regardless of its construction date, may be used for the transportation in commerce of any hazardous material with a self-energized manway located below the liquid level of the lading.

(6) Unless otherwise specifically provided in this part:

(i) When this subchapter designates a specific specification tank car, the same class tank car with a higher marked test pressure also may be used.

(ii) When the tank car specification delimiter is an ''A,'' offerors may also use tank cars with a delimiter ''S,'' ''J'' or ''T''.

(iii) When the tank car specification delimiter is an ''S,'' offerors may also use tank cars with a delimiter ''J'' or ''T''.

(iv) When a tank car specification delimiter is a ''T'' offerors may also use tank cars with a delimiter of ''J''.

(v) When a tank car specification delimiter is a ''J'', offerors may not use a tank car with any other specification delimiter.

(b) *Safety systems*—(1) *Coupler vertical restraint.* Each tank car conforming to a DOT specification and any other tank car used for transportation of a hazardous material must be equipped with a coupler vertical restraint system that meets the requirements of § 179.14 of this subchapter.

(2) *Pressure relief devices.* (i) Pressure relief devices on tank cars must conform to Part 179 of this subchapter.

(ii) Except for shipments of chloroprene, inhibited, in class DOT 115 tank cars, tank cars used for materials meeting the definition for Division 6.1 liquid, Packing Group I or II, Class 2 materials, or Class 3 or 4 liquids, must have self-closing pressure relief devices. However, a tank car built before January 1, 1991, and equipped with a non-closing pressure relief device may be used to transport a Division 6.1 or Class 4 liquid if the liquid is not poisonous by inhalation. Unless otherwise specifically provided in this

subchapter, frangible discs may not have breather holes.

(3) *Tank-head puncture-resistance requirements.* The following tank cars must have a tank-head puncture-resistance system that conforms to the requirements in § 179.16 of this subchapter, or to the corresponding requirements in effect at the time of installation:

(i) Tank cars transporting a Class 2 material.

(ii) Tank cars constructed from aluminum or nickel plate that are used to transport hazardous material.

(iii) Except as provided in paragraph (b)(3)(iv) of this section, tank cars not requiring a tank-head puncture-resistance system prior to July 1, 1996, must have a tank-head puncture-resistance system installed no later than July 1, 2006.

(iv) Class DOT 105A tank cars built prior to September 1, 1981, having a tank capacity less than 70 kl (18,500 gallons), and used to transport a Division 2.1 (flammable gas) material, must have a tank-head puncture-resistant system installed no later than July 1, 2001.

(4) *Thermal protection requirements.* The following tank cars must have thermal protection that conforms to the requirements of § 179.18 of this subchapter:

(i) Tank cars transporting a Class 2 material, except for class DOT 105A tank cars transporting chlorine, carbon dioxide refrigerated liquid, or nitrous oxide refrigerated liquid, and class DOT 106, 107A, 110, and 113 tank cars.

(ii) Tank cars not requiring thermal protection prior to July 1, 1996, must conform to this section no later than July 1, 2006.

(5) *Bottom-discontinuity protection requirements.* No person may offer for transportation a hazardous material in a tank car unless the tank car has bottom-discontinuity protection that conforms to the requirements of E9.00 and E10.00 of the AAR Specifications for Tank Cars. Tank cars not requiring bottom-discontinuity protection under the terms of Appendix Y of the AAR Specifications for Tank Cars as of July 1, 1996, must conform to these requirements no later than July 1, 2006. Tank cars modified before July 1, 1996, may conform to the bottom-discontinuity protection requirements of Appendix Y of the 1992 edition of the AAR Specifications for Tank Cars.

(6) *Scheduling of modifications and progress reporting.* The date of conformance for the continued use of tank cars subject to paragraphs (b)(3), (b)(4), (b)(5), (e)(2), and (f) of this section and §§ 173.314(j) and 173.323(c)(1) is subject to the following conditions and limitations.

(i) Each tank car owner shall modify, reassign, retire, or remove at least 50 percent of their in-service tank car fleet within the first half of the compliance period and the remainder of their in-service tank car fleet during the second half of the compliance period.

(ii) Before July 1 of each year, each owner shall submit to the Associate Administrator for Safety, FRA (Attention: RRS–12) a progress report that shows the reporting mark of each tank car, the status of each tank car during the previous year, and the total number of those tank cars modified reassigned, retired, or removed the previous year.

(c) *Tank car test pressure.* A tank car used for the transportation of a hazardous material must have a tank test pressure equal to or greater than the greatest of the following:

(1) Except for shipments of carbon dioxide, anhydrous hydrogen chloride, vinyl fluoride, ethylene, or hydrogen, 133 percent of the sum of lading vapor pressure at the reference temperature of 46 °C (115 °F) for non-insulated tank cars or 41 °C (105 °F) for insulated tank cars plus static head, plus gas padding pressure in the vacant space of a tank car;

(2) 133 percent of the maximum loading or unloading pressure, whichever is greater;

(3) 20.7 Bar (300 psi) for materials that are poisonous by inhalation;

(4) The minimum pressure prescribed by the specification in Part 179 of this subchapter; or

(5) The minimum test pressure prescribed for the specific hazardous material in the applicable packaging section in Subpart F or G of this Part.

(d) *Examination before shipping.* (1) No person may offer for transportation a tank car containing a hazardous material or a residue of a hazardous material unless that person determines that the tank car is in proper condition and safe for transportation. As a minimum, each person offering a tank car for transportation must perform an external visual inspection that includes:

(i) Except where insulation or a thermal protection system precludes an inspection, the tank shell and heads for abrasion, corrosion, cracks, dents, distortions, defects in welds, or any other condition that makes the tank car unsafe for transportation;

(ii) The piping, valves, fittings, and gaskets for corrosion, damage, or any other condition that makes the tank car unsafe for transportation;

(iii) For missing or loose bolts, nuts, or elements that make the tank car unsafe for transportation;

(iv) All closures on tank cars and determine that the closures and all fastenings securing them are properly tightened in place by the use of a bar, wrench, or other suitable tool;

(v) Protective housings for proper securement;

(vi) The pressure relief device, including a careful inspection of the frangible disc in non-closing pressure relief devices, for corrosion or damage that may alter the intended operation of the device;

(vii) Each tell-tale indicator after filling and prior to transportation to ensure the integrity of the frangible disc;

(viii) The external thermal protection system, tank head puncture resistance system, coupler vertical restraint system, and other safety systems for conditions that make the tank car unsafe for transportation;

(ix) The required markings on the tank car for legibility; and

(x) The periodic inspection date markings to ensure that the inspection and test intervals are within the prescribed intervals.

(2) Closures on tank cars are required, under this subchapter, to be designed and closed so that under conditions normally incident to transportation, including the effects of temperature and vibration, there will be no identifiable release of a hazardous material to the environment. In any action brought to enforce this section, the lack of securement of any closure to a tool-tight condition, detected at any point, will establish a rebuttable presumption that a proper inspection was not performed by the offeror of the car. That presumption may be rebutted only by evidence establishing that the car was subjected to abnormal treatment, e.g., a derailment or vandalism.

(e) *Special requirements for materials poisonous by inhalation*—(1) *Interior heater coils.* Tank cars used for materials poisonous by inhalation may not have interior heater coils.

(2) *Tank car specifications.* Except as otherwise provided in this subchapter, tank cars used for materials poisonous by inhalation must conform to at least a DOT 105S300W, 105S300ALW, 112J340W, or 114J340W specification. Hazardous materials not requiring the use of a class DOT 105S300W, 105S300ALW, 112J340W, or 114J340W tank car prior to July 1, 1996, must be transported in one of these specifications no later than July 1, 2006.

(f) *Special requirements for hazardous substances.* (1) Before July 1, 2006, each tank car used for transportation of a

hazardous substance listed in paragraph (f)(2) of this section must conform to DOT 105S200W, DOT 112S200W with an 11-gauge steel jacket, DOT 112S340W, or DOT 112S200W constructed from AAR steel specification TC–128, normalized.

(2) *List of hazardous substances.* Hazardous substances for which the provisions of this paragraph (f) apply are as follows:

Aldrin
Allyl chloride
alpha-BHC
beta-BHC
delta-BHC
gamma-BHC
Bis(2-chloroethyl) ether
Bromoform
Carbon tetrachloride
Chlordane
p-Chloroaniline
Chlorobenzene
Chlorobenzilate
p-Chloro-m-cresol
2-Chloroethyl vinyl ether
Chloroform
2-Chloronapthalene
o-Chlorophenol
3-Chloropropionitrile
DDE
DDT
1,2-Dibromo-3-chloropropane
m-Dichlorobenzene
o-Dichlorobenzene
p-Dichlorobenzene
3,3′-Dichlorobenzidine
1,4-Dichloro-2-butene
1,1-Dichloroethane
1,2-Dichloroethane
1,1-Dichloroethylene
Dichloroisopropyl ether
Dichloromethane @
2,4-Dichlorophenol
2,6-Dichlorophenol
1,2-Dichloropropane
1,3-Dichloropropene
Dieldrin
alpha-Endosulfan
beta-Endosulfan
Endrin
Endrin aldehyde
Heptachlor
Heptachlor epoxide
Hexachlorobenzene
Hexachlorobutadiene
Hexachloroethane
Hexachlorophene
Hexachloropropene
Isodrin
Kepone
Methoxychlor
4,4′-Methylenebis(2-chloroaniline)
Methylene bromide
Pentachlorobenzene
Pentachloroethane
Pentachloronitrobenzene (PCNB)
Pentachlorophenol
Polychlorinated biphenyls (PCBs)
Pronamide
Silvex (2,4,5-TP)
2,4,5-T
TDE
1,2,4,5-Tetrachlorobenzene
2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD)
Tetrachloroethane
Tetrachloroethylene
2,3,4,6-Tetrachlorophenol
Toxaphene
1,2,4-Trichlorobenzene
1,1,1-Trichloroethane
1,1,2-Trichloroethane
Trichloroethylene
2,4,5-Trichlorophenol
2,4,6-Trichlorophenol
Tris(2,3-dibromopropyl) phosphate

8. In § 173.314, the section heading and paragraph (c) are revised, and paragraphs (j) through (o) are added to read as follows:

§ 173.314 Compressed gases in tank cars and multi-unit tank cars.

* * * * *

(c) *Authorized gases, filling limits for tank cars.* A compressed gas in a tank car or a multi-unit tank car must be offered for transportation in accordance with § 173.31 and this section. The named gases must be loaded and offered for transportation in accordance with the following table:

Proper shipping name	Outage and filling limits (see note 1)	Authorized tank car class
Ammonia, anhydrous, or ammonia solutions > 50 percent ammonia	Note 2	105, 112, 114.
	Note 3	106.
Ammonia solutions with > 35 percent, but ≤ 50 percent ammonia by mass	Note 3	105, 109, 112, 114.
Argon, compressed	Note 4	107.
Boron trichloride	Note 3	105, 106.
Carbon dioxide, refrigerated liquid	Note 5	105.
Chlorine	Note 6	105.
	125	106.
Chlorine trifluoride	Note 3	106, 110.
Chlorine pentafluoride	Note 3	106, 110.
Dimethyl ether	Note 3	105, 106, 110.
Dimethylamine, anhydrous	Note 3	105, 106, 112.
Dinitrogen tetroxide, inhibited	Note 3	105, 106, 110.
Division 2.1 materials not specifically identified in this table	Note 3	105, 106, 110, 112, 114.
Division 2.2 materials not specifically identified in this table	Note 3	105, 106, 109, 110, 112, 114.
Division 2.3 Zone A materials not specifically identified in this table	None	See § 173.245.
Division 2.3 Zone B materials not specifically identified in this table	Note 3	105, 106, 110, 112, 114.
Division 2.3 Zone C materials not specifically identified in this table	Note 3	105, 106, 110, 112, 114.
Division 2.3 Zone D materials not specifically identified in this table	Note 3	105, 106, 109, 110, 112, 114.
Ethylamine	Note 3	105, 106, 110, 112, 114.
Helium, compressed	Note 4	107.
Hydrogen	Note 4	107.
Hydrogen chloride, refrigerated liquid	Note 7	105.
Hydrogen sulphide, liquified	68	106.
Methyl bromide	Note 3	105, 106.
Methyl chloride	Note 3	105, 106, 112.
Methyl mercaptan	Note 3	105, 106.
Methylamine, anhydrous	Note 3	105, 106, 112.
Nitrogen, compressed	Note 4	107.
Nitrosyl chloride	124	105.
	110	106.

Proper shipping name	Outage and filling limits (see note 1)	Authorized tank car class
Nitrous oxide, refrigerated liquid	Note 5	105.
Oxygen, compressed	Note 4	107.
Phosgene	Note 3	106.
Sulfur dioxide, liquified	125	105, 106, 110.
Sulfuryl fluoride	120	105.
Vinyl fluoride, inhibited	Note 8	105.

Notes:
1. The percent filling density for liquefied gases is hereby defined as the ratio of the mass of gas in the tank to the mass of water the tank will hold. For determining the water capacity of the tank in kilograms, the mass of one liter (0.264 gallons) of water at 15.55 °C (60 °F.) in air is 1 kg (2.204 pounds).
2. The liquefied gas must be so loaded so that the outage is at least two percent of the total capacity of the tank at the reference temperature of 46 °C (115 °F.) for non-insulated tanks and 41 °C (105 °F.) for insulated tanks.
3. The requirements of § 173.24b(a) apply.
4. The gas pressure at 54.44 °C (130 °F.) in any non-insulated tank car may not exceed 7/10 of the marked test pressure, except that a tank may be charged with helium to a pressure 10 percent in excess of the marked maximum gas pressure at 54.44 °C (130 °F.) of each tank.
5. The liquid portion of the gas at -17.77 °C (0 °F.) must not completely fill the tank.
6. The maximum permitted filling density is 125 percent. The quantity of chlorine loaded into a single unit-tank car may not be loaded in excess of the normal lading weights nor in excess of 81.65 Mg (90 tons).
7. 89 percent maximum to 80.1 percent minimum at a test pressure of 6.2 Bar (90 psi).
8. 59.6 percent maximum to 53.6 percent minimum at a test pressure of 7.2 Bar (105 psi).

* * * * *

(j) *Special requirements for materials having a primary or secondary Division 2.1 (flammable gas) hazard.* For single unit tank cars, interior pipes of loading and unloading valves, sampling devices, and gauging devices with an opening for the passage of the lading exceeding 1.52 mm (0.060 inch) diameter must be equipped with excess flow valves. For single unit tank cars constructed before January 1, 1972, gauging devices must conform to this paragraph by no later than July 1, 2006. The protective housing cover must be provided with an opening, with a weatherproof cover, above each safety relief valve that is concentric with the discharge of the safety relief valve and that has an area at least equal to the valve outlet area. Class DOT 109 tank cars and tank cars manufactured from aluminum or nickel plate are not authorized.

(k) *Special requirements for chlorine.* Tank cars built after September 30, 1991, must have an insulation system consisting of 5.08 cm (2 inches) glass fiber placed over 5.08 cm (2 inches) of ceramic fiber. Tank cars must have excess flow valves on the interior pipes of liquid discharge valves. Tank cars constructed to a DOT 105A500W specification may be marked as a DOT 105A300W specification with the size and type of safety relief valves required by the marked specification.

(l) *Special requirements for hydrogen sulphide.* Each multi-unit tank car must be equipped with adequate safety relief devices of the fusible plug type having a yield temperature not over 76.66 °C (170 °F.), and not less than 69.44 °C (157 °F.). Each device must be resistant to extrusion of the fusible alloy and leak tight at 55 °C (130 °F.). Each valve outlet must be sealed by a threaded solid plug. In addition, all valves must be protected by a metal cover.

(m) *Special requirements for nitrosyl chloride.* Single unit tank cars and their associated service equipment, such as venting, loading and unloading valves, and safety relief valves, must be made of metal or clad with a material that is not subject to rapid deterioration by the lading. Multi-unit tank car tanks must be nickel-clad and have safety relief devices incorporating a fusible plug having a yield temperature of 79.44 °C (175 °F.). Safety relief devices must be vapor tight at 54.44 °C (130 °F.).

(n) *Special requirements for hydrogen chloride.* Each tank car must be equipped with one or more safety relief devices. The discharge outlet for each safety relief device must be connected to a manifold having a non-obstructed discharge area of at least 1.5 times the total discharge area of the safety relief devices connected to the manifold. All manifolds must be connected to a single common header having a non-obstructed discharge pointing upward and extending above the top of the car. The header and the header outlet must each have a non-obstructed discharge area at least equal to the total discharge area of the manifolds connected to the header. The header outlet must be equipped with an ignition device that will instantly ignite any hydrogen discharged through the safety relief device.

(o) *Special requirements for carbon dioxide, refrigerated liquid and nitrous oxide, refrigerated liquid.* Each tank car must have an insulation system so that the thermal conductance is not more than 0.613 kilojoules per hour, per square meter, per degree Celsius (0.03 B.t.u. per square foot per hour, per degree Fahrenheit) temperature differential. Each tank car must be equipped with one safety relief valve set to open at a pressure not exceeding 75 percent of the tank test pressure and one frangible disc design to burst at a pressure less than the tank test pressure. The discharge capacity of each safety relief device must be sufficient to prevent building up of pressure in the tank in excess of 82.5 percent of the test pressure of the tank. Tanks must be equipped with two regulating valves set to open at a pressure not to exceed 24.1 Bar (350 psi) on DOT 105A500W tanks and at a pressure not to exceed 27.6 Bar (400 psi) on DOT 105A600W tanks. Each regulating valve and safety relief device must have its final discharge piped to the outside of the protective housing.

9. In § 173.319, new paragraph (e) is added to read as follows:

§ 173.319 Cryogenic liquids in tank cars.

* * * * *

(e) *Special requirements for class DOT 113 tank cars.* (1) A class DOT–113 tank car need not be periodically pressure tested; however, each shipment must be monitored to determine the average daily pressure rise in the tank car. If the average daily pressure rise during any shipment exceeds 0.2 Bar (3 psi) per day, the tank must be tested for thermal integrity prior to any subsequent shipment.

(2) *Thermal integrity test.* When required by paragraph (e)(1) of this section, either of the following thermal integrity tests may be used:

(i) *Pressure rise test.* The pressure rise in the tank may not exceed 0.34 Bar (5 psi) in 24 hours. When the pressure rise test is performed, the absolute pressure in the annular space of the loaded tank car may not exceed 75 microns of

mercury at the beginning of the test and may not increase more than 25 microns during the 24-hour period; or

(ii) *Calculated heat transfer rate test.* The insulation system must be performance tested as prescribed in § 179.400–4 of this subchapter. When the calculated heat transfer rate test is performed, the absolute pressure in the annular space of the loaded tank car may not exceed 75 microns of mercury at the beginning of the test and may not increase more than 25 microns during the 24-hour period. The calculated heat transfer rate in 24 hours may not exceed:

(A) 120 percent of the appropriate standard heat transfer rate specified in § 179.401–1 of this subchapter, for DOT–113A60W and DOT–113C120W tank cars;

(B) 122.808 joules (0.1164 Btu/day/lb.) of inner tank car water capacity, for DOT–113A175W tank cars;

(C) 345.215 joules (0.3272 Btu/day/lb.) of inner tank car water capacity, for DOT–113C60W and 113D60W tank cars; or

(D) 500.09 joules (0.4740 Btu/day/lb.) of inner tank car water capacity, for DOT–113D120W tank cars.

(3) A tank car that fails a test prescribed in paragraph (e)(2) of this section must be removed from hazardous materials service. A tank car removed from hazardous materials service because it failed a test prescribed in paragraph (e)(2) of this section may not be used to transport a hazardous material unless the tank car conforms to all applicable requirements of this subchapter.

(4) Each frangible disc must be replaced with a new frangible disc every 12 months, and the replacement date must be marked on the car near the pressure relief valve information.

(5) Pressure relief valves and alternate pressure relief valves must be tested every five years. The start-to-discharge pressure and vapor tight pressure requirements for the pressure relief valves must be as specified in § 179.401–1 of this subchapter. The alternate pressure relief device values specified in § 179.401–1 of this subchapter for a DOT–113C120W tank car apply to a DOT–113D120W tank car.

§ 173.319 [Amended]

10. In addition, in § 173.319, in paragraph (a)(4)(iii), the parenthetical reference ''(see § 173.31(c)(13))'' is removed.

11. In § 173.323, paragraph (c)(1) is revised to read as follows:

§ 173.323 Ethylene oxide.

* * * * *

(c) * * *

(1) *Tank cars.* Class DOT 105J tank cars: Notwithstanding the requirements of § 173.31(c), each tank car must have a tank test pressure of at least 20.7 Bar (300 psi) no later than July 1, 2006.

* * * * *

PART 179—SPECIFICATIONS FOR TANK CARS

2. The authority citation for part 179 continues to read as follows:

Authority: 49 App. U.S.C. 5101–5127; 49 CFR 1.53.

§ 179.1 [Amended]

13. In § 179.1, in paragraph (c), the section reference ''§ 173.31'' is revised to read ''§ 180.507''.

14. In § 179.2, paragraph (a)(10) is redesignated as paragraph (a)(11) and a new paragraph (a)(10) is added to read as follows:

§ 179.2 Definitions and abbreviations.

(a) * * *

(10) *Tank car facility* means an entity that manufactures, repairs, inspects, or tests a tank car to ensure that the tank car conforms to this part and subpart F of part 180 of this subchapter, that alters the certificate of construction of the tank car, that ensures the continuing qualification of a tank car by performing a function prescribed in parts 179 or 180 of this subchapter, or that makes any representation indicating compliance with one or more of the requirements of parts 179 or 180 of this subchapter.

* * * * *

15. Section 179.7 is added to subpart A to read as follows:

§ 179.7 Quality assurance program.

(a) At a minimum, each tank car facility shall have a quality assurance program, approved by AAR, that—

(1) Ensures the finished product conforms to the requirements of the applicable specification and regulations of this subchapter;

(2) Has the means to detect any nonconformity in the manufacturing, repair, or testing of the tank car; and

(3) Prevents non-conformities from recurring.

(b) At a minimum, the quality assurance program must have the following elements—

(1) Statement of authority and responsibility for those persons in charge of the quality assurance program.

(2) An organizational chart showing the interrelationship between managers, engineers, purchasing, construction, inspection, testing, and quality control personnel.

(3) Procedures to ensure that the latest applicable drawings, design calculations, specifications, and instructions are used in manufacture, inspection, testing, and repair.

(4) Procedures to ensure that the fabrication and construction materials received are properly identified and documented.

(5) A description of the manufacturing, inspection, and testing program so that an inspector can determine specific inspection and test intervals.

(6) Monitoring and control of processes and product characteristics during production.

(7) Procedures for correction of imperfections.

(8) Provisions indicating that the requirements of the AAR Specifications for Tank Cars, Specification M–1002, apply.

(9) Qualification requirements of personnel performing ultrasonic, radiographic, dye penetrant, magnetic particle, or other non-destructive inspections and tests.

(10) Qualification requirements of personnel performing optically aided visual inspections (including fiber optic, borescope, and video-image-scope systems). Under these requirements, the examiner must have the capability to consistently and repetitively find flaws under test conditions. Furthermore, the requirements must include visual acuity criteria where detectability (minimum size of a flaw that an examiner can find); resolution (minimum distance at which two flaws may be seen separately); and contrast sensitivity (minimum detectable thickness change (convolutions) over a surface area) further define the qualifications of the examiner.

(11) Procedures for evaluating the inspection and test technique employed, including the accessibility of the area and the sensitivity of the inspection and test technique and minimum detectable crack length.

(12) Procedures for the periodic calibration and measurement of inspection and test equipment.

(13) A system for the maintenance of records, inspections, tests, and the interpretation of inspection and test results.

(c) Each tank car facility shall ensure that only personnel qualified for each non-destructive inspection and test perform that particular operation.

(d) Each tank car facility shall establish written procedures for their employees to ensure that the work performed on the tank car conforms to the specification and AAR approval for the tank car.

(e) Each tank car facility shall train its employees in accordance with Subpart

H of part 172 of this subchapter on the program and procedures specified in paragraph (b) of this section to ensure quality.

(f) *Date of conformance.* After July 1, 1998, no tank car facility may manufacture, repair, inspect, or test tank cars subject to requirements of this subchapter, unless it is operating in conformance with a quality assurance program and written procedures required by paragraphs (a) and (b) of this section.

16. Section 179.16 is added to subpart B to read as follows:

§ 179.16 Tank-head puncture-resistance systems.

(a) *Performance standard.* When the regulations in this subchapter require a tank-head puncture-resistance system, the system shall be capable of sustaining, without any loss of lading, coupler-to-tank-head impacts at relative car speeds of 29 km/hour (18 mph) when:

(1) The weight of the impact car is at least 119,295 kg (263,000 pounds);

(2) The impacted tank car is coupled to one or more backup cars that have a total weight of at least 217,724 kg (480,000 pounds) and the hand brake is applied on the last ''backup'' car; and

(3) The impacted tank car is pressurized to at least 6.9 Bar (100 psi).

(b) Compliance with the requirements of paragraph (a) of this section shall be verified by full-scale testing according to Appendix A of this part or by installing full-head protection (shields) or full tank-head jackets on each end of the tank car conforming to the following—

(1) The tank-head puncture-resistance system must be at least 1.27 cm (0.5 inch) thick, shaped to the contour of the tank head and made from steel having a tensile strength greater than 379.21 N/mm^2 (55,000 psi).

(2) The design and test requirements of the tank-head puncture-resistance system must meet the impact test requirements of Section 5.3 of the AAR Specifications for Tank Cars.

(3) The workmanship must meet the requirements of Section C, Part II, Chapter 5 of the AAR Specifications for Design, Fabrication, and Construction of Freight Cars.

17. Section 179.18 is added to subpart B to read as follows:

§ 179.18 Thermal protection systems.

(a) *Performance standard.* When the regulations in this subchapter require thermal protection on a tank car, the tank car must have sufficient thermal resistance so that there will be no release of any lading within the tank car, except release through the safety relief valve, when subjected to:

(1) A pool fire for 100 minutes; and

(2) A torch fire for 30 minutes.

(b) *Thermal analysis.* (1) Compliance with the requirements of paragraph (a) of this section shall be verified by modeling the fire effects on the entire surface of the tank car according to the procedures outlined in *''Temperatures, Pressures and Liquid Levels of Tank Cars Engulfed in Fires,'' DOT/FRA/OR&D–84/08.11, (1984), Federal Railroad Administration, Washington D.C.* (available from National Technical Information Service, Springfield, VA 22161), or other procedure approved by the AAR Committee on Tank Cars. The analysis must also consider the fire effects on and the heat flux through tank discontinuities, protective housings, underframes, metal jackets, insulation, and thermal protection. A complete record of each analysis shall be made, retained and, upon request, made available for inspection and copying by an authorized representative of the Department.

(2) When the analysis shows the thermal resistance of the tank car does not conform to paragraph (a) of this section, the thermal resistance of the tank car must be increased by using a system listed by the Department under paragraph (c) of this section or by testing an unlisted system and verifying it according to appendix B of this part.

(c) *Systems that no longer require test verification.* The Department maintains a list of thermal protection systems that comply with the requirements of appendix B of this part and that no longer require test verification. Information necessary to equip tank cars with one of these systems is available in the Dockets Unit, Research and Special Programs Administration, 400 Seventh Street, SW., Washington, D.C. 20590–0001.

18. Section 179.20 is added to subpart B to read as follows:

§ 179.20 Service equipment; protection systems.

If an applicable tank car specification authorizes location of filling or discharge connections in the bottom shell, the connections must be designed, constructed, and protected according to paragraphs E9.00 and E10.00 of the AAR Specifications for Tank Cars, M–1002.

19. Section 179.22 is added to subpart B to read as follows:

§ 179.22 Marking.

In addition to any other marking requirement in this subchapter, the following marking requirements apply:

(a) Each tank car must be marked according to the requirements in Appendix C of the AAR Specifications for Tank Cars.

(b) Each tank car that is equipped with a tank-head puncture-resistance system must have the letter ''S'' substituted for the letter ''A'' in the specification marking.

(c) Each tank car that is equipped with a tank-head puncture-resistance system, a thermal protection system, and a metal jacket must have the letter ''J'' substituted for the letter ''A'' or ''S'' in the specification marking.

(d) Each tank car that is equipped with a tank-head puncture-resistance system, a thermal protection system, and no metal jacket must have the letter ''T'' substituted for the letter ''A'' or ''S'' in the specification marking.

§ 179.100–4 [Amended]

20. In § 179.100–4, in paragraph (a), the last sentence is amended by removing the phrase ''except that a protective coating is not required when foam-in-place insulation that adheres to the tank or jacket is applied''.

§§ 179.100–21 and 179.100–23 [Removed]

21. Sections 179.100–21 and 179.100–23 are removed.

22. In § 179.101–1, in paragraph (a), Note 4 following the table is revised to read as follows:

§ 179.101–1 Individual specification requirements.

(a) * * *

[4] Tank cars not equipped with a thermal protection or an insulation system used for the transportation of a Class 2 (compressed gas) material must have at least the upper two-thirds of the exterior of the tank, including manway nozzle and all appurtenances in contact with this area, finished with a reflective coat of white paint.

* * * * *

§ 179.103–1 [Amended]

23. In § 179.103–1, paragraph (c) is removed and reserved.

24. In § 179.103–2, paragraph (a) is revised to read as follows:

§ 179.103–2 Manway cover.

(a) The manway cover must be an approved design.

* * * * *

§ 179.103–5 [Amended]

25. In § 179.103–5, paragraph (a)(1) is amended by removing the first two sentences.

§§ 179.105, 179.105–1—179.105–8 [Removed]

26. Sections 179.105, 179.105–1 through 179.105–8 are removed.

27. In § 179.200–4, in paragraph (a), the last sentence is revised to read as follows:

§ 179.200–4 Insulation.

(a) * * * The exterior surface of a carbon steel tank and the inside surface of a carbon steel jacket must be given a protection coating.

* * * * *

§§ 179.200–25 and 179.200–27 [Removed]

28. Sections 179.200–25 and 179.200–27 are removed.

§§ 179.203, 179.203–1—179.203–3 [Removed]

29. Sections 179.203, 179.203–1 through 179.203–2 are removed.

30. Appendixes A and B are added to Part 179 to read as follows:

Appendix A to Part 179—Procedures for Tank-Head Puncture-Resistance Test

1. This test procedure is designed to verify the integrity of new or untried tank-head puncture-resistance systems and to test for system survivability after coupler-to-tank-head impacts at relative speeds of 29 km/hour (18 mph).

2. *Tank-head puncture-resistance test.* A tank-head puncture-resistance system must be tested under the following conditions:

a. The ram car used must weigh at least 119,295 kg (263,000 pounds), be equipped with a coupler, and duplicate the condition of a conventional draft sill including the draft yoke and draft gear. The coupler must protrude from the end of the ram car so that it is the leading location of perpendicular contact with the impacted test car.

b. The impacted test car must be loaded with water at six percent outage with internal pressure of at least 6.9 Bar (100 psi) and coupled to one or more ''backup'' cars which have a total weight of 217,724 kg (480,000 pounds) with hand brakes applied on the last ''backup'' car.

c. At least two separate tests must be conducted with the coupler on the vertical centerline of the ram car. One test must be conducted with the coupler at a height of 53.3 cm (21 inches), plus-or-minus 2.5 cm (1 inch), above the top of the sill; the other test must be conducted with the coupler height at 79 cm (31 inches), plus-or-minus 2.5 cm (1 inch), above the top of the sill. If the combined thickness of the tank head and any additional shielding material is less than the combined thickness on the vertical centerline of the car, a third test must be conducted with the coupler positioned so as to strike the thinnest point of the tank head.

3. One of the following test conditions must be applied:

Minimum weight of attached ram cars in kg (pounds)	Minimum velocity of impact in km/hour (mph)	Restrictions
119,295 (263,000).	29 (18)	One ram car only.
155,582 (343,000).	25.5 (16) ..	One ram car or one car plus one rigidly attached car.
311,164 (686,000).	22.5 (14) ..	One ram car plus one or more rigidly attached cars.

4. A test is successful if there is no visible leak from the standing tank car for at least one hour after impact.

Appendix B to Part 179—Procedures for Simulated Pool and Torch-Fire Testing

1. This test procedure is designed to measure the thermal effects of new or untried thermal protection systems and to test for system survivability when exposed to a 100-minute pool fire and a 30-minute torch fire.

2. *Simulated pool fire test.*

a. A pool-fire environment must be simulated in the following manner:

(1) The source of the simulated pool fire must be hydrocarbon fuel with a flame temperature of 871 °C (1,600 °F), plus-or-minus 37.8 °C (100 °F), throughout the duration of the test.

(2) A square bare plate with thermal properties equivalent to the material of construction of the tank car must be used. The plate dimensions must be not less than one foot by one foot by nominal 1.6 cm (0.625 inch) thick. The bare plate must be instrumented with not less than nine thermocouples to record the thermal response of the bare plate. The thermocouples must be attached to the surface not exposed to the simulated pool fire and must be divided into nine equal squares with a thermocouple placed in the center of each square.

(3) The pool-fire simulator must be constructed in a manner that results in total flame engulfment of the front surface of the bare plate. The apex of the flame must be directed at the center of the plate.

(4) The bare plate holder must be constructed in such a manner that the only heat transfer to the back side of the bare plate is by heat conduction through the plate and not by other heat paths.

(5) Before the bare plate is exposed to the simulated pool fire, none of the temperature recording devices may indicate a plate temperature in excess of 37.8 °C (100 °F) nor less than 0 °C (32 °F).

(6) A minimum of two thermocouple devices must indicate 427 °C (800 °F) after 13 minutes, plus-or-minus one minute, of simulated pool-fire exposure.

b. A thermal protection system must be tested in the simulated pool-fire environment described in paragraph 2a of this appendix in the following manner:

(1) The thermal protection system must cover one side of a bare plate as described in paragraph 2a(2) of this appendix.

(2) The non-protected side of the bare plate must be instrumented with not less than nine thermocouples placed as described in paragraph 2a(2) of this appendix to record the thermal response of the plate.

(3) Before exposure to the pool-fire simulation, none of the thermocouples on the thermal protection system configuration may indicate a plate temperature in excess of 37.8 °C (100 °F) nor less than 0 °C (32 °F).

(4) The entire surface of the thermal protection system must be exposed to the simulated pool fire.

(5) A pool-fire simulation test must run for a minimum of 100 minutes. The thermal protection system must retard the heat flow to the plate so that none of the thermocouples on the non-protected side of the plate indicate a plate temperature in excess of 427 °C (800 °F).

(6) A minimum of three consecutive successful simulation fire tests must be performed for each thermal protection system.

3. *Simulated torch fire test.*

a. A torch-fire environment must be simulated in the following manner:

(1) The source of the simulated torch must be a hydrocarbon fuel with a flame temperature of 1,204 °C (2,200 °F), plus-or-minus 37.8 °C (100 °F), throughout the duration of the test. Furthermore, torch velocities must be 64.4 km/h ± 16 km/h (40 mph ± 10 mph) throughout the duration of the test.

(2) A square bare plate with thermal properties equivalent to the material of construction of the tank car must be used. The plate dimensions must be at least four feet by four feet by nominal 1.6 cm (0.625 inch) thick. The bare plate must be instrumented with not less than nine thermocouples to record the thermal response of the plate. The thermocouples must be attached to the surface not exposed to the simulated torch and must be divided into nine equal squares with a thermocouple placed in the center of each square.

(3) The bare plate holder must be constructed in such a manner that the only heat transfer to the back side of the plate is by heat conduction through the plate and not by other heat paths. The apex of the flame must be directed at the center of the plate.

(4) Before exposure to the simulated torch, none of the temperature recording devices may indicate a plate temperature in excess of 37.8 °C (100 °F) or less than 0 °C (32 °F).

(5) A minimum of two thermocouples must indicate 427 °C (800 °F) in four minutes, plus-or-minus 30 seconds, of torch simulation exposure.

b. A thermal protection system must be tested in the simulated torch-fire environment described in paragraph 3a of this appendix in the following manner:

(1) The thermal protection system must cover one side of the bare plate identical to that used to simulate a torch fire under paragraph 3a(2) of this appendix.

(2) The back of the bare plate must be instrumented with not less than nine thermocouples placed as described in

paragraph 3a(2) of this appendix to record the thermal response of the material.

(3) Before exposure to the simulated torch, none of the thermocouples on the back side of the thermal protection system configuration may indicate a plate temperature in excess of 37.8 °C (100 °F) nor less than 0 °C (32 °F).

(4) The entire outside surface of the thermal protection system must be exposed to the simulated torch-fire environment.

(5) A torch-simulation test must be run for a minimum of 30 minutes. The thermal protection system must retard the heat flow to the plate so that none of the thermocouples on the backside of the bare plate indicate a plate temperature in excess of 427 °C (800 °F).

(6) A minimum of two consecutive successful torch-simulation tests must be performed for each thermal protection system.

PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

31. The authority citation for part 180 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

32. A new Subpart F is added to part 180 to read as follows:

Subpart F—Qualification and Maintenance of Tank Cars

Sec.
180.501 Applicability.
180.503 Definitions.
180.505 Quality assurance program.
180.507 Qualification of tank cars.
180.509 Requirements for inspection and test of specification tank cars.
180.511 Acceptable results of inspections and tests.
180.513 Repairs, alterations, conversions, and modifications.
180.515 Markings.
180.517 Reporting and record retention requirements.
180.519 Periodic retest and inspection of tank cars other than single-unit tank car tanks.

Subpart F—Qualification and Maintenance of Tank Cars

§ 180.501 Applicability.

(a) This subpart prescribes requirements, in addition to those contained in parts 107, 171, 172, 173, and 179 of this subchapter, applicable to any person who manufactures, fabricates, marks, maintains, repairs, inspects, or services tank cars to ensure that the tank cars are in proper condition for transportation.

(b) Any person who performs a function prescribed in this part shall perform that function in accordance with this part.

§ 180.503 Definitions.

The definitions contained in §§ 171.8 and 179.2 of this subchapter apply.

§ 180.505 Quality assurance program.

The quality assurance program requirements of § 179.7 of this subchapter apply.

§ 180.507 Qualification of tank cars.

(a) Each tank car marked as meeting a ''DOT'' specification or any other tank car used for the transportation of a hazardous material must meet the requirements of this subchapter or the applicable specification to which the tank was constructed.

(b) *Tank car specifications no longer authorized for construction.* (1) Tank cars prescribed in the following table are authorized for service provided they conform to all applicable safety requirements of this subchapter:

Specification prescribed in the current regulations	Other specifications permitted	Notes
105A200W	105A100W	1
105A200ALW	105A100ALW	1
105A300W	ICC–105, 105A300.	
105A400W	105A400.	
105A500W	105A500.	
105A600W	105A600.	
106A500X	ICC–27, BE–27, 106A500.	
106A800X	106A800.	
107A * * * *		2

Note 1: Tanks built as Specification DOT 105A100W or DOT 105A100ALW may be altered and converted to DOT 105A200W and DOT 105A200ALW, respectively.

Note 2: The test pressures of tanks built in the United States between January 1, 1941 and December 31, 1955, may be increased to conform to Specification 107A. Original and revised test pressure markings must be indicated and may be shown on the tank or on a plate attached to the bulkhead of the car. Tanks built before 1941 are not authorized.

(2) For each tank car conforming to and used under an exemption issued before October 1, 1984, which authorized the transportation of a cryogenic liquid in a tank car, the owner or operator shall remove the exemption number stenciled on the tank car and stamp the tank car with the appropriate Class DOT–113 specification followed by the applicable exemption number. For example: DOT–113D60W–E * * * * (asterisks to be replaced by the exemption number). The owner or operator marking a tank car in this manner shall retain on file a copy of the last exemption in effect during the period the tank car is in service. No person may modify a tank car marked under this paragraph unless the modification is in compliance with an applicable requirement or provision of this subchapter.

(3) Specification DOT–113A175W, DOT–113C60W, DOT–113D60W, and DOT–113D120W tank cars may continue in use, but new construction is not authorized.

(4) Class DOT 105A and 105S tank cars used to transport hydrogen chloride, refrigerated liquid under the terms of DOT–E 3992 may continue in service, but new construction is not authorized.

§ 180.509 Requirements for inspection and test of specification tank cars.

(a) *General.* (1) Each tank car facility shall evaluate a tank car according to the requirements specified in § 180.511.

(2) Each tank car that successfully passes a periodic inspection and test must be marked as prescribed in § 180.515.

(3) A written report as specified in § 180.517(b) must be prepared for each tank car that is inspected and tested under this section.

(b) *Conditions requiring inspection and test of tank cars.* Without regard to any other periodic inspection and test requirement, a tank car must have an inspection and test according to this section if:

(1) The tank car shows evidence of abrasion, corrosion, cracks, dents, distortions, defects in welds, or any other condition that makes the tank car unsafe for transportation.

(2) The tank car was in an accident and damaged to an extent that may adversely affect its capability to retain its contents.

(3) The tank bears evidence of damage caused by fire.

(4) The Associate Administrator for Safety, FRA, requires it based on the existence of probable cause that a tank car or a class or design of tank cars may be in an unsafe operating condition.

(c) *Frequency of inspection and tests.* Each tank car shall have an inspection and test according to the requirements of this paragraph.

(1) For Class 107 tank cars and tank cars of riveted construction, the tank car must have a hydrostatic pressure test and visual inspection conforming to the requirements in effect prior to July 1, 1996, for the tank specification.

(2) For Class DOT 113 tank cars, see § 173.319(e) of this subchapter.

(3) For fusion welded tank cars, each tank car must have an inspection and test in accordance with paragraphs (d) through (k) of this section.

(i) For cars transporting materials not corrosive to the tank, every 10 years for the tank and service equipment (i.e., filling and discharge, venting, safety, heating, and measuring devices).

(ii) For non-lined or non-coated tank cars transporting materials corrosive to the tank, an interval based on the following formula, but in no case shall

the interval exceed 10 years for the tank and 5 years for service equipment:

$$i = \frac{t_1 - t_2}{r}$$

where:
i is the inspection and test interval.
t_1 is the actual thickness.
t_2 is the allowable minimum thickness under paragraph (g) of this section.
r is the corrosion rate per year.

(iii) For lined or coated tank cars transporting a material corrosive to the tank, every 10 years for the tank, 5 years for the service equipment, and when a lining or coating is applied to protect the tank shell from the lading, an interval based on the owner's determination for the lining or coating, but not greater than every 10 years.

(A) When a lining or coating is applied to protect the tank shell from the lading, each owner of a lining or coating shall determine the periodic inspection interval and test technique for the lining or coating. The owner must maintain all supporting documentation used to make such a determination, such as the lining or coating manufacturer's recommended inspection interval and test technique, at the owner's principal place of business.

(B) The supporting documentation used to make such inspection and test interval determinations and technique must be made available to FRA upon request.

(d) *Visual inspection.* At a minimum, each tank car facility must visually inspect the tank externally and internally as follows:

(1) An internal inspection of the tank shell and heads for abrasion, corrosion, cracks, dents, distortions, defects in welds, or any other condition that makes the tank car unsafe for transportation, and except in the areas where insulation or a thermal protection system precludes it, an external inspection of the tank shell and heads for abrasion, corrosion, cracks, dents, distortions, defects in welds, or any other condition that makes the tank car unsafe for transportation;

(2) An inspection of the piping, valves, fittings, and gaskets for indications of corrosion and other conditions that make the tank car unsafe for transportation;

(3) An inspection for missing or loose bolts, nuts, or elements that make the tank car unsafe for transportation;

(4) An inspection of all closures on the tank car for proper securement in a tool tight condition and an inspection of the protective housings for proper securement;

(5) An inspection of excess flow valves having threaded seats for tightness; and

(6) An inspection of the required markings on the tank car for legibility.

(e) *Structural integrity inspections and tests.* At a minimum, each tank car facility shall inspect the tank car for structural integrity as specified in this section. The structural integrity inspection and test shall include all transverse fillet welds greater than 0.64 cm (0.25 inch) within 121.92 cm (4 feet) of the bottom longitudinal center line; the termination of longitudinal fillet welds greater than 0.64 cm (0.25 inch) within 121.92 cm (4 feet) of the bottom longitudinal center line; and all tank shell butt welds within 60.96 cm (2 feet) of the bottom longitudinal center line by one or more of the following inspection and test methods to determine that the welds are in proper condition:

(1) Dye penetrant test;

(2) Radiography test;

(3) Magnetic particle test;

(4) Ultrasonic test; or

(5) Optically-aided visual inspection (e.g., magnifiers, fiberscopes, borescopes, and machine vision technology).

(f) *Thickness tests.* (1) Each tank car facility shall measure the thickness of the tank car shell, heads, sumps, domes, and nozzles on each tank car by using a device capable of accurately measuring the thickness to within ±0.05 mm (±0.002 inch).

(2) After repairs, alterations, conversions or modifications of a tank car that result in a reduction to the tank car shell thickness, the tank car facility shall measure the thickness of the tank car shell in the area of reduced shell thickness to ensure that the shell thickness conforms to paragraph (g) of this section.

(g) *Service life shell thickness allowance.* (1) A tank car found with a shell thickness below the required minimum thickness after forming for its specification, as stated in part 179 of this subchapter, may continue in service if:

(i) Construction of the tank car shell and heads is from carbon steel, stainless steel, aluminum, nickel, or manganese-molybdenum steel; and

(ii) Any reduction in thickness of the tank shell or head is not more than that provided in the following table:

ALLOWABLE SHELL THICKNESS REDUCTIONS

Damage type	Class DOT 103, 104, 111, and 115 tank cars		Class DOT 105, 109, 112, and 114 tank cars	
	Top shell	Bottom shell	Top shell	Bottom shell
Corrosion	3.17 mm (0.125 inch)	1.58 mm (0.063 inch)	0.79 mm (0.031 inch)	0.79 mm (0.031 inch).
Corrosion and mechanical	3.17 mm (0.125 inch)	1.58 mm (0.063 inch)	0.79 mm (0.031 inch)	0.79 mm (0.031 inch).
Corrosion, local	4.76 mm (3/16 inch)	3.17 mm (0.125 inch)	1.58 mm (0.063 inch)	1.58 mm (0.063 inch).
Mechanical, local	3.17 mm (0.125 inch)	1.58 mm (0.063 inch)	1.58 mm (0.063 inch)	1.58 mm (0.063 inch).
Corrosion and mechanical, local.	4.76 mm (3/16 inch)	3.17 mm (0.125 inch)	1.58 mm (0.063 inch)	1.58 mm (0.063 inch).

Notes:
1. The perimeter for a local reduction may not exceed a 60.96 cm (24 inch) perimeter. Local reductions in the top shell must be separated from other reductions in the top shell by at least 40.64 cm (16 inches). The cumulative perimeter for local reductions in the bottom shell may not exceed 182.88 cm (72 inches).
2. Any reduction in the tank car shell may not affect the structural strength of the tank car so that the tank car shell no longer conforms to Section 6.2 of the AAR Specifications for Tank Cars.
3. Any reduction applies only to the outer shell for Class DOT 115 tank cars.
4. For Class DOT 103 and 104 tank cars, the inside diameter may not exceed 243.84 cm (96 inches).

(h) *Safety system inspections.* At a minimum, each tank car facility must inspect:

(1) Tank car thermal protection systems, tank head puncture resistance systems, coupler vertical restraint systems, and systems used to protect discontinuities (i.e., skid protection and protective housings) to ensure their integrity.

(2) Reclosing pressure relief devices by:

(i) Removing the safety relief device from the tank car for inspection; and

(ii) Testing the safety relief device with air or another gas to ensure that it conforms to the start-to-discharge pressure for the specification or hazardous material in this subchapter.

(i) *Lining and coating inspection and test.* When this subchapter requires a lining or coating, at a minimum, each tank car facility must inspect the lining or coating installed on the tank car according to the inspection interval and test technique established by the owner of the lining or coating in accordance with paragraph (c)(3)(iii) of this section.

(j) *Leakage pressure test.* (1) At a minimum, each tank car facility shall perform a leakage pressure test on the tank fittings and appurtenances. The leakage pressure test must include product piping with all valves and accessories in place and operative, except that during the pressure test the tank car facility shall remove or render inoperative any venting devices set to discharge at less than the test pressure. Test pressure must be maintained for at least 5 minutes. Leakage test pressure may not be less than 2.1 Bar (30 psig) for tank cars having a test pressure less than or equal to 13.8 Bar (200 psig), or 3.4 Bar (50 psig) for tank cars having a tank test pressure greater than 13.8 Bar (200 psig).

(2) Interior heater systems must be tested hydrostatically at 13.87 Bar (200 psi) and must show no signs of leakage.

(k) *Alternative inspection and test procedures.* In lieu of the other requirements of this section, a person may use an alternative inspection and test procedure or interval based on a damage-tolerance fatigue evaluation (that includes a determination of the probable locations and modes of damage due to fatigue, corrosion, or accidental damage), when the evaluation is examined by the Association of American Railroads Tank Car Committee and approved by the Associate Administrator for Safety, FRA.

(l) *Inspection and test compliance date for tank cars with metal jackets or thermal protection systems.* (1) After July 1, 2000, each tank car with a metal jacket or with a thermal protection system shall have an inspection and test conforming to this section no later than the date the tank car requires a periodic hydrostatic pressure test (i.e., the marked due date on the tank car for the hydrostatic test).

(2) After July 1, 1998, each tank car without a metal jacket shall have an inspection and test conforming to this section no later than the date the tank car requires a periodic hydrostatic pressure test (i.e., the marked due date on the tank car for the hydrostatic test).

(3) For tank cars on a 20-year periodic hydrostatic pressure test interval (i.e., Class DOT 103W, 104W, 111A60W1, 111A100W1, and 111A100W3 tank cars), the next inspection and test date is the midpoint between the compliance date in paragraph (l)(1) or (2) of this section and the remaining years until the tank would have had a hydrostatic pressure test.

§ 180.511 Acceptable results of inspections and tests.

Provided it conforms with other applicable requirements of this subchapter, a tank car is qualified for use if it successfully passes the following inspections and tests conducted in accordance with this subpart:

(a) *Visual inspection.* A tank car successfully passes the visual inspection when the inspection shows no structural defect that may cause leakage from or failure of the tank before the next inspection and test interval.

(b) *Structural integrity inspection and test.* A tank car successfully passes the structural integrity inspection and test when it shows no structural defect that may initiate cracks or propagate cracks and cause failure of the tank before the next inspection and test interval.

(c) *Service life shell thickness.* A tank car successfully passes the service life shell thickness inspection when the tank shell and heads show no thickness reduction below that allowed in § 180.509(g).

(d) *Safety system inspection.* A tank car successfully passes the safety system inspection when each thermal protection system, tank head puncture resistance system, coupler vertical restraint system, and system used to protect discontinuities (e.g., breakage grooves on bottom outlets and protective housings) on the tank car conform to this subchapter.

(e) *Lining and coating inspection.* A tank car successfully passes the lining and coating inspection and test when the lining or coating shows no evidence of holes or degraded areas.

(f) *Leakage pressure test.* A tank car successfully passes the leakage pressure test when all product piping, fittings and closures show no indication of leakage.

(g) *Hydrostatic test.* A Class 107 tank car or a riveted tank car successfully passes the hydrostatic test when it shows no leakage, distortion, excessive permanent expansion, or other evidence of weakness that might render the tank car unsafe for transportation service.

§ 180.513 Repairs, alterations, conversions, and modifications.

(a) In order to repair tank cars, the tank car facility must comply with the requirements of Appendix R of the AAR Specifications for Tank Cars.

(b) Unless the exterior tank car shell or interior tank car jacket has a protective coating, after a repair that requires the complete removal of the tank car jacket, the exterior tank car shell and the interior tank car jacket must have a protective coating applied to prevent the deterioration of the tank shell and tank jacket.

§ 180.515 Markings.

(a) When a tank car passes the required inspection and test with acceptable results, the tank car facility shall mark the date of the inspection and test and the due date of the next inspection and test on the tank car in accordance with paragraph (b) of this section. When a tank car facility performs multiple inspection and test at the same time, one date may be used to satisfy the requirements of this section. One date also may be shown when multiple inspection and test have the same due date.

(b) The tank car facility must comply with the marking requirements of Appendix C of the AAR Specifications for Tank Cars.

(c) Converted tank cars must have the new specification and conversion date permanently marked in letters and figures at least 0.95 cm (0.375 inch) high on the outside of the manway nozzle or the edge of the manway nozzle flange on the left side of the car. The marking may have the last numeral of the specification number omitted (e.g., ''DOT 111A100W'' instead of ''DOT 111A100W1'').

(d) When pressure tested within six months of installation and protected from deterioration, the test date marking of a safety relief device is the installation date on the tank car.

§ 180.517 Reporting and record retention requirements.

(a) *Certification and representation.* Each owner of a specification tank car shall retain the certificate of construction (AAR Form 4–2) and related papers certifying that the manufacture of the specification tank car identified in the documents is in accordance with the applicable specification. The owner shall retain the documents throughout the period of ownership of the specification tank car and for one year thereafter. Upon a

change of ownership, the requirements of Section 1.3.15 of the AAR Specifications for Tank Cars apply.

(b) *Inspection and test reporting.* Each tank car that is inspected as specified in § 180.509 must have a written report, in English, prepared according to this paragraph. The owner must retain a copy of the inspection and test reports until successfully completing the next inspection and test of the same type. The inspection and test report must include the following:

(1) Type of inspection and test performed (a checklist is acceptable);

(2) The results of each inspection and test performed;

(3) Owner's reporting mark;

(4) DOT Specification;

(5) Inspection and test date (month and year);

(6) Location and description of defects found and method used to repair each defect;

(7) The name and address of the tank car facility and the signature of inspector.

§ 180.519 Periodic retest and inspection of tank cars other than single-unit tank car tanks.

(a) *General.* Unless otherwise provided in this subpart, tanks designed to be removed from cars for filling and emptying and tanks built to a Class DOT 107A specification and their safety relief devices must be retested periodically as specified in Retest Table 1 of paragraph (b)(5) of this section. Retests may be made at any time during the calendar year the retest falls due.

(b) *Pressure test.* (1) Each tank, except as provided in paragraph (b)(8) of this section, must be subjected to the specified hydrostatic pressure and its permanent expansion determined. Pressure must be maintained for 30 seconds and far as long as necessary to secure complete expansion of the tank. Before testing, the pressure gauge must be shown to be accurate within 1 percent at test measure. The expansion gauge must be shown to be accurate, at test pressure, to within 1 percent. Expansion must be recorded in cubic centimeters. Permanent volumetric expansion may not exceed 10 percent of total volumetric expansion at test pressure and the tank must not leak or show evidence of distress.

(2) Each tank, except tanks built to specification DOT 107A, must also be subjected to interior air pressure test of at least 100 psi under conditions favorable to detection of any leakage. No leaks may appear.

(3) Safety relief valves must be retested by air or gas, must start to discharge at or below the prescribed pressure and must be vapor tight at or above the prescribed pressure.

(4) Frangible discs and fusible plugs must be removed from the tank and visually inspected.

(5) Tanks must be retested as specified in Retest Table 1 of this paragraph (b)(5), and before returning to service after repairs involving welding or heat treatment:

RETEST TABLE 1

Specification	Retest interval—years		Minimum Retest pressure—p.s.i.		Safety relief valve pressure—p.s.i.	
	Tank	Safety relief devices [d]	Tank hydrostatic expansion [c]	Tank air test	Start-to-discharge	Vapor tight
DOT 27	5	2	500	100	375	300
106A500	5	2	500	100	375	300
106A500X	5	2	500	100	375	300
106A800	5	2	800	100	600	480
106A800X	5	2	800	100	600	480
106A800NCI	5	2	800	100	600	480
107A * * * *	[d]5	[a]2	([b])	None	None	None
110A500–W	5	2	500	100	375	300
110A600–W	5	2	600	100	500	360
110A800–W	5	2	800	100	600	480
110A1000–W	5	2	1,000	100	750	600
BE–275	5	2	500	100	375	300

Notes:

[a] If DOT 107A * * * * tanks are used for transportation of flammable gases, one frangible disc from each car must be burst at the interval prescribed. The sample disc must burst at a pressure not exceeding the marked test pressure of the tank and not less than 70 percent of the marked test pressure. If the sample disc does not burst within the prescribed limits, all discs on the car must be replaced.

[b] The hydrostatic expansion test pressure must at least equal the marked test pressure.

[c] See § 180.519(b)(1).

[d] Safety relief valves of the spring-loaded type on tanks used exclusively for fluorinated hydrocarbons and mixtures thereof which are free from corroding components may be retested every 5 years.

(6) The month and year of test, followed by a ''V'' if visually inspected as described in paragraph (d)(8) of this section, must be plainly and permanently stamped into the metal of one head or chime of each tank with successful test results; for example, 1–60 for January 1960. On DOT 107A**** tanks, the date must be stamped into the metal of the marked end, except that if all tanks mounted on a car have been tested, the date may be stamped into the metal of a plate permanently applied to the bulkhead on the ''A'' end of the car. Dates of previous tests and all prescribed markings must be kept legible.

(c) *Visual inspection.* Tanks of Class DOT 106A and DOT 110A–Z specifications (§§ 179.300, 179.301, 179.302 of this subchapter) used exclusively for transporting fluorinated hydrocarbons and mixtures thereof, and that are free from corroding components, may be given a periodic complete internal and external visual inspection in place of the periodic hydrostatic retest. Visual inspections shall be made only by competent persons. The tank must be accepted or rejected in accordance with the criteria in CGA Pamphlet C–6.

(d) *Written records.* The results of the pressure test and visual inspection must be recorded on a suitable data sheet. Completed copies of these reports must be retained by the owner and by the person performing the pressure test and visual inspection as long as the tank is in service. The information to be recorded and checked on these data

sheets are: Date of test and inspection; DOT specification number; tank identification (registered symbol and serial number, date of manufacture and ownership symbol); type of protective coating (painted, etc., and statement as to need for refinishing or recoating); conditions checked (leakage, corrosion, gouges, dents or digs, broken or damaged chime or protective ring, fire, fire damage, internal condition); test pressure; results of tests; and disposition of tank (returned to service, returned to manufacturer for repair, or scrapped); and identification of the person conducting the retest or inspection.

Issued in Washington, DC, on September 7, 1995 under authority delegated in 49 CFR Part 1.

D.K. Sharma,

Administrator.

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Thursday
September 21, 1995

Part III

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 50, et al.

Protection of Human Subjects; Informed Consent; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 50, 56, 312, 314, 601, 812, and 814

[Docket No. 95N–0158]

RIN 0910–AA60

Protection of Human Subjects; Informed Consent

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; opportunity for public comment.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its current informed consent regulations to permit harmonization of Federal policies on emergency research, and to reduce confusion as to when such research can proceed without obtaining informed consent. The regulation provides a narrow exception to the requirement for obtaining and documenting informed consent from each human subject prior to initiation of an experimental treatment. The exception would apply to a limited class of research activities involving human subjects who, because of their life-threatening medical condition and the unavailability of legally authorized persons to represent them, are in need of emergency medical intervention and cannot provide legally effective informed consent. FDA is proposing this action in response to growing concerns that current rules are making high quality acute care research activities difficult or impossible to carry out at a time when the need for such research is increasingly recognized.

DATES: Written comments by November 6, 1995.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Glen D. Drew, Office of Health Affairs (HFY–20), Food and Drug Administration, Rockville, MD 20852, 301–443–1382.

SUPPLEMENTARY INFORMATION:

I. Harmonization

Recently, the Department of Health and Human Services (HHS) authorized Institutional Review Boards (IRB's) to waive informed consent requirements for one specific National Institutes of Health-funded project under strictly defined circumstances similar to those authorized by these FDA proposed rules. (See HHS Notice of Action Related to Emergency Research Activity at 60 FR 38353 through 38354, July 26, 1995.) HHS is considering a general IRB authorization to waive informed consent requirements under the same strictly defined circumstances as those identified in the specific project waiver authorization and in the FDA proposed rule. Any HHS decision to grant a general informed consent waiver authority to IRB's for emergency research activities will be made with attention to harmonization with action on these FDA proposed rules and will be published in the Federal Register. It is the intent of HHS to bring the HHS (45 CFR part 46) and FDA (21 CFR part 50) regulations into harmony on this matter at the time this rule is made final.

II. Informed Consent Regulations

Much of what has become standard, accepted, medical therapies for use in acute or resuscitation clinical care has not been evaluated by adequate trials that demonstrate either safety or effectiveness. Controlled clinical trials have demonstrated that some therapies that have become standard medical practice are ineffective or even harmful. Other standard therapies, although shown to be effective in clinical trials, have significant limitations, in that, for example, they only work in a small percentage of those individuals who receive the therapies, so that testing of improved or additional therapies remains critically important. By permitting certain adequate and well-controlled clinical trials to occur that involve human subjects who are confronted by a life-threatening condition and who also are unable to give informed consent because of that condition, the agency expects the clinical trials to allow individuals in these situations access to potentially life-saving therapies and to result in advancement in knowledge and improvement of therapies used in emergency medical situations that currently have poor clinical outcome.

Sections 505(i), 507(d), and 520(g) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(i), 357(d), and 360j(g)) require FDA to publish regulations governing the use in humans of drugs, including certain biologics and antibiotics, and devices in clinical investigations (hereafter ''investigational drugs'' and ''investigational devices,'' respectively).

In 1962, amendments to the act (Section 505(d)) provided that drugs could be approved for marketing only if they were found, on the basis of adequate and well-controlled clinical investigations, to be effective as well as safe for their intended use. Section 505(i) of the act also provided that unapproved drugs could be made available to humans for investigational use only. Section 505(i) of the act further provided for the issuance of regulations which condition the investigational use, in part, on:

> * * * the manufacturer * * * requiring that experts using such drugs * * * certify * * * that they will inform any human beings to whom such drugs, or any controls used in connection therewith, are being administered, or their representatives, that such drugs are being used for investigational purposes and will obtain the consent of such human beings or their representatives, except where they deem it not feasible, or in their professional judgment, contrary to the best interests of such human beings.

This provision created the general requirement of informed consent for investigations conducted under sections 505(i) and 507(d) of the act.

The Medical Device Amendments of 1976 revised FDA's authority to regulate medical devices and, in part, set up a statutory scheme under which devices would be classified and subjected to varying degrees of regulatory control according to classification. Section 520(g) of the act created a system under which the safety and effectiveness of new medical devices could be investigated by qualified experts. Among other requirements, section 520(g)(3)(D) of the act provided that the sponsor of clinical investigations must:

> * * * assure that informed consent will be obtained from each human subject (or his representative) * * * except where subject to such conditions as the Secretary may prescribe, the investigator conducting or supervising the proposed clinical testing of the device determines in writing that there exists a life threatening situation involving the human subject of such testing which necessitates the use of such device and it is not feasible to obtain informed consent from the subject and there is not sufficient time to obtain such consent from his representative.

Section 520(g)(3)(D) of the act further provided that this determination:

> * * * shall be concurred in by a licensed physician who is not involved in the testing of the human subject with respect to which such determination is made unless immediate use of the device is required to save the life of the human subject of such testing and there is not sufficient time to obtain such concurrence.

Sections 505(i) and 507(d) of the act permit waiver of informed consent either when ''it [is] not feasible'' or when it is ''contrary to the best interests of such [subjects].'' Section 520(g) of the act permits waiver of informed consent in life-threatening situations which ''necessitates the use of such device and it is not feasible to obtain informed consent * * *.''

In 1979, following the enactment of the Medical Device Amendments, FDA proposed rules revising its regulations governing informed consent (44 FR 47713, August 14, 1979). FDA issued final regulations governing informed consent in the Federal Register of January 27, 1981 (46 FR 8942). Those regulations, codified in part 50 (21 CFR part 50), apply to any clinical investigation subject to regulation by FDA under sections 505(i), 507(d), and 520(g) of the act, as well as to clinical investigations that support applications for research or marketing permits for products regulated by FDA. The agency explained its reasons for revising its regulations governing informed consent in the preamble to these final regulations. These reasons included, among others: (1) The desire to address the informed consent provision included in the device amendments; (2) the need to create a uniform set of agency-wide informed consent standards for more effective administration of the agency's bioresearch monitoring program; (3) implementation of recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research; and (4) harmonization of FDA rules with those of the HHS.

Some comments on the proposed regulations questioned whether the regulations met the statutory requirements of sections 505, 507, and 520 of the act, but all comments approved of the elimination of regulatory confusion and the enhancement of human subject protections. In responding to public comments, the agency stated its belief that the standard regarding informed consent expressed in the 1962 Drug Amendments was the standard of its time, but that it was no longer the current standard of practice, given progress in the understanding of ethical principles and their relevance to biomedical research. The preamble went on to express the agency's intent to adopt a single standard that reflected both the most current congressional thinking on informed consent and the important ethical principles and social policies underlying the doctrine of consent. (See 46 FR 8942 to 8944, January 27, 1981.) In the preamble to the August 14, 1979, proposed rule, FDA further explained the requirement that a determination be made as to lack of an available alternative method of therapy that may save the life of the subject. FDA stated that this requirement:

> * * * has been added to prevent routine reliance on the exception. This additional requirement should provide guidance to investigators regarding those exceptional situations in which informed consent need not be obtained. As noted above, obtaining informed consent has come to be a standard of practice for professional clinical investigators. Defining those circumstances when informed consent need not be obtained should provide a clearer understanding of how to determine when informed consent is ''not feasible.''

(44 FR 47713 at 47720).

In § 50.23(a)) of the 1981 rule, FDA required informed consent except when obtaining informed consent is determined not to be feasible for the emergency use of an investigational article, where:

> * * * both the investigator and a physician who is not otherwise participating in the clinical investigation certify in writing all of the following: (1) The human subject is confronted by a life-threatening situation necessitating the use of the test article. (2) Informed consent cannot be obtained from the subject because of an inability to communicate with, or obtain legally effective consent from, the subject. (3) Time is not sufficient to obtain consent from the subject's legal representative. (4) There is available no alternative method of approved or generally recognized therapy that provides an equal or greater likelihood of saving the life of the subject.

If immediate use of the investigational product is, in the investigator's opinion, required to preserve the life of the subject, and there is not sufficient time to obtain an independent physician's determination in advance of using the product, the use of the product is to be reviewed and evaluated in writing by a physician who is not participating in the study within 5 working days after its use (46 FR 8951, January 27, 1981).

On December 21, 1990, FDA published an interim rule in the Federal Register (55 FR 52814), amending these informed consent regulations to permit an exception from the general requirements for informed consent in certain military combat circumstances. As codified in § 50.23(d), the Commissioner of Food and Drugs (the Commissioner) is permitted to make a determination that obtaining informed consent from military personnel for the use of an investigational drug or biologic is not feasible in certain battlefield or combat-related situations. The Commissioner is authorized to make such a determination when the physician(s) responsible for the medical care of the military personnel involved and the investigator(s) named in the investigational new drug application (IND) provide written justification for their conclusions that, in the use of specific investigational drugs or biologics in a specific combat-related situation, obtaining informed consent is not feasible and withholding treatment would be contrary to the best interests of the military personnel because of military combat exigencies and that the waiver of informed consent is ethically justified (52 FR 52814, December 21, 1990). This exception was upheld in the United States Court of Appeals for the D.C. Circuit in 1991. (See *Doe* v. *Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991), affirming 756 F. Supp. 12 (D. D.C. 1991)).

In June 1991, the Office of Science and Technology Policy published the common Federal Policy for the Protection of Human Subjects (common rule) in the Federal Register. (56 FR 28002, June 18, 1991.) Issuance of the common rule was the result of more than a decade of work by Federal agencies and departments that conduct, support, or regulate research involving human subjects. The common rule implemented a recommendation of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (President's Commission). This recommendation was included in the December 1981 report of the President's Commission, entitled, ''First Biennial Report on the Adequacy and Uniformity of Federal Rules and Policies, and their Implementation, for the Protection of Human Subjects in Biomedical and Behavioral Research, Protecting Human Subjects,'' which stated:

> The President should, through appropriate action, require that all federal departments and agencies adopt as a common core the regulations governing research with human subjects issued by the Department of Health and Human Services (codified at 45 CFR 46), as periodically amended or revised, while permitting additions needed by any department or agency that are not inconsistent with these core provisions.

(56 FR 28004, June 18, 1991)

In May 1982, the Chairman of the Federal Coordinating Council for Science, Engineering, and Technology appointed an Ad Hoc Committee for the Protection of Human Subjects. The Ad Hoc Committee agreed that uniformity was desirable among departments and agencies and worked to develop a model Federal policy, which became the common rule, to ''eliminate unnecessary regulation and to promote increased understanding and ease of compliance by institutions that conduct federally supported or regulated research involving human subjects.'' (56 FR 28004, June 18, 1991.) Section xx.116(d) of the common rule described the conditions under which an Institutional Review Board (IRB) was authorized to waive some or all of the elements of informed consent. This section was adopted unchanged into the HHS regulations (45 CFR part 46). (56 FR

28022, June 18, 1991.) The HHS regulations apply to research supported or conducted by HHS; they are implemented under the direction of the Office for Protection from Research Risks (OPRR) at the National Institutes of Health (NIH).

Although FDA concurred in the common rule and amended its regulations in 21 CFR parts 50 and 56 to conform them to the common rule to the extent permitted by the act, FDA regulations diverged from section xx.116(d). (56 FR 28025, June 18, 1991.) In describing the reason for this divergence, FDA stated as follows:

> The act requires that informed consent be obtained from all subjects of clinical investigations except in very limited circumstances (see, e.g., 21 U.S.C. 355(i), 357(d)(3), and 360j(g)(3)(D), which establish requirements for the conduct of clinical investigations for drugs, antibiotic drugs, and medical devices, respectively). FDA does not have the authority under the act to waive this requirement.

(53 FR 45679, November 10, 1988).

Thus, FDA retained its exception language dealing with individual emergency use which was contained in FDA's 1981 regulations (§ 50.23(a) through (c)); this exception remains applicable today. FDA modified other aspects of parts 50 and 56 (21 CFR part 56) in the Federal Register on June 18, 1991, in order to bring them into harmony with the common rule (56 FR 28025).

IRB's that are subject to both the HHS and FDA regulations have had to ensure that both the criteria in the common rule as set forth at 45 CFR part 46 and in FDA's regulation at 21 CFR part 50 are met in order to permit research to be approved.

On many occasions IRB's, functioning under HHS regulations, have been unable to approve research that required use of the waiver allowed by 45 CFR 46.116(d) because the risk involved in emergency research activities was thought to be greater than minimal and therefore the condition that the research activity ''involve no more than minimal risk'' could not be met. (See 45 CFR 46.116(d).)

Similarly, FDA has permitted only a very limited number of controlled trials involving investigational drugs to be conducted without informed consent under its current exception provisions. This is because § 50.23(a) permits the use of an investigational product without consent only in order to save the life of a patient, and if there is no other approved or generally recognized alternative therapy available that provides an equal or greater likelihood of saving the life of the patient. In other words, the investigator and the independent physician have had to determine that the investigational product represented the best available treatment for the patient.

The agency has permitted limited trials involving investigational drugs to be conducted by interpreting § 50.23(a) as describing the general state of circumstances that must exist as a threshold to determining that informed consent is not feasible (Refs. 1 and 2). The term ''human subject,'' defined in § 50.3(g) as one who participates in research either as a recipient of the test article or as a control, supports the interpretation that this provision was intended to be used in the setting of an investigation conducted in accordance with principles of good clinical design, including blinding, randomization, and, where appropriate, use of a placebo as a control.

III. Background on Current Practices in the Research Community

Most therapeutic intervention in acute care and emergency research must be initiated immediately to be life-saving. For victims of heart attacks or head injuries, for example, this intervention often must be instituted in the field, prior to hospital admission, when the individual is usually found to be unresponsive and unable to communicate and where there usually is no authorized representative of the subject available to give surrogate consent.

In 1993, the agency became aware that certain IRB's were approving research involving interventions in acutely life-threatening situations by invoking a ''deferred consent'' procedure. This term was used to describe a procedure whereby subjects or representatives of subjects are informed, after the fact, that the subject participated, unknowingly, in a clinical investigation of an experimental product, and was administered a test article in the course of the investigation. Subjects or their representatives were then asked to ratify that participation retroactively, and to agree to continuing participation (Refs. 3 through 6). As described, ''deferred consent'' is nothing other than post-hoc ratification. Post-hoc ratification is not genuine consent because the subject or representative has no opportunity to prevent the administration of the test article, and cannot, therefore, meaningfully be said to have consented to its use (Ref. 7).

In August 1993, IRB chairs at institutions with written assurances of compliance with HHS regulations were sent a letter by NIH's OPRR reiterating the mandate for obtaining legally effective informed consent prospectively and reminding them that the only deviation allowed by the HHS regulations is contained in 45 CFR 46.116(d), its waiver provision. The letter indicated that ''deferred consent'' or ''ratification'' fails to constitute informed consent under the HHS regulations (Ref. 8).

During the summer of 1993, the Commissioner of Food and Drugs received a number of letters from the neurology and emergency medicine communities, including the Society for Academic Emergency Medicine, the National Coalition for Research in Neurological Disorders, and the National Head Injury Foundation, expressing concern about their continued ability to conduct placebo controlled research in subjects unable to provide informed consent if FDA did not permit ''implied'' or ''deferred consent.'' The Commissioner responded to these letters on September 14, 1993, indicating that FDA did not agree that ''deferred'' consent constituted true consent; he stated further that:

> While we recognize that it is not always possible to obtain informed consent from subjects prior to the administration of an investigational drug, we believe that it is critical to define and seek some consensus on how, precisely, patients who cannot give consent can be enrolled in such trials * * *. Before establishing new policy in this area, the Agency believes that it needs broad public and scientific input in order to determine how to balance the need for well-controlled studies with the protection of subjects' rights. Therefore, we are in the early stages of planning a workshop that will be co-sponsored by NIH to obtain necessary advice on this topic. * * * *

(Refs. 9 through 12)

Thus, although the research community is now aware that ''deferred consent'' does not meet the requirements of either HHS or FDA rules, and does not constitute valid informed consent, it has been given no alternative procedure, under which it may conduct emergency research under the FDA and HHS regulations, other than the limited exceptions and exemptions described previously.

IV. Patients and Research Community's Support for Change in Regulation and Congressional Interest

In correspondence, at meetings, and in published articles, the IRB and research communities have expressed their frustration at the difficulties they faced in interpreting existing regulations to fit the needs of emergency research. They have identified the need for FDA and NIH to reach a decision concerning the conduct of these studies that would result in a harmonization of the FDA and HHS regulations. Patient advocacy

groups and researchers have stressed that the research at stake is of great importance to patients and the health of the nation and care must be taken to ensure that the agencies' regulations do not inappropriately disrupt access to, or prevent the development of, potentially life-saving treatments for serious illnesses and injuries (Refs. 13 through 20). The IRB and research communities have stressed that a common position adopted by both FDA and NIH will help eliminate confusion concerning which regulations, FDA or HHS or both, need to be followed and will eliminate conflicting requirements that must be met in order for the research to proceed. This is especially true in cases where a majority of the study sites are subject to both sets of regulations. Finally, they have argued that it is appropriate that FDA and NIH agree on the basic conditions and the ethical conduct of acute care research in order to carry out PHS's dual leadership responsibility to promote sound biomedical research while helping to protect the rights and welfare of human subjects (Refs. 21 through 25).

The research addressed by this proposed regulation is believed to constitute a small fraction of all clinical research. This is because, in some instances, an individual may be unconscious or incompetent to give informed consent, but immediate involvement in research is not needed to promote healing or to prevent death. In those instances, it may be possible to delay participation in research until consent from a legally authorized representative can be obtained. There are also medical conditions that predictably occur in given identifiable patient populations. In such cases, prior informed consent can be obtained from potential future subjects before the intervention occurs because the patient will understand the likelihood of the future need to participate in research when consent cannot be obtained. In other cases, such as events that occur regularly in already hospitalized, acutely ill patients, the majority of subjects will have a legally authorized representative readily available to provide surrogate consent. In these instances, the research may, in accord with the provisions of the law of the jurisdiction, proceed without invoking a waiver of informed consent. In those cases that remain, research can only be conducted in the absence of informed consent.

A May 23, 1994, hearing of the Subcommittee on Regulation, Business Opportunities, and Technology, House Committee on Small Business, then chaired by Representative Ron Wyden, addressed problems encountered in securing informed consent of subjects in clinical trials of investigational drugs and medical devices (Ref. 26). In Representative Wyden's opening remarks, he acknowledged that while informed consent is an essential component of biomedical research, there are certain conditions under which obtaining informed consent in the classic sense may not be possible, and it is imperative that testing of potentially life-saving therapies go forward. He further asserted that contradictory and confusing Federal policies on informed consent have fostered inconsistent application of the Federal requirements on the part of investigators and IRB members. Representative Larry Combest, in his opening statement, expressed his desire for HHS Secretary Donna Shalala to establish consistent Federal rules related to obtaining informed consent during research on unapproved drugs and medical devices. He emphasized the need to harmonize HHS and FDA regulations while streamlining the approval process.

Researchers, IRB members, device and drug manufacturers, and ethicists testified about the state of emergency research and the negative impact current regulations have had on the ability of such research to proceed; the ethical issues surrounding the conduct of emergency research in situations where human subjects are not competent to give informed consent; and the need for better guidance from Federal agencies. Representatives from NIH and FDA testifying at the hearing acknowledged the need to further examine the issue of circumstances under which research activities may go forward when informed consent cannot be obtained.

On October 25, 1994, persons associated with several professional organizations, institutions, patient advocacy groups, and the bioethics community met at the Coalition Conference of Acute Resuscitation and Critical Care Researchers (the Coalition) to discuss the current Federal regulations regarding informed consent for participation in research. Observers from the legal community, congressional and senate offices, FDA, and the NIH's OPRR also attended.

The Coalition conference was convened under the joint sponsorship of the American Heart Association and the Society for Academic Emergency Medicine and included representatives from the American Academy of Clinical Toxicology, the American Association for the Surgery of Trauma, the American College of Cardiology, the American College of Emergency Physicians, the Applied Research Ethics National Association, the Emergency Nurses Association, the Joint Section on Neurotrauma and Critical Care, the National Head Injury Foundation, and the Society of Critical Care Medicine.

Following this Coalition conference, the Coalition developed a consensus document to offer recommendations to help resolve some of the issues concerning informed consent and waiver of consent in emergency research. The American Heart Association and the Society for Academic Emergency Medicine submitted the consensus statement to FDA. The consensus document has been endorsed by a number of professional organizations, including the American Academy of Clinical Toxicology, the American Academy of Pediatrics' Pediatric Emergency Medicine Collaborative Research Committee and Section on Emergency Medicine, the American Association for the Surgery of Trauma, the American Autoimmune Related Diseases Association, the American Brain Injury Consortium, the American College of Emergency Physicians, the Applied Research Ethics National Association, the Emergency Nurses Association, the Medical Device Manufacturers Association, the National Head Injury Foundation, the New England Biomedical Research Coalition, the Society for Pediatric Emergency Medicine, the Society for Critical Care Medicine, and the National Association of EMS Physicians.

The consensus document described the importance of emergency research, provided background on the current regulations that govern waiver of consent in clinical research trials, and reviewed current issues arising from the use of waiver of consent in emergency research. The consensus document concluded that there are circumstances under which it is not feasible to obtain consent for enrollment into a protocol involving emergency research; and that, in these circumstances, patients are vulnerable both to risks associated with research, but also to being denied benefits offered by research interventions when no effective standard treatment is known. The consensus document contained recommendations ''which should be met when the critical nature of the illness or injury, or the need for rapid treatment intervention, precludes prospective consent for participation in emergency research'' (Ref. 22).

On January 9 and 10, 1995, FDA and NIH cosponsored a Public Forum on Informed Consent in Clinical Research Conducted in Emergency

Circumstances, as was proposed by the Commissioner of Food and Drugs in his letters of September 14, 1993 (Refs. 9 through 12 and Refs. 23 and 24). The Coalition consensus document was presented and discussed as well as other models for changing the regulatory paradigm (Ref. 25). Participants at that public forum affirmed the need to protect research subjects while allowing clinical research to proceed if the research subjects are in a life-threatening situation, available treatments are unproven or unsatisfactory, and immediate intervention is necessary if the intervention is to be of benefit (Refs. 25 and 26). Many participants expressed concern that the current regulations value individual autonomy and the right to informed consent at the expense of the principles of beneficence and justice. They argued that when the expected outcome of standard therapy is poor, and a promising research intervention is available, the principle of beneficence should be permitted to take precedence over the principle of autonomy (Ref. 23). A minority view expressed was that one cannot ethically assume that acutely ill, incompetent patients would, if they were able, choose to participate in a research protocol. Those supporting this view believed that to exclude these patients from a research protocol did not discriminate against them, but rather respected their autonomy (Refs. 24, 27, and 28).

Forum participants discussed the ethical, regulatory, and operational challenges faced by IRB's and by emergency and acute care researchers, as well as ideas for resolving those dilemmas in an ethical way. Speakers emphasized that the ''golden hour'' or the ''window of opportunity'' following acute injury is a concept on which modern trauma care is based. ''Nearly all patients who die from injury in the first 24 hours do so from processes set in motion at the time of injury. Any therapeutic intervention must [therefore] be begun immediately to interrupt the injury-induced cascade of body reactions leading to death. That is, intervention must be instituted in the field by the first response team of paramedics, in the trauma room in the operating room, and in the surgical critical care unit'' (Ref. 23, p. 277).

Participants agreed that current resuscitation modalities are only minimally effective in saving lives and improving outcome and quality of life. Trauma and acute care physicians reported frustration in employing time-honored treatments that provide little benefit to their patients. Many expressed concern that, because of the current Federal regulations, emergency care professionals are hesitant to conduct appropriately designed clinical trials which are needed to validate or discredit current or innovative treatments. During the Public Forum, participants provided numerous examples of the chilling effect that the current regulations have had on the conduct of clinical research, including cardiopulmonary resuscitation (CPR) studies, and studies of acute trauma, overdose, acute asthma exacerbations, cardiac arrest, head injury, seizures, and stroke (Refs. 23, 24, and 25).

Representative of the studies discussed was one in the area of sudden cardiac arrest. Each year, approximately 350,000 people in the United States suffer a sudden cardiac arrest. Most die, while many others are irreversibly harmed by complications such as brain damage. In the cases of patients who survive, the risk of recurrence is high and the protection offered by easily implantable cardioverter-defibrillators exemplifies the important successes that can be achieved. One of the most critical challenges is to find ways to improve the initial survival rate of individuals who are typically unresponsive and unable to communicate. Currently, despite efforts to instill basic life support education (i.e., standard CPR techniques), only a small percentage of individuals who suffer sudden out-of-hospital cardiac arrests are resuscitated by bystanders. Few survive to leave the hospital. This percentage may be as low as 1 to 3 percent in some large metropolitan areas, with the best results estimated to be only in the 25 percent range. Given the large number of sudden cardiac arrests annually in the United States alone, even small improvements in care offer enormous life-saving potential (Ref. 29).

Standard CPR methodology was largely developed on a mechanistic and theoretical basis. Improvement or rigorous challenge of the methodology is complicated by the difficulty in obtaining approval to undertake studies in out-of-hospital cardiac arrest victims. The inability of most cardiac arrest victims to provide the requisite informed consent has proved a significant barrier to evaluating either treatment options available in other countries, or new techniques devised in the United States (Ref. 29).

Participants asserted that, without validation of standard treatment, many patients are now essentially participants in uncontrolled ''experiments'' when they receive emergency care. These ''experiments,'' however, do not yield data on which progress in rational medical decisionmaking can be based. For example, one IRB would not approve a protocol for a randomized clinical trial of high dose versus standard dose epinephrine in cardiac arrest, even though some clinicians at that institution used high dose epinephrine in some cases and others did not. The ultimate result was that patients were not allocated randomly to high or standard dose (Ref. 30). The scientific question of which dose was better could be realistically addressed only in a controlled trial with subjects randomly allocated to each dosage level in order to assure that multiple variables caused by differences in physicians or other features of resuscitation technique did not confound the data.

The majority of participants in the Public Forum recommended that NIH and FDA change their regulations so that they are clear and consistent and that NIH and FDA develop a new section in the regulations to clearly permit the waiver of informed consent for acute care research if certain defined conditions and safeguards are met. Participants recommended that a short- and long-term solution be sought which would permit this research to proceed. The short-term solution would be needed if a change in the regulations could not be accomplished quickly.

Since the time of the Public Forum, the Assistant Secretary for Health, the NIH Director, and the Commissioner of FDA have received a number of letters urging NIH and FDA to clarify their regulations to allow for waiver of informed consent in appropriate emergency research circumstances. On March 31, 1995, the Coalition of Acute Resuscitation and Critical Care Researchers submitted a statement containing over 1,300 signatures requesting that NIH and FDA: (1) Recognize the need for clinical research in emergent circumstances where informed consent may not be feasible; and (2) issue an interpretation of the existing Federal regulations to allow the performance of this research.

V. Statutory Basis for These Regulations

Sections 505(i), 507(d), and 520(g) of the act direct the Secretary (and, in accordance with section 903 of the act (21 U.S.C. 394), FDA) to issue regulations establishing conditions under which investigational use of drugs and devices by qualified experts will be permitted. For drugs (including biological drugs and antibiotics) and devices, the statute specifies that the agency must include among these conditions that the product manufacturer or sponsor require the

expert studying the product to obtain informed consent from the subjects or their representatives.

The only exceptions from the informed consent requirement for drugs are where the investigators ''deem it not feasible or, in their professional judgment, contrary to the best interests'' of the subjects (sections 505(i) and 507(d) of the act). The language of these provisions makes it clear that Congress contemplated that informed consent could be waived in the context of placebo-controlled drug trials: ''[the investigators] will inform any human beings to whom such drugs, *or any controls used in connection therewith*, are being administered * * * and will obtain the consent of such human beings or their representatives, except where [not feasible or contrary to their best interests]'' (emphasis added). The 1962 Drug amendments, which included section 505(i) of the act, added the requirement that drugs be shown to be not only safe, but also effective through ''adequate and well-controlled investigations, including clinical investigations,'' by experts qualified to evaluate effectiveness (section 505(d) and (e)). Section 505(i) of the act, then, authorized FDA to establish the conditions for the conduct of these required studies in humans. (See also section 507(d) of the act.)

The 1962 amendments were adopted following the thalidomide tragedy, in which women were given the drug without being informed that the drug was experimental, or that they were research subjects, or that the safety of the drug had not been established. (See generally legislative history discussion at 44 FR 47714–47715, August 14, 1979.) Although the House bill would have required informed consent in all clinical trials of drugs, the version reported out of Conference allowed the exceptions that became law (H.R. Rept. No. 2526, 87th Cong., 2d sess., October 3, 1962, pp. 4 and 5). Professional responsibility, based on ''the greatest exercise of conscience,'' was accepted in permitting administration of investigational drugs without informed consent (108 Congressional Record 22038, 22042–43, 87th Cong., 2d sess., October 3, 1962).

The only exceptions from the informed consent requirements for devices are where the investigator determines ''there exists a life threatening situation involving the human subject of such testing which necessitates the use of such device and it is not feasible to obtain informed consent from the subject and there is not sufficient time to obtain such consent from his representative'' (section 520(g)(3)(D) of the act). In addition, ''unless immediate use of the device is required to save the life of the human subject,'' and there is insufficient time to obtain the concurrence of a licensed physician not involved in the testing, such a physician must concur in the determination (section 520(g)(3)(D) of the act). The exceptions to require informed consent are ''subject to such conditions as the Secretary may prescribe.''

The context of this provision also is a statutory amendment allowing exemptions to permit investigational use to study the products' safety and effectiveness (section 520(g)(2)(A) of the act). The Medical Device Amendments of 1976, which included section 520(g), added a system of classifications and premarket approval for certain devices (section 513 of the act (21 U.S.C. 360c)). The amendments contemplated that, with certain exceptions, effectiveness would be determined based on ''well-controlled investigations, including clinical investigations where appropriate,'' by experts qualified to evaluate effectiveness (section 513(a)(3) of the act).

Congress was explicit about the purpose of section 520(g) of the act: ''to encourage to the extent consistent with the protection of the public health and safety and with ethical standards, the discovery and development of useful devices intended for human use and to that end to maintain optimum freedom for scientific investigators in their pursuit of that purpose'' (section 520(g)(1)). The conditions required by section 520(g), then, are to be interpreted within the context of this stated general purpose of providing freedom to the investigators within ethical standards and health and safety protections.

Both the House report on the bill containing the language that became law in section 520(g) of the act and the Conference report refer to the study by the National Commission on the Protection of Human Subjects concerning informed consent. (See H.R. Rept. No. 853, 94th Cong., 2d sess. 44 (1976); H.R. Rept. No. 1090, 94th Cong., 2d sess. 64 (1976).) This Commission, established by the National Research Act in 1974, was to study the basic ethical principles underlying the conduct of biomedical and behavioral research involving human subjects. Congress clearly intended HHS to act in response to the Commission's efforts (id.). The Commission issued numerous reports, including a report on Institutional Review Boards. (See generally 44 FR 47716, August 14, 1979 for a listing of the reports.) This IRB report stated that ''investigators should not have sole responsibility for determining whether research involving human subjects fulfills ethical standards. Others, who are independent of the research, must share this responsibility, because investigators are always in positions of potential conflict by virtue of their concern with the pursuit of knowledge as well as the welfare of human subjects of their research'' (43 FR 56174, November 30, 1978).

The Commission's articulation of the basic ethical principles that should underlie the conduct of biomedical research involving human subjects is the Belmont Report, which was prepared by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research in 1978 (44 FR 23192, April 18, 1979). In proposing its informed consent regulations in 1979, FDA noted the congressional purpose reflected in both the Drug Amendments of 1962 and the Medical Device Amendments of 1976, to require that biomedical research be conducted ''in accordance with the highest contemporary ethical standards'' (44 FR 47718, August 14, 1979). In interpreting sections 505(i), 507(d), and 520(g) of the act in 1995, it remains consistent with congressional intent to apply the principles of the Belmont Report in their applications by ethicists to current research issues. As discussed in detail in the following section, this proposed rule to provide an exception from the requirement of informed consent is supported by contemporary application of the ethical principles of the Belmont Report.

Congress did not specifically address the fact that the statutory language containing the informed consent exemption requirements for investigational devices differed from those for investigational drugs enacted 14 years earlier. However, as the agency discussed in proposing its informed consent regulations in 1979, the actual policy followed by FDA regarding the drug informed consent exception was very similar to the policy being proposed for devices (44 FR 47718). In originally promulgating its regulations in part 50 on the protection of human subjects, FDA chose to apply the same standards to drug and device research. In order to preclude confusion that might result from different systems for informed consent for drug and device research and to implement congressional purpose reflected in both the Drug Amendments of 1962 and the Medical Device Amendments of 1976 (i.e., to require conduct of research in accordance with contemporary ethical

standards), FDA is again proposing to apply the same standards to drug and device research.

Sections 505(i), 507(d), and 520(g) of the act authorize the agency to establish the conditions for investigational use. In the proposed rule, FDA would establish conditions that satisfy the statutory criteria for exceptions from the informed consent requirement and allow for safe use under ethical standards for research.

Under sections 505(i) and 507(d) of the act, a showing that obtaining informed consent is not ''feasible'' is alone sufficient to permit an exception to the requirement. Research without informed consent is also authorized in drug studies based upon professional judgment regarding the ''best interest'' of the subjects. Under section 520(g), informed consent is required unless there is a written determination that (1) ''There exists a life threatening situation involving the human subject of such testing which necessitates the use of such device,'' (2) ''it is not feasible to obtain informed consent from the subject,'' and (3) ''there is not sufficient time to obtain such consent from his representative.'' In addition, a licensed physician who is not involved in the testing must agree with this three-part determination unless there is not sufficient time to obtain such concurrence. Consequently, circumstances that satisfy the statutory informed consent exception criteria for investigational devices will also satisfy the criteria for investigational drugs.

The exception from the informed consent requirement permitted by the proposed rule would be conditioned upon various findings by an IRB. First, the subjects must be in a situation that is: (1) Life-threatening, (2) where available treatments are unproven or unsatisfactory, and (3) the collection of valid scientific evidence is necessary to determine the most beneficial intervention (§ 50.24(a)(1)). In addition, the opportunity to be in the study must be in the interest of the subject because the life-threatening situation necessitates intervention and the risk of the study is reasonable in light of the medical condition and what is known about the risks and benefits of current therapy and of the investigational intervention (§ 50.24(a)(3)). With regard to the study itself, it must be research that could not practicably be carried out without the informed consent waiver (§ 50.24(a)(4)).

These conditions satisfy the criterion included in sections 505(i) and 507(d) of the act regarding the best interest of the subject. They also satisfy the criteria in section 520(g) of the act that the subject be in a ''life threatening situation'' which ''necessitates the use of such device.'' The proposed rule would limit the exception to the narrow circumstance in which both (1) intervention is needed because of the subject's medical condition, and (2) the collection of valid data is needed because of the absence of proven satisfactory available treatment for the condition. The proposed rule thus gives double weight to the statutory ''necessitates'' criterion.

The agency's proposed implementation of the ''necessitates'' criterion also would permit administration of either the test product or a control product, in keeping with the legislative intent to permit scientific investigation to demonstrate safety and effectiveness. Randomized placebo-controlled or active-controlled studies may be needed to demonstrate the effectiveness of products for life-threatening, as well as nonlife-threatening, conditions. As discussed in more detail below, this interpretation is also consistent with the ethical principles in the Belmont Report. For example, the principle of beneficence supports research that ultimately ''makes it possible to avoid the harm that may result from the application of previously accepted routine practices that on closer investigation turn out to be dangerous'' (Belmont Report, 44 FR 23192 at 23194, April 18, 1979).

In issuing current § 50.23(a), permitting exceptions from obtaining informed consent, the agency included an additional criterion not required by section 520(g)(3)(D) of the act (44 FR 47720, August 14, 1979). This provision of the regulation, codified at § 50.23(a)(4), was added ''to prevent routine reliance on the exception'' (44 FR 47720, August 14, 1979). In final form, this subsection required that ''[t]here is available no alternative method of approved or generally recognized therapy that provides an equal or greater likelihood of saving the life of the subject.'' The proposed new § 50.24(a) would permit use of the test product when there is an alternative unproven or unsatisfactory therapy in general use that may be equally likely to save the subject's life. Section 50.24(a)(3) would allow for ''reasonable'' risk, given what is known about the risks and benefits of the test product, the alternative therapy, and the medical condition. The narrowly circumscribed situation described in § 50.24, as well as additional safeguards, such as public disclosure prior to beginning the study, protects against ''routine reliance'' on this exception to conduct research without informed consent.

Section 50.24 also would require, in accordance with the criterion in sections 505(i), 507(d), and 520(g) of the act, that obtaining informed consent not be ''feasible.'' This regulation would restrict determinations of infeasibility to those situations in which: (1) The subjects are unable to give consent because of their medical condition, (2) the product must be administered before it is feasible to obtain consent from legally authorized representatives, and (3) individuals likely to be eligible cannot reasonably be identified prospectively (§ 50.24(a)(2)). Thus, section 50.24(a)(2) also incorporates the required criterion of section 520(g) that there be insufficient time to obtain consent from a representative.

Section 50.24 would require approval of the protocol by an IRB, which is also required to have at least one member who is a licensed physician not otherwise involved in the research protocol (or such a consultant) who concurs with the protocol. That physician's concurrence is in keeping with the provision of 520(g)(3)(D) for concurrence by such an individual that the criteria for testing without informed consent have been satisfied. In most, if not all, instances under § 50.24 there will be a need for ''immediate use'' to save the subject's life and not sufficient time following the onset of the life-threatening condition to obtain the concurrence by an independent physician and, therefore, there will be no statutory requirement for such concurrence. Nevertheless, the agency believes that concurrence with the protocol by an independent physician associated with the IRB is another valuable protection for the subject and additional assurance that the statutory intent of independent physician concurrence will be satisfied.

For the reasons discussed above, the provisions of § 50.24 satisfy all of the statutory criteria of sections 505(i), 507(d), and 520(g) of the act for permitting exceptions to the informed consent requirements for investigational drug and device uses.

Section 50.24 also contains additional protections for the health and safety of the research subjects (e.g., establishment of an independent data and safety monitoring board), as authorized by, and in keeping with the purposes of sections 505(i), 507(d), and 520(g) of the act. This proposed regulation is also authorized by section 701(a) of the act, which provides general authority to issue regulations for the efficient enforcement of the act.

The conforming amendments to regulations governing drug and device investigations and marketing are authorized by sections 502, 503, 505, 506, 510, 513, 514, 515, 516, 518, 519, 520, 701, and 801 of the act and section 351 of the Public Health Service Act (21 U.S.C. 352, 353, 355, 356, 360, 360c, 360d, 360e, 360f, 360h, 360i, 360j, 371, and 381, and 42 U.S.C. 262)

VI. Ethical Basis for These Regulations

In developing this proposed regulation, FDA has carefully considered the basic ethical principles that underlie research to ensure that it is consistent with those principles. The agency is convinced that the research described in this section is ethically permissible.

The current FDA and HHS IRB and informed consent regulations are based, in large part, on the ethical principles discussed in the Belmont Report. As discussed in that report, the three basic ethical principles that are relevant to research involving human subjects are the principles of respect for persons, beneficence, and justice.

The principle of respect for persons incorporates two general rules of ethical behavior: (1) Competent individuals must be treated as autonomous agents, that is to say, persons who are legally and morally competent to understand the risks and benefits of a proposed research activity must provide prior, uncoerced informed consent before they may be enrolled as research subjects; and (2) persons whose autonomy is absent or diminished may participate in research only if additional protections are provided for them. The proposed rule recognizes that subjects who are candidates for emergency research will not meet the condition of being fully competent. In many cases, they will be totally incompetent. Such potential subjects, if they are to be enrolled in research, must be provided with special additional protections. The special protections proposed in this rule for subjects of emergency research include prior FDA and community consultation on the research, public disclosure, and careful mandatory oversight of the welfare of subjects by a data and safety monitoring board. These special protections are described below.

The principle of beneficence requires that the risks associated with a research activity are reasonable in the light of expected benefits and it also requires that the chance for benefits from participation be maximized, and the risk of possible harms be minimized, consistent with sound research design.

The principle of justice requires that the burdens and benefits of participation in research be equitably distributed across the entire population in the place or region where the research is conducted. That means, in general, that racial, ethnic, gender, and economic status should not be used as exclusion criteria for participation in research. It further means that persons who are eligible for participation in the research because of their disease or condition, should be provided reasonable opportunity to participate in research until the research cohort is fully recruited. Experience has repeatedly shown that requiring surrogate consent from legally authorized representatives tends to inhibit equitable inclusion in the study because surrogate consent is more easily obtained from family members of Caucasians than from family members of minorities, and it is more easily obtained from family members of middle and upper income persons than from persons of lower income (Ref. 31). Waiving the requirement for informed consent from potential subjects and their surrogates helps to provide for an equitable distribution of both burdens and benefits of emergency research in a manner that meets the requirements of justice.

The Belmont Report notes that ''[t]hese principles cannot always be applied so as to resolve beyond dispute particular ethical problems. The objective is to provide an analytical framework that will guide the resolution of ethical problems arising from research involving human subjects.'' (44 FR 23193, April 18, 1979.) The Belmont Report did not, therefore, address resolution of conflicts among these ethical principles that might be occasioned by a particular research protocol, but it did provide a framework within which conflicts among the principles could be resolved.

The National Commission did not explicitly address the issue of research involving the comatose patient. However, in March 1983, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research issued its ''Second Biennial Report on the Adequacy and Uniformity of Federal Rules and Policies, and of their Implementation, for the Protection of Human Subject.'' In its report, the President's Commission identified research on the comatose as an issue worthy of further consideration. In its discussion, it noted that

> It is settled law that physicians and hospitals may assume that an emergency patient would consent to life-saving treatment; such treatment may therefore be initiated without express consent. The legal principle is based, however, on the provision of standard care. It is not so clear, however, whether one should assume that an emergency patient would consent to participation in research on new or experimental treatment.
> (Ref. 32)

The agency has considered the ethical principles set forth in the Belmont Report in the formulation of this rule. It has also engaged in extended public dialogue to resolve the difficulty noted by the President's Commission. The exception from informed consent for investigations involving life-threatening conditions would apply only to subjects not in a position to exercise autonomy. These subjects will be in a life-threatening situation which necessitates emergency intervention. Thus, in accord with the principle of respect for persons, persons in these situations are entitled to special protection.

In emergent situations, protection is provided and the principle of respect for persons is satisfied if, in circumstances of clinical equipoise, either the test therapy or its historic alternative is provided, even without specific consent. When the relative benefits and risks of the proposed intervention, as compared to standard therapy, are unknown, or thought to be equivalent or better, there is clinical equipoise between the historic intervention and the proposed test intervention. Clinical equipoise would exist, according to testimony presented at the January 1995 FDA/NIH Public Forum on Informed Consent in Clinical Research Conducted in Emergency Circumstances, whenever at least a reasonable minority of medical professionals believe the experimental treatment would be as good as, or better than, the standard treatment (Ref. 23).

This proposed rule is also consistent with the principle of beneficence. The principle of beneficence maximizes possible benefits and minimizes possible harms. In order to avoid harm, one must know what is harmful. In emergency medicine, the standard of care may not have been validated—it may be beneficial or it may be harmful. The principle of beneficence dictates that knowledge be gathered when there is clinical equipoise between established and proposed interventions, through the conduct of research. Beneficence can be assured by the collection of valid scientific evidence, including evidence derived from randomized controlled clinical trials, in order to determine whether the particular intervention is beneficial. Harms are minimized, in part, by careful monitoring of the study by an independent data and safety monitoring board that regularly compares study

data with preestablished ''stopping rules'' designed to terminate the study before any serious harm occurs.

The principle of justice is also pertinent to this proposed rule. Systematically excluding persons who are unable to give informed consent and who have no surrogate to consent for them from research may be discriminatory, as noted above. An inability to consent, or lack of an authorized representative, should not in itself be a reason for excluding persons from participating in potentially beneficial and scientifically well-designed, controlled, studies (Refs. 33 and 34).

VII. Description of the Proposed Rule

A. Introduction

Section 50.24 will be applicable only to that limited subset of research activities that involve individuals who are in a life-threatening situation and for whom available treatments are unproven or unsatisfactory (e.g., have poor clinical outcome or leave individuals with substantial mortality or major morbidity). FDA believes that evidence submitted at the Public Forum on the chilling effect of current regulations on the care and medical management of such persons in life-threatening situations, including impairing their access to potentially life-saving therapy, justifies the prompt issuance of regulations governing research on such subjects. Thus, FDA intends to issue a final rule, responding to comments received on this proposed rule, promptly following the 45-day comment period.

B. Scope

Section 50.24(d) will require that all protocols that involve a product regulated by FDA and that involve the possibility of invoking an exception under this section are to be performed under a separate IND or a separate Investigational Device Exemption (IDE).

For medical devices, this means that a sponsor may not submit the investigation to an IRB as a nonsignificant risk device (21 CFR 812.2(b)). All device investigations are to be submitted to the agency as separate IDE's, prominently identified as IDE's that propose to invoke the exception in this rule. If the sponsor has already submitted an IDE to the agency for the medical device, the sponsor may cross-reference information in that IDE. The purpose of proposing to require a separate IDE is to ensure that there are 30 days before commencement of the trial in order to permit agency review of the protocol and supporting information.

For drugs, this means that the exemptions from the requirement to submit an IND, contained in 21 CFR 312.2(b), may not be invoked for investigations of a drug product that is lawfully marketed in the United States if the investigation involves potential invoking of § 50.24. The agency believes that investigations that propose to involve individuals who are unable to give informed consent do not meet the requirements of § 312.2(b)(iii), i.e., the use in this subject population would increase the risks or decrease the acceptability of the risks associated with the use of the drug product and, therefore, agency review of the IND is appropriate. All drug investigations will be submitted to the agency as separate IND's, prominently identified as IND's that propose to invoke the exception in this rule. If the sponsor has already submitted an IND to the agency for the drug product, the sponsor may cross-reference information in that IND. The purpose of proposing to require a separate IND is to ensure that there are 30 days before commencement of the trial in order to permit the agency to review the protocol and supporting information.

C. IRB Responsibilities

Section 50.24(a) gives the IRB the primary responsibility for determining that the research meets the requirements of this proposed rule. In the Coalition's consensus statement, the Coalition recommended that the interests, rights, and welfare of subjects in emergency research trials be protected by special safeguards applied by IRB's. It recommended further that because IRB's have good insight into local practice, subject populations, and the capabilities of researchers, institutions and resources, that IRB's should be the primary unit responsible for maintaining oversight of these clinical trials. The majority of participants at FDA/NIH Public Forum also expressed support for this responsibility being placed on IRB's.

At the congressional hearing and at the Public Forum, some individuals expressed concern about placing this responsibility with IRB's that charge for their services and that are not physically located where the research is to be conducted, so called, ''independent IRB's.'' The agency has considered these concerns, but believes that duly constituted IRB's that fulfill the requirements of part 56 (21 CFR part 56) and § 50.24, including paragraph (a)(5) which will require consultation with the communities from which the subjects will be drawn and public disclosure, will ensure that the rights and welfare of research subjects are protected. The agency has permitted independent IRB's to review research since 1981. The agency has acknowledged that independent IRB's that lack members from the area of the research site may have difficulty acquiring knowledge of community attitudes, information on conditions surrounding the conduct of the research, and the continuing status of the research. FDA has advised these IRB's, at conferences and in written educational materials, to be particularly sensitive to meeting all requirements of the regulations.

This regulation would permit the IRB to approve research without requiring that informed consent be obtained if the IRB determines and documents that it is approving such research for the reasons given in § 50.24(a).

D. IRB Documentation

This regulation will require the IRB to document that it considered each element in § 50.24(a) and found that each element was met by the proposed research. The agency believes that this documentation is necessary to ensure that the IRB is adequately protecting the rights and welfare of human subjects.

Under § 50.24(e), an IRB would be required to document its findings when it cannot approve the research either because the research does not meet the criteria in § 50.24 or because of other relevant ethical concerns. The IRB is to provide this information in writing to the research sponsor. The sponsor of the research must share this information with FDA, and investigators, and other IRB's that are asked to review this or a substantially equivalent trial. FDA believes that sharing IRB information with these entities concerned with the study will enhance the protection provided to research subjects by establishing communication among IRB's on this important issue. IRB concerns about the approvability of studies may identify to the sponsor and FDA issues that need to be addressed in the research such as the need to alter the study design to better protect the rights and welfare of research subjects. The sponsor's sharing of these concerns with other investigators and IRB's that are asked to review this or substantially equivalent research, assures that all relevant IRB's and investigators will be aware of concerns noted by other IRB's and will have the opportunity to assess those concerns in their review of the research activity.

Because IRB's that review FDA-regulated research may be institutionally-based, independent of an

institution, commercial, established by the sponsor of the research, or established by a group of investigators, it is possible for an investigator to seek approval of an investigation from more than one IRB. Thus, if the study is disapproved by one IRB, it is possible for the investigator to seek approval from another. The agency believes that the provision requiring the sharing of information will enable any IRB that is asked to review the study to take into account relevant ethical concerns raised by another IRB.

This requirement would not add an additional documentary burden to IRB's because under § 56.115(a)(2), the IRB is required to document the basis for disapproving any proposed research and to prepare a written summary of the discussion of controverted issues and their resolution. The proposed requirement in § 50.24(c), for IRB retention of records and for their availability during an inspection, is identical to that required for records maintained pursuant to part 56.

E. Criteria for IRB Approval

Section 50.24(a)(1) would require that the IRB determine that:

> * * * the human subjects are in a life-threatening situation, available treatments are unproven or unsatisfactory, and the collection of valid scientific evidence, which may include evidence obtained through randomized placebo controlled trials, is necessary to determine what particular intervention is most beneficial.

The agency believes that an IRB can determine that the subjects are in a life-threatening situation if it determines that the medical condition being treated by the proposed intervention poses an imminent risk of loss of life. FDA considers treatments to be unproven when, for example, their safety and effectiveness have not been established in adequate and well-controlled clinical trials. FDA believes that unsatisfactory treatments include those treatments which fail to prevent a significant proportion of deaths or permanent disabilities in the population of interest. As discussed earlier, in order to learn what is harmful or beneficial, the intervention or activity must be subjected to adequate and well-controlled trials, including, where appropriate, trials involving a placebo. Determining the risks and benefits of intervention for potentially life-saving therapies will enable physicians to better evaluate the appropriate treatment for individual patients.

As the Coalition noted in its consensus statement:

> Patients deserve and expect modern, safe, and effective medical care when they are acutely ill or injured. We believe the public desires advances in acute emergency and critical care and understands that research is required to improve medical care. The benefits of emergency research include potential improvement in survival and the quality of life following many life threatening conditions that otherwise would have dismal outcomes. The risk of not doing emergency research is denying promising new treatments to individual patients with conditions that currently have no effective therapy, or to future patients with the same devastating condition.

(Ref. 22.)

Section 50.24(a)(2) defines when obtaining informed consent is not feasible. The agency believes that the first criterion (§ 50.24(a)(2)(i)) generally will be met if, once the medical condition develops, the potential subjects would not be able to give informed consent as a result of the medical condition. Examples of situations in which obtaining informed consent from the subject may not be feasible include individuals who have suffered a cardiac arrest, severe head injury, or other catastrophic medical or traumatic event.

Section 50.24(a)(2)(ii) would require the IRB to determine that it is necessary to administer the intervention before it is feasible to obtain informed consent from a legally authorized representative. It would require the IRB to consider the consequences of waiting to administer the intervention until a legally authorized representative can consent on behalf of the subject. This criterion recognizes the Coalition's concern that ''the test therapy for these catastrophic conditions must be given immediately after the acute injury or illness to have any possibility of benefit.'' If the window of time is narrow, it will be difficult or impossible to identify a legally authorized representative especially for patients whose identities are unknown at the time of presentation.

Section 50.24(a)(2)(iii) would require the IRB to determine that there is no reasonable way to identify prospectively the individuals likely to become eligible for the research because the emergence of the condition to be studied cannot be predicted reliably in particular individuals. The agency believes that when there is a reasonable way to prospectively identify such individuals, that efforts should be made to obtain prospective consent for the particular protocol from those subjects.

Section 50.24(a)(3) describes why the research intervention is in the best interests of subjects. As discussed earlier, the agency expects clinical equipoise to exist in protocols that would be approved under this section. Clinical equipoise exists when the relative benefits and risks of the proposed intervention are unknown, or thought to be equivalent or better than standard therapy. Clinical equipoise has been described as existing when at least a reasonable minority of medical professionals believe the test article is as good as or better than the standard treatment or that the standard treatment to be tested is no better than placebo. The agency expects that evidence from animal studies, previous use in humans (for other indications), similarity to other products used in humans, and other evidence, could be used to document clinical equipoise.

Section 50.24(a)(4) would require the IRB to determine that the study could not practicably be conducted without the waiver. This regulation will not permit waiver of informed consent in instances in which an individual may be unconscious or otherwise incompetent to give informed consent, but immediate intervention is not needed in order to prevent death because there is sufficient time to locate, and obtain consent from, a legally authorized representative. In those instances, it may be possible to delay treatment until a court appointed patient-advocate is arranged, the consent of a family member can be obtained, or some other procedure for a surrogate can be followed. There are also medical conditions that predictably occur in given identifiable subject populations. In those cases, it is possible to obtain advance consent before the intervention is required. In other cases, such as events that occur regularly in already hospitalized, acutely ill patients, the majority of subjects will have a family member or a legally authorized representative readily available to provide consent. In these instances, the research may, in accord with the provisions of the law of the jurisdiction, proceed without invoking a waiver of informed consent. In cases such as these, it will be inappropriate to invoke this exception.

The agency recognizes that there may be situations where research studies that would be conducted under § 50.24(a) may include a limited number of subjects for whom a representative is able to provide surrogate consent for the subject, and the treatment window may be such to permit such consent to be obtained. In anticipation of this possibility, the IRB will be required to have reviewed and approved an informed consent document in accord with § 56.109(b), so that surrogate consent can be obtained for those subjects.

Section 50.24(a)(5) describes four ''additional protections'' that would have to be provided for each protocol:

consultation with representatives of the communities from which the subjects will be drawn; public disclosure prior to the commencement of the study sufficient to describe the study and its risks and benefits; public disclosure of sufficient information following completion of the study to apprise the community and researchers of the study and its results; and the establishment of an independent data and safety monitoring board. In addition to these protections, the IRB should consider whether there are other appropriate additional protections that should be included to protect the rights and welfare of these subjects.

In order to provide for consultation with representatives of the communities from which the subjects will be drawn, and to supplement the information available for review by the IRB, all IRB's should consider, for example, having the clinical investigator or sponsor convene a public meeting in the community on the protocol; establishing a separate panel of members of the community from which the subjects will be drawn; including consultants to the IRB from the community from which the subjects will be drawn; enhancing the membership of the IRB by adding additional members who are not affiliated with the institution and are representative of the community; or developing some other mechanism to ensure community involvement and input into the IRB's decisionmaking process.

In order to provide for public disclosure, the IRB should consider how best to publicly disclose, prior to the commencement of the study, sufficient information to describe the study's risks and benefits, e.g., relevant information from the investigator's brochure or study protocol. Public disclosure following IRB review should be sufficient to disclose information concerning the IRB's resolution of issues and final decisions; this disclosure should provide community confidence in the role of the IRB and in its decisionmaking capability. Disclosure following completion of the study should provide sufficient information to the community about its results and sufficient information to researchers, which would include the underlying data, to be able to assess the results of the study.

The agency recognizes that the level of disclosure to representatives of the community and to researchers that would be required by § 50.24(a)(5) would require sponsors to disclose information about an investigation which they might not otherwise publicly disclose. FDA would require sponsors to provide copies to FDA of the publicly disclosed information for any investigation which proposes an exemption from the informed consent requirement. The agency believes that by disclosing the information described in this paragraph, the community will better understand the nature of the research and the rights and welfare of subjects will be better protected. By broadly sharing the results of the research with the scientific community, there may be less need to replicate the research; therefore, fewer subjects may be needed to obtain the same level of scientific knowledge and to advance emergency medicine.

Requiring an independent data and safety monitoring board would help ensure that if it becomes clear that risks are greater than anticipated, or that the benefits do not justify the risks of the research, the IRB is informed and can act on the information. For multi-center studies, the agency generally would expect the sponsor of the research, rather than the IRB, to establish the independent data and safety monitoring board. By ''independent,'' the agency intends that the board be composed solely of individuals who have no financial interest in the outcome of the study, and who have not been involved in the design or conduct of the study. Section 56.111(a)(6) currently requires the IRB to determine that, where appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects. As discussed in the preamble to the January 27, 1981, regulations, in response to comments questioning the meaning of § 56.111(a)(6) and requesting guidelines for determining at what point in each experiment one treatment is shown to be safer and more effective than alternative treatments or no treatments, FDA responded:

> This [data monitoring] procedure might be an appropriate requirement in large scale clinical trials or in studies with a high degree of risk. The IRB may require the use of data safety monitoring boards in order to meet the requirements of this provision. Thus, if it becomes clear that risks are greater than anticipated, or that the benefits do not justify the risks of the research, the IRB is informed and can act on the information. This provision matches the HHS requirement * * *. IRB's generally will not have the scientific competence to make such a judgement [at what point in each experiment one treatment is shown to be safer and more effective than alternate treatments or no treatment]. The determination whether and at what point in an investigation a test article has been shown to be safe and effective in accordance with the requirements of the act is a determination that must be made by the investigator, the sponsor, and, ultimately, FDA.

(46 FR 2869, January 27, 1981)

Section 50.24(b) describes a hierarchy of persons who should be informed of the subject's inclusion in the study, about the details of the study, and that the subject can discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled. The hierarchy is, first, the subject; if the subject remains incapacitated, then a legally authorized representative of the subject; if the representative is not available, a member of the subject's family is to be informed. The agency has included the phrase ''without penalty or loss of benefits to which the subject is otherwise entitled'' to ensure, in part, that a subject who is withdrawn from a study is provided with appropriate alternative medical care consistent with that person's medical condition.

The definition of ''family members'' in § 50.3(n) was taken from the Federal Government's Office of Personnel Management's final rule which relates, in part, to the use of sick leave to care for family members. That rule implements the Federal Employees Friendly Family Leave Act (Pub. L. 103–388), and was published in the Federal Register of December 2, 1994 (59 FR 62266). The definition has been modified by the phrase ''legally competent'' to acknowledge that family members must be not only of legal age, but also possess appropriate mental capacity, to have this information meaningfully conveyed to them.

F. Preemptive Effect

In developing these proposed rules, FDA considered whether there were existing State or local legal requirements governing informed consent that might limit or preclude participation in research in circumstances that otherwise could be authorized by IRB's acting in accord with these proposed rules. FDA believes that it is important that informed consent requirements governing this type of research be nationally uniform, particularly in light of the current confusion created in the research community by differing Federal regulations. FDA recognizes, however, that the existing Federal Policy for the Protection of Human Subjects, which governs much of this type of research, currently provides that it does not affect any State or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects. Accordingly, FDA specifically invites comment on whether there are existing State or local legal requirements that might limit or preclude participation in research in circumstances that otherwise could be

authorized by IRB's acting in accord with these proposed rules and whether any such requirements should be preempted by Federal requirements.

VIII. Effective Date

FDA is proposing to make these regulations effective on the date of publication of the final rule in the Federal Register because of the urgent need to permit emergency research to proceed. The agency believes that it is in the public interest to have a final rule in place as quickly as possible. By permitting certain controlled clinical trials to be conducted with the involvement of human subjects who are confronted by a life-threatening condition and who are also unable to give informed consent because of that condition, the agency expects to provide individual access to potentially beneficial treatment. The agency also expects that research to result in advancement and improvement of therapies used in emergency medicine situations that currently have poor clinical outcome. As a result of this rule, many individuals confronted by life-threatening situations will benefit immediately. Survival of these individuals may be enhanced by their participation in controlled trials. Therefore, FDA tentatively concludes that there is good cause to dispense with the normal 30-day period between publication of a final rule and its effective date.

IX. Request for Comments

Interested persons may, on or before November 6, 1995 submit to the Dockets Management Branch (address above) written comments regarding this proposal. Comments are also solicited regarding the need for Federal preemption (see sections VII.F. and XI.B. of this document) and information collection requirements subject to Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1995 (see section XIII. of this document). 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. Comments on information collection requirements should be directed to FDA's Dockets Management Branch (address above) and to OMB's Office of Information and Regulatory Affairs (addressed below in section XIII. of this document).

FDA believes that a comment period greater than 45 days would be contrary to the public interest for the reasons given above. In addition, FDA is taking this action in response to the congressional hearing, the Consensus Conference, FDA/NIH Public Forum, and to public and professional concerns that not all of what has become standard and accepted medical therapy for use in acute or resuscitation care has been subjected to controlled clinical trials to establish its safety or effectiveness.

Currently, there are some investigations ongoing involving life-threatening conditions which enroll only subjects able to consent; other investigations are on hold pending issuance of this regulation. In those trials that are ongoing, accrual of subjects is exceedingly slow. Further delay could cause sponsors and funding institutions to cease support of such research, resulting in the research being stopped before sufficient data is gathered to demonstrate efficacy. FDA believes that extending the comment period would delay implementation of this rule and would result in the cessation of some of these studies or in the diversion of emergency research resources to other activities. As a result, potential subjects would be deprived of the opportunity to obtain potentially life-saving treatment. In addition, society would suffer as a result of this discontinuity in research by not being able to determine the effectiveness of potentially life-saving therapies.

Because of these public health concerns, FDA does not intend to extend the comment period beyond that date. Also, the agency is advising that it may not be able to consider any comments received at the Dockets Management Branch after the close of business on November 6, 1995. Although FDA is providing 45 days, rather than 90 days, for comments on this subject through the routine notice and comment procedures, it has received much input through the various conferences and congressional hearings discussed above and in correspondence. This input has come from IRB's, sponsors, investigators, ethicists, patient groups, etc.

The agency considered whether a reinterpretation of its existing regulations would meet the needs of persons in life-threatening situations and the research community. It concluded against such a reinterpretation for a number of reasons, including: it would not make the FDA regulations and the HHS regulations congruent; it would not provide prospective protections to subjects participating in such research; it would be difficult if not impossible to enforce additional safeguards that the agency believes are essential to protect subjects involved in such research activities; and it would not adequately eliminate the confusion that currently exists within the research community as to the standards that must be applied to this research. The sole benefit of a reinterpretation of existing regulations would be to permit this limited class of research to move forward quickly, rather than delaying until a new regulation could be written. The agency has, thus, placed priority on developing this proposed regulation in order to permit the ethical conduct of a limited class of emergency research.

X. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(8) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

XI. Executive Orders

A. Executive Order 12606: The Family

Executive Order 12606 directs Federal agencies to determine whether policies and regulations may have a significant impact on family formation, maintenance, and general well-being. FDA has analyzed this proposed rule in accordance with Executive Order 12606, and has determined that it has no potential negative impact on family formation, maintenance, and general well-being.

FDA has determined that this rule will not affect the stability of the family, and particularly, the marital commitment. It will not have any significant impact on family earnings. The proposed rule would not erode the parental authority and rights in the education, nurture, and supervision of children.

B. Executive Order 12612: Federalism

Executive Order 12612 requires Federal agencies to carefully examine regulatory actions to determine if they would have a significant effect on federalism. Using the criteria and principles set forth in the order, FDA has considered the proposed rule's impact on the States, on their relationship with the Federal Government, and on the distribution of power and responsibilities among the various levels of government. FDA concludes that this proposal is consistent with the principles set forth in Executive Order 12612.

Executive Order 12612 states that agencies formulating and implementing

policies are to be guided by certain federalism principles. Section 2 of Executive Order 12612 enumerates fundamental federalism principles. Section 3 states that, in addition to these fundamental principles, executive departments and agencies shall adhere, to the extent permitted by law, to certain listed criteria when formulating and implementing policies that have federalism implications. Section 4 lists special requirements for preemption.

Section 4 of Executive Order 12612 states that an executive department or agency foreseeing the possibility of a conflict between State law and federally protected interests within its area of regulatory responsibility is to consult with States in an effort to avoid such conflict. Section 4 also states that an executive department or agency proposing to act through rulemaking to preempt State law is to provide all affected States notice and opportunity for appropriate participation in the proceedings. As required by the Executive Order, States have, through this notice of proposed rulemaking, an opportunity to raise the possibility of conflicts and to participate in the proceedings (section 4(d) and (e)). Consistent with Executive Order 12612, FDA requests information and comments from interested parties, including but not limited to State and local authorities, on these issues of federalism.

XII. Analysis of Impacts

FDA has examined the impacts of the proposed rule under Executive Order 12866 and the Regulatory Flexibility Act (Pub. L. 96–395). 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.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this rule is a deregulatory action insofar as it will permit research to proceed which could not proceed under existing regulations, and because relatively few research projects will need to meet the requirements of this rule, the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required.

XIII. Paperwork Reduction Act of 1995

This proposed rule contains only information collection requirements which are subject to review by the OMB under the Paperwork Reduction Act of 1995 (Pub. L. 104–13), and which are already approved under Protection of Human Subjects—Recordkeeping Requirements for Institutional Review Boards, part 56 under OMB Control No. 0910–0130; Investigational New Drug Application under OMB Control No. 0910–0014; and Investigational Devices Exemption Reports and Records, part 812 under OMB Control No. 0910–0078. Modifications to these approved information collection requirements are underway.

For Protection of Human Subjects—Recordkeeping Requirements for Institutional Review Boards (IRB) under OMB Control No. 0910–0130, FDA has calculated the existing recordkeeping burden on IRB's based on the estimated number of IRB's and the estimated annual number of hours each IRB spends in recordkeeping activities. FDA does not believe that this rule will increase the number of IRB's. However, the agency estimates that the number of hours for recordkeeping related to studies which propose to invoke this exception from informed consent will increase for an estimated 200 IRB's by 5 annual hours per record-keeper. This will change the estimated recordkeeper burden from 65 to 70 hours annually.

The newly redesignated and revised § 56.109(e) proposes to require that an IRB notify in writing the sponsor of the research when an IRB determines that it cannot approve the research because it does not meet the criteria in the exception provided under § 50.24(a) of this chapter or because of other relevant ethical concerns. In accord with the Paperwork Reduction Act of 1995, this proposal discloses the agency's intent to require this third party notification.

For Investigational New Drug Application under OMB Control No. 0910–0014, the agency estimates that sponsors will submit an average of 20 studies a year, with an average of 20 clinical investigators each, that propose to invoke this exception from informed consent. Currently, the agency estimates the reporting requirements contained in part 312 to average 123.34 hours per respondent annually. FDA estimates that respondents will increase by 400 annually, resulting in an increase of 49,336 hours over that currently estimated. The reporting burden for respondents will, as a result, increase from an estimated 3,926,308 hours annually to 3,975,644 hours annually.

New § 312.54(b) proposes to require the sponsor to provide information when an IRB determines that it cannot approve the research because it does not meet the criteria in the exception in § 50.24(a) of this chapter or because of other relevant ethical concerns. This information is to be provided promptly in writing to FDA, investigators who are asked to participate in the trial or a substantially equivalent trial, and other IRB's that are asked to review the trial or a substantially equivalent trial. In accord with the Paperwork Reduction Act of 1995, this proposal discloses the agency's intent to require this third party notification.

For recordkeeping, the agency estimated that an average of 165.13 hours were spent per respondent. For the estimated additional 400 recordkeeping respondents invoking this rule, this would result in approximately 66,072 hours annually. The recordkeeping burden for respondents will, as a result, increase from an estimated 2,244,090 hours annually to 2,310,162 hours annually.

For Investigational Devices Exemption Reports and Records under OMB Control No. 0910–0078, the agency estimates that 10 studies proposing to invoke this exception will be submitted to the agency annually. The number of studies upon which the current paperwork reporting burden is estimated may, therefore, increase from 244 original submissions to 254 original submissions, increasing the number of hours by 800 for respondents (estimated at 80 hours per submission), from a total of 19,520 to 20,320 hours annually.

New § 812.47(b) proposes to require the sponsor to provide information when an IRB determines that it cannot approve the research because it does not meet the criteria in the exception in § 50.24(a) of this chapter or because of other relevant ethical concerns. This information is to be provided promptly in writing to FDA, investigators who are asked to participate in the trial or a substantially equivalent trial, and other IRB's that are asked to review the trial or a substantially equivalent trial. In accord with the Paperwork Reduction Act of 1995, this proposal discloses the agency's intent to require this third party notification.

The number of recordkeepers is currently estimated at 700; this number is not expected to change. The estimated number of annual hours for recordkeeping requirements is expected to increase by 100 hours. The agency had estimated that original submissions

require 10 hours annually of recordkeeping per submission; recordkeeping related to protocols invoking this rule are expected to increase the submissions from 244 to a total of 254.

As required by section 3507(d) of the Paperwork Reduction Act of 1995, FDA has submitted a copy of this proposed rule to OMB for its review of these previously approved information collection requirements. The agency solicits comments on the information collection requirements in order to: (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 clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. Organizations and individuals desiring to submit comments on the information collection requirements should direct them to FDA's Dockets Management Branch (address above) and to the Office of Information and Regulatory Affairs, OMB, rm. 10235, New Executive Office Bldg., 725 17th Street, N.W., Washington, DC 20503, Attention: Desk Officer for FDA.

XIV. Conforming Amendments

This proposed rule would necessitate a number of changes to the regulations for human drugs, biologics, devices, and institutional review boards so that those regulations are consistent with this rule.

A. Amendments to Regulations for IRB's

FDA is proposing to amend § 56.109(c) to expressly recognize that IRB's may approve studies for which informed consent is not obtained when the requirements in § 50.24 are met. FDA is also proposing to amend § 56.109 to specify in the IRB regulations the requirement to notify sponsors when an IRB determines it cannot approve such studies and to notify sponsors when public disclosure of these studies has occurred. In addition, FDA is proposing to revise § 56.111 to reference the IRB's need to find that the criteria set forth in § 50.24 are met before approving investigations involving an exception from informed consent under § 50.24.

B. Amendments to Regulations for Human Drug Products

The proposed amendment to § 312.2(b) (21 CFR 312.2(b)) makes clear that these studies are not exempt from the requirements of part 312 (21 CFR part 312). Proposed § 312.20(a) and the amendments to § 312.30 would codify in the IND regulations the requirement for a separate IND for studies under § 50.24. Proposed new § 312.23(f) contains the requirement referenced in § 50.24(d) that sponsors prominently identify these studies in separate IND's. FDA is proposing to add new § 312.54 to specify the need for sponsors to actively monitor the progress of proposed investigations so that appropriate public disclosure can occur and so that other IRB's, investigators, and FDA are notified of an IRB determination that it cannot approve the investigation. Section 312.60 would be amended to reference the exception from informed consent in § 50.24. The amendment to § 314.430(d) (21 CFR 314.430(d)) would acknowledge that studies involving § 50.24 will not proceed without public discussion. Section 314.430(d) would be amended to codify that sponsors identify the information publicly disclosed.

C. Amendment to Biologics Regulations

FDA is proposing to amend 21 CFR 601.51(d) for the reasons set forth above for § 314.430(d).

D. Amendment to Device Regulations

FDA is proposing to amend §§ 812.20 and 812.35(a) (21 CFR 812.20 and 812.35(a) to codify in the IDE regulations the requirement for filing a separate IDE for studies under § 50.24. Section 812.20(b)(13) would be amended to codify the need to clearly identify in the IDE submission that the study involves an exception from informed consent under § 50.24. The amendment to § 812.38(b)(2) would acknowledge that studies involving § 50.24 will not proceed without public discussion. Section 812.38(b) would be amended to codify that sponsors identify the information publicly disclosed.

New § 812.47 would specify the need for the sponsor to actively monitor proposed investigations so that appropriate public disclosure can occur and so that other IRB's, investigators, and FDA are notified of an IRB determination that it cannot approve the investigation. FDA is proposing to amend 814.9(d) (21 CFR 814.9(d)) to codify the need for sponsors to identify information publicly disclosed consistent with the requirements of § 50.24(a)(5)(ii) and (a)(5)(iii).

XV. References

The following information has been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Prentice, E. D., et al., ''IRB Review of a Phase II Randomized Clinical Trial Involving Incompetent Patients Suffering from Severe Closed Head Injury,'' *IRB A Review of Human Subjects Research*, 15:1–7, 1993.

2. Prentice, E. D., et al., ''An Update on the PEG–SOD Study Involving Incompetent Subjects: FDA Permits an Exception to Informed Consent Requirements,'' *IRB A Review of Human Subjects Research*, 16:16–18, 1994.

3. Fost N., and J. A. Robertson, ''Deferring Consent with Incompetent Patients in an Intensive Care Unit.'' *IRB Review of Human Subjects Research*, 2:5–6, 1980.

4. Beauchamp, T. L., ''Commentary: The Ambiguities of 'Deferred Consent','' *IRB Review of Human Subjects Research*, 2:6–9, 1980.

5. Levine, R. J., ''Commentary: Deferred Consent,'' *Controlled Clinical Trials*, 12:546–550, 1991.

6. Olson, C. M., ''Editorial: The Letter or the Spirit; Consent for Research in CPR,'' *Journal of the American Medical Association*, 271:1445–1447, 1994.

7. Abramson, N. S., and P. Safar, ''Deferred Consent: Use in Clinical Resuscitation Research,'' *Annals of Emergency Medicine*, 19:781–784, 1990.

8. ''Informed Consent—Legally Effective and Prospectively Obtained,'' OPRR Reports-Human Subject Protections, Number 93–3, 1993.

9. Jane, J. A., June 28, 1993, letter to D. A. Kessler and September 14, 1993, response.

10. Herr, D. L., July 23, 1993, letter to D. A. Kessler and September 14, 1993, response.

11. Binder, L. S., and M. H. Biros, July 23, 1993, letter to D. A. Kessler and September 14, 1993, response.

12. Zitnay, G. A., June 22, 1993, letter to D. A. Kessler and September 14, 1993, response.

13. Abramson, N. S., and P. Safar, ''Response to Commentary,'' *Controlled Clinical Trials*, 12:551–552, 1991.

14. Parrillo, J. E., ''Special Article: Research in critical care medicine: Present status of critical care investigation,'' *Critical Care Medicine*, 19:569–577, 1991.

15. Halperin, H. R., et al., ''A Preliminary Study of Cardiopulmonary Resuscitation by Circumferential Compression of the Chest with Use of a Pneumatic Vest,'' *New England Journal of Medicine*, 329:762–768, 1993.

16. Cohen, T. J., et al., ''A Comparison of Active Compression-Decompression Cardiopulmonary Resuscitation with Standard Cardiopulmonary Resuscitation for Cardiac Arrests Occurring in the Hospital,'' *New England Journal of Medicine*, 329:1918–1921, 1993.

17. Lurie, K. G., et al., ''Evaluation of Active Compression-Decompression CPR in Victims of Out-of-Hospital Cardiac Arrest,'' *Journal of the American Medical Association*, 271:1405–1411, 1994.

18. Schwab, T. M., ''A Randomized Clinical Trial of Active Compression-Decompression CPR vs Standard CPR in Out-of-Hospital Cardiac Arrest in Two Cities,'' *Journal of the American Medical Association*,273:1261–1268, 1995.

19. Olson, C. M., ''Editorial: Plungers and Polemics: Active Compression-Decompression CPR and Federal Policy,'' *Journal of the American Medical Association*, 273:1299–1300, 1995.

20. Levine, R. J., ''Editorial: Research in Emergency Situations; The Role of Deferred Consent,'' *Journal of the American Medical Association*, 273:1300–1302, 1995.

21. Marwick, C., ''Research in Emergency Circumstances,'' *Journal of the American Medical Association*, 273:687–688, 1995.

22. ''Informed Consent in Emergency Research,'' Consensus from the Coalition Conference of Acute Resuscitation and Critical Care Researchers, 1994.

23. ''Public Forum on Informed Consent in Clinical Research Conducted in Emergency Circumstances,'' transcript of January 9, 1995.

24. ''Public Forum on Informed Consent in Clinical Research Conducted in Emergency Circumstances,'' transcript of January 10, 1995.

25. ''Report of the Public Forum on Informed Consent in Clinical Research Conducted in Emergency Circumstances,'' FDA and NIH, May 1995.

26. ''Problems in Securing Informed Consent of Subjects in Experimental trials of Unapproved Drugs and Devices,'' Hearing before the Subcommittee on Regulation, Business Opportunities, and Technology of the Committee on Small Business, House of Representatives, Washington, DC, Serial No. 103–85, 1994.

27. Miller, B. L., ''Philosophical, ethical, and legal aspects of resuscitation medicine,'' *Critical Care Medicine*, 16:1059–1062, 1988.

28. Miller, B. L., ''The Ethics of Cardiac Arrest Research,'' *Annals of Emergency Medicine*, 22–118–124, 1993.

29. ''Waiver of Informed Consent: A Critical Issue for Improving Treatment of Emergent Medical Conditions,'' North American Society of Pacing and Electrophysiology Government Relations Committee Position Statement, Testimony presented at FDA/NIH Public Forum, 1995.

30. Wears, R. L., Written testimony presented at FDA/NIH Public Forum, 1995.

31. McCarthy, C. R., ''To Be or Not to Be: Waiving Informed Consent in Emergency Research,'' *Kennedy Institute of Ethics Journal*, 5:155–162, 1995.

32. ''Implementing Human Research Regulations; Second Biennial Report on the Adequacy and Uniformity of Federal Rules and Policies, and of their Implementation, for the Protection of Human Subjects,'' President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, 1983.

33. Fost, N. C., ''Part 3; Human Subjects in Cardiopulmonary Resuscitation Research,'' in ''Ethics in Emergency Medicine,'' Edited by Iserson, K. V., et al., Williams & Wilkins, Baltimore, pp. 77–81, 1986.

34. Sprung, C. L., and B. J. Winick, ''Informed Consent in Theory and Practice: Legal and Medical Perspectives on the Informed Consent Doctrine and a Proposed Reconceptualization,'' *Critical Care Medicine*, 17:1346–1354, 1989.

List of Subjects

21 CFR Part 50

Informed consent, Prisoners, Reporting and recordkeeping requirements, Research, Safety.

21 CFR Part 56

Human research subjects, Reporting and Recordkeeping requirements, Safety.

21 CFR Part 312

Drugs, Exports, Imports, Investigations, Labeling, Medical research, Reporting and recordkeeping requirements, Safety.

21 CFR Part 314

Administrative practice and procedure, Confidential business information, Drugs, Reporting and recordkeeping requirements.

21 CFR Part 601

Administrative practice and procedure, Biologics, Confidential business information.

21 CFR Part 812

Health records, Medical devices, Medical research, Reporting and recordkeeping requirements.

21 CFR Part 814

Administrative practice and procedure, Confidential business information, Medical devices, Medical research, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 50, 56, 312, 314, 601, 812, and 814 be amended as follows:

PART 50—PROTECTION OF HUMAN SUBJECTS

1. The authority citation for 21 CFR part 50 continues to read as follows:

Authority: Secs. 201, 406, 408, 409, 502, 503, 505, 506, 507, 510, 513–516, 518–520, 701, 721, 801 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 346, 346a, 348, 352, 353, 355, 356, 357, 360, 360c–360f, 360h–360j, 371, 379e, 381); secs. 215, 301, 351, 354–360F of the Public Health Service Act (42 U.S.C. 216, 241, 262, 263b–263n).

2. Section 50.3 is amended by adding a new paragraph (n) to read as follows:

§ 50.3 Definitions.

* * * * *

(n) *Family members* means the following legally competent persons: Spouses; parents; children (including adopted children); brothers, sisters and their spouses; and any individual related by blood or affinity whose close association with the subject is the equivalent of a family relationship.

3. Section 50.24 is added to subpart B to read as follows:

§ 50.24 Exception from informed consent requirements for emergency research.

(a) The IRB responsible for the review, approval, and continuing review of the clinical investigation described in this section may approve that investigation without requiring that informed consent be obtained if the IRB (with a concurring licensed physician member or consultant) finds and documents each of the following:

(1) The human subjects are in a life-threatening situation, available treatments are unproven or unsatisfactory, and the collection of valid scientific evidence, which may include evidence obtained through randomized placebo controlled trials, is necessary to determine what particular intervention is most beneficial.

(2) Obtaining informed consent is not feasible because:

(i) The subjects will not be able to give consent as a result of their medical condition; and

(ii) The intervention under study must be administered before consent from legally authorized representatives is feasible; and

(iii) There is no reasonable way to identify prospectively the individuals likely to become eligible for the research because the emergence of the condition to be studied cannot be predicted reliably in particular individuals.

(3) The opportunity for the subjects to participate in the research is in the interest of the subjects because:

(i) A life-threatening situation necessitates intervention, and

(ii) The risk of the investigation is reasonable in light of what is known about the medical condition and the risks and benefits of current therapy, if any, and what is known about the risks and benefits of the proposed intervention or activity.

(4) The research could not practicably be carried out without the waiver.

(5) Additional protections of the rights and welfare of the subjects will be provided, including, at least:

(i) Consultation (which may include consultation carried out by the IRB itself) with representatives of the

communities from which the subjects will be drawn;

(ii) Public disclosure prior to the commencement of the study sufficient to describe the study and its risks and benefits;

(iii) Public disclosure of sufficient information following completion of the study to apprise the community and researchers of the study and its results; and

(iv) The establishment of an independent data and safety monitoring board.

(6) The IRB has reviewed and approved an informed consent document for use with subjects or legal representatives in situations in which obtaining such consent may be feasible for some subjects.

(b) When possible and at the earliest possible opportunity, each subject (or, if the subject remains incapacitated, a legally authorized representative of the subject, or if such a representative is not reasonably available, a family member) will be informed of the subject's inclusion in the research study, the details of the research study, and that the subject (or, if the subject remains incapacitated, a legally authorized representative of the subject or, if such a representative is not reasonably available, a family member) may discontinue the subject's participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

(c) The IRB determinations required by paragraph (a) of this section and the documentation required by paragraphs (d) and (e) of this section are to be retained by the IRB for at least 3 years after completion of the research, and the records shall be accessible for inspection and copying by FDA in accordance with 56.115(b) of this chapter.

(d) Protocols involving an exception to the informed consent requirement under this section must be performed under an investigational new drug application (IND) or investigational device exemption (IDE). FDA requires clear identification of protocols that would include subjects who are unable to consent, and submission of those protocols in a separate IND/IDE (even if an IND for the same drug product or an IDE for the same device already exists). Applications for investigations under this section may not be submitted as supplemental applications under §§ 312.30 or 812.35 of this chapter.

(e) If an IRB determines that it cannot approve this research because the research does not meet the criteria in the exception provided under paragraph (a) of this section or because of other relevant ethical concerns, the IRB must document its findings and provide these findings in writing to the sponsor of the research. The sponsor of the research must share this information with FDA, researchers/clinical investigators who are asked to participate in this or a substantially equivalent trial, and to other IRB's which are asked to review this or a substantially equivalent clinical trial.

PART 56—INSTITUTIONAL REVIEW BOARDS

4. The authority citation for 21 CFR part 56 continues to read as follows:

Authority: Secs. 201, 406, 408, 409, 501, 502, 503, 505, 506, 507, 510, 513–516, 518–520, 701, 721, 801 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 346, 346a, 348, 351, 352, 353, 355, 356, 357, 360, 360c–360f, 360h–360j, 371, 379e, 381); secs. 215, 301, 351, 354–360F of the Public Health Service Act (42 U.S.C 216, 241, 262, 263b–263n).

5. Section 56.109 is amended by revising paragraph (c), by redesignating paragraphs (d) and (e) as paragraphs (e) and (f), by adding a new sentence to the end of newly redesignated paragraph (e), and by adding new paragraphs (d) and (g) to read as follows:

§ 56.109 IRB review of research.

* * * * *

(c) An IRB shall require documentation of informed consent in accordance with § 50.27 of this chapter, except as follows:

(1) The IRB may, for some or all subjects, waive the requirement that the subject, or the subject's legally authorized representative, sign a written consent form if it finds that the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside the research context, or

(2) The IRB may, for some or all subjects, find that the requirements in § 50.24 of this chapter for an exception from informed consent for emergency research are met.

(d) In cases where the documentation requirement is waived, the IRB may required the investigator to provide subjects with a written statement regarding the research.

(e) * * * For studies involving an exception to informed consent under § 50.24 of this chapter, an IRB shall notify in writing the sponsor of the research when an IRB determines that it cannot approve the research because it does not meet the criteria in the exception provided under § 50.24(a) of this chapter or because of other relevant ethical concerns.

* * * * *

(g) An IRB shall provide in writing to the sponsor of research involving an exception to informed consent under § 50.24 of this chapter a copy of information that has been publicly disclosed under § 50.24(a)(5)(ii) and (a)(5)(iii). The IRB shall provide this information to the sponsor promptly so that the sponsor is aware that such disclosure has occurred. The sponsor shall provide copies of the information disclosed to FDA.

6. Section 56.111 is amended by adding new paragraph (c) to read as follows:

§ 56.111 Criteria for IRB approval of research.

* * * * *

(c) When the research involves an exception from informed consent for emergency research under § 50.24 of this chapter, the IRB finds and documents that the safeguards set forth in § 50.24 are included.

PART 312—INVESTIGATIONAL NEW DRUG APPLICATION

7. The authority citation for 21 CFR part 312 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 503, 505, 506, 507, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C 321, 331, 351, 352, 353, 355, 356, 357, 371); sec 351 of the Public Health Service Act (42 U.S.C. 262).

8. Section 312.2 is amended by adding pragraph (b)(6) to read as follows:

§ 312.2 Applicability.

* * * * *

(b) * * *

(6) A clinical investigation involving an exception from informed consent under § 50.24 of this chapter is not exempt from the requirements of this part.

* * * * *

9. Section 312.20 is amended by adding paragraph (c) to read as follows:

§ 312.20 Requirements for an IND.

* * * * *

(c) A sponsor shall submit a separate IND for any clinical investigation involving an exception from informed consent under § 50.24 of this chapter.

10. Section 312.23 is amended by adding paragraph (f) to read as follows:

§ 312.23 IND content and format.

* * * * *

(f) If the investigation involves an exception from informed consent under § 50.24 of this chapter, prominent

identification on the cover sheet that the investigation is subject to the requirements in § 50.24.

11. Section 312.30 is amended by adding a new sentence to the end of the introductory text to read as follows:

§ 312.30 Protocol amendments.

* * * Whenever a sponsor intends to conduct a clinical investigation with an exception from informed consent for emergency research as set forth in § 50.24 of this chapter, the sponsor shall submit a separate IND for such investigation.

* * * * *

12. New section 312.54 is added to subpart D to read as follows:

§ 312.54 Emergency research under § 50.24 of this chapter.

(a) The sponsor shall monitor the progress of all proposed investigations involving an exception from informed consent under § 50.24 of this chapter. The sponsor shall determine when the public disclosures required by § 50.24(a)(5)(ii) and (a)(5)(iii) of this chapter of the proposed investigation have occurred and promptly shall submit to the IND file and to Dockets Management Branch copies of the information that was disclosed.

(b) The sponsor also shall monitor such proposed investigations to identify when an IRB determines that it cannot approve the research because it does not meet the criteria in the exception in § 50.24(a) of this chapter or because of other relevant ethical concerns. The sponsor promptly shall provide this information in writing to FDA, investigators who are asked to participate in this or a substantially equivalent trial, and other IRB's that are asked to review this or a substantially equivalent trial.

13. Section 312.60 is amended by revising the second and third sentences in the text as follows:

§ 312.60 General responsibilities of investigators.

* * * An investigator shall, in accordance with the provisions of part 50 of this chapter, obtain the informed consent of each human subject to whom the drug is administered, except as provided in § 50.23 or § 50.24 of this chapter. Additional specific responsibilities of clinical investigators are set forth in this part and in parts 50 and 56 of this chapter.

PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG OR AN ANTIBIOTIC DRUG

14. The authority citation for 21 CFR part 314 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 503, 505, 506, 701, 704, 721 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 351, 352, 353, 355, 356, 357, 371, 374, 379e).

15. Section 314.430 is amended by adding two sentences to the end of paragraph (d) to read as follows:

§ 314.430 Availability for public disclosure of data and information in an application or abbreviated application.

* * * * *

(d)* * * For applications concerning investigations involving an exception from informed consent under § 50.24 of this chapter, sponsors are required to submit copies of information that has been publicly disclosed under § 50.24(a)(5)(ii) and (a)(5)(iii) to the IND file and to Dockets Management Branch. Copies of this information will be available to the public from the Dockets Management Branch.

* * * * *

PART 601—LICENSING

16. The authority citation for 21 CFR part 601 continues to read as follows:

Authority: Secs. 201, 501, 502, 503, 505, 510, 513–516, 518–520, 701, 704, 721, 801 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 351, 352, 353, 355, 360, 360c–360f, 360h–360j, 371, 372, 374, 379e, 381); secs. 215, 301, 351 of the Public Health Service Act (42 U.S.C. 216, 241, 262, 263).

17. Section 601.51 is amended by adding two sentences to the end of paragraph (d) to read as follows:

§ 601.51 Confidentiality of data and information in applications for establishment and product licenses.

* * * * *

(d) * * * For applications concerning investigations involving an exception from informed consent under § 50.24 of this chapter, sponsors are required to submit copies of information that has been publicly disclosed under § 50.24(a)(5)(ii) and (a)(5)(iii) to the IND file and to the Dockets Management Branch. Copies of this information will be available to the public from the Dockets Management Branch.

* * * * *

PART 812—INVESTIGATIONAL DEVICE EXEMPTIONS

18. The authority citation for 21 CFR part 812 continues to read as follows:

Authority: Secs. 301, 501, 502, 503, 505, 506, 507, 510, 513–516, 518–520, 701, 702, 704, 721, 801 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331, 351, 352, 353, 355, 356, 357, 360, 360c–360f, 360h–360j, 371, 372, 374, 379e, 381); secs. 215, 301, 351, 354–360F of the Public Health Service Act (42 U.S.C 216, 241, 262, 263b–263n).

19. Section 812.20 is amended by revising paragraph (a)(1) and adding paragraph (a)(4) to read as follows:

§ 812.20 Application.

(a) *Submission*. (1) A sponsor shall submit an application to FDA if the sponsor intends to use a significant risk device in an investigation, intends to conduct an investigation that involves an exception from informed consent under § 50.24 of this chapter, or if FDA notifies the sponsor that an application is required for an investigation.

* * * * *

(4)(i) A sponsor shall submit a separate IDE for any clinical investigation involving an exception from informed consent under § 50.24 of this chapter, and

(ii) If the investigation involves an exception from informed consent under § 50.24 of this chapter, the sponsor shall prominently identify on the cover sheet that the investigation is subject to the requirements in § 50.24.

* * * * *

20. Section 812.35 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 812.35 Supplemental applications.

(a) * * * Whenever a sponsor intends to conduct a clinical investigation with an exception from informed consent for emergency research as set forth in § 50.24 of this chapter, the sponsor shall submit a separate IDE for such investigation.

* * * * *

21. Section 812.38 is amended by adding two sentences to the end of paragraph (b)(2) to read as follows:

§ 812.38 Confidentiality of data and information.

* * * * *

(b) * * *

(2) * * * If a device is subject to an investigation that involves an exception from informed consent under § 50.24 of this chapter, sponsors are required to submit copies of information that has been publicly disclosed under § 50.24(a)(5)((ii) and (a)(5)(iii) to the IDE file and to the Dockets Management Branch. Copies of this information will be available to the public from the Dockets Management Branch.

* * * * *

22. New section 812.47 is added to subpart C to read as follows:

§ 812.47 Emergency research under § 50.24 of this chapter.

(a) The sponsor shall monitor the progress of all proposed investigations involving an exception from informed consent under § 50.24 of this chapter. The sponsor shall determine when the public disclosures under § 50.24(a)(5)(ii) and (a)(5)(iii) of this chapter of the proposed investigation have occurred. The sponsor promptly shall submit copies of the information that has been publicly disclosed to the IDE file and also to the Dockets Management Branch.

(b) The sponsor also shall monitor such studies to determine when an IRB determines that it cannot approve the research because it does not meet the criteria in the exception in § 50.24(a) of this chapter or because of other relevant ethical concerns. The sponsor promptly shall provide this information in writing to FDA, investigators who are asked to participate in this or a substantially equivalent trial, and other IRB's that are asked to review this or a substantially equivalent trial.

PART 814—PREMARKET APPROVAL OF MEDICAL DEVICES

23. The authority citation for 21 CFR part 814 continues to read as follows:

Authority: Secs. 501, 502, 503, 510, 513–520, 701, 702, 703, 704, 705, 708, 721, 801 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351, 352, 353, 360, 360c–360j, 371, 372, 373, 374, 375, 379, 379e, 381).

24. Section 814.9 is amended by adding two sentences to the end of paragraph (d) to read as follows:

§ 814.9 Confidentiality of data and information in a premarket approval application (PMA) file.

* * * * *

(d)* * * For applications concerning investigations involving an exception from informed consent under § 50.24 of this chapter, sponsors are required to submit copies of information publicly disclosed under § 50.24(a)(5)(ii) and (a)(5)(iii) to the IDE file and to the Dockets Management Branch. Copies of this information will be available to the public from the Dockets Management Branch.

* * * * *

Dated: August 31, 1995.

David A. Kessler,

Commissioner of Food and Drugs.

Donna E. Shalala,

Secretary of Health and Human Services.

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Part IV

Department of Transportation

Research and Special Programs Administration

49 CFR Part 107, et al.

Hazardous Materials Regulations; Editorial Corrections and Clarifications; Final Rule

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 107, 171, 172, 173, 174, 175, 176, and 178

[Docket No. HM–189L, Amdt. Nos. 107–35, 171–136, 172–145, 173–246, 174–81, 175–54, 176–38, 178–110]

RIN 2137–AC72

Hazardous Materials Regulations; Editorial Corrections and Clarifications

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: This final rule corrects editorial errors, makes minor regulatory changes, and in response to requests for clarification, improves the clarity of certain provisions of the Hazardous Materials Regulations (HMR). The intended effect of this rule is to enhance accuracy and reduce misunderstandings of the HMR. The amendments contained in this rule are minor editorial changes and do not impose new requirements.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT: Joan McIntyre, Office of Hazardous Materials Standards, (202)366–8553, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Background

RSPA annually reviews the Hazardous Materials Regulations (HMR) to detect errors which may be causing confusion to its readers. Inaccuracies corrected in this final rule include typographical errors, incorrect references to other rules and regulations in the CFR, inconsistent use of terminology, and misstatements of certain regulatory requirements. In response to inquiries RSPA received concerning the clarity of particular requirements specified in the HMR, certain other changes are made to reduce uncertainties.

Since these amendments do not impose new requirements, notice and public procedure are unnecessary. For the same reason, there is good cause to make these amendments effective without the customary 30-day delay following publication. This will allow the changes to appear in the next revision of 49 CFR.

The following is a section-by-section summary of the amendments made under this final rule. It does not discuss editorial corrections (e.g., typographical, capitalization, and punctuation errors), changes to legal citations and certain other minor adjustments to enhance the clarity of the HMR.

Summary of Regulatory Changes by Section

Part 107

Appendix A to Subpart B

Under the sections entitled ''Motor Carriers'' and ''Water Carriers,'' the names of the offices in the Federal Highway Administration and the United States Coast Guard designated for handling emergency exemptions are revised to reflect recent name changes.

Section 107.335

In the first sentence, the word ''chapter'' the first place it appears, is corrected to read ''subchapter.''

Part 171

Section 171.8

Definitions for ''Hazmat employee'' and ''Hazmat employer,'' as mandated by the Federal Hazardous Materials Transportation Law, Section 5102, are revised to include persons who are involved in the manufacturing of hazardous material packages. In addition, the definition of ''Hazardous material'' is corrected by removing the reference to § 172.102, which is not applicable.

Section 171.10

In paragraph (c)(2), the Table of Conversion Factors For SI Units is revised to more accurately reflect certain equivalent measurements for pressure.

Section 171.12

Paragraph (b)(5) is revised to reflect the correct reference to the International Maritime Dangerous Goods (IMDG) Code.

Section 171.15

Paragraph (b) is revised to reflect the new telephone number for the Director, Center for Disease Control in Atlanta, Georgia.

Part 172

Section 172.101

In paragraph (i)(4), the packaging section table is revised by adding packaging sections for pyrophoric materials.

The Hazardous Materials Table (the Table). The Table is amended as follows:

Punctuation and other minor editorial corrections to proper shipping names in Column (2) are made to the following entries: ''Antimony trifluoride solution,'' ''Benzoic derivative pesticides, solid toxic,'' ''Bromates, inorganic, aqueous solution, n.o.s.,'' ''Cyclonite and cyclotetramethylenetetranitramine mixtures, wetted *or* desensitized *see* RDX and HMX mixtures, wetted *or* desensitized *etc.*,'' ''Permanganates, inorganic, aqueous solution, n.o.s.,'' ''Pesticides, liquid, flammable, toxic, *flashpoint less than 23 degrees C,*'' ''Toxic liquids, water-reactive, n.o.s.,'' ''Toxic liquids, water-reactive, n.o.s. *Inhalation hazard, packing group I, Zone A,*'' ''Toxic liquids, water-reactive, n.o.s. *Inhalation hazard, packing group I, Zone B,*'' and ''Toxic solids, water-reactive, n.o.s.''

In Column (3), the hazard class/division for ''Articles, explosive, n.o.s.'', UN0354 is corrected to read ''1.1L.''

For the entry, ''Diborane mixtures,'' a ''D'' is added to Column (1) to identify this proper shipping name as appropriate for domestic transportation, but not necessarily for international transportation under the provisions for international regulations.

For the entry, ''Dyes, liquid, toxic, n.o.s. *or* Dyes, intermediates, liquid, toxic, n.o.s.,'' in Column (9B), the specification for the maximum quantity that may be offered for transportation in one package by cargo aircraft is clarified by adding the unit of measurement.

The exceptions reference for packaging authorizations in Column (8A) for the entry, ''Dicyclohexylammonium nitrite'' is revised to reflect the correct section reference, § 173.151.

The entries ''Hydrocyanic acid, aqueous solutions *or* Hydrogen cyanide, aqueous solutions *with not more than 20 percent hydrogen cyanideic acid*'' and ''Hydrocyanic acid, aqueous solutions *with less than 5 percent hydrogen cyanideacid,*'' in Column (2), are revised to correct the last two words and last word, respectively, to read ''*cyanide.*''

The entry ''*Hydrofluoroboric acid, see* Fluoboric acid,'' in Column (2), is revised to correct the word ''Fluoboric'' to read ''Fluoroboric.''

For the entry ''Insecticide gases *flammable* n.o.s,'' ''D'' is added to Column (1), because it was inadvertently omitted.

The entries ''Isocyanates, flammable, toxic, n.o.s. *or* Isocyanate solutions, flammable, toxic, n.o.s. *flashpoint less than 23 degrees C,*'' and ''Triazine pesticides, liquid, flammable, toxic *flashpoint less than 23 degrees C*'' in Column (2) are corrected by removing

the Packing Group III entries, which are not authorized for these materials.

For the entry ''Medicine, liquid, flammable, toxic, n.o.s.,'' ''1 L'' is added to Column (9A) as the quantity limitation for passenger aircraft or railcar, because it was inadvertently omitted.

For the entry ''Methyl chloroformate,'' Column (7) is corrected by removing Special Provision notes ''A3,'' ''A6'' and ''A7'' because this material is forbidden from transportation by air.

The entries ''Sulfur chlorides,'' and ''Thionyl chloride,'' in Column (7), are revised to reflect the correct Special Provision ''T'' codes.

The entry ''Titanium tetrachloride,'' in Column (7), is corrected by removing Special Provision ''N41,'' because it is inconsistent with the other packaging authorizations for this material.

Appendix A to § 172.101

The entry ''2,4-(1H,3H-Pyrimidinedione, 5[bis(2-chloroethyl)amino]-'' is placed in the correct alphabetical order.

Section 172.102

In paragraph (c)(1), Special Provision 52, the reference to § 173.150 is revised to reflect the correct reference, § 173.50. In Special Provision 103, the appropriate word ''propagation'' replaces ''preparation.''

Section 172.308

Paragraph (b) is removed because currently there are no authorized proper shipping names for ''ammunition'' that contain the words ''with'' or ''without.'' In addition, paragraphs (c) and (d) are redesignated as (b) and (c) and in new paragraph (c), the example ''2,4-D,'' which is no longer listed as a proper shipping name, is removed and replaced with ''PCB.''

Section 172.322

In paragraph (d)(2)(i), in provisions for combination packagings for marine pollutants, the customary measurement provided for informational purposes is adjusted to correctly read ''(1.3 gallons).''

Section 172.704

Paragraph (a)(2)(i) is revised to reflect the correct subchapter reference.

Part 173

Section 173.32

In paragraph (e)(3), the marking reference for the retesting of portable tanks is corrected.

Section 173.34

In paragraph (d)(7), the reference for pyrophoric liquids, n.o.s. is corrected.

Section 173.62

In paragraph (c), in the Table of Packing Methods, for the packing method entries E–108 and E–128, the obsolete particular packing exception requirement ''23'' is removed.

Section 173.150

Paragraph (b)(3) is revised to reflect ''(1.3 gallons)'' as the equivalent customary measurement for 5 L.

Section 173.164

Redesignated paragraphs (c)(1) and (c)(5), as revised under Docket HM–215A, December 29, 1994, are revised to reflect the correct paragraph references for the packaging requirements for electron tubes, mercury vapor tubes and similar tubes, and the packaging requirements for mercurial barometers, respectively.

Section 173.224

Paragraph (b) is revised to reflect the correct reference for approval provisions for self-reactive materials.

Sections 173.242 and 173.243

To alleviate inconsistency resulting from the reference to an exception in § 173.33(d), paragraph (b)(1) of each section is revised to permit non-reclosing pressure relief devices on MC 310, MC 311 and MC 312 cargo tanks used for Class 8 materials.

Section 173.306

Paragraph (d)(3)(iii) is revised to reflect the correct reference for approval provisions for actuating cartridges and also removes an incorrect definition reference.

Part 174

Section 174.67

Paragraph (k) is revised to clarify the process for securing tank cars after unloading by allowing more innovative methods while ensuring compliance.

Part 175

Section 175.45

Paragraph (a)(3) is revised to reflect the new telephone number for the Director, Center for Disease Control in Atlanta, Georgia.

Part 176

Section 176.76

In paragraph (h)(1), the cargo tank provision for the transportation of cryogenic liquids is revised.

Section 176.83

The diagram in paragraph (c)(2)(iv) is revised to correct an editorial inconsistency with the IMDG Code by adjusting the segregation provision applicable to stowage aboard vessels.

Part 178

Section 178.504

Paragraph (b)(1) is revised to reflect the correct reference for minimum thickness marking requirements for drums intended for reuse.

Section 178.819

Paragraph (b)(2) is revised to correct an error under Docket HM–181E (59 FR 38079, July 26, 1994), ''Intermediate Bulk Containers for Hazardous Materials,'' for the vibration test specifications for intermediate bulk containers, by removing the word ''rotate.''

Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not subject to review by the Office of Management and Budget. This rule is not significant according to the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). Because of the minimal economic impact of this rule, preparation of a regulatory impact analysis or a regulatory evaluation is not warranted.

Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria in Executive Order 12612 (''Federalism'') and does not have sufficient federalism impacts to warrant the preparation of a federalism assessment.

Regulatory Flexibility Act

I certify that this final rule will not have a significant economic impact on a substantial number of small entities. This rule makes minor editorial changes which will not impose any new requirements on persons subject to the HMR; thus, there are no direct or indirect adverse economic impacts for small units of government, businesses, or other organizations.

Paperwork Reduction Act

There are no new information collection requirements in this final rule.

List of Subjects

49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Packaging and containers, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

49 CFR Part 172

Hazardous materials transportation, Hazardous waste, Labeling, Markings, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Incorporation by reference, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 174

Hazardous materials transportation, Incorporation by reference, Radioactive materials, Railroad safety.

49 CFR Part 175

Air carriers, Hazardous materials transportation, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 176

Hazardous materials transportation, Maritime carriers, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 178

Hazardous materials transportation, Incorporation by reference, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR Chapter I is amended as follows:

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

1. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701, 49 CFR 1.45, 1.53.

Appendix A to Subpart B of Part 107 [Amended]

2. In Appendix A to subpart B of part 107, the following changes are made:

a. In the section entitled ''Motor Carriers'', the wording ''Chief, Hazardous Materials Division, Office of Motor Carrier Field Operations,'' is removed and ''Chief, Hazardous Materials and Safety Division, Office of Safety and Technology,'' is added in its place.

b. In the section entitled ''Water Carriers'', the wording ''Hazardous Materials Branch, Marine Technical and Hazardous Materials Division,'' is removed and ''Hazardous Materials Standards Branch, Operating and Environmental Standards Division,'' is added in its place.

§ 107.201 [Amended]

3. In § 107.201, in paragraph (c), the word ''the'' is added before the wording ''Federal hazardous materials transportation law''.

§ 107.311 [Amended]

4. In § 107.311, in paragraph (c), in the second sentence, the word ''the'' is added before the wording ''Office of Chief Counsel''.

§ 107.335 [Amended]

5. In § 107.335, in the first sentence, the wording ''the Federal hazardous material transportation law, this chapter, subchapter C of this chapter,'' is removed and ''the Federal hazardous material transportation law, this subchapter, subchapter C of this chapter,'' is added in its place.

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

6. The authority citation for part 171 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 171.8 [Amended]

7. In § 171.8, the following changes are made:

a. For the definition ''*Hazardous material*'', in the second sentence, the wording ''§§ 172.101 and 172.102'' is removed and ''§ 172.101'' is added in its place.

b. For the definition ''*Hazmat employee*'', in paragraph (2), the wording ''Tests, reconditions,'' is removed and ''Manufactures, tests, reconditions,'' is added in its place.

c. For the definition ''*Hazmat employer*'', in the first sentence, the wording ''offering, reconditioning,'' is removed and ''offering, manufacturing, reconditioning,'' is added in its place.

§ 171.10 [Amended]

8. In § 171.10, paragraph (c)(2), the following changes are made:

a. In the text preceding the table, the word ''method'' is removed and the wording ''conversion table'' is added in its place.

b. In the table, for the entry ''Pressure'', in the second column ''SI to U.S. standard'', the second entry ''1 Bar=100 kPa=14.5 psi'' is removed and ''1 Bar=100 kPa=14.504 psi'' is added in its place.

c. In the table, for the entry ''Pressure'', in the third column ''U.S. standard to SI'', the second entry ''1 psi=0.06 Bar'' is removed and ''1 psi=0.06895 Bar'' is added in its place.

§ 171.12 [Amended]

9. In § 171.12, in paragraph (b)(5), the wording ''Chapter 26 of the IMDG Code,'' is removed and ''Section 26 of the General Introduction to the IMDG Code,'' is added in its place.

§ 171.15 [Amended]

10. In § 171.15, in paragraph (b) introductory text, in the second sentence, the first telephone number ''Area Code (404) 633–5313'' is removed and ''1–800–232–0124'' is added in its place.

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

11. The authority citation for part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

12. In § 172.101, in paragraph (i)(4), the table is amended by adding the following entry, in numerical order, to read as follows:

§ 172.101 Purpose and use of hazardous materials table.

* * * * *

(i) * * *

(4) * * *

Packaging section reference for solid materials	Corresponding packaging section for liquid materials
§ 173.187	§ 173.181
* * *	* *

* * * * *

13. In § 172.101, the Hazardous Materials Table as revised at 59 FR 67409, effective October 1, 1995, is amended by removing the following entries to read as follows:

§ 172.101 Purpose and use of hazardous materials table.

* * * * *

§ 172.101 HAZARDOUS MATERIALS TABLE

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or Division	Identification Numbers	Packing group	Label(s) required (if not excepted)	Special provisions	(8) Packaging authorizations (§ 173.* * *)			(9) Quantity limitations		(10) Vessel stowage requirements	
							Exceptions	Nonbulk packaging	Bulk packaging	Passenger aircraft or railcar	Cargo aircraft only	Vessel stowage	Other stowage provisions
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	*	*		*		*		*		*		*	
	Isocyanates, flammable, toxic, n.o.s. *or* Isocyanate solutions, flammable, toxic, n.o.s. *flashpoint less than 23 degrees* C.	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *
	[REMOVE]												
	.....	.....	.....	III	FLAMMABLE LIQUID, KEEP AWAY FROM FOOD.	B1, T8	150	203	242	60L	220L	A	
	* *		*		*		*		*		*		
	Triazine pesticides, liquid, flammable, toxic, *flash point less than 23 degrees C.*	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *	* * *
	* *		*		*		*		*		*		
	[REMOVE].												
	.....	.....	.....	III	FLAMMABLE LIQUID, KEEP AWAY FROM FOOD.	B1	150	203	242	60L	220L	A	
	* *		*		*		*		*		*		

* * * * *

§ 172.101 [Amended]

14. In addition, in § 172.101, in the Hazardous Materials Table, as revised at 59 FR 67409, effective October 1, 1995, the following changes are made:

a. For the entry ''Antimony trifluoride solution'', in Column (2), as revised at 59 FR 67415, a comma is added immediately following the word ''trifluoride''.

b. For the entry ''Articles, explosive, n.o.s.'', UN0354, in Column (3), as revised at 59 FR 67416, ''1 1L'' is removed and ''1.1L'' is added in its place.

c. For the entry ''Benzoic derivative pesticides, solid toxic'', in Column (2), as revised at 59 FR 67418, a comma is added immediately following the word ''solid''.

d. For the entry ''Bromates, inorganic, aqueous solution, n.o.s.'', in Column (8B), as revised at 59 FR 67419, the reference ''2O2'' (which has the letter ''O'' instead of the numeral ''0'') is removed and ''202'' is added in its place.

e. For the entry ''Cyclonite and cyclotetramethylenetetranitramine mixtures, wetted *or* desensitized *see* RDX and HMX mixtures, wetted *or* desensitized *etc*.ed'', in Column (2), as revised at 59 FR 67431, the letters ''ed'' immediately following the abbreviation ''*etc*.'' are removed.

f. For the entry ''Diborane mixtures'', in Column (1), as revised at 59 FR 67432, the letter ''D'' is added.

g. For the entry ''Dicyclohexylammonium nitrite'', in Column (8A), as revised at 59 FR 67433, the reference ''153'' is removed and ''151'' is added in its place.

h. For the entry ''Dyes, liquid, toxic, n.o.s. *or* Dye intermediates, liquid, toxic, n.o.s.'', in Column (9B), as revised at 59 FR 67436, for Packing group III, the number ''220'' is removed and ''220 L'' is added in its place.

i. For the entry ''Hydrocyanic acid, aqueous solutions *or* Hydrogen cyanide, aqueous solutions *with not more than 20 percent hydrogen cyanideic acid*'', in Column (2), as revised at 59 FR 67445, the wording ''*cyanideic acid*'' is removed and ''*cyanide*'' is added in its place.

j. For the entry ''Hydrocyanic acid, aqueous solutions *with less than 5 percent hydrogen cyanideacid*'', in Column (2), as revised at 59 FR 67445, the wording ''*hydrogen cyanideacid*'' is

removed and ''*hydrogen cyanide*'' is added in its place.

k. For the entry ''*Hydrofluoroboric acid, see* Fluoboric acid'', in Column (2), as revised at 59 FR 67445, the wording ''Fluoboric acid'' is removed and ''Fluoroboric acid'' is added in its place.

l. For the entry ''Insecticide gases *flammable* n.o.s.'', in Column (1), as revised at 59 FR 67446, the letter ''D'' is added.

m. For the entry ''Medicine, liquid, flammable, toxic, n.o.s.'', in Column (9A), as revised at 59 FR 67450, the letter ''L'' is removed and ''1 L'' is added in its place.

n. For the entry ''Methyl chloroformate'', in Column (7), as revised at 59 FR 67453, the references ''A3, A6, A7,'' are removed.

o. For the entry ''Permanganates, inorganic, aqueous solution, n.o.s.'', in Column (8B), as revised at 59 FR 67462, the reference ''2O2'' (which has the letter ''O'' instead of the numeral ''0'') is removed and ''202'' is added in its place.

p. For the entry ''Pesticides, liquid, flammable, toxic, (flashpoint less than 23 degrees C)'', in Column (2), as revised at 59 FR 67463, the wording ''(flashpoint less than 23 degrees C)'' is removed and ''*flashpoint less than 23 degrees C*'' is added in its place.

q. For the entry ''Sulfur chlorides'', in Column (7), as revised at 59 FR 67475, the reference ''N34.'' is removed and ''N34, T18, T27.'' are added in its place.

r. For the entry ''Thionyl chloride'', in Column (7), as revised at 59 FR 67476, the reference ''T42.'' is removed and ''T18, T27.'' are added in its place.

s. For the entry ''Titanium tetrachloride'', in Column (7), as revised at 59 FR 67477, the reference ''N41,'' is removed.

t. For each of the following entries, in Column (2), as revised at 59 FR 67478 and 67479, the wording ''water-reative'' is removed and the wording ''water-reactive'' is added in its place:

i. ''Toxic liquids, water-reative, n.o.s.''

ii. ''Toxic liquids, water-reative, n.o.s. *Inhalation hazard, packing group I, Zone A*''.

iii. ''Toxic liquids, water-reative, n.o.s. *Inhalation hazard, packing group I, Zone B*''.

iv. ''Toxic solids, water-reative, n.o.s.''

Appendix A to § 172.101—[Amended]

15. In Appendix A to § 172.101, the entry ''2,4-(1H,3H)-Pyrimidinedione, 5[bis(2-chloroethyl)amino]-'' is removed from immediately following the entry ''Hexaethyl tetraphosphate'' and added in proper alphabetical order.

§ 172.102 [Amended]

16. In § 172.102, in paragraph (c)(1), the following changes are made:

a. In Special Provision 52, as added at 59 FR 67486, effective October 1, 1995, the reference ''§ 173.150'' is removed and ''§ 173.50'' is added in its place.

b. In Special Provision 103, in the first sentence, the word ''preparation'' is removed and ''propagation'' is added in its place.

§ 172.308 [Amended]

17. In § 172.308, the following changes are made:

a. Paragraph (b) is removed and paragraphs (c) and (d) are redesignated as paragraphs (b) and (c), respectively.

b. In newly designated paragraph (c), the example '' '2,4-D'' ' is removed and '' 'PCB'' ' is added in its place.

§ 172.322 [Amended]

18. In § 172.322, in paragraph (d)(2)(i), the wording ''(1 gallon)'' is removed and ''(1.3 gallons)'' is added in its place.

§ 172.400a [Amended]

19. In § 172.400a, in paragraph (a)(1) introductory text, the wording ''A cylinder or Dewar flask'' is removed and ''A cylinder, or a Dewar flask'' is added in its place and a dash is added after the words ''that is''.

§ 172.704 [Amended]

20. In § 172.704, paragraph (a)(2)(i), the wording ''subchapter B'' is removed and ''subchapter A'' is added in its place.

PART 173 — SHIPPERS — GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

21. The authority citation for part 173 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 173.32 [Amended]

22. In § 173.32, in paragraph (e)(3), in the last sentence, the reference ''§ 173.24'' is removed and ''§ 178.3 of this subchapter'' is added in its place.

§ 173.34 [Amended]

23. In § 173.34, the following changes are made:

a. In paragraph (d)(3), the second sentence beginning with ''Notwithstanding the requirements in § 171.14(b)(4)(ii) of this subchapter,'' is removed.

b. In paragraph (d)(7), the reference ''§ 173.134'' is removed and ''§ 173.124'' is added in its place.

§ 173.62 [Amended]

24. In § 173.62, in paragraph (c), in the Table of Packing Methods, as revised at 59 FR 67492, effective October 1, 1995, for the packing method entries E–108 and E–128, in column four, the particular packaging exception/requirement ''23'' is removed each place it appears.

§ 173.150 [Amended]

25. In § 173.150, in paragraph (b)(3), the wording ''(1 gallon)'' is removed and ''(1.3 gallons)'' is added in its place.

§ 173.159 [Amended]

26. In § 173.159, in paragraph (c)(3), the following changes are made:

a. In the first sentence, a comma is added immediately after the word ''each''.

b. In the second sentence, a period is added after the wording ''(75 pounds)''.

§ 173.164 [Amended]

27. In § 173.164, the following changes are made in paragraph (c), as redesignated at 59 FR 67509, effective October 1, 1995:

a. In paragraph (c)(1), in the first sentence, the words ''paragraph (b)(2)'' are removed and ''paragraph (c)(3)'' is added in its place.

b. In paragraph (c)(5), in the first sentence, the wording ''paragraph (b)(1)'' is removed and ''paragraph (c)(1)'' is added in its place.

§ 173.224 [Amended]

28. In § 173.224, as revised at 59 FR 67511, effective October 1, 1995, in paragraph (b) introductory text, the reference ''§ 173.124(a)(2)(vii)'' is removed and ''§ 173.124(a)(2)(iii)'' is added in its place.

§ 173.242 [Amended]

29. In § 173.242, in paragraph (b)(1), at the end of the second sentence, the wording ''(except for Class 8, Packing Group I and II)'' is added immediately following ''MC 307 cargo tank''.

§ 173.243 [Amended]

30. In § 173.243, in paragraph (b)(1), at the end of the second sentence, the wording ''(except for Class 8, Packing Group I and II)'' is added immediately following ''MC 307 cargo tank''.

§ 173.306 [Amended]

31. In § 173.306(d)(3)(iii), the following changes are made:

a. Following the words ''in accordance with'', the reference ''§ 173.86'' is removed and ''§ 173.56'' is added in its place.

b. The wording ''and meet the definition set forth in § 173.100(w)'' is removed.

PART 174—CARRIAGE BY RAIL

32. The authority citation for part 174 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 174.67 [Amended]

33. In § 174.67, in paragraph (k), the following changes are made:

a. In the first sentence, the wording ''must be made tight,'' is removed and the words ''must be made tight by the use of a bar, wrench or other suitable tool,'' are added in its place.

b. The last sentence, beginning with ''The manhole cover must'' is removed.

PART 175—CARRIAGE BY AIRCRAFT

34. The authority citation for part 175 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 175.45 [Amended]

35. In § 175.45(a)(3), the telephone number ''area code 404–633–5313'' is removed and ''1–800–232–0124'' is added in its place.

PART 176—CARRIAGE BY VESSEL

36. The authority citation for part 176 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 176.76 [Amended]

37. In § 176.76, in paragraph (h)(1), the wording '', or a cargo tank approved under the provisions of § 173.33(b)(2) of this subchapter'' is removed.

38. In § 176.83, in paragraph (c)(2)(iv), the diagram which precedes the note is revised to read as follows:

§ 176.83 Segregation.

* * * * *

(c) * * *

(2) * * *

(iv) * * *

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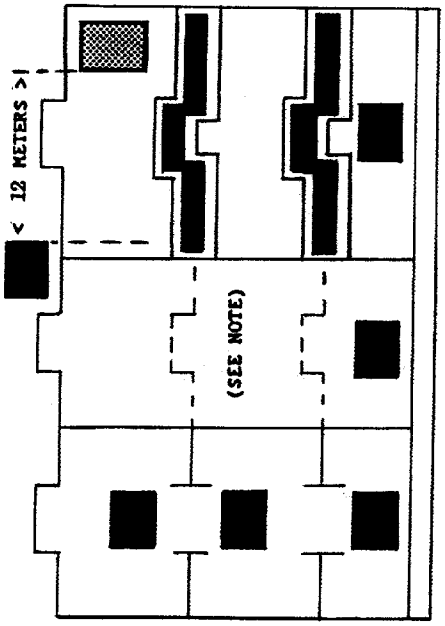

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* * * * *

§ 176.136 [Amended]

39. In § 176.136, in paragraph (a), the period is removed after the word ''section'' and a comma is added in its place.

§ 176.410 [Amended]

40. In § 176.410, in paragraph (b), the parenthetical mark following ''Class 9'' is removed.

PART 178—SPECIFICATIONS FOR PACKAGINGS

41. The authority citation for part 178 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 178.53–5 [Amended]

42. In § 178.53–5, the parenthetical authorities at the end of the section are removed.

§ 178.58–5 [Amended]

43. In § 178.58–5, the parenthetical authorities at the end of the section are removed.

§ 178.358–3 [Amended]

44. In § 178.358–3, in paragraph (a), the word ''to'' preceding ''April 1, 1989'' is removed.

§ 178.504 [Amended]

45. In § 178.504, in paragraph (b)(1), in the last sentence, the reference ''§ 178.503(a)(10)'' is removed and ''§ 178.503(a)(9)'' is added in its place.

§ 178.819 [Corrected]

46. In the Federal Register of August 4, 1995, on page 40039, in column one, in amendatory instruction 19, lines two through four are corrected to read ''in the second sentence, the wording 'move vertically, bounce and rotate' is removed and 'move vertically and bounce' is added in its place.''.

Issued in Washington, DC, on September 8, 1995, under the authority delegated in 49 CFR part 1.

Ana Sol Gutiérrez,

Deputy Administrator, Research and Special Programs Administration.

[FR Doc. 95–22772 Filed 9–20–95; 8:45 am]

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federal register

Thursday
September 21, 1995

Part V

Department of Education

34 CFR Parts 668, 674, et al.

Higher Education Act of 1965; Student Financial Assistance Programs; Federal Regulatory Assistance Review; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 668, 674, 675, 676, 682, 685, and 690

RIN: 1840 AC20

Student Assistance General Provisions, Federal Perkins Loan Program, Federal Work-Study Programs, Federal Supplemental Educational Opportunity Grant Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Programs, and Federal Pell Grant Program

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations governing the student financial assistance programs authorized under title IV of the Higher Education Act of 1965, as amended (title IV, HEA programs). These programs include the campus-based programs (Federal Perkins Loan, Federal Work-Study (FWS), and Federal Supplemental Educational Opportunity Grant (FSEOG) programs), the Federal Family Education Loan (FFEL) programs, the William D. Ford Federal Direct Loan programs, the Federal Pell Grant Program, and the State Student Incentive Grant program. These proposed amendments, which eliminate unnecessary regulations and improve the existing regulations, are part of a planned series of regulatory reform and relief proposals for the title IV, HEA programs. The Secretary is proposing these changes in response to the President's Regulatory Reform Initiative.

The Federal student financial assistance programs support the National Education Goals by enhancing opportunities for postsecondary education. The National Education Goals call for increasing the rate at which students graduate from high school and pursue high quality postsecondary education and for supporting life-long learning.

DATES: Comments on the proposed regulations must be received on or before October 27, 1995.

ADDRESSES: All comments concerning these proposed regulations should be addressed to: Harold McCullough, U.S. Department of Education, P.O. Box 23272, Washington, DC 20026–3272. Comments may also be sent through the Internet to reg__relief@ed.gov.

To ensure that public comments have maximum effect in developing the final regulations, the Department urges that each comment clearly identify the specific section or sections of the regulations that the comment addresses and that comments be in the same order as the proposed regulations.

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. A copy of those comments may also be sent to the Department representative named above.

FOR FURTHER INFORMATION CONTACT:

1. For the Student Assistance General Provisions: Claude Denton, Student Eligibility and Verification Section, General Provisions Branch on (202) 708–7888;
2. For the Federal Perkins Loan Program: Sylvia R. Ross, Campus-Based Loan Programs Section, Loans Branch on (202) 708–8242;
3. For the FWS and FSEOG programs: Kathy S. Gause, Campus-Based Programs Section, Grants Branch on (202) 708–4690;
4. For the FFEL Programs: Ralph Madden, GSL Programs Section, Loans Branch on (202) 708–8242;
5. For the William D. Ford Federal Direct Loan Programs: Doug Laine, Direct Loan Policy Group on (202) 708–9406; and
6. For the Federal Pell Grant Program: Mike Oliver, Pell and State Grant Section, Grants Branch on (202) 708–4607.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On March 4, 1995, the President directed every Federal agency to review its rules and procedures to reduce regulatory and paperwork burden, and directed Federal agencies to eliminate or revise those regulations that are outdated or otherwise in need of reform. Responding to the President's Regulatory Reform Initiative, the Secretary announced plans to eliminate or revise 93 percent of the Department's regulations. To launch the Department's reinvention effort, the Secretary published a notice in the May 23, 1995 Federal Register (60 FR 27223–27226), eliminating more than 30 percent of the Department's regulations, primarily in areas not related to student financial assistance.

The Secretary is conducting a page-by-page review of all student financial assistance regulations to identify those that should be eliminated or improved. The Secretary is also considering developing proposals for statutory amendments to eliminate unnecessary administrative burden.

As part of his response to the President's regulatory reinvention initiative, the Secretary is proposing these amendments to the regulations that apply to the title IV, HEA programs. The Secretary plans to propose additional reform and relief regulatory amendments for the title IV, HEA programs in the upcoming months.

A description of the major proposed changes follows. The proposed changes that apply to more than one program are described first followed by descriptions of provisions that apply only to a specific program.

The Federal student financial assistance programs support the National Education Goals by enhancing opportunities for postsecondary education.

Summary of Proposed Changes

Student Assistance General Provisions

The Student Assistance General Provisions regulations, 34 CFR part 668, implement requirements that are common to the title IV, HEA programs.

Subpart A—General

Section 668.7 Eligible Student

The Secretary proposes to remove and reserve the section formerly designated as § 668.7, ''Eligible student.'' The ''eligible student'' provisions currently provided in § 668.7 would now comprise a revised subpart C of 34 CFR part 668.

The Secretary believes that this relocation will improve regulatory organization, provide greater clarity, and improve understanding of those provisions.

Subpart B—Standards for Participation in Title IV, HEA Programs

Section 668.19 Financial Aid Transcript

Under the current regulations, if an institution determines that a student previously attended another institution, the institution must obtain a financial aid transcript from that other institution. The financial aid transcript provides some of the information that enables an institution to determine whether an enrolling student is eligible to receive title IV, HEA program funds. Thus, the financial aid transcript may indicate that a student is in default on a title IV, HEA program loan, or owes a repayment on a title IV, HEA program grant or loan. It may also help the institution to determine the amount that an eligible student is entitled to receive in the current award year by indicating

a student's Scheduled Federal Pell Grant award or the amount of FFEL or William D. Ford Federal Direct loan funds that the student received in the current award year.

The Secretary proposes an alternative to obtaining a financial aid transcript. The Department has been developing the National Student Loan Data System (NSLDS), which will contain basically the same information that is included on a financial aid transcript. When the system becomes fully operational, institutions will be able to obtain financial aid history information about an applicant for title IV, HEA program assistance from the NSLDS instead of from other institutions previously attended by the applicant. Therefore, the Secretary is proposing in § 668.19 that when the NSLDS can be used to satisfy this purpose, an institution will have the option of obtaining information about an enrolling student who has previously attended another institution from the NSLDS instead of requesting a financial aid transcript from the other institution.

At the present time, the Secretary anticipates that institutions will be able to obtain financial aid transcript information from the NSLDS starting with the 1996–97 award year. However, the Secretary is proposing in § 668.19 to notify institutions through a Federal Register notice when they may begin to use this option.

After experience demonstrates that the NSLDS is a valid alternative to requesting a financial aid transcript from another institution, the Secretary anticipates that institutions will use the NSLDS exclusively to obtain information and the Secretary will eliminate the financial aid transcript requirement.

The Secretary expects that use of NSLDS will relieve institutions of the burden of requesting and compiling information from financial aid transcripts. Because financial aid history information will be available electronically, obtaining information from the NSLDS will also reduce delays in awarding and disbursing title IV, HEA program assistance to students.

While the Secretary is confident that NSLDS data will provide accurate and reliable information, there will be instances where an institution encounters inconsistencies between NSLDS data and other sources of information. If that happens, the institution is expected to resolve those conflicts in accordance with § 668.16(f). Resolution of inconsistencies can be achieved through use of the financial aid transcript or other methods the institution determines to be appropriate.

Subpart C—Student Eligibility

Because of increased statutory requirements affecting a student's eligibility to receive title IV, HEA program funds, the Secretary believes that the inclusion of all those requirements in one section of the regulations has become too cumbersome. Therefore, the Secretary has revised and reorganized those requirements into subpart C of 34 CFR part 668. The Secretary requests comments on this proposed reorganization.

Section 668.33 Student Identification

The Office of Inspector General recently recommended enhancement of the data match with the Social Security Administration (SSA), under which SSA would confirm claims of U.S. citizenship by applicants for title IV, HEA program funds on their Free Application for Federal Student Aid (FAFSA). Currently, the Department and SSA have a data match under which SSA confirms the accuracy of social security numbers provided by title IV, HEA program applicants.

The Secretary and SSA have agreed to this expanded data match starting with the 1996–97 award year application cycle. Section 668.33 has provisions to conform these regulations to this internal interagency process.

Operationally, the citizenship aspect of the SSA data match would be similar to other data matches. If a student's claim of U.S. citizen status is confirmed by SSA, the central processor will generate a confirming message on an applicable ''output document,'' such as an ISIR or SAR. No further action will be required by either the student or institution, absent conflicting information. If the student's claim is not confirmed, the student would be advised of the lack of confirmation and would be given the opportunity to provide documentary evidence to the institution, such as a birth certificate, naturalization certificate, or passport, to support his or her assertion of citizenship.

The Secretary proposes, in this section, to allow students to satisfy the requirement of filing a Statement of Educational Purpose with the institution, by completing the FAFSA, which will include this statement starting with the 1996–97 award year. Currently, institutions must collect a Statement of Educational Purpose individually from each student applying for title IV, HEA program assistance. The Secretary;s proposal does not affect current FFEL requirements with regard to this statement on loan applications.

The Secretary proposes to eliminate the model Statement of Educational Purpose in the current regulations. A model statement would be duplicative because the statement will appear on the FAFSA starting with the 1996–97 award year.

The Secretary also proposes to eliminate the Statement of Registration Status because the statement is duplicative. A male student's selective service registration status is now confirmed through a data match with the Selective Service System. This data match eliminates the need for the collection of a separate statement.

Section 668.34 Student Debts Under the HEA and to the U.S.

The Secretary is proposing in these regulations to amend and reorganize, for clarity and conformity, the provisions under which a student who owes a debt under the HEA or to the United States may nevertheless be eligible to receive title IV, HEA program assistance. Also, the Secretary proposes to conform the regulations to existing statutory requirements pertaining to bankruptcy.

Specifically, these regulations would allow a student who owes a debt under the HEA or to the United States to be eligible to receive title IV, HEA program funds even though the student (1) is in default on a title IV, HEA program loan, (2) inadvertently received a title IV, HEA program loan in an amount that exceeded that program's annual or aggregate loan limits, (3) owes a repayment on a title IV, HEA program grant or loan, or (4) has property subject to a judgment lien for a debt owed to the United States.

Under the proposed regulations, a student who is in default on a title IV, HEA program loan would be eligible to receive additional title IV, HEA program funds if the student repays the loan in full, or makes six consecutive monthly payments on the defaulted loan and makes arrangements, satisfactory to the holder of the loan, to repay that loan.

A student who is not in default but inadvertently obtained loan funds under a title IV, HEA loan program in an amount that exceeded the annual or aggregate loan limits under that program would be eligible to receive additional title IV, HEA program funds if the student repays in full the excess loan amount or makes arrangements satisfactory to the holder of the loan, to repay that excess loan amount.

A student who receives a grant or loan overpayment under a title IV, HEA program would be eligible for additional title IV, HEA program funds if the student pays the overpayment in full, or

makes arrangements satisfactory to the institution to pay the overpayment.

A student who has property subject to a judgment lien for a debt owed to the United States would be eligible for title IV, HEA program funds if the student pays the debt in full, or makes arrangements satisfactory to the United States to pay the debt.

In addition, the proposed regulations clarify that the exception under bankruptcy law is applicable to a student who is otherwise in default on a title IV, HEA program loan, or owes an overpayment on a title IV, HEA program grant or loan.

These proposed changes provide clarification and, to the extent allowed by the HEA, consistency in the treatment by institutions of applicants for title IV, HEA program assistance who may owe a debt on previously awarded title IV aid or when the applicant has had a lien placed on another debt owed to the United States. Additionally, they provide, in the case of a grant or loan overpayment, flexibility to the holder of the debt by allowing for the establishment of satisfactory arrangements to repay so that the applicant who demonstrates good faith in resolving his or her obligation may regain eligibility for title IV, HEA program assistance.

Subpart I—Immigration-Status Confirmation

Section 668.133 Conditions Under Which an Institution Shall Require Documentation and Request Secondary Confirmation

The Secretary proposes to remove the requirement that an institution request secondary confirmation from the Immigration and Naturalization Service for a student if (1) the student presents documents verifying his or her immigration status that are identical to documents presented to that institution in a previous year, and (2) that institution determined the student to be an eligible noncitizen using secondary confirmation of those same documents in a previous award year. This waiver of secondary confirmation requirements would not apply if the institution has conflicting information or reason to doubt the student's claim to be an eligible noncitizen.

Subpart K—Cash Management

Section 668.164 Maintaining Funds

The Secretary proposes to amend § 668.164(a)(2) to limit the requirement that all institutions file a UCC–1 statement for any bank account in which title IV, HEA program funds are maintained. Specifically, the Secretary proposes to eliminate the UCC–1 filing requirement for institutions that (1) disclose clearly in the name of the account that Federal funds are maintained in that account, or (2) are backed by the full faith and credit of a State. The filing of a UCC–1 would only be required for bank accounts of institutions that do not satisfy either of these conditions.

In establishing this requirement, the Secretary sought to use the UCC–1 filing process as the means by which an institution publicly discloses which of its accounts contain Federal funds. A public disclosure reduces the possibility that an unscrupulous institution could misrepresent Federal funds as its own funds.

Upon further review, the Secretary believes that the disclosure purposes of the UCC–1 filing requirement are adequately accomplished where an institution includes the phrase ''Federal funds'' in the name of its accounts. Moreover, the Secretary believes that the UCC–1 filing requirement is not appropriate for public institutions because these institutions generally do not seek to obtain credit in the same manner as private institutions.

Section 668.165 Disbursing Funds

The Secretary is proposing to modify section 668.165(b)(1) to provide an institution as much flexibility as possible with respect to how it notifies a student or parent borrower that William D. Ford Federal Direct Loan or FFEL program funds have been credited to a student's account. Under the current regulations, the institution must provide such notification in writing. Under the proposed rules, the institution would be able to provide this notification electronically or through the use of telecommunication devices. If an institution provides the notification through these devices, the institution must have a means of documenting that the student or parent received this information. For example, if the institution provides this information through electronic mail, the institution must ensure that it receives a ''return receipt'' message from the addressee.

The Secretary proposes to amend § 668.165(b) (1) and (3) to provide that under certain circumstances, and with a student's permission, an institution may credit the student's account with title IV, HEA program funds to pay for minor institutional charges from a prior year. Currently, § 668.165(b)(1) prohibits this practice. This prohibition reflects long-standing Department policy and is based on the tenet that title IV, HEA program funds are intended to be used to pay for educational expenses a student incurs in the period for which those funds are provided. The Cash Management regulations published on December 1, 1994 merely codified this policy.

After the publication of these regulations, institutions have brought to the Secretary's attention circumstances under which a limited exception to this rule may be appropriate. These circumstances occur where a student incurs a minor institutional charge late in a semester after the institution has released to the student all of his or her title IV, HEA program funds. This charge is often not paid by the student by the end of the semester and is consequently carried over to the next semester. Where that next semester falls within the award year, the charges may be paid using the student's title IV, HEA program funds. The institutions note, however, that a problem arises where the next semester falls in a subsequent award year because many institutions have a policy that prevents a student from continuing at the institution until all prior year charges are paid. In this case, the student's current title IV, HEA program funds may not be used to pay the prior year charges even if the amount of these funds exceeds all current allowable costs and the student's remaining funds are sufficient to pay the prior year charges. While the institutions acknowledge that a student's failure to pay institutional charges when those charges are due is a problem that may arise regardless of whether a student receives title IV, HEA program funds, they maintain that the current regulatory prohibition on the payment of prior year charges imposes an unnecessary administrative burden and otherwise interferes with an institution's ability to resolve this problem with the student.

After further review, the Department announced on July 11, 1995 that in the case described above where a balance of title IV, HEA program funds remains after the student's current allowable costs are paid, an institution may use the student's current title IV, HEA program funds to pay for minor prior year charges provided that the institution obtains appropriate authorization from a student to do so. These proposed regulations merely restate this announced policy.

The Secretary believes that, as a practical matter, the payment of minor prior year charges does not violate the intended use of title IV, HEA program funds because the primary purpose of these funds is to assist a student in beginning and continuing to pursue his or her postsecondary education. However, the Secretary is concerned

that the payment of prior year charges may impair a student from continuing his or her education at an institution if the amount of those charges reduces adversely the amount of title IV, HEA program funds that the student would otherwise rely on in meeting his or her living expenses and other educational costs. The Secretary believes strongly that this would not only violate the intended use of title IV, HEA program funds but that it would be a disservice to the student and waste of Federal funds. Therefore, although the Secretary does not specify the dollar amount of prior year charges that may be paid, the Secretary would expect institutions to use the latitude provided under this proposal in a reasonable manner.

Campus-Based Programs

Sections 674.2, 675.2 and 676.2 Definitions

Section 674.2(b) and § 675.2(b) of the Federal Perkins Loan and FWS program regulations, respectively, define the terms ''full-time or professional student'' and ''full-time undergraduate student'' and § 676.2(b) of the FSEOG program regulations defines the term ''full-time undergraduate student.'' However, § 668.2 of the Student Assistance General Provisions regulations contains a definition of the term ''full-time student'' that duplicates those definitions. Therefore, the Secretary is proposing to eliminate these duplicative definitions in § 674.2(b), § 675.2(b) and § 676.2(b) and instead incorporate the definition of the term ''full-time student'' set forth in § 668.2 for all three of the campus-based programs.

Sections 674.17, 675.17, and 676.17 Federal Interest in Allocated Funds

Section 674.17(a), § 675.17 and § 676.17 of the Federal Perkins Loan, FWS, and FSEOG program regulations provide that program funds are held in trust for the Secretary and intended student beneficiaries and cannot be used or hypothecated for any other purpose. These very provisions are included in § 668.161(b) of the Student Assistance General Provisions regulations so are not needed in these program regulations.

In the past, the Secretary kept these provisions in program regulations even though they were in the Student Assistance General Provisions regulations as a reminder of their importance. However, the Secretary now believes that the continued presence of redundant regulatory provisions in each Title IV, HEA program regulation is no longer needed.

Sections 674.19, 675.19, and 676.19 Fiscal Procedures and Records

The Secretary proposes to amend §§ 674.19(e)(4)(v), 675.19(c)(3), and 676.19(c)(3) of the Federal Perkins Loan, FWS, and FSEOG program regulations, respectively, to allow institutions the additional flexibility of using optical disk technology in complying with recordkeeping requirements. The Secretary believes that the use of new technologies such as optical disk is an important tool in reducing paper retention at an institution, particularly if an institution keeps its records in computer format. The Secretary further believes that broadening methods of record retention through the use of optical disk will enhance administrative efficiency and increase flexibility by providing institutions with a new recordkeeping option that saves time and space.

Federal Perkins Loan Program

Section 674.2 Definitions

The current definition of ''making of a loan'' under § 674.2 of the Federal Perkins Loan program regulations includes the burdensome requirement of collecting a student's signature each time loan funds are advanced. In order to make this definition consistent with the changes in signature requirements being proposed in § 674.16, the Secretary is proposing to amend this definition by removing the reference to a borrower signing for each advance of funds. The Secretary proposes to redefine ''making of a loan'' simply as when the borrower signs the promissory note and the loan funds are disbursed.

Section 674.16 Making and Disbursing Loans

In keeping with the Secretary's desire to alleviate administrative burden on institutions and to protect students, the Secretary is proposing to eliminate the requirement that a student must sign for each loan advance under the Federal Perkins Loan Program. The financial aid community has commented repeatedly that this is a time-consuming, costly, and impractical requirement that often results in long lines of students waiting to sign loan documents.

Under the Secretary's proposal, an institution simply must obtain the borrower's signature on a promissory note for each award year before it disburses any loan funds under that promissory note for that award year. Thus, when he or she signs a promissory note for an award year, the student will know the loan amount for that award year. Moreover, the student will know when and how those funds will be disbursed because the institution is required to provide that information to the student under § 668.165 of the Student Assistance General Provisions regulations.

Section 674.31 Promissory Note

The Secretary proposes to amend § 674.31(a) of the Federal Perkins Loan Program regulations to indicate that the Secretary will provide sample promissory notes to institutions. Institutions may add additional items to the sample notes as long as the new items do not alter the substance of these sample notes.

Section 674.33 Repayment

The Secretary is proposing to amend § 674.33(a)(2) of the Federal Perkins Loan Program regulations by allowing institutions to combine the last scheduled Federal Perkins Loan payment with the next-to-last payment if the last payment is $25 or less. As currently written, in order to combine payments, the last payment must be $15 or less. The Secretary believes that allowing institutions to combine a last payment of a higher dollar amount will reduce collection costs by eliminating the generation of bills for small dollar amounts and also significantly improve an institution's success in collecting small loan balances.

Section 674.47 Costs Chargeable to the Fund

The Secretary recently issued a ''Dear Colleague'' Letter regarding the limitations on write-offs in the Federal Perkins Loan Program (CB–95–17). However, the Secretary believes that confusion still exists as to what the term ''write-off'' means as it relates to § 674.47(g). In an attempt to clarify the Secretary's position and to alleviate burden on institutions, the Secretary is proposing to revise § 674.47(g) by replacing the term ''write-off'' with the term ''cessation of collection activity.''

As the proposed change indicates, an institution may cease collection activity on a defaulted account with a balance of less than $25. However, the institution must continue to include the loan as in default for purposes of calculating its cohort default rate.

Cessation of collection activity by an institution does not relieve the borrower of his or her obligation to repay that loan, and interest continues to accrue on the amount on which collection activities cease. Moreover, the borrower is still considered in default on that loan and therefore remains ineligible for further title IV, HEA program assistance and retains an adverse credit rating.

It is the Secretary's long-standing policy to require institutions to collect every amount due on an account from the borrower. However, the Secretary recognizes that institutions and collection agencies experience cost-inefficiencies in their attempts to collect small-balance, defaulted loan accounts.

The Secretary recognizes that very small balances frequently occur, for example, when a few days of additional interest accrues on the final balance, and that billing borrowers for this small remaining balance is not cost-effective for institutions as servicing fees often exceed the remaining balance. Accordingly, the Secretary is proposing to further amend § 674.47 by adding new paragraph (h) to allow institutions to cease collection activities and write off loan accounts with a balance of less than $1, including outstanding principal, accrued interest, collection costs, and late charges.

The write-off of balances of less than $1 creates a paid-in-full status on the loan and, therefore, relieves the borrower of all obligations, does not have an adverse effect on the borrower's credit rating, does not affect the borrower's eligibility for further title IV, HEA program assistance, nor will the loan be included in the calculation of an institution's cohort default rate.

Federal Work-Study Programs

Appendix B—Model Off-Campus Agreement

When an institution enters into a written agreement—a contract—with any off-campus agency or company that employs FWS students, the institution must make sure the organization is a reliable organization with professional direction and staff, and that the work to be performed is adequately supervised and consistent with the purpose of the FWS Program. Appendix B of the current FWS regulations provides a model off-campus agreement. Institutions can use this model as a guide in developing their agreements.

In an effort to streamline regulations, the Secretary is proposing to eliminate this sample agreement as an appendix to the FWS regulations. The Secretary will include a model off-campus agreement in the Federal Student Financial Aid Handbook.

Federal Family Education Loan Program, William D. Ford Federal Direct Loan Programs

Sections 682.201 and 685.200 Eligible Borrowers

The Secretary proposes to expand the pool of borrowers under the Federal PLUS and Federal Direct PLUS programs to include the spouse of a student's parent if that parent remarried. The Secretary is proposing this expansion to provide greater flexibility to the student's family to enable them to pay for the student's educational costs. The proposed extension includes the spouse of the parent if that spouse's income and assets would be taken into account in determining the student's expected family contribution.

Section 682.600 Agreement Between an Eligible School and the Secretary for Participation in the FFEL Programs and § 682.602 Schedule Requirements for Courses of Study by Correspondence

The Secretary believes that the provisions of § 682.600(a) through § 682.600(c) duplicate provisions in 34 CFR part 600 or 668 and are therefore unnecessary. Accordingly, the Secretary has proposed to eliminate those provisions in 34 CFR part 682. The provisions included in § 682.600(d) that deal with foreign schools are needed and the Secretary has proposed to include those provisions in a new section, § 682.611.

Students enrolled in correspondence programs are not eligible to receive FFEL Program loans unless they are enrolled in a program that leads to an associate, bachelor, or graduate degree. Therefore, the Secretary believes that the provisions contained in § 682.602 are no longer needed and has proposed to eliminate those provisions.

Federal Pell Grant Program

Subpart A—Scope, Purpose and General Definitions

Section 690.7 Institutional Participation

The Secretary proposes to revise § 690.7 by deleting current paragraph (a)(1) because the provisions contained in that paragraph duplicate provisions in 34 CFR part 600 or 668.

Subpart G—Administration of Grants Payments

Section 690.71 Scope, § 690.72 Institutional Participation, § 690.73 Termination of Institutional Participation Agreement, and § 690.74 Provision of Funds to Institutions

The Secretary proposes to eliminate the last sentences in §§ 690.71, 690.72, 690.73, and 690.74 because they duplicate provisions contained in 34 CFR part 668.

Section 690.83 Submission of Reports

The Secretary proposes to revise § 690.83 by consolidating in one paragraph the procedures that allow institutions to receive payment or credit for Federal Pell Grants they previously disbursed if that situation is disclosed by an initial audit or program review.

Executive Order 12866

1. Assessment of Costs and Benefits

These proposed regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering these programs effectively and efficiently. Burdens specifically associated with information collection requirements, if any, are identified and explained elsewhere in this preamble under the heading *Paperwork Reduction Act of 1995*.

In assessing the potential costs and benefits—both quantitative and qualitative—of these proposed regulations, the Secretary has determined that the benefits of the proposed regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these regulations without impeding the effective and efficient administration of the program.

2. Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the regulations contain technical terms or other wording that interferes with their clarity? (3) Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a numbered heading, for example, § 674.4 Allocation and reallocation.) (4) Is the description of the regulations in the ''Supplementary Information'' section of this preamble helpful in understanding the regulations? How could this

description be more helpful in making the regulations easier to understand? (5) What else could the Department do to make the regulations easier to understand?

A copy of any comments that concern how the Department could make these proposed regulations easier to understand should be sent to Stanley M. Cohen, Regulations Quality Officer, U.S. Department of Education, 400 Maryland Avenue, S.W., (Room 5125, FOB–6), Washington, D.C. 20202–2241.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The small entities affected by these proposed regulations are small institutions of postsecondary education. The changes in these regulations will not substantially increase institutions—workload or costs associated with administering the title IV, HEA programs and, therefore, will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act of 1995

Sections 668.19, 668.32, 668.33, 668.34, 668.36, 668.133, 668.164, 668.165, 674.16, 674.19, 674.31, 674.47, 675.19, 676.19, and 690.83 contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Collection of information: Student Assistance General Provisions—

Section 668.19—Financial aid transcript—Institutions are required to obtain financial aid transcript information for purposes of determining student eligibility under these regulations. The information to be collected includes: assurances to meet certain statutory requirements and specific information regarding a student's financial aid history. Institutions need and use the information to release title IV, HEA program funds.

All information is to be collected on a case by case basis for those students that previously attended an institution and received title IV, HEA program funds. Annual recordkeeping and reporting burden contained in the collection of information proposed in these regulations are estimated to average .17 hours for 17,600 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The total annual recordkeeping and reporting burden equals 2992 hours.

Section 668.32—Statement of Educational Purpose—The Department currently has this section approved under OMB control number for the FAFSA (1840–0110). There are no new information collection requirements as a result of these regulations.

Section 668.33—Statement of Registration Status—The Department currently has this section approved under OMB control number for the FAFSA (1840–0110). There are no new information collection requirements as a result of these regulations.

Section 668.34—Model Statement of Educational Purpose and Registration Status—The Department currently has this section approved under OMB control number for the FAFSA (1840–0110). There are no new information collection requirements as a result of these regulations.

Section 668.36—Selective Service notification, administrative review, and liability—The Department currently has this section approved under OMB control number for the FAFSA (1840–0110). There are no new information collection requirements as a result of redesignating and renaming this section from § 668.35.

Section 668.133—Conditions under which an institution shall require documentation and request secondary confirmation—Institutions must require documentation and secondary confirmation with INS for purposes of determining student eligibility for noncitizen applicants under these regulations. The information to be collected includes: specific information regarding a student's residency status and documentary evidence. Institutions need and use the information to determine a student's eligibility for title IV, HEA program funds.

All information is to be collected on a case by case basis. Annual recordkeeping and reporting burden contained in the collection of information proposed in these regulations are estimated to average .25 hours for 8,000 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The total annual recordkeeping and reporting burden equals 2000 hours.

Section 668.164—Maintaining funds—Institutions are required to deposit title IV, HEA program funds into a bank account, (1) with the words ''Federal funds'' in the title of the account, or (2) be backed by the full faith and credit of a state, or (3) file a UCC–1 form with the appropriate county and/or State office(s) and maintain a copy of that filing in its records to disclose that Federal funds are maintained in that bank account under these regulations.

All information is to be collected on a one time basis if changing the title of a bank account, or annually if filing a UCC–1 form. Annual recordkeeping and reporting burden contained in the collection of information proposed in these regulations are estimated to average 1.23 hours for 3,634 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The total annual recordkeeping and reporting burden equals 4470 hours.

Section 668.165—Disbursing funds—There are no new information collection requirements as a result of these regulations.

Collection of information: Federal Perkins Loan, FWS, and FSEOG programs—

Section 674.16—Making and disbursing loans and section 674.31—Promissory note—There are no new information collection requirements as a result of these regulations.

Section 674.19, 675.19, and 676.19—Fiscal procedures and records—The Department currently has these sections approved under OMB control number for the FISAP (1840–0073). There are no new information collection requirements as a result of these regulations.

Section 674.47—Costs chargeable to the fund—There are no new information collection requirements as a result of these regulations.

Collection of information: Federal Pell Grant Program—

Section 690.83—Submission of reports—Institutions must follow certain procedures for receiving funds for payment submissions after established deadline dates.

All information is to be collected annually. There are no new collection requirements as a result of these regulations. The current annual recordkeeping and reporting burden contained in section 690.83 is estimated to average 41 hours for 400 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.

The total annual recordkeeping and reporting burdne equals 16,400 hours.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, D.C. 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on these proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have a practical use;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefullness, and clarity of the information to be collected; and
- Minimizing the burden of 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.

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

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 3053, ROB–3, 7th and D Streets, S.W., Washington, D.C., between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by, or is available from, any other agency or authority of the United States.

List of Subjects

34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Loan programs—education, Grant programs—education, Student aid, Reporting and recordkeeping requirements.

34 CFR Part 674

Loan programs—education, Student aid, Reporting and recordkeeping requirements.

34 CFR Part 675

Loan programs—education, Student aid, Reporting and recordkeeping requirements.

34 CFR Part 676

Loan programs—education, Student aid, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Consolidation Program; 84.032 Federal Stafford Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 Federal State Student Incentive Grant Program; 84.268 William D. Ford Federal Direct Loan Programs; and 84.272 National Early Intervention Scholarship and Partnership Program.)

Dated: September 13, 1995.

Richard W. Riley,

Secretary of Education.

The Secretary proposes to amend parts 668, 674, 675, 676, 682, 685, and 690 of title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, and 1141, unless otherwise noted.

§ 668.2 [Amended]

2. Section 668.2, paragraph (b) is amended by revising the first paragraph of the definition of ''Payment period'' to read as follows: ''With respect to the Federal Pell Grant Program, a payment period as defined in 34 CFR 690.3;''

§ 668.7 [Amended]

3. Section 668.7 is removed and reserved.

4. Section 668.19 is revised to read as follows:

§ 668.19 Financial aid transcript.

(a)(1) An institution shall determine whether a student who is applying for assistance under any title IV, HEA program has previously attended another eligible institution.

(2) Before a student who previously attended another eligible institution may receive any title IV, HEA program funds—

(i) The institution must request each institution the student previously attended to provide a financial aid transcript to the institution the student is, or will be, attending; or

(ii) The institution may use information obtained from the National Student Loan Data System, that would otherwise be provided on a financial aid transcript, once the Secretary notifies institutions through a notice in the Federal Register that the National Student Loan Data System is available for this purpose.

(3) Except as provided in paragraph (a)(5) of this section, if an institution requests a financial aid transcript from each of the institutions a student previously attended, until the institution receives a financial aid transcript from each of those institutions, the requesting institution—

(i) May withhold payment of Federal Pell Grant and campus-based funds to the student;

(ii) May disburse Federal Pell Grant or campus-based funds to the student for one payment period only;

(iii) May decline to certify the student's Federal Stafford Loan application or the parent's Federal PLUS application under the FFEL Program;

(iv) May decline to originate the student's Federal Direct Stafford Loan application or the parent's Federal Direct PLUS application under the William D. Ford Federal Direct Loan Programs;

(v) May not release Federal Stafford Loan proceeds to a student or Federal PLUS proceeds to a parent or student under the FFEL Program; and

(vi) May not release Federal Direct Stafford Loan proceeds to a student or Federal Direct PLUS proceeds to a parent or student under the William D. Ford Federal Direct Loan Programs.

(4)(i) An institution may not hold Federal Stafford, or Federal PLUS loan proceeds under paragraph (a)(3) of this section for more than 45 days. If an institution does not receive all required financial aid transcripts for a student within 45 days of the receipt of those proceeds, the institution shall return the loan proceeds to the appropriate lender.

(ii) An institution that certifies a Federal Stafford or Federal PLUS loan

application before receiving all required financial aid transcripts shall return to the lender the appropriate amount of any Federal Stafford or Federal PLUS loan proceeds for the student if it receives a financial aid transcript indicating that the student is not eligible for all, or a part, of the loan proceeds.

(5) An institution may disburse title IV, HEA program funds to a student without receiving a financial aid transcript from an eligible institution the student previously attended if the institution the student previously attended—

(i) Has closed, and information concerning the student's receipt of title IV, HEA program assistance for attendance at that institution is not available;

(ii) Is not located in a State; or

(iii) Provides the disbursing institution with the written certification described in paragraph (b)(2)(ii) of this section.

(b) Upon request, each institution located in a State shall promptly provide to the institution that requested a financial aid transcript—

(1) All information in its possession concerning whether the student in question attended institutions other than itself and the requesting institution; and

(2)(i) A financial aid transcript for that student, if the student received or benefited from any title IV, HEA program assistance while attending the institution; or

(ii) A written certification that—

(A) The student did not receive or benefit from any title IV, HEA program assistance while attending the institution; or

(B) The transcript would cover only years for which the institution no longer has records and is no longer required to keep records under the applicable title IV, HEA program recordkeeping requirements.

(c) An institution must disclose on a financial aid transcript for a student—

(1) The student's name and social security number;

(2) To the extent that the institution is aware, whether the student is in default on any title IV, HEA loan;

(3) Whether the student owes an overpayment on any grant made under the Federal Pell Grant or FSEOG programs and, to the extent that the institution is aware, the SSIG Program, for attendance at the institution;

(4) For the award year for which a financial aid transcript is requested—

(i) The student's scheduled Federal Pell Grant award;

(ii) The amount of Federal Pell Grant funds disbursed to the student;

(iii) The amount of loans made under the National Defense Student Loan, Direct Loan, and Federal Perkins Loan programs; and

(iv) The amount of loans made under the FFEL and William D. Ford Federal Direct Loan programs; and

(5) The aggregate amount of loans under the title IV, HEA loan programs for attendance at the institution.

(d)(1) A financial aid transcript must be signed by an official authorized by the institution to disclose information in connection with title IV, HEA programs.

(2) An institution must base the information it includes on financial aid transcripts on records it maintains under the title IV, HEA programs' recordkeeping requirements.

5. The heading for § 668.21 is revised to read as follows:

668.21 Treatment of Federal Perkins Loan, FSEOG, and Federal Pell Grant program funds if the recipient withdraws, drops out, or is expelled before his or her first day of class.

§ 668.22 [Amended]

6. Section 668.22 is amended by removing paragraph (h)(1)(i) and redesignating paragraphs (h)(1)(ii) through (xiii) as paragraphs (h)(1)(i) through (xii), respectively.

7.–8. Subpart C is revised to read as follows:

Subpart C—Student Eligibility

Sec.
668.31 Scope.
668.32 Student enrollment.
668.33 Student identification.
668.34 Student debts under the HEA and to the U.S.
668.35 Program-specific requirements.
668.36 Selective Service notification, administrative review, and liability.

Subpart C—Student Eligibility

§ 668.31 Scope.

This subpart establishes rules by which a student establishes eligibility for assistance under the title IV, HEA programs. In order to qualify as an eligible student, a student must meet all applicable requirements in this subpart.

(Authority: 20 U.S.C. 1091)

§ 668.32 Student enrollment.

A student is eligible to receive assistance under the title IV, HEA programs if the student—

(a)(1) Is a regular student enrolled or accepted for enrollment in an eligible program at an eligible institution;

(2) For purposes of the FFEL or William D. Ford Federal Direct Loan programs, is enrolled for no longer than one twelve-month period as at least a half-time student in a course of study necessary for enrollment in an eligible program; or

(3) For purposes of the Federal Perkins Loan, FWS, FFEL, or William D. Ford Federal Direct Loan programs, is enrolled or accepted for enrollment as at least a half-time student at an eligible institution in a program necessary for a professional credential or certification from a State that is required for employment as a teacher in an elementary school or secondary school in that State;

(b) Is not enrolled in either an elementary or secondary school;

(c)(1) Has a high school diploma or its recognized equivalent;

(2) Has obtained within 12 months before the date the student initially receives title IV, HEA program funds, a passing score specified by the Secretary on an approved, independently administered test, in accordance with subpart J of this part; or

(3) Is enrolled in an eligible institution that participates in a State process approved by the Secretary under subpart J of this part;

(d) Maintains satisfactory progress in his or her course of study according to the institution's published standards of satisfactory progress that satisfy the provisions of § 668.16(e). To make a determination that a student is maintaining satisfactory progress, an institution shall—

(1) At a minimum, review the student's academic progress at the end of each academic year;

(2) If the student is enrolled in a program of study of more than two academic years, at the end of the student's second year of attendance, determine that the student—

(i) Has at least a cumulative grade point average of ''C'' or its equivalent, or has academic standing consistent with the institution's graduation requirements; or

(ii) Failed to have at least a cumulative grade point average of ''C'' or its equivalent, or academic standing consistent with its graduation requirements because of—

(A) The death of a relative of the student;

(B) An injury or illness of the student; or

(C) Other special circumstances; or

(3) Is not making satisfactory progress at the end of the second academic year, but at the end of a subsequent grading period comes into compliance with the institution's requirements for graduation. The institution may consider the student as making satisfactory progress beginning with the next grading period;

(e) Is enrolled in an educational program leading to an associate, bachelor's, or graduate degree, if enrolled in telecommunications or correspondence courses; and

(f) If engaged in a study-abroad program, (which need not be required as part of the student's degree program)—

(1) Maintains enrollment in an eligible institution during his or her study-abroad program; and

(2) Enrolls in a study-abroad program that has been approved for academic credit by the eligible institution at which the student is enrolled.

(Authority: 20 U.S.C. 1091)

§ 668.33 Student identification.

A student is eligible to receive assistance under the title IV, HEA programs if the student—

(a) *Citizenship status.* (1) Has confirmed status as a U.S. citizen or national as a result of a data match with the Social Security Administration;

(2) In the absence of confirmation as provided in paragraph (a)(1) of this section, and within a deadline to be set by the institution of no less than 30 days from the date the institution is notified of the results of the data match, has provided documented evidence that he or she is a U.S. citizen or national;

(3) Provides evidence from the U.S. Immigration and Naturalization Service that he or she—

(i) Is a permanent resident of the United States; or

(ii) Is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident; or

(4) For purposes of the FWS, FSEOG, and Federal Pell Grant programs—

(i) Is a citizen of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau, and attends an eligible institution of higher education in a State or a public or nonprofit private institution of higher education in the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau; or

(ii) Meets the requirements of paragraph (a)(1), (a)(2), or (a)(3) of this section and attends an eligible public or nonprofit private institution of higher education in the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau;

(b) *Selective Service.* (1) Has confirmed registration with Selective Service as a result of a data match with the Selective Service System; or

(2) In the absence of confirmation as provided in paragraph (b)(1) of this section and within a deadline to be set by the institution of no less than 30 days from the date the institution is notified of the results of the data match, has provided evidence of compliance with, or exemption from, Selective Service registration requirements. An institution may establish that a student is exempt from Selective Service registration requirements if the institution determines, based on clear and unambiguous evidence, that—

(i) The student is not, or was not required to be, registered with Selective Service; or

(ii) The student—

(A) Was required to be registered with the Selective Service prior to age 26;

(B) Is now at least 26 years old;

(C) Failed to register with the Selective Service prior to age 26; and

(D)(*1*) Demonstrates to the institution that he did not knowingly and willfully fail to register with the Selective Service. The Secretary considers that a student satisfies this requirement by obtaining and presenting to the institution an advisory opinion from the Selective Service System that does not dispute the student's claim that he did not knowingly and willfully fail to register, and the institution does not have uncontroverted evidence that the student knowingly and willfully failed to register; or

(*2*) Served as a member of one of the U.S. Armed Forces on active duty and received a DD Form 214, ''Certificate of Release or Discharge from Active Duty'' showing military service with other than the Reserve Forces and National Guard;

(iii) The student is enrolled in an officer procurement program the curriculum of which has been approved by the Secretary of Defense at the following institutions:

(A) The Citadel, Charleston, South Carolina;

(B) North Georgia College, Dahlonega, Georgia;

(C) Norwich University, Northfield, Vermont; or

(D) Virginia Military Institute, Lexington, Virginia;

(iv) The student is a commissioned officer of the Public Health Service or a member of the Reserve of the Public Health Service who is on active duty as provided in section 6(a)(2) of the Military Selective Service Act; or

(v) The student was unable to present himself for registration for reasons beyond his control, such as being hospitalized, institutionalized, or incarcerated;

(c) *Incarcerated students.* For purposes of the Federal Perkins Loan, FFEL, and William D. Ford Federal Direct Loan programs, is not an incarcerated student at the time funds are delivered or disbursed;

(d) *Social security number.* Except for the residents of the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau, has a correct social security number that has been verified by an eligible institution, which shall enforce the following conditions:

(1) An institution may not deny, reduce, delay or terminate a student's eligibility for assistance under the title IV, HEA programs because social security number verification is pending.

(2) If the institution receives an output document indicating that the Secretary has determined that the student's social security number is correct, the institution may not require the student to produce other evidence to confirm that the student's social security number is correct, unless the institution—

(i) Has documentation that conflicts with the social security number status reported on the output document; or

(ii) Has reason to believe the output document is incorrect.

(3) If the institution receives an output document indicating that the Secretary has determined that the social security number provided by the student is incorrect, or that the Secretary was unable to confirm that the social security number provided by the student is correct, the institution—

(i) Shall provide the student an opportunity, within a deadline of at least 30 days from the date the institution is notified of the results of the data match, to provide clear and convincing evidence to verify that the student has a correct social security number;

(ii) May disburse any combination of title IV, HEA program funds, employ the student under the FWS Program, certify a Federal Stafford, Federal PLUS, or originate a William D. Ford Federal Direct Loan application for the student upon making, based on the evidence provided for in paragraph (d)(3)(i) of this section, a determination that the social security number provided by the otherwise eligible student to the institution is correct; and

(iii) Shall ensure that the student reports his or her correct social security number to the Secretary if the correct social security number differs from the social security number previously reported by the student to the Secretary.

(4) If a student fails to submit the documentation by the deadline established in accordance with paragraph (d)(3)(i) of this section, the institution need not disburse to the student, or certify the student as eligible

for, any title IV, HEA program funds for that period of enrollment or award year; employ the student under the FWS Program; certify a Federal Stafford, or Federal PLUS; or originate a William D. Ford Federal Direct Loan for the student for that period of enrollment.

(5) If the Secretary determines that the social security number provided to an institution by a student is incorrect, and the institution has not made a determination under paragraph (d)(3) of this section, and a loan has been guaranteed for the student under FFEL Program, the institution shall notify and instruct the lender and guaranty agency making and guaranteeing the loan, respectively, to cease further disbursements of the loan, until the Secretary or the institution determines that the social security number provided by the student is correct, but the guaranty may not be voided or otherwise nullified with respect to disbursements made before the date that the lender and the guaranty agency receive the notice.

(6) Nothing in this section permits the Secretary to take any compliance, disallowance, penalty or other regulatory action against—

(i) Any institution of higher education with respect to any error in a social security number, unless the error was the result of fraud on the part of the institution; or

(ii) Any student with respect to any error in a social security number, unless the error was a result of fraud on the part of the student; and

(e) *Statement of Educational Purpose.* Has filed a Statement of Educational Purpose with the institution, or under the FFEL Program, with the lender, in accordance with instructions of the Secretary.

(Authority: 20 U.S.C. 1091)

§ 668.34 Student debts under the HEA and to the U.S.

(a) Except as provided under paragraphs (b) through (g) of this section, a student is ineligible to receive title IV, HEA program funds if the student—

(1) Is in default on a loan made under a title IV, HEA loan program;

(2) Has inadvertently obtained loan funds under a title IV, HEA loan program in an amount that exceeded the annual or aggregate loan limits under that program;

(3) Received a grant or loan overpayment under a title IV, HEA grant program; or

(4) Has property subject to a judgment lien for a debt owed to the United States.

(b) A student who is in default on a loan made under a title IV, HEA loan program may nevertheless be eligible to receive title IV, HEA program funds if the student—

(1) Repays the loan in full; or

(2)(i) Makes at least six consecutive monthly payments on the defaulted loan; and

(ii) Makes arrangements, satisfactory to the holder of the loan, to repay the loan balance.

(c) A student who is not in default on a loan made under a title IV, HEA loan program but has inadvertently obtained loan funds under a title IV, HEA loan program in an amount that exceeded the annual or aggregate loan limits under that program may nevertheless be eligible to receive title IV, HEA program funds if the student—

(1) Repays in full the excess loan amount; or

(2) Makes arrangements, satisfactory to the holder of the loan, to repay that excess loan amount.

(d)(1) A student who receives a grant or loan overpayment under a title IV, HEA program may nevertheless be eligible to receive title IV, HEA program funds if the student—

(i) Pays the overpayment in full; or

(ii) Makes arrangements, satisfactory to the institution, to pay the overpayment.

(2) If a student's grant or loan payments exceed the amount he or she is eligible to receive, he or she has received a grant or loan overpayment.

(e) A student who has property subject to a judgment lien for a debt owed to the United States may nevertheless be eligible to receive title IV, HEA programs funds if the student—

(1) Pays the debt in full; or

(2) Makes arrangements, satisfactory to the United States, to pay the debt.

(f)(1) The Secretary considers that a student does not receive a Federal Pell Grant overpayment during an award year if the institution can eliminate that overpayment by adjusting subsequent Federal Pell Grant payments in the same award year.

(2) The Secretary considers that a student does not receive a Federal Perkins Loan, FSEOG or SSIG overpayment during an award year if the institution can eliminate that overpayment by adjusting subsequent title IV, HEA program (other than Federal Pell Grant) disbursements in the same award year.

(g) A student who otherwise is in default on a loan made under a title IV, HEA loan program or who otherwise owes an overpayment on a title IV, HEA program grant or loan is not considered to be in default or owe an overpayment if the student—

(1) Obtains a judicial determination that the debt has been discharged or is dischargeable in bankruptcy; or

(2) Demonstrates to the holder of the debt that—

(i) When the student filed the petition for bankruptcy relief, the loan, or demand for the payment of the grant overpayment, had been outstanding for the period required under 11 U.S.C. 523(a)(8)(A), exclusive of applicable suspensions of the repayment period for either debt of the kind defined in 34 CFR 682.402(m); and

(ii) The debt is otherwise qualifies for discharge under applicable bankruptcy law.

(Authority: 20 U.S.C. 1091 and 11 U.S.C. 523 and 525)

§ 668.35 Program-specific requirements.

A student is eligible to receive assistance under the campus-based, FFEL, William D. Ford Federal Direct Loan, and Federal Pell Grant programs if the student has financial need, if applicable, and otherwise meets the student eligibility requirements of—

(a) For purposes of the Federal Perkins Loan Program, 34 CFR 674.9;

(b) For purposes of the FWS Program, 34 CFR 675.9;

(c) For purposes of the FSEOG Program, 34 CFR 676.9;

(d) For purposes of the FFEL Program, 34 CFR 682.201;

(e) For purposes of the William D. Ford Federal Direct Loan Programs, 34 CFR 685.200;

(f) For purposes of the Federal Pell Grant Program, 34 CFR 690.75; or

(g) For purposes of the SSIG Program, 34 CFR 692.40.

(Authority: 20 U.S.C. 1091)

§ 668.36 Selective Service notification, administrative review, and liability.

(a) *General.* Before denying aid to any student under any title IV, HEA program who is required by law to register with the Selective Service, but fails to do so, the institution shall inform that student in writing that he or she will be denied title IV, HEA program assistance.

(b) *Selective Service notification.* (1) A student notified under paragraph (a) of this section who has not registered, although required to do so, may establish his eligibility for title IV, HEA program assistance for the award year in which he was notified under paragraph (a) of this section by registering with Selective Service before the end of that award year.

(2) A student notified under paragraph (a) of this section who is not required to register with the Selective Service may establish his or her eligibility for title IV, HEA program

assistance for the award year in which he was notified under paragraph (a) of this section by providing evidence of exemption within 30 days of the receipt of the notice or the end of the same award year, whichever is later.

(c) *Administrative review.* (1) A student who is required to register with Selective Service, claims that he is registered with Selective Service, and has been denied title IV, HEA program assistance because he has not proven to the satisfaction of the institution that he has complied with that requirement, may seek a hearing from the Secretary by filing a request in writing with the Secretary. The student must submit with that request—

(i) A statement that he is in compliance with registration requirements;

(ii) A concise statement of the reasons why he has not been able to prove that he is in compliance with those requirements; and

(iii) Copies of all material that he has already supplied to the institution to verify his compliance.

(2) The Secretary provides an opportunity for a hearing to a student who—

(i) Asserts that he is in compliance with registration requirements; and

(ii) Files a written request for a hearing in accordance with paragraph (c)(1) of this section within the award year for which he was denied title IV, HEA program assistance or within 30 days following the end of the payment period, whichever is later.

(3) An official designated by the Secretary shall conduct any hearing held under paragraph (c)(2) of this section. The sole purpose of this hearing is the determination of compliance with registration requirements. At this hearing, the student retains the burden of proving compliance, by credible evidence, with the requirements of the Military Selective Service Act. The designated official may not consider challenges based on constitutional or other grounds to the requirements that a student state and verify, if required, compliance with registration requirements, or to those registration requirements themselves.

(4) Any determination of compliance made under this section is final unless reopened by the Secretary and revised on the basis of additional evidence.

(5) Any determination of compliance made under this section is binding only for purposes of determining eligibility for title IV, HEA program assistance.

(d) *Liability.* An institution is liable for any title IV aid provided to a student who was required to register, but who was not registered, if—

(1) The institution made its determination that the student was not required to register on the basis of ambiguous information regarding his status under registration law; or

(2)(i) The institution had conflicting information about whether the student was required to register; and

(ii) Its determination that the student was not required to register was not reasonable in the light of all available information.

(Authority: 50 U.S.C. App. 462)

9. Section 668.133 is amended by revising paragraph (b) to read as follows:

§ 668.133 Conditions under which an institution shall require documentation and request secondary confirmation.

* * * * *

(b) *Exclusions from secondary confirmation.* (1) An institution may not require the student to produce the documentation requested under § 668.33(a)(3) and may not request that INS perform secondary confirmation, if—

(i) The student demonstrates eligibility under the provisions of § 668.33(a)(4); and

(ii) The institution does not have conflicting documentation or reason to believe that the student's claim of eligible noncitizen status is incorrect.

(2) An institution receiving documentation required under § 668.33(a)(3) from a student need not request that INS perform secondary confirmation for that student, if—

(i) The documents submitted by the student are identical to documents received by the institution in a previous award year and for which secondary confirmation was performed;

(ii) Based on the results of secondary confirmation, the institution determined the student to be an eligible noncitizen for a previous award year; and

(iii) The institution does not have conflicting documentation or reason to believe that the student's claim of eligible noncitizen status for the current award year is incorrect.

* * * * *

10. Section 668.164 is amended by revising paragraph (a) to read as follows:

§ 668.164 Maintaining funds.

(a) *General.* (1) The requirements in this section apply only to title IV, HEA program funds an institution receives under the campus-based, William D. Ford Federal Direct Loan, Federal Pell Grant, and SSIG programs. An institution that receives FFEL program funds through electronic funds transfer or by master check must maintain those funds as provided under 34 CFR 682.207(b).

(2)(i) Except as provided in paragraph (e) of this section, an institution is not required to maintain a separate account for title IV, HEA program funds. For funds an institution receives under the campus-based, William D. Ford Federal Direct Student Loan, Federal Pell Grant, and SSIG programs, an institution must maintain a bank account that meets the requirements under paragraphs (b) or (c) of this section. In establishing the bank account, an institution must—

(ii) Ensure that the name of the account discloses clearly that Federal funds are maintained in that account; or

(iii)(A) Notify the bank of the accounts that contain Federal funds and retain a record of that notice in its recordkeeping system; and

(B) Except for an institution that is backed by the full faith and credit of a State, file with the appropriate State or municipal government entity a UCC–1 statement disclosing that the account contains Federal funds and maintain a copy of that statement in its records.

* * * * *

11. Section 668.165 is amended by revising paragraph (b)(1); by removing the word ''and'' at the end of paragraph (b)(3)(iv)(A); by removing the period at the end of paragraph (b)(3)(iv)(B) and adding in its place ''; and''; and by adding new paragraph (b)(3)(iv)(C) to read as follows:

§ 668.165 Disbursing funds.

* * * * *

(b) *Crediting a student's account—(1) General.* In crediting the student's account with title IV, HEA program funds, the institution may apply those funds only to allowable charges described under paragraph (b)(3) of this section. An institution must notify expeditiously a student or parent borrower, in writing, electronically, or by other means that the institution has credited the student's account with FFEL or William D. Ford Federal Direct Loan program funds.

* * * * *

(3) * * *

(iv) * * *

(C) Provided that a student has or will have a title IV, HEA credit balance as determined under paragraph (b)(2) of this section, minor institutional charges assessed the student in a prior award year or period of enrollment. For purposes of this paragraph, minor institutional charges are limited to an amount that does not, or will not, monetarily impair the student from paying for his or her room, board, transportation, or other education-related expenses.

* * * * *

§ 668.1 [Amended]

12. In § 668.1, paragraph (c)(11), remove ''FDSL'' and add in its place ''William D. Ford Federal Direct Loan Programs''.

§ 668.2 [Amended]

13. In § 668.2, paragraph (b) in the definitions of ''Federal Direct PLUS loan'' and ''Federal Direct Stafford loan'' remove ''Federal Direct Student Program'' and add in its place ''William D. Ford Federal Direct Loan Programs''; in the definition of ''Federal Direct Student loan'' remove ''Federal Direct Student loan'' and add in its place ''William D. Ford Federal Direct loan''; and in the definition of ''Federal Direct Student Loan (FDSL) program'' remove ''Federal Direct Student Loan (FDSL) program'' and add in its place ''William D. Ford Federal Direct Loan Programs''; and remove the definition of ''Income Contingent Loan (ICL) program''.

§ 668.13 [Amended]

14. In § 668.13, paragraph (a)(4)(i) remove ''Federal Pell Grant Program, the campus-based programs, the FDSL program, or the Federal Stafford Loan, Federal SLS, or Federal PLUS Program'' and add in its place ''campus-based programs, the Federal Stafford Loan, Federal PLUS programs, the William D. Ford Federal Direct Loan Programs, or the Federal Pell Grant Program''.

§ 668.21 [Amended]

15. In § 668.21, in the heading and in paragraph (a)(1), respectively, remove ''Pell Grant, SEOG, ICL, and Perkins Loan'' and add in its place ''Federal Perkins Loan, FSEOG, and Federal Pell Grant''.

§ 668.22 [Amended]

16. In § 668.22, paragraphs (c)(2)(ii) and (g)(2)(ii)(B) remove ''Federal Direct Student Loan Program'' and add in its place ''William D. Ford Federal Direct Loan Programs''.

§ 668.23 [Amended]

17. In § 668.23, paragraphs (a) introductory language and (c)(1)(i) remove ''FDSL'' and add in its place ''William D. Ford Federal Direct Loan''.

§ 668.26 [Amended]

18. In § 668.26, paragraph (b)(4) remove ''FDSL'' and add in its place ''William D. Ford Federal Direct Loan''; in paragraph (b)(6) remove ''National Defense/Direct Student Loan and ICL.'' and add in its place ''National Defense Student Loan and Direct Loan programs''; in paragraph (d)(1) remove ''or PAS Program''; in paragraph (d)(3) remove ''FDSL'' and ''Federal Direct Student loan'', respectively, and add in its place ''William D. Ford Federal Direct Loan'', respectively; in paragraph (d)(3)(i) remove ''FDSL'' and add in its place ''William D. Ford Federal Direct Loan''; and in paragraph (e)(1) remove ''and PAS programs'' and add in its place ''Program''.

§ 668.43 [Amended]

19. In § 668.43, paragraph (c)(6) remove ''Federal Direct Student Loan'' and add in its place ''William D. Ford Federal Direct Loan''.

§ 668.51 [Amended]

20. In § 668.51, paragraph (a) remove ''FDSL'' and add in its place ''William D. Ford Federal Direct Loan''.

§ 668.52 [Amended]

21. In § 668.52, in the definition of ''Student aid application'' remove ''Federal Direct Loan'' and add in its place ''William D. Ford Federal Direct Loan''.

§ 668.54 [Amended]

22. In § 668.54, paragraph (a)(2)(i) remove ''Federal Pell Grant, Federal Direct Student Loan, campus-based, and Federal Stafford Loan'' and add in its place ''campus-based, Federal Stafford Loan, William D. Ford Federal Direct Loan, and Federal Pell Grant''.

§ 668.55 [Amended]

23. In § 668.55, paragraph (c) remove ''Federal Pell Grant, campus-based, Federal Stafford Loan, or FDSL'' and add in its place ''campus-based, Federal Stafford Loan, William D. Ford Federal Direct Loan, or Federal Pell Grant''; in paragraphs (c)(1) and (c)(2) remove ''Federal Pell Grant, campus-based, or FDSL'', respectively, and add in its place ''campus-based, William D. Ford Federal Direct Loan, or Federal Pell Grant'', respectively.

§ 668.58 [Amended]

24. In § 668.58, paragraph (a)(1)(i) remove ''Federal Pell Grant, campus-based, or need-based ICL'' and add in its place ''campus-based, or Federal Pell Grant''; in paragraph (a)(2)(i) remove ''Federal Pell Grant and campus-based'' and add in its place ''campus-based and Federal Pell Grant''; and in paragraph (a)(2)(iii)(A) add ''origination of the applicant's'' before ''William''; and add ''originate the'' before ''William''.

§ 668.59 [Amended]

25. In § 668.59, paragraph (d)(1) add ''s'' to ''Program''.

§ 668.60 [Amended]

26. In § 668.60, paragraph (b) remove ''FDSL'' and add in its place ''William D. Ford Federal Direct Loan''; in paragraphs (b)(1)(i)(A) and (b)(1)(iii), respectively, remove ''FDSL, or FSEOG'' and add in its place ''FSEOG, or William D. Ford Federal Direct Loan'', respectively; and in paragraph (d) remove ''FDSL, or Federal Stafford Loan'' and add in its place ''Federal Stafford Loan, or William D. Ford Federal Direct Loan''.

§ 668.61 [Amended]

27. In § 668.61, paragraph (a)(2)(ii)(B) remove ''Federal Pell Grant, Federal Perkins Loan, FDSL, or FSEOG'' and add in its place ''Federal Perkins Loan, FSEOG, William D. Ford Federal Direct Loan, or Federal Pell Grant''.

§ 668.161 [Amended]

28. In § 668.161, paragraph (a)(4) remove ''Federal Pell Grant, PAS, FSEOG, Federal Perkins Loan, FWS, Direct Loan, and FFEL'' and add in its place ''Federal Perkins Loan, FWS, FSEOG, FFEL, William D. Ford Federal Direct Loan, and Federal Pell Grant''.

§ 668.162 [Amended]

29. In § 668.162 in the definition of ''Disburse'' in paragraph (1)(i) add ''William D. Ford Federal'' before ''Direct''; in paragraph (1)(ii) remove ''Direct Loan or FFEL'' and add in its place ''FFEL or William D. Ford Federal Direct Loan''; and in the definition of ''Period of enrollment'' add ''William D. Ford Federal'' before ''Direct''.

§ 668.165 [Amended]

30. In § 668.165, paragraph (c)(2)(ii) remove ''Direct Loan and FFEL'' and add in its place ''FFEL and William D. Ford Federal Direct Loan''; and in paragraph (c)(3) add ''William D. Ford Federal'' before ''Direct''.

§ 668.166 [Amended]

31. In § 668.166, paragraph (b)(3) add ''William D. Ford Federal'' before ''Direct''.

* * * * *

PART 674—FEDERAL PERKINS LOAN PROGRAM

32. The authority citation for part 674 continues to read as follows:

Authority: 20 U.S.C. 1087aa-1087ii and 20 U.S.C. 421–429, unless otherwise noted.

33. Section 674.2 paragraph (a) is amended by adding, in alphabetical order, ''Full-time student''.

34. Section 674.2 paragraph (b) is amended by removing the definitions of ''Full-time graduate or professional student'' and ''Full-time undergraduate student''; and by revising the definition of ''Making of a loan'' to read as follows:

§ 674.2 Definitions.

* * * * *

(b) * * *

Making of a loan: When the borrower signs the promissory note and the loan funds are disbursed.

* * * * *

35. Section 674.16 is amended by revising paragraph (d) to read as follows:

§ 674.16 Making and disbursing loans.

* * * * *

(d)(1) The institution shall disburse funds to a student or the student's account in accordance with 34 CFR 668.165.

(2) The institution shall obtain the borrower's signature on a promissory note for each award year before it disburses any loan funds to the borrower under that note for that award year.

* * * * *

§ 674.17 [AMENDED]

36. Section 674.17 is amended by removing paragraph (a) and by redesignating paragraphs (b)(1), (b)(1)(i), (b)(1)(ii), (b)(1)(iii), (b)(2), (b)(3), (b)(4), (b)(4)(i), (b)(4)(ii), and (5) as paragraphs (a), (a)(1), (a)(2), (a)(3), (b), (c), (d), (d)(1), (d)(2), and (e), respectively.

37. Section 674.19 is amended by revising paragraph (e)(4)(v) to read as follows:

§ 674.19 Fiscal procedures and records.

* * * * *

(e) * * *

(4) * * *

(v) An institution may keep the records required in this section on microforms, optical disk, other machine readable format, or it may keep its records in computer format. If an institution keeps its records in computer format it shall maintain, in either hard copy, microforms, optical disk, or other machine readable format, the source documents supporting the computer input.

* * * * *

38. Section 674.31 is amended by redesignating paragraph (a)(2) as paragraph (a)(3); and by adding a new paragraph (a)(2) to read as follows:

§ 674.31 Promissory note.

* * * * *

(a) * * *

(2) The Secretary provides sample promissory notes to participating institutions. The institution may not change the substance of these sample notes.

* * * * *

§ 674.33 [Amended]

39. Section 674.33, paragraph (a)(2) is amended by removing ''$15'' and adding in its place ''$25''.

40. Section 674.47 is amended by revising paragraph (g) and by adding a new paragraph (h) to read as follows:

§ 674.47 Costs chargeable to the fund.

* * * * *

(g) *Cessation of collection activity of defaulted accounts.* (1) An institution may cease collection activity of a defaulted account with a balance of less than $25, including outstanding principal, accrued interest, collection costs, and late charges.

(2) An institution that ceases collection activity under paragraph (g)(1) of this section may no longer include the amount of the account as an asset of the Fund.

(h) *Write-offs of accounts of less than $1.* Notwithstanding any other provision in this subpart, an institution may write off an account with a balance of less than $1, including outstanding principal, accrued interest, collection costs, and late charges.

* * * * *

PART 675—FEDERAL WORK-STUDY PROGRAMS

41. The authority citation for part 675 continues to read as follows:

Authority: 42 U.S.C. 2571–2756b, unless otherwise noted.

§ 675.2 [Amended]

42. Section 675.2, paragraph (a) is amended by adding in alphabetical order, ''Full-time student''.

43. Section 675.2, paragraph (b) is amended by removing the definitions of ''Full-time graduate or professional student'' and ''Full-time undergraduate student''.

§ 675.17 [Removed]

44. Section 675.17 is removed and reserved.

45. Section 675.19 is amended by revising paragraph (c)(3) to read as follows:

§ 675.19 Fiscal procedures and records.

* * * * *

(c) * * *

(3) An institution may keep the records required in this section on microforms, optical disk, other machine readable format, or it may keep its records in computer format. If an institution keeps its records in computer format it shall maintain, in either hard copy, microforms, optical disk, or other machine readable format, the source documents supporting the computer input.

* * * * *

Appendix B to Part 675—[Removed]

46. Appendix B to part 675—Model Off-Campus Agreement is removed.

PART 676—FEDERAL SUPPLEMENTAL EDUCATIONAL OPPORTUNITY GRANT PROGRAM

47. The authority citation for part 676 continues to read as follows:

Authority: 20 U.S.C. 1070b–1070–3, unless otherwise noted.

§ 676.2 [Amended]

48. Section 676.2, paragraph (a) is amended by adding in alphabetical order, ''Full-time student''.

49. Section 676.2, paragraph (b) is amended by removing the definition of ''Full-time undergraduate student''.

§ 676.17 [Removed]

50. Section 676.17 is removed and reserved.

51. Section 676.19 is amended by revising paragraph (c)(3) to read as follows:

§ 676.19 Fiscal procedures and records.

* * * * *

(c) * * *

(3) An institution may keep the records required in this section on microforms, optical disk, other machine readable format, or it may keep its records in computer format. If an institution keeps its records in computer format it shall maintain, in either hard copy, microforms, optical disk, or other machine readable format, the source documents supporting the computer input.

* * * * *

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

52. The authority citation for part 682 continues to read as follows:

Authority: 20 U.S.C. 1071 to 1087–2, unless otherwise noted.

53. Section 682.201, paragraph (b) is amended by redesignating paragraphs (b)(1) through (b)(8) as paragraphs (b)(1)(i) through (b)(1)(viii), respectively; by redesignating the introductory sentence as paragraph (b)(1); and by adding a new paragraph (b)(2) to read as follows:

§ 682.201 Eligible borrowers.

* * * * *

(b) * * *

(2) For purposes of paragraph (b)(1) of this section, a ''parent'' includes the

individuals described in the definition of the term ''parent'' in 34 CFR 668.2 and the spouse of a parent who remarried, if that spouse's income and assets are taken into account when calculating a dependent student's expected family contribution.

§ 682.600 [Removed]

54. Section 682.600 is removed and reserved.

§ 682.602 [Removed]

55. Section 682.602 is removed and reserved.

56. A new § 682.611 is added to read as follows:

§ 682.611 Foreign schools.

A foreign school shall comply with the regulations in this part except to the extent that the Secretary states in these regulations or in other official publications or documents that those schools do not have to comply.

(Authority: 20 U.S.C. 1077, 1078, 1078–1, 1078–2, 1078–3, 1082, 1088, and 1094)

PART 685—WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAMS

57. The authority citation for part 685 continues to read as follows:

Authority: 20 U.S.C. 1078a *et seq.*, unless otherwise noted.

58. Section 685.200, paragraph (b) is amended by redesignating paragraphs (b)(1) through (b)(7) as paragraphs (b)(1)(i) through (b)(1)(vii), respectively; by redesignating the introductory sentence as paragraph (b)(1); and by adding a new paragraph (b)(2) to read as follows:

§ 685.200 Borrower eligibility.

* * * * *

(b) * * *

(2) For purposes of paragraph (b)(1) of this section, a ''parent'' includes the individuals described in the definition of the term ''parent'' in 34 CFR 668.2 and the spouse of a parent who remarried, if that spouse's income and assets are taken into account when calculating a dependent student's expected family contribution.

* * * * *

PART 690—FEDERAL PELL GRANT PROGRAM

59. The authority citation for part 690 continues to read as follows:

Authority: 20 U.S.C. 1070a, unless otherwise noted.

§ 690.7 [Amended]

60. Section 690.7, paragraph (a)(1) is removed and paragraph (a)(2) is redesignated as paragraph (a).

§ 690.71 [Amended]

61. Section 690.71 is amended by removing the second sentence.

§§ 690.72, 690.73, 690.74 [Removed]

62. Sections 690.72, 690.73, and 690.74 are removed and reserved.

§ 690.83 [Amended]

63. Section 690.83 is amended by removing paragraph (c); by redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively; by removing in redesignated paragraph (c), ''paragraphs (a), (b) or (c) of this section'' and adding, in its place, ''paragraphs (a) or (b) of this section''; and by removing in redesignated paragraph (d)(1), ''Notwithstanding paragraphs (a), (b), (c)(1) or (2), or (d) of this section'' and adding, in its place, ''Notwithstanding paragraphs (a), (b), or (c) of this section''; by removing in redesignated paragraph (d)(1) ''(e)'' and adding, in its place, ''(d)''; by adding in redesignated paragraph (d)(2) ''or program review,'' after ''34 CFR 668.23(c),'', and ''or program review'' after ''audit'' in the last sentence.

[FR Doc. 95–23150 Filed 9–20–95; 8:45 am]

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federal register

Thursday
September 21, 1995

Part VI

Department of Education

34 CFR Part 682

Federal Family Education Loan Program; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Part 682

RIN 1840–AC21

Federal Family Education Loan Program

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations governing the Federal Family Education Loan (FFEL) Program. The FFEL regulations govern the Federal Stafford Loan Program, the Federal Supplemental Loans for Students (Federal SLS) Program, the Federal PLUS Program, and the Federal Consolidation Loan Program, collectively referred to as the Federal Family Education Loan Program. The Federal Stafford Loan, the Federal SLS, the Federal PLUS and the Federal Consolidation Loan programs are hereinafter referred to as the Stafford, SLS, PLUS and Consolidation Loan programs. The Secretary is proposing to make changes to the FFEL Program regulations to reflect policies and procedures implemented in the William D. Ford Federal Direct Student Loan Program, hereinafter referred to as the Direct Loan Program.

DATES: Comments must be received on or before October 23, 1995.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Pamela A. Moran, U.S. Department of Education, Post Office Box 23272, Washington, DC 20026–3272. Comments may also be sent through the internet to ffel__conform@ed.gov.

To ensure that public comments have maximum effect in developing the final regulations, the Department urges that each comment clearly identify the specific section or sections of the regulations that the comment addresses and that comments be in the same order as the regulations.

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. A copy of those comments may also be sent to the Department representative named in the preceding paragraph.

FOR FURTHER INFORMATION CONTACT: Barbara Bauman, Program Specialist, Loans Branch, Policy Development Division, Policy, Training, and Analysis Service, U.S. Department of Education, 600 Independence Avenue, SW. (room 3053, ROB–3), Washington, DC 20202–5449. Telephone: (202) 708–8242. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

The Secretary is proposing to amend 34 CFR Part 682 of the Department's regulations to adopt certain policies and procedures that have been used in the Direct Loan Program.

On October 7, 1994, the Secretary published a Notice of Proposed Rulemaking (NPRM) in the Federal Register (59 FR 51346) proposing changes to the FFEL regulations to reflect certain policy decisions made during development of the Direct Loan regulations. The comments on the NPRM suggested additional changes to those included in the proposed rule. In publishing the final regulations on November 29, 1994 (59 FR 61210), the Secretary stated that he needed to further evaluate the implications of these additional changes. This NPRM proposes to adopt many of the suggestions made by those comments. The Secretary believes these regulations will streamline and improve the efficiency of the FFEL program.

By improving the efficiency of the FFEL Program, these proposed regulations will enhance opportunities for postsecondary education. Encouraging students to graduate from high school and to pursue high quality postsecondary education are important elements of the National Education Goals.

The student aid programs also enable both current and future workers to have the opportunity to acquire both basic and technologically-advanced skills needed for today's and tomorrow's workplace. These programs provide the financial means for an increasing number of Americans to receive an education that will prepare them to think critically, communicate effectively, and solve problems efficiently, as called for in the National Education Goals.

Proposed Regulatory Changes

The Secretary proposes to amend the following sections of the regulations to reflect changes needed to conform the FFEL Program to the final regulations for the Direct Loan Program. Those changes not related to the Direct Loan Program are otherwise noted.

Section 682.200 Definitions

Satisfactory repayment arrangement—The Secretary, in order to reflect a recent statutory change made by the Higher Education Technical Amendments of 1993, Public Law 103–208, proposes to amend the regulations to clarify that a borrower may make satisfactory repayment arrangements on a defaulted FFEL debt for purposes of regaining Title IV eligibility only one time.

Section 682.201 Eligible Borrowers

Section 682.201(c)(1)(iii)(D)—In order to align the FFEL Program with the Direct Loan Program regulations, the Secretary proposes to allow a borrower in a default status to be eligible for a consolidation loan if the borrower either makes satisfactory repayment arrangements as that term is defined or agrees to repay the consolidation loan under an income-sensitive repayment plan.

Section 682.207 Due Diligence in Disbursing a Loan

Section 682.207(c)(4)—The Secretary proposes, in order to conform to Direct Loan Program regulations and to reflect current FFEL policy, to allow a loan to be disbursed in a single installment, if at least one-half of the loan period has elapsed before the first disbursement is made.

Section 682.207(d)(2)(iii)—The Secretary proposes to clarify that a lender has an additional 30-day period to make a late disbursement of a loan if the school documents a borrower's exceptional circumstances. Previously, the regulations suggested that documentation of the exceptional circumstances was required for all late disbursements.

The Secretary also proposes to remove the references in § 682.207 and § 682.604 providing for lender or guaranty agency options regarding disbursement policies, so that every eligible student is assured certain opportunities with the approval of the school.

Section 682.209 Payment Application and Prepayment

Section 682.209(b)(2)—The Secretary further clarifies that this section deals with the application of payments and how to deal with prepayments. The Secretary proposes to require a lender who receives a prepayment (made by a borrower without the borrower's specific instructions as to how to apply the proceeds) in an amount that equals or exceeds the borrower's scheduled monthly repayment amount to apply that amount to future installment payments on the loan by advancing the borrower's next payment due date. The Secretary proposes this change

(previously left to the lender's discretion and allowed only in situations where a borrower's payment exceeded 3 full payments) to conform to current Direct Loan Program policies and so that all borrowers are treated equally.

Section 682.210 Deferment

Section 682.210(a)(8)—The Secretary proposes to clarify that a defaulted borrower is eligible for a deferment only if the borrower has made satisfactory repayment arrangements with the lender prior to the lender's filing of a default claim on the loan.

Section 682.211 Forbearance

Section 682.211(f)(9)—The Secretary proposes to allow a lender to provide administrative forbearance in situations where a borrower ends a period of eligible deferment in delinquent status.

Section 682.401 Basic Program Agreement

Section 682.401(b)(10)(vi)(B)(1)—The Secretary proposes that in instances where a loan or a portion of a loan is returned by the school at any time to a lender, the lender shall refund to the borrower the premium attributable to each disbursement of the loan.

Section 682.402 Death, Disability, Closed School, False Certification, and Bankruptcy Payments

Section 682.402—The Secretary proposes to clarify that a lender must return any payments made by or on behalf of the borrower after the date that the borrower became totally and permanently disabled as certified by a physician. At the same time that the lender returns the payments to the borrower or sender, the lender must notify the borrower or sender that there is no obligation to repay that loan.

Also, the Secretary proposes, in order to conform with the Direct Loan Program, that if a guaranty agency receives any payments from a borrower or a borrower's representative for a loan discharged in bankruptcy on which the Secretary previously paid a claim, the agency must return 100% of these payments to the borrower. Previously these payments were remitted to the Secretary. At the same time that the guaranty agency returns the payments to the borrower or representative the agency must notify the borrower that there is no obligation to repay that loan.

Section 682.412 Consequences of the Failure of a Borrower or Student To Establish Eligibility

Section 682.412(c)—The Secretary is making a change in the regulations to clarify that a borrower has 30 days from the date a final demand letter is sent by the lender in which to repay an amount for which the borrower was ineligible.

Section 682.603 Certification by a Participating School in Connection With a Loan Application

Section 682.603 (f) and (g)—The Secretary proposes this change to conform to language in the Direct Loan Program regulations.

Section 682.605 Determining the Date of a Student's Withdrawal.

Section 682.605(c)—The Secretary is reinserting language that was inadvertently deleted during the development of the November 29, 1994 final regulations regarding the determination of the date of a student's withdrawal for purposes other than calculating a refund.

Executive Order 12866

1. Assessment of Costs and Benefits

These proposed regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering this program effectively and efficiently. Burdens specifically associated with information collection requirements, if any, are identified and explained elsewhere in this preamble under the heading Paperwork Reduction Act of 1995.

In assessing the potential costs and benefits—both quantitative and qualitative—of these proposed regulations, the Secretary has determined that the benefits of the regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the program.

2. Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the regulations contain technical terms or other wording that interferes with their clarity? (3) Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a numbered heading; for example, § 682.200 *Definitions*.) (4) Is the description of the regulations in the ''Supplementary Information'' section of this preamble helpful in understanding the regulations? How could this description be more helpful in making the regulations easier to understand? (5) What else could the Department do to make the regulations easier to understand?

A copy of any comments that concern how the Department could make these proposed regulations easier to understand should be sent to Stanley M. Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue SW. (Room 5100, FB–10), Washington, DC 20202–2241.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

While the statute requires that the Secretary regulate certain actions that must be taken by various program participants, these requirements would not have a significant impact because they would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal additional requirements to protect the Federal fiscal interest, as well as the interests of the borrowers under the programs.

Paperwork Reduction Act of 1995

Sections 682.207, 682.209, 682.210, 682.211, 682.401, 682.402, 682.412, 682.603, 682.604 and 682.605 contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of

Management and Budget (OMB) for its review.

Collection of Information: Federal Family Education Loan Program. Documentation and notification requirements.

These regulations require institutions to document a borrower's exceptional circumstances in instances where a lender disburses a loan within 30 days beyond the usual 60-day period. A lender is now required to advance a borrower's due date for repayment if a borrower doesn't indicate how a payment that equals or exceeds a scheduled monthly payment should be applied. In those instances, these regulations require the lender to notify the borrower that the payment has been applied in such a manner and the next payment due date. A lender or guaranty agency must now return any payments made by or on behalf of the borrower after the date that the borrower became totally and permanently disabled as certified by a physician and if a guaranty agency receives any payments from a borrower or a borrower's representative for a loan discharged in bankruptcy on which the Secretary previously paid a claim, the agency must return 100% of the payments to the borrower. In both of these circumstances, a lender and guaranty agency must also notify the borrower that there is no obligation to repay that loan.

There is no annual frequency of reporting this information to the Department. However, the recordkeeping burden for this collection of information is estimated to average 1 hour per response for 12,803,255 respondents, including the time for documenting circumstances, researching existing data sources, gathering and maintaining the data needed, and generating and processing the collection of information. The total annual recordkeeping burden equals 12,803,255 hours.

These regulations affect the business, for-profit and not-for-profit entities that participate in the Title IV Federal student aid programs.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on this proposed collection of information in—

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical use;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing 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.

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

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in room 3053, Regional Office Building 3, 7th and D Streets, SW., Washington, DC between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except federal holidays.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 682

Administrative practice and procedure, Colleges and universities, Education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

(Catalog of Federal Domestic Assistance Number 84.032, Federal Family Education Loan Program)

Dated: September 13, 1995.

Richard W. Riley,

Secretary of Education.

The Secretary proposes to amend part 682 of title 34 of the Code of Federal Regulations as follows:

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

1. The authority citation for part 682 continues to read as follows:

Authority: 20 U.S.C. 1071 to 1087–2, unless otherwise noted.

2. Section 682.200, paragraph (b) is amended by revising paragraph (1) of the definition of ''satisfactory repayment arrangement'' to read as follows:

§ 682.200 Definitions.

* * * * *

(b) * * *

Satisfactory repayment arrangement. (1) For purposes of regaining eligibility under section 428F (b) of the HEA, the making of six (6) full monthly payments on a defaulted loan. A borrower may only obtain the benefit of this paragraph with respect to renewed eligibility once.

* * * * *

3. Section 682.201 is amended by revising paragraph (c)(1)(iii)(C) to read as follows:

§ 682.201 Eligible borrowers.

* * * * *

(c) * * *

(1) * * *

(iii) * * *

(C) In a default status and has either made satisfactory repayment arrangements or has agreed to repay the consolidation loan under the income sensitive repayment plan described in § 682.209(a)(6)(viii).

* * * * *

4. Section 682.207 is amended by adding a new paragraph (c)(4) and revising paragraphs (d)(1) and (d)(2)(iii) to read as follows:

§ 682.207 Due diligence in disbursing a loan.

* * * * *

(c) * * *

(4) If at least one-half of the loan period has elapsed when the first disbursement is made, the loan may be disbursed in a single installment.

(d)(1) A lender may disburse loan proceeds after the student has ceased to be enrolled on at least a half-time basis or after the expiration date of the period of enrollment for which the loan was intended, in accordance with paragraphs (d)(2) and (3) of this section.

(2) * * *

(iii) In exceptional circumstances within 30 days after the period

described in paragraph (d)(2)(ii) of this section. The school shall document the exceptional circumstances in the student's file.

* * * * *

5. Section 682.209 is amended by revising paragraph (b) to read as follows:

§ 682.209 Repayment of a loan.

* * * * *

(b) *Payment application and prepayment.* (1) The lender may credit the entire payment amount first to any late charges accrued or collection costs and then to any outstanding interest and then to outstanding principal.

(2)(i) The borrower may prepay the whole or any part of a loan at any time without penalty.

(ii) If the prepayment amount equals or exceeds the monthly payment amount under the repayment schedule established for the loan, the lender shall apply the prepayment to future installments by advancing the next payment due date, unless the borrower requests otherwise. If the lender applies payments to future installments without the borrower's request, it shall notify the borrower that the payments have been so applied, and remind the borrower of the repayment obligation and the next scheduled due date.

* * * * *

6. Section 682.210 is amended by revising paragraph (a)(8) to read as follows:

§ 682.210 Deferment.

(a) * * *

(8) A borrower whose loan is in default is not eligible for a deferment, unless the borrower has made satisfactory repayment arrangements with the lender prior to the filing of a default claim.

* * * * *

7. Section 682.211 is amended by adding a new paragraph (f)(9) to read as follows:

§ 682.211 Forbearance.

* * * * *

(f) * * *

(9) For a period of delinquency that may remain after a borrower ends a period of deferment.

* * * * *

8. Section 682.401(b)(10)(vi)(B), introductory text, is amended by adding a dash after the word ''if'', and by removing ''within 120 days of disbursement''; redesignating paragraphs (B)(*1*), (B)(*2*), and (B)(*3*) as paragraphs (B)(*2*), (B)(*3*), and (B)(*4*), respectively; at the beginning of redesignated paragraphs (B)(*2*), (B)(*3*) and (B)(*4*) remove ''The'' and add, in its place, ''Within 120 days the''; and a new paragraph (B)(*1*) is added to read as follows:

§ 682.401 Basic program agreement.

* * * * *

(b) * * *

(10) * * *

(vi) * * *

(B) * * *

(*1*) The loan or a portion of a loan is returned by the school to the lender;

* * * * *

9. Section 682.402 is amended by revising paragraph (c)(3); removing ''(l)(2)'' in paragraph (l)(3) and adding, in its place, ''(l)(1)''; by revising paragraphs (l)(1) and (l)(2) to read as follows:

§ 682.402 Death, disability, closed school, false certification, and bankruptcy payments.

* * * * *

(c) * * *

(3) After receiving the physician's certification described in paragraph (c)(2) of this section, the lender shall return to the borrower any payments received by the lender after the date that the borrower became totally and permanently disabled as certified by the physician. At the same time that the lender returns the payment, it shall notify the borrower that there is no obligation to repay a loan discharged on the basis of disability.

* * * * *

(l) * * *

(1) If the guaranty agency receives any payments from or on behalf of the borrower on or attributable to a loan that has been discharged in bankruptcy on which the Secretary previously paid a bankruptcy claim, the guaranty agency shall return 100 percent of these payments to the sender. The guaranty agency shall promptly return, to the sender, any payment on a cancelled or discharged loan made by the sender and received after the Secretary pays a closed school or false certification claim. At the same time that the agency returns the payment, it shall notify the sender that there is no obligation to repay a loan discharged on the basis of death, disability, bankruptcy, false certification, or closing of the school.

(2) The guaranty agency shall remit to the Secretary all payments received from a tuition recovery fund, performance bond, or other third party with respect to a loan on which the Secretary previously paid a closed school or false certification claim.

* * * * *

10. Section 682.412 is amended by revising paragraph (c) to read as follows:

§ 682.412 Consequences of the failure of a borrower or student to establish eligibility.

* * * * *

(c) In the final demand letter transmitted under paragraph (a) of this section, the lender shall demand that within 30 days from the date the letter is mailed the borrower repay in full any principal amount for which the borrower is ineligible and any accrued interest, including interest and all special allowance paid by the Secretary.

* * * * *

11. Section 682.603 is amended by adding a new paragraph (f)(4) and by revising paragraph (g) to read as follows:

§ 682.603 Certification by a participating school in connection with a loan application.

* * * * *

(f) * * *

(4) In prorating a loan amount for a student enrolled in a program of study with less than a full academic year remaining, the school need not recalculate the amount of the loan if the number of hours for which an eligible student is enrolled changes after the school certifies the loan.

(g) A school may not assess the borrower a fee for the completion or certification of any FFEL Program forms or information or for providing any information necessary for a student or parent to receive a loan under part B of the Act or any benefits associated with such a loan.

* * * * *

12. Section 682.604 is amended by removing paragraph (e)(3), redesignating paragraph (e)(4) as paragraph (e)(3), in redesignated paragraph (e)(3), introductory text, at the beginning of the paragraph, removing ''If the lender or guaranty agency has not informed the school that it prohibits a late disbursement as permitted by § 682.207(d)(2)(i), and'', and capitalizing the ''i'' in the word ''if''.

* * * * *

13. Section 682.605 is revised to read as follows:

§ 682.605 Determining the date of a student's withdrawal.

(a) Except in the case of a student who does not return for the next scheduled term following a summer break, a school shall follow the procedures in 34 CFR 668.22(j) for determining the student's date of withdrawal. In a case of a summer break, the school must determine the student's date of withdrawal no later than 30 days after the first day of the next scheduled term.

(b) Except for students involved in a summer break as provided in paragraph (a) of this section, the school shall use

the date determined under 34 CFR 668.22(j) for the purpose of reporting to the lender the date that the student has withdrawn from the school and for determining when a refund must be paid under 34 CFR 668.22.

(c) For the purpose of a school's reporting to a lender, a student's withdrawal date is the month, day and year of the withdrawal date.

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federal register

Thursday
September 21, 1995

Part VII

Department of Transportation

Federal Highway Administration

23 CFR Part 655

National Standards for Traffic Control Devices; Revision of the Manual on Uniform Control Devices (MUTCD); Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 655

[FHWA Docket No. 95–8, Notice No. 1]

RIN 2125–AD57

National Standards for Traffic Control Devices; Revision of the Manual on Uniform Traffic Control Devices (MUTCD)

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Extension of comment period.

SUMMARY: The FHWA proposes to extend the comment period for a notice of proposed amendments to the MUTCD which was published June 12, 1995, at 60 FR 31008. The original comment period was set to close on September 11, 1995. The proposed extension stems from concern expressed by the National Committee on Uniform Traffic Control Devices (NCUTCD) that the September 11 closing date does not provide sufficient time for appropriate response to the proposed MUTCD changes. The FHWA recognizes that other commenters may be subject to similar time constraints and agrees with the NCUTCD that the comment period should be extended. Therefore, the closing date for comments is changed to March 11, 1996 which will provide the NCUTCD and other interested commenters additional time to evaluate the proposed changes and to submit responses.

DATES: Submit written comments on or before March 11, 1996.

ADDRESSES: Submit written, signed comments to FHWA Docket No. 95–8, Federal Highway Administration, Room 4232, HCC–10, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address between 8:30 a.m. and 3:30 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT: For information regarding the notice of proposed amendments or a copy of the proposed text contact Mr. Ernest Huckaby, Office of Highway Safety, (202) 366–9064, Department of Transportation, Federal Highway Administration, 400 Seventh Street, SW., Room 3419, Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The MUTCD is incorporated by reference in 23 CFR part 655, subpart F, and recognized as the national standard for traffic control on all public roads. As discussed in the June 12, 1995 notice of proposed rulemaking, the FHWA is in the process of rewriting and reformatting the MUTCD. As the effort proceeds, many changes to the MUTCD will be identified. The June 12, 1995 notice of proposed rulemaking invites comments on the proposed changes which the FHWA has identified to date. As other changes are identified or proposed, they will be published in a future rulemaking. These changes affect various parts of the MUTCD and are intended to expedite traffic, promote uniformity, improve safety and traffic control device application, and provide a clearer understanding of the principles contained in the MUTCD.

As noted, the original comment period for the June 12, 1995 notice of proposed amendments to the MUTCD is set to close on September 11, 1995. The NCUTCD has expressed concern that this closing date does not provide sufficient time to review the proposed changes, consolidate comments, and submit these comments to its member organizations for approval. The NCUTCD only meets in January and June of each year to vote as a full body on proposals and issues relating to the MUTCD. The FHWA recognizes that the issuance of the June 12, 1995 notice did not allow enough time for the proposed changes to be discussed and approved at the regularly scheduled meetings. Therefore, the closing date for comments is changed to March 11, 1996 to allow the NCUTCD and other commenters additional time to respond.

The MUTCD is available for inspection and copying as prescribed in 49 CFR Part 7, appendix D. It may be purchased for $44.00 from the Superintendent of Documents, U. S. Government Printing Office, Washington, DC 20402, Stock No. 050–001–00308–2.

Authority: 23 U.S.C. 315, 49 CFR 1.48.

Issued on: September 13, 1995.

Rodney E. Slater,

Federal Highway Administrator.

[FR Doc. 95–23349 Filed 9–20–95; 8:45 am]

BILLING CODE 4910–22–P

federal register

Thursday
September 21, 1995

Part VIII

Department of Transportation

Federal Aviation Administration

14 CFR Part 91

Prohibition Against Certain Flights Between the United States and Iraq; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No. 26380; Special Federal Aviation Regulation (SFAR) No. 61–2]

RIN 2120–AF87

Prohibition Against Certain Flights Between the United States and Iraq

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule replaces the flight prohibition implemented by the FAA in SFAR 61, which was made effective on November 9, 1990, and expired on November 9, 1991. This action prohibits the takeoff from, landing in, or overflight of the territory of the United States by an aircraft on a flight to or from the territory of Iraq. This action further prohibits the landing in, takeoff from, or overflight of the territory of the United States by any aircraft on a flight from or to any intermediate destination, if the flight's origin or ultimate destination is Iraq. Exceptions are made for particular flights approved by the United States Government in consultation with the UN Security Council committee established under Security Council Resolutions 661, 666 and 670 (1990) and for certain emergency operations. This action is necessary to implement Executive Orders 12722 (1990) and 12724 (1990) and Security Council Resolutions 661, 666, and 670 mandating an embargo of air traffic with Iraq.

DATES: SFAR 61–2 is effective on September 21, 1995. SFAR 61–2 shall remain in effect until further notice.

FOR FURTHER INFORMATION CONTACT: Jeffrey A. Klang, International Affairs and Legal Policy Staff, AGC–7, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, DC 20591; telephone: 202–267–3515.

SUPPLEMENTARY INFORMATION:

Availability of Document

Any person may obtain a copy of this document by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Public Inquiry Center, APA–230, 800 Independence Avenue S.W., Washington, DC 20591, or by calling 202–267–3484. Communications must identify the number of this SFAR. Persons interested in being placed on a mailing list for future rules should also request a copy of the Advisory Circular No. 11–2A, which describes the application procedure.

Background

The Federal Aviation Administration (FAA) is responsible for the safety of flight in the United States and the safety of U.S.-registered aircraft and U.S. operators throughout the world. Section 40101(d)(1) of Title 49, United States Code, requires the Administrator of the FAA to consider the regulation of air commerce in a manner that best promotes safety and fulfills the requirements of national security as being in the public interest. In addition, 49 U.S.C. 40105(b)(1)(A) requires the Administrator to exercise his authority consistently with the obligations of the United States Government under an international agreement.

One such international agreement is the Charter of the United Nations (the Charter) (59 Stat. 1031; 3 Bevans 1153 (1945)). Under Article 25 of the Charter, ''the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'' Article 48(1) of the Charter further provides, in pertinent part, that ''[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all members of the United Nations . . . .''

On September 25, 1990, acting under Chapter VII of the Charter, the Security Council adopted Resolution 670, mandating an embargo of certain air traffic with Iraq. Paragraph 3 of Resolution 670 requires all states to deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq other than food provided under humanitarian circumstances, or supplies intended strictly for medical purposes, or solely for the UN Iran-Iraq Military Observer Group (UNIIMOG). Paragraph 4 imposes an obligation on all States to deny permission to any aircraft destined to land in Iraq to overfly its territory unless:

(a) The aircraft lands at an airfield designated by that State outside of Iraq in order to permit its inspection to ensure that there is no cargo aboard in violation of Resolution 661 or 670;

(b) The particular flight has been approved by the sanctions committee established by Resolution 661; or

(c) The flight is certified by the UN as solely for the purposes of UNIIMOG.

The United States Government has taken several actions to restrict air transportation between the United States and Iraq. On August 2, 1990, the President issued Executive Order 12722 (55 FR 31803, August 3, 1990), which prohibits ''any transaction by a United States person relating to transportation to or from Iraq; the provision of transportation to or from the United States by any Iraqi person or any vessel of Iraqi registration; or the sale in the United States . . . of any transportation by air which includes any stop in Iraq;'' and defines ''United States person'' so as to include any person within the United States.

On August 6, 1990, the Secretary of Transportation implemented Executive Order 12722 by issuing Order 90–8–16, which amended all Department of Transportation (DOT) certificates issued under section 401 of the Federal Aviation Act, all permits issued under section 402 of the Act, and all exemptions from sections 401 and 402 to prohibit the holder from selling or engaging in transportation by air to Iraq, or engaging in any transportation to or from Iraq.

On August 8, 1990, the President, exercising his authority under the United Nations Participation Act of 1945, as amended, issued Executive Order No. 12724 (55 FR 33089, August 13, 1990), pertaining to Iraq. This order contains additional prohibitions on air transportation to Iraq.

In support of Executive Orders 12722 and 12724, the FAA adopted SFAR 61 on November 9, 1990. SFAR 61 prohibited the takeoff from, landing in, or overflight of the territory of the United States by an aircraft on a flight to or from the territory of Iraq. SFAR 61 also prohibited the landing in, takeoff from, or overflight of the territory of the United States by an aircraft on a flight from or to any intermediate destination, if the flight is destined to land in or take off from Iraq. SFAR 61 expired on November 9, 1991.

Copies of UN Security Council Resolutions 660, 661 and 670, Executive Orders 12722 and 12724, and DOT Order 90–8–16, all of which remain in effect, have been placed in the docket for this rulemaking.

Prohibition Against Certain Flights Between the United States and Iraq

On the basis of the above, and in support of the Executive Order of the President of the United States, I find that immediate action by the FAA is required to implement Executive Orders 12722 and 12724 and to meet the obligations of the United States under international law as evidenced by U.N. Security Council Resolutions No. 660, 661 and 670. Accordingly, I am ordering a prohibition on the takeoff from, landing in, or overflight of the territory of the United States by an aircraft on a

flight that has Iraq as its origin or ultimate destination. Operations approved by the United States Government in consultation with the UN Security Council Committee established under Resolution 661 and certain emergency operations shall be excepted from this prohibition. For the reasons stated above, I also find that notice and public comment under 5 U.S.C. 533(b) are impracticable and contrary to the public interest. Further, I find that good cause exists for making this rule effective immediately upon publication. I also find that this action is fully consistent with my obligations under section 49 U.S.C. 40105(b)(1)(A) to act consistently with the obligations of the United States under international agreements.

The rule contains no expiration date, and will be terminated as soon as the underlying legal requirements leading to its adoption are removed.

Regulatory Evaluation

The potential cost of this regulation is limited to the net revenue of commercial flights between the United States and Iraq. However, revenue flights to Iraq are currently prohibited by DOT Order 90–8–16. Accordingly, this action will impose no additional burden on those operators.

Paperwork Reduction Act

The rule contains no information collection requests requiring approval of the Office of Management and Budget pursuant to the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

International Trade Impact Assessment

DOT Order 90–8–16 prohibits U.S. and foreign air carriers from engaging in the sale of air transportation to or from Iraq. This SFAR does not impose any restrictions on commercial carriers beyond those imposed by the DOT Order. Therefore, the SFAR will not create a competitive advantage or disadvantage for foreign companies in the sale of aviation products or services in the United States, nor for domestic firms in the sale of aviation products or services in foreign countries.

Federalism Determination

The amendment set forth herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612 (52 FR 4168; October 30, 1987), it is determined that this regulation does not have federalism implications warranting the preparation of a Federalism Assessment.

Conclusion

For the reasons set forth above, the FAA has determined that this action is not a ''significant regulatory action'' under Executive Order 12866. This action is not considered a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). Because revenue flights to Iraq are already prohibited by DOT Order 90–8–16, the FAA certifies that this rule 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.

List of Subjects in 14 CFR Part 91

Aircraft, Airmen, Airports, Air traffic control, Aviation safety, Freight, Iraq.

The Amendment

For the reasons set forth above, the Federal Aviation Administration is amending 14 CFR Part 91 as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. app 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; Articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 *et seq.;* E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970 Comp., p. 902; 49 U.S.C. 106(g).

2. Special Federal Aviation Regulation (SFAR) No. 61–2 is added to read as follows:

Special Federal Aviation Regulation No. 61–2—Prohibition Against Certain Flights Between the United States and Iraq

1. Applicability. This Special Federal Aviation Regulation (SFAR) No. 61–2 applies to all aircraft operations originating from, landing in, or overflying the territory of the United States.

2. Special flight restrictions. Except as provided in paragraphs 3 and 4 of this SFAR No. 61–2—

(a) No person shall operate an aircraft on a flight to any point in Iraq, or to any intermediate point on a flight where the ultimate destination is any point in Iraq or that includes a landing at any point in Iraq in its intended itinerary, from any point in the United States;

(b) No person shall operate an aircraft on a flight to any point in the United States from any point in Iraq, or from any intermediate point on a flight where the origin is in Iraq, or from any point on a flight which includes a departure from any point in Iraq in its intended itinerary; or

(c) No person shall operate an aircraft over the territory of the United States if that aircraft's flight itinerary includes any landing at or departure from any point in Iraq.

3. Permitted operations. This SFAR shall not prohibit the flight operations between the United States and Iraq described in section 2 of this SFAR by an aircraft authorized to conduct such operations by the United States Government in consultation with the committee established by UN Security Council Resolution 661 (1990), and in accordance with UN Security Council Resolution 666 (1990).

4. Emergency situations. In an emergency that requires immediate decision and action for the safety of the flight, the pilot in command of an aircraft may deviate from this SFAR to the extent required by that emergency. Except for U.S. air carriers and commercial operators that are subject to the requirements of 14 CFR 121.557, 121.559, or 135.19, each person who deviates from this rule shall, within ten (10) days of the deviation, excluding Saturdays, Sundays, and Federal holidays, submit to the nearest FAA Flight Standards District Office a complete report of the operations or the aircraft involved in the deviation, including a description of the deviation and the reasons therefore.

5. Duration. This SFAR No. 61–2 shall remain in effect until further notice.

Issued in Washington, DC, on September 13, 1995.

David R. Hinson,

Administrator.

[FR Doc. 95–23347 Filed 9–20–95; 8:45 am]

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federal register

Thursday
September 21, 1995

Part IX

Environmental Protection Agency

40 CFR Part 186

Pesticide Tolerances; Revocation of Certain Feed Additive Regulations; Proposed Rule and Notice

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 186

[OPP–300397; FRL–4977–3]

RIN 2070–AC18

Pesticides; Feed Additive Regulation Revocations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA has made determinations regarding 36 feed additive regulations (FARs) for 16 pesticides in animal feeds that were previously reported as potentially inconsistent with the Delaney clause in section 409 of the Federal Food, Drug and Cosmetic Act (FFDCA). EPA is proposing to revoke 34 animal feed FARs because they are not needed to prevent adulterated food, and two additional animal feed FARs because they violate the Delaney clause.

DATES: Written comments, identified by the document control number [OPP-300397], must be received on or before December 19, 1995.

ADDRESSES: By mail, submit comments to: Public Response Section, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: OPP Docket, Public Information Branch, Field Operations Division, Rm. 1132, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The telephone number for the OPP docket is (703)-305-5805. Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as ''Confidential Business Information'' (or CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2 and in section 10 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). For questions related to disclosure of materials, contact the OPP Docket at the telephone number given above. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in the OPP Docket, Rm. 1132, at the Virginia address given above, from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

Comments and data may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect in 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number [OPP-300397]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic comments on this proposed rule may be filed online at many Federal Depository Libraries. Additional information on electronic submissions can be found below in this document.

FOR FURTHER INFORMATION CONTACT: By mail: Niloufar Nazmi, Special Review and Reregistration Division (7508W), Environmental Protection Agency, 401 M St., SW., Washington, DC, 20460. Office location and telephone number: Crystal Station #1, 2800 Crystal Drive, Arlington, VA. Telephone: 703-308-8010; e-mail: nazmi.niloufar@epamail.epa.gov.

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I. Introduction

In this document, EPA examines whether 36 FARs for 16 pesticides in animal feeds should be revoked, either because the FAR is inconsistent with the Delaney clause in section 409(c)(3) of the FFDCA or because the FAR is not needed to prevent adulterated feed under current Agency policies and guidelines. For those FARs which EPA determines should be revoked, EPA is in this document proposing revocation.

EPA concludes that the Delaney clause affects few of the FARS involved in this document, primarily because of revised Agency policies and guidelines governing when FARs are required to prevent adulterated animal feed. Although a combination of factors are responsible for this result, perhaps the most significant point is that the FARs in this document involve animal feeds. For example, almost half of the 36 FARs were judged unnecessary because EPA concluded that the animal feeds in question were not a significant portion of the livestock diet.

EPA will in the near future be making decisions concerning the fate of a number of FARs for processed human foods. EPA proposals are pending to revoke human food FARs for 11 pesticides covering 32 uses. The policies announced in the Agency's June 14, 1995 response to the National Food Processors' Association (NFPA) petition have been instituted, and EPA has begun to review the effects of those policies on its earlier proposals. EPA has not completed this analysis and so its results are uncertain, but the Agency believes that the effects of its policy changes will not be as dramatic for human, as opposed to animal, foods. For example, in general EPA has concluded that most processing byproducts used as animal feeds are not ready to eat; processed human foods are not as obviously amenable to such a broadly drawn conclusion. EPA anticipates that case-by-case determinations will be the rule for human foods.

Finally, EPA notes that the identification of pesticides and uses that are potentially subject to the Delaney clause is an ongoing process as EPA receives new cancer and processing studies required as part of reregistration. When EPA concludes that a processed food or feed tolerance is necessary under FFDCA section 409 for a pesticide that induces cancer within the meaning of the Delaney clause, EPA will take action to revoke or deny that tolerance.

II. Background

A. Statutory Background

The Federal Food, Drug and Cosmetic Act (FFDCA) (21 U.S.C. 301 et seq.) authorizes the establishment of maximum permissible levels of pesticides in foods, which are referred to as ''tolerances'' (21 U.S.C. 346a, 348). Under the FFDCA, a tolerance is required for pesticide residues in food for consumption by humans or by food animals. Without such a tolerance or an exemption from a tolerance, a food or

feed containing a pesticide residue is ''adulterated'' under section 402 of the FFDCA and may not be legally moved in interstate commerce (21 U.S.C. 342). Monitoring and enforcement of pesticide residues are carried out by the U.S. Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA).

The FFDCA governs tolerances for raw agricultural commodities (RACs) and processed foods separately. For pesticide residues in or on RACs, EPA establishes tolerances, or exemptions from tolerances when appropriate, under section 408. For processed foods, food additive regulations (FARs) setting maximum permissible levels of pesticide residues are established under section 409. Section 409 FARs are needed, however, only for certain pesticide residues in processed food. Under section 402(a)(2) of the FFDCA, no section 409 FAR is required if any pesticide residue in a processed food, when ready to eat, is equal to or below the tolerance for that pesticide in or on the RAC from which it was derived and all other conditions of section 402(a)(2) are met. This exemption in section 402(a)(2) is commonly referred to as the ''flow-through'' provision because it allows the section 408 raw food tolerance to flow through to the processed food form. Thus, a section 409 FAR is necessary to prevent foods from being deemed adulterated when the concentration of the pesticide residue in a processed food is greater than the tolerance prescribed for the RAC, or if the processed food itself is treated or comes in contact with a pesticide.

If a food additive regulation must be established, section 409 of the FFDCA requires that the use of the pesticide will be ''safe'' (21 U.S.C. 348(c)(3)). Section 409 also contains the Delaney clause, which specifically provides that, with little exception, ''no additive shall be deemed safe if it has been found to induce cancer when ingested by man or animal'' (21 U.S.C. 348(c)(3)).

B. Regulatory Background

1. *Les v. Reilly.* On May 25, 1989, the State of California, the Natural Resources Defense Council, Public Citizen, the AFL-CIO, and several individuals filed a petition requesting that EPA revoke several food additive regulations. The petitioners argued that these food additive regulations should be revoked because they violate the Delaney clause.

EPA responded to the petition by revoking certain food additive regulations, but retained several others on the grounds that the Delaney clause provides an exception for pesticide residues posing *de minimis* risk. EPA denied the petition for the food additive regulations determined to fall under this exception. EPA's response was challenged by the petitioners in the U.S. Court of Appeals, Ninth Circuit. On July 8, 1992, the court ruled in *Les v. Reilly,* 968 F.2d 985 (9th Cir.), cert. denied, 113 S.Ct. 1361 (1993), that the Delaney clause of section 409 barred the establishment of a food additive regulation for pesticides which ''induce cancer,'' even if the risks are considered *de minimis.* In response to the court's decision in *Les v. Reilly,* EPA has taken steps to identify and revoke all section 409 FARs for pesticides which ''induce cancer.'' In the Federal Register of March 30, 1994 (59 FR 14980), EPA issued a list of pesticide uses which were likely to be affected by the court's decision. (Note that for the purpose of this document, the list has been superseded by Appendices to the court-approved settlement in *California v. Browner,* discussed below.)

EPA first revoked certain FARs of six pesticides that were the subject of the original NRDC petition. (58 FR 37862, 58 FR 59663 and 59 FR 10993). A number of these actions have been challenged in court; some have been stayed. EPA decided to evaluate the remaining FARs potentially inconsistent with the Delaney clause in phases. The first two phases focused on processed human foods. EPA proposed the first set of revocations, including 26 FARs for seven pesticides, in the Federal Register of July 1, 1994 (59 FR 33941). A second set of proposed revocations, including six FARs for four pesticides, was published in the Federal Register of January 18, 1995 (60 FR 3607). These two proposed revocations have not yet been finalized. This document, which focuses on FARs for animal feeds, completes EPA's review of the FARs earlier identified as potentially inconsistent with the Delaney clause.

2. *California v. Browner.* In a court-approved settlement, entered on February 9, 1995, in the case of *California v. Browner,* EPA agreed to make decisions regarding pesticides that may be affected by the Delaney clause. This settlement agreement includes Appendices listing pesticides and uses upon which EPA must make decisions and a timetable for making the decisions. The settlement required EPA to rule on the NFPA petition that challenged a number of policies under which EPA administers its tolerance-setting program. This document is consistent with the timeframes in that settlement.

In the Federal Register of June 14, 1995 (60 FR 31300), EPA issued a partial response to the NFPA petition. In that document, EPA concluded that some changes were warranted to its policies concerning application of the Delaney clause. The proposals below in this document are consistent with these new policies.

III. Revised Agency Policies, Guidelines, and Legal Interpretations

A. Concentration and ''Ready to Eat'' Policies

To determine whether the use of a pesticide on a growing crop needs a section 409 FAR in addition to a section 408 tolerance, EPA looks at the likelihood that the residue levels in the processed food will exceed the section 408 tolerance level. In the past, EPA applied this policy focusing almost exclusively on the results of processing studies using treated crops. In response to the NFPA petition, EPA announced new policies on how it would determine whether a pesticide needs a section 409 FAR. EPA stated that it would consider a greater range of information in determining the likelihood of residues in processed food exceeding the section 408 tolerance. EPA also adopted a definition of ''ready to eat'' (RTE) as it applies to human food and animal feed. Whether a food is RTE or not is critical to application of the concentration policy. If a food is not RTE, EPA must consider the degree of dilution that occurs in producing a RTE food from the not-RTE food in determining the likelihood that residues in RTE food will exceed the section 408 tolerance.

Perhaps the most significant new information that EPA stated it would consider is information bearing on the average residue value from crop field trials. The data from field residue trials show that it is possible to obtain significantly different residue values from multiple field trials. EPA concluded that where a crop is mixed or blended during processing, it would be appropriate to use an average residue value rather than the highest field trial sample value in estimating the potential level of residue in processed food. As EPA noted, EPA believes that generally the most appropriate average value to use is the highest average field trial (HAFT) value. Consequently, EPA revised its procedures and is now using the HAFT as the basis for determining whether a section 409 FAR is needed.

Another outcome of the new concentration policy is that EPA has revised its policies for the use of multiple processing studies. EPA may receive several processing studies for a

crop, with each showing a different concentration factor. When different concentration factors result from multiple processing studies, EPA will now use the average concentration factor to determine concentration. EPA explained the basis for this change in its response to comments filed on the NFPA petition. In addition, EPA is examining processing studies to ensure that they reflect typical commercial practices. If a study does not include a step (e.g., washing) that is considered typical practice in processing an RAC, EPA may not include that study in the calculation of the average concentration factor.

In response to the NFPA petition, EPA stated it would interpret the phrase RTE food as meaning food ready for consumption ''as is'' without further preparation. EPA also announced that it will apply a similar approach to processing byproducts used as animal feeds. With regard to animal feed, EPA announced that if a feed item is considered unpalatable when fed ''as is'' or if for nutritional or other reasons the feed item is generally further processed or mixed, EPA will consider that feed item not RTE. EPA has applied this new interpretation on a case-by-case basis in making determinations on several of the feed items that are the subject of this document.

B. Guidelines on Significant Animal Feeds

EPA requires processing data and sets tolerances and FARs only on animal feeds that are consumed in significant amounts in the United States. Table II of the Pesticide Assessment Guidelines, Subdivision O, Residue Chemistry, provides a listing of all significant food and feed commodities, both raw and processed, for which residue data are collected and tolerances or FARs are established. On June 8, 1994, EPA revised Table II and sought comments on these revisions (59 FR 29603). In response, EPA received extensive new data and many comments concerning the amounts of raw agricultural commodities and processing byproducts that are used as animal feeds. As a result, EPA has updated Table II and modified its guidelines regarding which raw commodities and processing byproducts EPA will consider as animal feeds possibly requiring FARs.

The general cutoff point used by EPA in deciding which feed items are considered ''significant'' is whether the feed item constitutes greater than 0.04 percent, by weight, of the total feed available to livestock in the U.S. However, feed items constituting less than 0.04 percent are also considered significant if:

1. Greater than 10,000 tons are fed annually (ca. 0.0015% of total feed), and the crop is grown exclusively for use as animal feed (e.g., vetch); or

2. The feed is of particular regional concern (e.g., animal feeds likely to result in residues in regionally produced commodities such as milk and eggs) or has had historical incidence issues (e.g., pineapple process residue); or

3. The feed is included in commodities market listings and is thus traded and likely to be found in interstate commerce. Using these criteria, approximately 99.8% of feeds available to livestock in the U.S. are accounted for in the updated Table II.

Although many feed items, including processing byproducts, are no longer included in Table II as a result of the new information used to revise the table, these commodities combined represent less than 0.2 percent by weight of total livestock feeds. The percentage represented by any single feed item is negligible.

Elsewhere in this issue of the Federal Register, EPA is issuing a Notice of Availability of the revised table.

C. DES Proviso

The Delaney clause in section 409 of the FFDCA contains an exception for animal feed additives that do not harm the animal and are not found in the resulting animal food products by an analytical method approved or prescribed by FDA or EPA as applicable. In full, this exception reads:

The Delaney clause shall not apply with respect to the use of a substance as an ingredient of feed for animals which are raised for food production, if the Secretary finds:

(i) That, under the conditions of use and feeding specified in proposed labeling and reasonably certain to be followed in practice, such additive will not adversely affect the animals for which such feed is intended; and

(ii) That no residue of the additive will be found (by methods of examination prescribed or approved by the Secretary by regulations, * * *) in any edible portion of such animal after slaughter or in any food yielded by or derived from the living animal. 21 U.S.C. 348(c)(3)(A).

This exception historically has been referred to as the ''DES proviso'' because it was enacted, in part, in response to the use of the animal drug diethylstilbestrol (DES). A similar provision is included in the Delaney clauses in the color additives and animal drug provisions of the FFDCA. See 21 U.S.C. 360b(d)(1)(I) and 379e(b)(5)(B).

FDA has a long history of rulemaking on the DES proviso. FDA's current regulations regarding the DES proviso codify what FDA has described as a ''sensitivity of method'' (SOM) approach. In brief, the SOM approach uses quantitative risk assessment to define a level of residue in the edible animal product which represents no more than a 1-in-1 million lifetime risk. This residue level is then taken to represent an insignificant risk level to the public, and FDA designates that residue level and below as ''no residue'' under the DES proviso whether or not such residues are detected by the approved method. See 21 CFR 500.84. Additionally, under the SOM approach, FDA requires sponsors of compounds to develop analytical methods which are at least sensitive enough to measure residues down to the level of residue corresponding to an insignificant risk. 21 CFR 500.88.

Although the DES proviso and the SOM approach were not part of the *Les v. Reilly* decision, EPA undertook a full review of its policies related to the Delaney clause including the SOM approach in the wake of that decision. For that reason, EPA requested comment on the SOM approach in its notice announcing receipt of the NFPA petition. 58 FR 7474 (February 5, 1993). After reviewing the comment received and after consulting with FDA and the Department of Justice, EPA has decided generally to continue to rely on the SOM approach including taking risk considerations into account in determining whether an analytical method is sufficiently sensitive to be approved. EPA, however, will not rely on one aspect of the SOM approach. EPA will not rely upon estimates of risks posed by residues to designate a ''no residue'' level, at or below which residues are presumed not to be found. Rather, EPA will determine whether residues could be found by (1) determining the level of residue expected in animal products given the conditions of use of the pesticide and the levels of residue expected in feed, and then (2) examining whether the approved method could detect such residue levels in animal products. If the method could detect the residues expected in animal products (even residues below the risk level determined under the SOM approach), then these residues would be considered to be ''found'' under the DES proviso, and the DES proviso could not be invoked as an exception to the Delaney clause.

EPA does not anticipate that this approach to determining whether

residues are ''found'' will change the substance of EPA's current practices involving method development and approval. As required by the DES proviso, however, EPA will formally approve methods by regulation when the DES proviso is invoked to support a FAR. EPA will not approve a method, and therefore not exercise the DES proviso, if the method cannot detect residues that the Agency considers to pose a risk of concern.

EPA believes that its decision to interpret the DES proviso as imposing a strict detectability standard is consistent with the plain language of the statute. The DES proviso requires that ''no residue of the additive will be found [] by methods of examination prescribed or approved by the Secretary * * * .'' The use of the term ''found'' and the express mention of analytical methods support reading the DES proviso as imposing a detectability test. This conclusion is confirmed by the legislative history which shows both that Congress understood that the DES proviso imposed a detectability standard and that Congress was opposed to the principle that any detected residue of a carcinogen could be found to be safe.

The prior justification for the taking risk into account in determining whether residues are ''found'' was that a literal approach to the term ''no residue'' would render the DES proviso meaningless because scientists could never conclude that a substance introduced into an animal left absolutely no molecules of residue in edible animal products. (52 FR 49572, December 31, 1987). To avoid construing the DES proviso so as to render it inconsequential, the concept of risk was introduced as a way of defining ''no residue.'' After further evaluation, EPA believes that reading the DES proviso as imposing a detectability standard is both consistent with the statutory language and avoids making the DES proviso a meaningless provision. EPA's experience has been that the presence of pesticide residues in animal feeds often does not lead to detectable residues in edible animal products. EPA regulations in 40 CFR 180.6 reflect that experience by explicitly directing that no tolerance for pesticide residues in animal products is required when appropriate studies show that detectable residues are not reasonably expected.

IV. Decision Framework

In analyzing whether the 36 FARs addressed in this document should be revoked, EPA has used the following decision framework. First, EPA determined whether a section 409 FAR is necessary to prevent adulteration, given the revisions to the animal feed guidelines, the concentration policy, or new data which have been submitted. If application of the revised guidelines and concentration policy shows no FAR is needed, this document proposes that the FAR be revoked on that ground. Second, if this analysis showed that a FAR is still needed, then the FAR's consistency with the Delaney clause was analyzed.

In examining whether a FAR was needed, EPA followed a stepwise process involving a series of questions. In brief, the questions are:

A. Significant Animal Feed

Is the feed for which the FAR was established a significant animal feed? EPA has updated its table of significant animal feeds. In the process, the Agency has identified a number of processed animal feed items that are not significant according to the criteria in Unit. III.B. of this preamble. If the animal feed for which the FAR was established has been dropped from the list of significant animal feeds, the FAR is not necessary.

B. Concentration Policy Including RTE

1. *Using highest average residue value from field trials (HAFT), do residues in processed food exceed the section 408 tolerance?* Use of the HAFT for feed commodities that are likely to be mixed or blended decreases the likelihood that residues in processed feed will exceed the section 408 tolerance. Typically, EPA would determine the HAFT as part of its review of field residue data for a new tolerance. For the pesticides that are the subject of this proposed rule, however, EPA did not determine the HAFT in most cases, because other factors, notably new processing studies and use of average concentration factors, were sufficient for EPA to conclude that residues would not exceed the 408 tolerance.

2. *Do processing data show that there is concentration of residues during processing?* If processing studies demonstrate that the level of residues in the processed animal feed is less than the level of residues in the precursor crop (i.e., no ''concentration in fact''), a FAR is unnecessary. For some pesticides subject to this proposed rule, EPA has received new processing studies which change its previous conclusion that concentration occurs in processing.

3. *Does use of the average concentration factor show that there is concentration of residues during processing?* Use of the average concentration factor from multiple processing studies generally decreases the likelihood that residues in the processed animal feed will exceed the section 408 tolerance.

4. *Is the dilution that occurs during preparation of RTE animal feed sufficient to reduce pesticide residues below the section 408 tolerance?* If a processed feed item is not fed to animals ''as is,'' EPA must evaluate the expected residue level in RTE animal feed containing the processed feed item. EPA has determined that many of processed feed items covered by the FARs addressed in this proposal are not RTE. Information available to EPA shows that processed feed items are rarely fed to animals singly or ''as is,'' that they are typically mixed or blended with other feed items to create a finished RTE feed. Blending of processed feed items is necessary to make them palatable or to ensure that the animal receives a nutritionally sufficient diet. For example, soybean hulls by themselves are neither palatable to animals nor an adequate nutritional source, and are therefore fed only in a feed mixture.

To determine the levels of pesticides residues in the RTE animal feed, EPA obtained information on the amount of dilution that occurs from mixing and blending feed items into finished feeds (a ''dilution factor''). Since the amount of dilution in finished animal feeds varies due to differences in animal dietary needs, EPA used the lowest dilution factor (the highest level of potential residues in finished feed) in its determinations. If the dilution of residues resulting from mixing and blending is greater than the concentration of residues resulting from processing (the dilution factor is greater than the concentration factor), it is likely that the residues in the finished RTE feed will be less than the section 408 tolerance. In this case, no FAR is necessary for the RTE animal feed.

5. *Does a combination of concentration factors show that it is unlikely that the residues in processed food will exceed the section 408 tolerance*? For some pesticides, the factors analyzed individually might indicate that residues exceed the section 408 tolerance, but when analyzed in combination they allow EPA to conclude that, in actuality, residues are not likely to exceed the section 408 tolerance. Therefore, the final step in this analysis was to look at the above factors in combination to determine if a FAR is needed.

If, after consideration of the above factors, a FAR is determined to be necessary, EPA then examined whether

a FAR for the pesticide chemical is consistent with the Delaney clause. That examination focused on whether the pesticide induces cancer within the meaning of the Delaney clause. If EPA concluded that the pesticide induces cancer, then EPA determined whether the FAR is nonetheless excepted from the Delaney clause prohibition by the DES proviso.

V. EPA's Decisions

Based on the above analyses, EPA proposes to revoke 34 FARs on the basis that they are not needed to prevent adulterated food and two FARs because they violate the Delaney clause.

A. Food Additive Regulation Is Not Needed

1. *Not considered significant feed item*. As a result of the updating of the guideline on significant animal feeds, 16 of the 36 FARs are no longer considered necessary. EPA proposes to revoke on this ground the following FARs: (1) benomyl on dried apple pomace, dried grape pomace and raisin waste; (2) diflubenzuron on soybean soapstock; (3) iprodione on dried grape pomace, raisin waste, and peanut soapstock; (4) mancozeb on milled fractions of barley, oats, and rye; (5) norflurazon on citrus molasses; (6) propargite on dried apple pomace and dried grape pomace; (7) thiophanate-methyl on dried apple pomace; and (8) triadimefon on wet/dry grape pomace and raisin waste. Documentation explaining EPA's conclusions on what animal feeds are significant is included in the docket.

After this reassessment, only 20 of the original 36 FARs require further consideration.

2. *Revised concentration policy including RTE—i. Highest average field trial value.* Consideration of HAFT values from crop field trials did not alone affect whether any FARs were needed. (The HAFT was considered in combination with other factors in determining that a tolerance for diflubenzuron on soybean hulls was not necessary.)

ii. *New processing study*. EPA has received new processing studies that show that 4 of the remaining FARs are unnecessary because processing results in no concentration in fact of residues. EPA proposes to revoke on this ground the following FARs: (1) dimethipin on cottonseed hulls; (2) norflurazon on dried citrus pulp; (3) propargite on dried citrus pulp; and (4) thiodicarb on cottonseed hulls. Documentation on these new processing studies is included in the docket.

After this reassessment, only 16 of the original 36 FARs require further consideration.

iii. *Average concentration factor shows no concentration in fact.* Calculation of the average concentration factor from more than one processing study shows that 4 of the remaining FARs are unnecessary because processing results in no concentration in fact of residues. EPA proposes to revoke on this ground the following FARs: (1) acephate on cottonseed meal and soybean meal; (2) carbaryl on pineapple bran; and (3) dimethoate on dried citrus pulp. Documentation on the calculation of the average concentration factors is included in the docket.

After this reassessment, only 12 of the original 36 FARs require further consideration.

iv. *Dilution factor is greater than concentration factor during processing* For the remaining FARs, EPA concluded that the following processed feed items are not RTE: Cottonseed hulls, dried citrus pulp, rice bran and hulls, milled fractions of wheat, and soybean hulls.

EPA concluded that the following processed feed item is RTE: Sugarcane molasses.

Evaluation of the degree of dilution involved in the preparation of RTE animal feeds from not-RTE processed feed items showed that 8 of the remaining FARs are unnecessary because residues are unlikely to exceed the section 408 tolerance in the RTE animal feeds. EPA proposes to revoke on this ground the following FARs: (1) acephate on cottonseed hulls; (2) benomyl on dried citrus pulp and rice hulls; (3) imazalil on dried citrus pulp; (4) iprodione on rice bran and rice hulls; (5) mancozeb on milled fractions of wheat; and (6) thiodicarb on soybean hulls.

For these pesticide/processed feed item combinations, EPA plans to use its general rulemaking authority under FFDCA sec. 701, to establish maximum residue levels. Documentation of EPA's conclusions regarding concentration factors, RTE status, and dilution factors for these processed feed items is provided in the docket.

After this reassessment, only 4 of the original 36 FARs require further consideration.

v. *Combination of factors.* Analysis of the combined effect of the use of the above factors for RTE feeds showed that two of the remaining FARs are unnecessary. EPA is proposing to revoke on this ground the FARs for diflubenzuron on soybean hulls and triadimefon on wet apple pomace.

The tolerance for diflubenzuron in soybeans is at the limit of quantification (LOQ) of the analytical method (0.05 ppm). A single processing study shows residues of diflubenzuron in soybean hulls concentrate to eight times the soybean level. Using the HAFT of 0.03 ppm obtained using a more sensitive analytical method, a concentration factor of 8 and a dilution factor of 4 for soybean hulls, residues in finished RTE feed are calculated to be 0.06 ppm (0.03 X 8 divided by 4). This is within the limit of analytical variability of the LOQ tolerance of 0.05 ppm. Documentation on consideration of these factors for this FAR is provided in the docket.

Several factors were considered in the determination as to whether the feed additive tolerance for triadimefon on wet apple pomace is still necessary. (The existing feed additive tolerance covers both wet and dry apple pomace; however, dry apple pomace is no longer considered a significant feed item.) All registered uses of triadimefon on apples have been amended to extend the preharvest interval (PHI) from 0 days to 45 days. Available residue data reflecting a 45-day PHI support a tolerance of 0.2 ppm on raw apples. The HAFT from these studies is 0.09 ppm, and a new processing study indicates a concentration factor of 1.6X for residues in wet apple pomace. Residues in wet apple pomace can thus be calculated as 0.09 ppm X 1.6 = 0.14 ppm, which is below the 0.2-ppm tolerance needed for apples. Therefore, a section 409 tolerance for wet apple pomace is not required.

After this reassessment, only 2 of the original 36 FARs require further consideration.

B. Food Additive Regulation is Needed

EPA has determined that one of the remaining FARs is necessary because the application of the pesticide to the RAC could lead to residues in RTE processed feed that exceed the applicable section 408 tolerance. This is simazine on sugarcane molasses. Documentation as to why this FAR is needed under the revised concentration policy is included in the docket.

The last FAR, tetrachlorvinphos in processed feed items, is needed because it is a direct additive to processed animal feed. None of the above factors is relevant to a direct additive to processed animal feeds.

C. Induce Cancer Call for Pesticides that Need 409s

If a FAR is necessary to prevent adulterated food, as in the case of the two pesticides named in Unit V.B. above, EPA next determined whether the pesticide induces cancer within the meaning of the Delaney clause.

In construing the ''induce cancer'' standard as to animals, EPA follows a weight-of-the-evidence approach. In regard to animal carcinogenicity, EPA, in general, interprets ''induces cancer'' to mean:

The carcinogenicity of a substance in animals is established when administration in an adequately designed and conducted study or studies results in an increase in the incidence of one or more types of malignant (or, where appropriate, benign or a combination of benign and malignant) neoplasms in treated animals compared to untreated animals maintained under identical conditions except for exposure to the test compound. Determination that the incidence of neoplasms increases as the result of exposure to the test compound requires a full biological, pathological, and statistical evaluation. Statistics assist in evaluating the biological significance of the observed responses, but a conclusion on carcinogenicity is not determined on the basis of statistics alone. Under this approach, a substance may be found to ''induce cancer'' in animals despite the fact that increased tumor incidence occurs only at high doses, or that only benign tumors occur, and despite negative results in other animal feeding studies. (See 58 FR 37863, July 14, 1993; 53 FR 41108, October 19, 1988; and 52 FR 49577, December 31, 1987).

In a proposed revocation issued in 1994, EPA concluded that simazine meets this standard. EPA is currently considering comments on this proposal. EPA believes that tetrachlorvinphos also qualifies as an animal carcinogen under this test.

Summarized below is the information supporting EPA's determination that tetrachlorvinphos induces cancer. Full copies of each of these reviews and other references in this document are available in the OPP Docket, the location of which is given under ''ADDRESSES'' above. Information on simazine is contained in OPP Docket OPP-300335.

Tetrachlorvinphos

After a full evaluation of the data and supporting information regarding animal carcinogenicity, EPA concludes that exposure to tetrachlorvinphos results in an increased incidence of hepatocellular carcinomas and combined adenomas/carcinomas (predominantly malignant carcinomas) in female B6C3Fl mice.

In male mice there are also increases in hepatocellular combined adenomas/carcinomas and tumors of the kidney (carcinomas, adenomas and combined adenomas/carcinomas with a large contribution from malignant carcinoma). In the male Sprague-Dawley rat there are nonsignificant increases in adrenal benign pheochromocytomas (significant positive trend) and thyroid C-cell adenomas. These latter two tumor types are consistent with the same tumor types observed in another earlier study in Osborne-Mendel rats.

The mutagenicity data for tetrachlorvinphos demonstrate clastogenic activity, which supports a carcinogenicity concern. Analogs structurally similar to tetrachlorvinphos (DDVP and phosphamidon) are also carcinogenic. Tetrachlorvinphos can undergo hydrolysis and then tautomerize to generate a potentially carcinogenic reactive ketone intermediate.

Discussions of the various studies on the carcinogenicity of tetrachlorvinphos can be found in the Peer Review of tetrachlorvinphos (Dec. 12, 1994) in the docket.

D. DES Proviso

EPA may establish or maintain a section 409 FAR for a pesticide that induces cancer only if the DES proviso excludes it from the Delaney clause (see Unit III.C. of this preamble). When a pesticide needing a FAR is found to induce cancer, the final step in the analysis is to determine if the FAR is nonetheless excepted from the Delaney clause prohibition by the DES proviso.

The DES proviso applies when no detectable residues are expected in the animal commodities (meat, milk, poultry, eggs) as a result of animal consumption of feeds containing tolerance level residues. If no detectable residues of the chemical can be found in the animal commodities, the FAR can be maintained or established.

1. *Tetrachlorvinphos*. EPA concludes that the DES proviso does not except the tetrachlorvinphos FAR from the Delaney clause. The tetrachlorvinphos FAR does not qualify because the existing enforcement method has not been approved under the DES proviso and EPA does not believe it would be appropriate to approve that method because it determines residues of parent only and not several metabolites of carcinogenic concern. Moreover, EPA has estimated, if a method covering these metabolites were developed, the method would be expected to be able to detect residues of tetrachlorvinphos in animal products, assuming the method is of comparable sensitivity to the existing method.

2. *Simazine*. EPA has concluded that the DES proviso does not except the simazine FAR from the Delaney clause. Using the existing enforcement method for simazine, EPA has estimated, residues of simazine will not be found in edible products of animals. However this enforcement method has not been approved by regulation for use by applying the DES proviso and EPA does not believe the method is sufficiently sensitive that it should be approved. As FDA's regulations concerning the DES proviso make clear, methods used in applying the DES proviso must be capable of detecting residues at a level representing a maximum lifetime cancer risk of 1-in-1 million. 21 CFR 500.88(b). The current enforcement method for simazine detects residues in edible animal products only down to a level representing a lifetime cancer risk from simazine in such products of approximately 1 in 100,000. Because this method is not sufficiently sensitive, EPA is not proposing it for approval, and therefore EPA cannot conclude that the DES proviso is available to exempt the simazine FAR from the Delaney clause. If a method for simazine is available that has greater sensitivity, EPA will reexamine the question of whether the DES proviso does apply.

VI. Proposed Rules

A. Proposed Revocations: Section 409 FAR Is Not Needed.

EPA is proposing to revoke the following 34 of the original 36 FARs because the Agency has determined they are not needed:

Name of pesticide	40 CFR cite	Processed feed item
Acephate	186.100	Cottonseed meal, cottonseed hulls, soybean meal
Benomyl	186.350	Dried apple pomace, dried citrus pulp, dried grape pomace, raisin waste, rice hulls
Carbaryl	186.550	Pineapple bran (wet and dry)
Diflubenzuron	186.2000	Soybean hulls, soybean soapstock
Dimethipin	186.2050	Cottonseed hulls

Name of pesticide	40 CFR cite	Processed feed item
Dimethoate	186.2100	Dried citrus pulp
Imazalil	186.3650	Dried citrus pulp
Iprodione	186.3750	Dried grape pomace, raisin waste, peanut soapstock, rice bran, rice hulls
Mancozeb	186.6300	Milled barley fractions, milled oat fractions, milled rye fractions, milled wheat fractions
Norflurazon	186.4450	Dried citrus pulp, citrus molasses
Propargite	186.5000	Dried apple pomace, dried citrus pulp, dried grape pomace
Thiodicarb	186.5650	Cottonseed hulls, soybean hulls
Thiophanate-methyl	186.5700	Dried apple pomace
Triadimefon	186.800	Grape pomace (wet and dry), raisin waste, apple pomace (wet/dry)

B. Proposed Revocations: Violates Delaney Clause

1. *Tetrachlorvinphos*. EPA is proposing to revoke the FAR for tetrachlorvinphos (2-chloro-1-(2,4,5-trichlorophenyl)vinyl dimethyl phosphate) when used as a direct feed additive. This FAR is codified at 40 CFR 186.950. EPA is proposing to revoke this FAR because EPA has determined that tetrachlorvinphos induces cancer in animals. Because a section 409 FAR is required and the DES proviso does not apply, the regulation violates the Delaney clause in section 409 of the FFDCA.

2. *Simazine*. EPA is proposing to revoke the FAR for simazine residues on sugarcane molasses. This FAR is codified at 40 CFR 186.5350. EPA is proposing to revoke this FAR because EPA has determined that simazine induces cancer in animals. Because a section 409 FAR is required and the DES proviso does not apply, the regulation violates the Delaney clause in section 409 of the FFDCA.

VII. Consideration of Comments

Any interested person may submit comments on this proposed action to the address given in the ''ADDRESSES'' section (see above). Before issuing a final rule based on this proposal, EPA will consider all relevant comments. EPA also welcomes comment on whether its proposed revocations issued on July 1, 1994 (59 FR 33941; OPP Docket 300335) and January 18, 1995 (60 FR 3607; OPP Docket 300360) should be revised based on the changed policies and guidelines discussed in this proposed rule. Any comment on these prior proposals should bear their appropriate OPP docket control numbers. After consideration of comments, EPA will issue a final order determining whether revocation of the regulations is appropriate. Such order will be subject to objections pursuant to section 409(f) (21 U.S.C. 348(f)). Failure to file an objection within the appointed period will constitute waiver of the right to raise issues resolved in the order in future proceedings.

A record has been established for this rulemaking under docket number [OPP-300397] (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 1132 of the Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Electronic comments can be sent directly to EPA at:

opp-Docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer all comments received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the address in ''ADDRESSES'' at the beginning of this document.

VIII. Executive Order 12866

EPA believes that there will be no significant economic impacts from this action. Revocation of 34 unnecessary tolerances does not affect the availability of the pesticides for use on the crops involved. EPA has not completed an evaluation of the economic impacts of this particular action for the two proposed revocations under the Delaney clause, since the Delaney clause requires EPA to act without considering the costs or benefits of the action. Nevertheless, EPA believes that the revocation of simazine on sugarcane molasses and tetrachlorvinphos on processed animal feed will have little economic impact.

Simazine residues on domestically produced molasses are assumed to be zero since simazine is no longer registered for use on sugarcane domestically. No impacts are expected to U.S. sugarcane growers from this proposed revocation. However, there could be short-term impacts to the domestic market due to decreased supply or increased price for imported molasses for animal feed. EPA cannot accurately estimate the amount of molasses from sugarcane that is imported to the U.S. Data on sugarcane molasses are generally aggregated with other molasses imports. Moreover, EPA lacks information on pesticide usage from some countries with significant molasses exportation. However, based on available information from countries for which EPA has data and alternative sources of molasses, EPA believes impacts upon domestic users of molasses will be minor and temporary.

Tetrachlorvinphos is used as a feed-through insecticide for control of flies on cattle, hogs, and horses. The bulk is used as a cattle feed-through; little is used for hogs or horses. Both diflubenzuron and methoprene are registered alternatives for cattle. For hogs and horses, although there are no feed-through alternatives available, dimethoate, cyromazine, and dichlorvos are available as nonfeed-through alternatives, and tetrachlorvinphos remains available for direct application to animals. Given that the costs of some of the alternatives are less than tetrachlorvinphos, alternatives exist, and dermal applications are permitted, EPA believes that there will be no significant adverse economic effects

from revocation of the animal feed tolerance for tetrachlorvinphos.

IX. Regulatory Flexibility Act

As explained above, the Agency is compelled to take this action without regard to the economic impacts, including impacts on small businesses. Therefore, this rule has not been reviewed under the provisions of sec. 3(a) of the Regulatory Flexibility Act.

X. Paperwork Reduction Act

There are no information collection requirements in this proposed order.

List of Subjects in 40 CFR Part 186

Environmental protection, Agricultural commodities, Pesticides and pests, Feed additives, Reporting and recordkeeping requirements.

Dated: September 15, 1995.

Lynn R. Goldman,

Assistant Administrator for Prevention, Pesticides and Toxic Substances.

Therefore, it is proposed that 40 CFR part 186 be amended as follows:

PART 186—[AMENDED]

1. The authority citation for part 186 continues to read as follows:

Authority: 2l U.S.C. 348.

§ 186.100 [Removed]

2. By removing § 186.100 *Acephate.*

§ 186.350 [Removed]

3. By removing § 186.350 *Benomyl.*

§ 186.550 [Removed]

4. By removing § 186.550 *Carbaryl.*

§ 186.800 [Removed]

5. By removing § 186.800 *1-(4-chlorophenoxy)-3,3-dimethyl -1-(1H-1,2,4-triazol-1-yl)-2-butanone.*

§ 186.950 [Removed]

6. By removing § 186.950 *2-Chloro-1-(2,4,5-trichlorophenyl)vinyl dimethyl phosphate.*

§ 186.2000 [Removed]

7. By removing § 186.2000 *Diflubenzuron.*

§ 186.2050 [Removed]

8. By removing § 186.2050 *Dimethipin.*

§ 186.2100 [Removed]

9. By removing § 186.2100 *Dimethoate including its oxygen analog.*

§ 186.3650 [Removed]

10. By removing § 186.3650 *Imazalil.*

§ 186.3750 [Removed]

11. By removing § 186.3750 *Iprodione.*

§ 186.4450 [Removed]

12. By removing § 186.4450 *Norflurazon.*

§ 186.5000 [Removed]

13. By removing § 186.5000 *Propargite.*

§ 186.5350 [Removed]

14. By removing § 186.5350 *Simazine.*

§ 186.5650 [Removed]

15. By removing § 186.5650 *Thiodicarb.*

§ 186.5700 [Removed]

16. By removing § 186.5700 *Thiophanate-methyl.*

§ 186.6300 [Removed]

17. By removing § 186.6300 *Zinc ion and maneb coordination product.*

[FR Doc. 95–23443 Filed 9–18–95; 1:26 pm]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–000412; FRL–4978–5]

Update of Table II of Pesticide Residue Chemistry Guidelines; Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of updated guidance for registrants on the residue data requirements to support registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act and tolerances under the Federal Food, Drug and Cosmetic Act. The updated guidance consists of a revision of Table II of the Pesticide Assessment Guidelines, Subdivision O, Residue Chemistry, describing raw and processed foods and feedstuffs. EPA will begin using the updated Table immediately, but for a period of 6 months will be flexible about the acceptability of residue studies that do not include data on new commodities in the Table.

ADDRESSES: A reference copy of Table II (September 1995) and Agency responses to comments received for Table II (June 1994) are filed with the Pesticides Docket, Office of Pesticide Programs, Public Response and Program Resources Branch, Rm. 1132, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-305-5805.

FOR FURTHER INFORMATION CONTACT: By mail: Jerry Stokes, Health Effects Division (7509C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person or by telephone: Rm. 803, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703)-305-7561 or FAX (703)-305-5147; e-mail: Stokes.Jerry@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: Table II of the Pesticide Assessment Guidelines, Subdivision O, Residue Chemistry, provides a listing of all significant food and feed commodities, both raw and processed, for which residue data are collected and tolerances may be set. In addition, for feed commodities, Table II provides (1) the maximum percent of the diet for beef and dairy cattle, poultry and swine, and (2) guidance on which crops EPA believes it would be appropriate to allow label restrictions prohibiting use of commodities as feedstuffs. As a culmination of a long-term project to update Agency guidance on the amounts of feedstuffs in livestock diets, EPA issued Table II (June 1994). A notice of availability of the updated Table II was published in the Federal Register of June 8, 1994 (59 FR 29603). This update of Table II was deemed appropriate because there had been significant changes in agricultural, processing, and feeding practices in the past decade. In response to a request for comments on Table II (June 1994), extensive information was received on the amounts of various feedstuffs and their proportions of animal diets. Therefore, Table II (June 1994) has now been further revised to reflect the most recent data and definitions on crops, raw agricultural and processed commodities, and feedstuffs. Other comments received by the Agency were also addressed.

In Table II (June 1994) EPA evaluated the policy of allowing a label restriction prohibiting the use of a commodity for livestock feeding as a substitute for data. Based on comments on the document, EPA has revised the list of commodities for which a prohibitive label statement is an acceptable alternative to development of data.

EPA will begin to use Table II (September 1995) as guidance in its evaluation of pesticide registrations and tolerances. EPA realizes that in some instances where studies have already begun or are scheduled to begin in the near future, data may not be able to be collected on the commodities that have been added to Table II. EPA believes that 6 months should be sufficient time for registrants to familiarize themselves with the changes in Table II. For studies begun either prior to the publication of this notice or in the next 6 months, EPA will be flexible regarding whether studies which do not supply data on the new commodities in Table II are adequate for registration, reregistration, and tolerance purposes and when additional data, if any, will be required to be submitted under EPA's data call-in authority or as a condition of registration.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping.

Dated: September 14, 1995.

Stephanie R. Irene,

Acting Director, Health Effects Division, Office of Pesticide Programs.

[FR Doc. 95–23444 Filed 9–18–95; 1:26 pm]

BILLING CODE 6560–50–F

federal register

Thursday
September 21, 1995

Part X

Department of Housing and Urban Development

Notice of Sale of Defaulted Title I Loans; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing-Federal Housing Commissioner

[Docket No. FR–3953–N–01]

Notice of Sale of Defaulted Title I Loans

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, Department of Housing and Urban Development.

ACTION: Notice of Sale of Defaulted Title I Loans.

SUMMARY: This notice announces the Department's intention to sell defaulted Title I loans by sealed bid. The loans were insured under the provisions of section 2 of title I of the National Housing Act (12 U.S.C. 1703). Each loan was made for either the alteration, repair or improvement of property, or for the purchase of a manufactured home. This notice also describes the bidding process for these loans. This is a notice of a sale of three pools of loans. It is not an offer to sell the loans. Offers will only be made individually to those interested parties that have executed a Confidentiality Agreement and a Bidder Qualification Statement that are accepted by the Department.

DATES: Bid Packages will be available on or about September 25, 1995. The loan sale will occur on or about November 6, 1995.

ADDRESSES: To obtain a Bid Package interested parties must obtain and execute both a Confidentiality Agreement and a Bidder Qualification Statement. Interested parties can obtain these documents from: FHA Information Center, 135 Center Street, Bristol, CT 06010, telephone 1–800–877–4814, FAX (203) 584–4759. (This FAX number is not a toll-free number.) Upon receipt of an executed Confidentiality Agreement and a Bidder Qualification Statement, a Bid Package will be forwarded by regular mail. Interested parties may make special arrangements to receive a Bid Package the next day.

FOR FURTHER INFORMATION CONTACT: William Richbourg, Office of the Housing-FHA Comptroller, Room 5146, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 401–0577, ext. 2727. Hearing or speech-impaired individuals may call (202) 708–4594 (TDD). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The Department intends to sell three pools of approximately 16,000 defaulted Title I loans. The majority of loans are unsecured and nonperforming. A loan is considered to be nonperforming if fewer than 10 of the previous 12 scheduled payments have been made. Some nonperforming loans do generate cash flows from borrower payments. A list of specific loans and pool descriptions will be contained in the Bid Package. No loans will be sold individually. The loans will be sold without Federal Housing Administration (FHA) insurance. Interested parties may bid competitively on the pool(s) of the defaulted Title I Loans. Bids may be made for one or all of the pools of defaulted Title I Loans, as well as for any combination of the pools. The Department will accept those bids that maximize the gross proceeds from the sale.

This is not an offer to sell these loans. Offers will only be made individually to interested parties that certify that they or their advisors: (a) Are sophisticated purchasers; (b) have been given the opportunity to make their purchase decisions based upon review of information concerning the loans and such other due diligence as they deem necessary; (c) are not relying on representations or warranties, written or oral, from HUD; and (d) have the ability to evaluate the risks of the transactions and can bear the loss of the purchase price.

The Bid Process

The Department will describe the procedure for participating in the Title I Defaulted Loan Sale in a Bid Package, which will include a nonnegotiable loan sale agreement prepared by the Department (Sale Agreement), specific bid instructions, as well as pertinent information such as total outstanding debt and applicable interest rate. Bid Packages will be mailed approximately 6 weeks prior to the Bid Date. The Bid Package will also include instructions for Bidder Registration and will contain procedures for obtaining supplemental information about the loans. Any interested party may request a copy of the Bid Package by following the instructions specified in the **ADDRESSES** section, above, of this notice.

Prior to the Bid Date a Bid Package Supplement will be mailed to all Registered Bidders. It will contain the final list of loans to be conveyed to the successful bidder(s).

Each bidder must include a deposit equal to 10% of the amount of its bid(s). If a successful bidder fails to abide by the terms of the Sale Agreement, including paying the Department any remaining sums due pursuant to the Sale Agreement and closing within the time period provided by the Sale Agreement, the Department shall retain and accept any deposit as liquidated damages.

Due Diligence Facilities

A due diligence period will take place prior to the Bid Date. During the due diligence period, supplemental information including payment and collection histories will be available for review by registered bidders. Supplemental information will be available by mail in an electronic form or by examination of servicing files located at Due Diligence Facilities located in Albany, New York; Chicago, Illinois; and Seattle, Washington. The supplemental information at each Due Diligence Facility will not be duplicative of the information in the other Due Diligence Facilities. Registered bidders must go to the three Due Diligence Facilities to gain access to hard copy supplemental information covering the complete portfolio. Specific instructions for ordering supplemental information in an electronic format or making an appointment to utilize one of the Due Diligence Facilities will be included in the Bid Package. The Department reserves the right to charge a reasonable fee to cover its costs in duplicating and forwarding any information requested by an interested party.

Title I Defaulted Loan Sale Policy

The Department reserves the right to add or delete loans to the Title I Defaulted Loan Sale at any time prior to the sale. The Department also reserves the right to reject any and all bids, without prejudice to the Department's right to include any defaulted Title I Loans in a later sale.

Ineligible Bidders. The following individuals and entities (either alone or in combination with others) are ineligible to bid on any one or combination of the Title I Defaulted Loan pools included in the Title I Defaulted Loan Sale:

(1) Any employee of the Department;

(2) Any individual or entity that is debarred from doing business with the Department pursuant to 24 CFR Part 24;

(3) Any contractor, subcontractor and/or consultant (including any agent of the foregoing) who performed services for, or on behalf of, the Department in connection with the Title I Defaulted Loan Sale;

(4) Any individual that was a principal and/or employee of any entity or individual described in paragraph (3) above at any time during which the entity or individual performed services

for, or on behalf of, the Department in connection with the Title I Defaulted Loan Sale; and

(5) Any individual or entity that does not meet the qualifications as certified in the Bidder Qualification Statement.

Number of Bids. A bidder may bid on as many pools as the bidder chooses.

Timely Bids and Deposits. Each bidder assumes all risks of loss relating to its failure to deliver, or cause to be delivered, on a timely basis and in the manner specified by the Department, each bid form, earnest money deposit, and loan sale agreement required to be submitted by the bidder.

Ties for High Bidder. In the event there is a tie for a high bid, the Department, through its financial advisor, will contact the parties for which there are tied bids and afford each of them an opportunity to offer a best and final bid. The successful bidder will be the one with the highest bid. If a tie continues after the best and final offers are submitted or the bidders do not respond within the time period established by the Department, the successful bidder will be determined by lottery. Notwithstanding the above, the Department reserves the right to withdraw any pool(s) of Title I defaulted loans subject to tied bids.

Cashflow Status of Title I Defaulted Loans. Most of the loans included in the Title I Defaulted Loan Sale are nonperforming. However, some of the loans generate cash flow from borrower payments under the terms of modification agreements or repayment plans. The Department will provide details of the repayment terms and payment histories, as reflected in Departmental records. The completeness and accuracy of the records cannot be guaranteed but the Department will provide to the best of its ability the current information contained in its records. During the due diligence period the Department will continue aggressive collection activities and some loans which are nonperforming may pay off or begin to generate cash flow on or before the date that title is transferred to the successful bidder. Some loans which are generating cash flow may also pay off or become nonperforming. In the Final Bid Package the Department will include the most current status of each loan available. However, the Department makes no representations as to the status of loans on the date that title is transferred.

Interest Rate Restrictions. Restrictions on the rates of interest that may be charged by the purchasers of the Title I loans will convey with the loans. When the Department accepted ownership of these loans, which generally carry high interest rates, it assessed interest at the lesser of the rate specified in the loan or the United States Treasury's current value of funds rate in effect on the date the Title I insurance claim was paid by the Department. See 24 CFR 201.62(a). Purchasers of defaulted Title I loans will be required to charge interest at no greater rate than that charged by the Department.

These are the essential terms of sale. The Sales Agreement will provide additional details. To ensure a competitive bidding process, the terms of sale are not subject to negotiation.

Title I Defaulted Loan Sale Procedure

The Department selected competitive sealed bids as the method to sell the pools of defaulted Title I loans. This method of sale optimizes the Department's return on the sale of these Title I loans, affords the greatest opportunity for all interested parties to bid on the defaulted Title I loans, and provides the quickest and most efficient vehicle for the Department to dispose of the pools of defaulted Title I loans.

Security Interests

Manufactured home loans are unsecured. These loans were secured when made, but the collateral was repossessed by the lenders, and the debts owed to the Department on these loans represents the deficiency after deducting the greater of the assessed value or the sale price from the unpaid principal balance of the loans, and adding certain expenses incurred by the lenders.

Property improvement loans may or may not be secured. The regulations require that any property improvement loan over a specified dollar amount must be secured by a deed of trust or a mortgage or, in Texas, a mechanic's or materialman's lien. This dollar amount has been, at various times, $2,500, $5,000, and $7,500.

In addition, lenders could require security for loans below those amounts. Therefore, many of the property improvement loans may be accompanied by security instruments. The liens are usually second liens, but in some cases may be first liens, and in others may be in third or even lower position. Many of the liens represented by these security instruments may have been extinguished due to foreclosures of superior liens. The Department makes no representation as to the status or validity of any lien obtained as security for a Title I loan.

Scope of Notice

This notice applies to the Title I Defaulted Loan Sale, and does not establish Departmental procedures for the sale of other loans, mortgage loans, or servicing interests. If there are any conflicts between the Notice and the Bid Package, the contents of the Bid Package prevail.

Dated: September 8, 1995.

Jeanne K. Engel,

General Deputy Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 95–23396 Filed 9–20–95; 8:45 am]

BILLING CODE 4210–27–P

federal register

Thursday
September 21, 1995

Part XI

Department of Education

34 CFR Part 668

Student Assistance General Provisions; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840–AB44

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the Student Assistance General Provisions. These amendments are necessary to implement the Student Right-to-Know Act, as amended by the Higher Education Technical Amendments of 1991 and the Higher Education Technical Amendments of 1993. The proposed regulations would require an institution that participates in any student assistance program under Title IV of the Higher Education Act of 1965, as amended (title IV, HEA program) to disclose information about graduation rates to current and prospective students. The proposed regulations would also require an institution that participates in any title IV, HEA program and awards athletically related student aid to provide certain types of data regarding the institution's student population, and the graduation rates of categories of student-athletes, to potential student-athletes and to the athletes' parents, coaches, and high school guidance counselors.

DATES: Comments must be received by October 25, 1995.

ADDRESSES: All comments concerning these proposed regulations should be addressed to: Ms. Paula Husselmann, U.S. Department of Education, P.O. Box 23272, Washington, DC 20026–3272, or to the following internet address: srtk@ed.gov.

To ensure that public comments have maximum effect in developing the final regulations, the Department urges that each comment clearly identify the specific section or sections of the regulations that the comment addresses and that comments be in the same order as the regulations.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. A copy of those comments may also be sent to the Department representative named in the above paragraph.

FOR FURTHER INFORMATION CONTACT: Ms. Paula Husselmann or Mr. David Lorenzo, U.S. Department of Education, 600 Independence Avenue, SW., ROB–3, Room 3045, Washington, DC 20202–5346. Telephone: (202) 708–7888. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Student Assistance General Provisions (34 CFR part 668) apply to all institutions that participate in the student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (HEA). The proposed changes in these regulations are necessary to implement changes to the HEA made by the Student Right-to-Know Act, Public Law 101–542, as amended by the Higher Education Technical Amendments of 1991, Public Law 102–26, and the Higher Education Technical Amendments of 1993, Public Law 103–208. The Secretary published a proposed rule on July 10, 1992 to implement the Student Right-to-Know and Campus Security Act. Over three hundred commenters responded to those proposed rules. Final regulations implementing the Campus Security Act were published separately on April 29, 1994.

This second proposed rule incorporates a number of recommendations submitted by the higher education community in response to the first proposed rule. In addition, this second proposed rule is published in response to comments expressed in many meetings with the higher education community concerning the implementation of the various graduation rate requirements mandated by the Higher Education Amendments of 1992, Public Law 102–325.

The HEA, as amended by Public Law 102–325, uses completion or graduation rates for administering provisions of the statute beyond those governing student consumerism. The July 10, 1992 NPRM proposed a rigorous, standardized methodology so that the same data could be used for purposes of the Student Right-to-Know regulations, the State Postsecondary Review Program, and regulations governing institutional eligibility for short-term vocational programs. However, Congress has rescinded funding for the State Postsecondary Review Program and has not proposed funding for future years. Unlike the provisions of the Student Right-to-Know Act, the statutory requirements for completion or graduation rate data for institutional eligibility purposes do not apply to all schools that participate in title IV, HEA programs. The Secretary has therefore decided that this proposed rule would address only the calculation of completion or graduation rates for purposes of the consumer information requirements of the Student Right-to-Know Act, and that these proposed rules would be more flexible than the July 10, 1992 NPRM.

The Secretary appreciates that some members of the higher education community favor the promulgation of a single valid methodological approach that would cover all the Student Assistance General Provisions regulations that require the calculation of completion or graduation rates. The Secretary believes, however, that the flexible approach and narrow scope of these proposed rules are appropriate. The Student Right-to-Know statute only requires completion or graduation rate calculations for consumer information purposes, so the scope of these proposed regulations is consistent with the law. The relative lack of methodological prescription in the statute means that the more prescriptive approach needed to generate completion or graduation rate calculations for other purposes would not be required by this law. The separation of these regulations governing student consumer information requirements from other regulations also makes it easier for the Department to meet the requirements of Executive Order 12866 to regulate flexibly and minimize burden on institutions. Finally, the Secretary solicits comments on whether the guidance these proposed regulations would provide is sufficient to generate useful data for the student consumer information purposes outlined in the statute, and on ways in which these proposed rules might be improved.

Given the flexible and limited approach the Secretary has adopted, the Secretary also, in the preparation of final regulations, wants to strike an appropriate balance among several important but sometimes competing aims related to these issues. First, the Secretary wants to balance the need to preserve flexibility with the need to avoid requiring institutions to use different methodologies when calculating completion or graduation rates to satisfy the requirements of this statute and other statutes and regulations. Second, the Secretary wants to balance the need to regulate institutions within the current level of technology and available information while preserving the flexibility to anticipate future developments. The Secretary foresees that institutions' ability to gather information and measure completion or graduation rates

will evolve and improve in the future. Such developments might lead to the identification and adoption of more rigorous methodologies for calculating completion or graduation rates for other regulatory purposes. If such methodologies are identified and adopted, the Secretary will look at the possibility of allowing institutions to use those methodologies to satisfy the requirements of the Student Right-to-Know statute as well as the requirements of other statutes and regulations.

In this regard the Secretary asks for comments on possible ways that consistency might be attained and overall burden reduced in light of the different purposes to which completion or graduation rate calculations are used in the Student Assistance General Provisions regulations. The Secretary also asks for comments on whether these proposed regulations strike the appropriate balance between flexibility and duplication of effort, and between current conditions and future developments in technology and information management, and how these regulations might be improved to better address these issues.

Preparation of Proposed Regulations

The Secretary has formulated these proposed regulations in accordance with Executive Order 12866, the Administration's initiative on regulatory reinvention, and the Department's own Principles for Regulating.

The Secretary believes that the Student Right-to-Know Act establishes important consumer information disclosure standards for institutions. In proposing these regulations, the Secretary's goal is to ensure that institutions provide consistent and useful information on completion and graduation rates. With this information in hand, the Secretary believes that students and student-athletes can make better, more informed choices when they choose a postsecondary institution.

The Secretary believes these proposed regulations strike an appropriate balance between establishing a basic level of useful consumer information for students, and keeping the burden on institutions to a minimum. However, the Secretary solicits comments on ways to reach both the goal of providing useful consumer information and the goal of keeping burden on institutions to a minimum, and on whether these proposed regulations are successful in meeting both goals.

Summary of the Proposed Regulations

The following is a summary of the regulations that the Secretary proposes to implement the Student Right-to-Know Act:

Section 668.41 Reporting and disclosure of information

Public Law 101–542 expands the types of ''consumer information'' that institutions must disclose to students to include completion or graduation rates. The statute and § 668.41(a)(3) of these regulations require an institution to update this information annually, and to make that updated information readily available, through appropriate publications and mailings, to both current and prospective students. The statute also requires an institution to disclose the information to prospective students before they enroll or enter into any financial obligation with the institution. The statute defines a prospective student as ''an individual who has contacted an eligible institution requesting information concerning admission to that institution.'' The Secretary also encourages institutions to make the rates available to secondary schools and guidance counselors so they have the information needed to advise student and parent consumers.

The Secretary invites comments on the differences between the reporting requirements contained in these proposed regulations and those contained in the Campus Security Act final regulations, with regard to where the institutions should publish this information, and whether the Department should regulate the placement of information in publications.

With respect to potential student-athletes, the statute and § 668.41(b) require that institutions that award athletically related student aid develop an annual, updated report containing information regarding the graduation rates of athletes, categorized by race, gender, and sport, as well as other data regarding the institution's student profile. The statute, and these proposed regulations, also require that institutions provide this report not only to the prospective student-athlete, but also to his or her parents, coach, and guidance counselor when the institution offers a potential student-athlete some form of athletically related student aid. The statute, and these regulations, define athletically related student aid as ''any scholarship, grant, or other form of financial assistance, offered by an institution, the terms of which require the recipient to participate in a program of intercollegiate athletics at the institution in order to receive that assistance.''

The statute, and § 668.41(b)(2) of these regulations, require that institutions provide a copy of this report on the completion or graduation rates of student-athletes to the Secretary by every July 1, beginning July 1, 1997.

The Secretary is proposing the following definitions in § 668.41(c) of these regulations:

The Secretary proposes to define ''full-time'' to mean the student workload, measured in credit or clock hours, that the institution consistently designates as a full-time workload. The Secretary is proposing this definition rather than the definition found elsewhere in the student assistance general provisions, in 34 CFR 668.2, to allow institutions greater flexibility in establishing the group of entering students on which the graduation rate is based. The definition of ''full-time'' in § 668.2 is designed for the narrow purpose of calculating award amounts for title IV, HEA program purposes; the Secretary proposes that institutions have wider latitude in defining ''full-time'' for this purpose than is provided by that definition.

The Secretary emphasizes, however, that this flexibility does not allow institutions to create new definitions of ''full-time'' for use only for purposes of these calculations. The Secretary also expects that the institution's customary definition of ''full-time'' is located in publications widely available to students. The Secretary solicits comment as to the utility of requiring an institution to supply its definition of ''full-time'' in the completion or graduation rate information it discloses so that students will have information about the different underlying components that contribute to a final completion or graduation rate.

These regulations would define the statutory term ''normal time'' as the minimum length of time necessary for a full-time student, continuously attending the institution, to complete a certificate or degree program. Many students do not complete or graduate within this definition of normal time for a variety of reasons, for example, family responsibilities, the need to work to earn income, the need for remediation, or changes in academic program or goals. An institution's completion or graduation rate may be influenced by varying factors, such as open admission requirements and student profiles. But the Secretary believes it was the intent of Congress in using the term ''normal time'' in the statute to mean a minimal length of time, rather than an average length of time, and that Congress meant to address the issues discussed above when it set the limit for counting

completers or graduates at 150% of normal time.

These regulations also contain the statutory definitions of the terms ''athletically related student aid'' and ''prospective students''.

Section 668.46 Report on Completion/Graduation Rate

This new section of the regulations would incorporate section 485(a)(1)(L) of the HEA, which requires an institution to disclose the completion or graduation rate of certificate- or degree-seeking, full-time, undergraduate students entering the institution. To promote flexibility and reduce regulatory burden, the Secretary is proposing that each institution have discretion to define the terms ''certificate- or degree-seeking students'' and ''undergraduate students'' for purposes of these regulations, but expects that the definitions it uses for these terms will be those it customarily employs. The Secretary solicits comment as to the utility of requiring an institution to supply its definition of ''full-time'' in the completion or graduation rate information it discloses so that students will have information about the different underlying components that contribute to a final completion or graduation rate.

Institutions are required by the statute to base their graduation rate on the group of students who enter between each July 1 and June 30, beginning with students who enter on or after July 1, 1996. This is reflected in §§ 668.46(a) and 668.46(a)(1)(i). An institution may arrive at this rate by counting all the graduates or completers among all the students who enter for this entire time period (year-long data), or by counting those in a portion of this time period (e.g., fall enrollment) who complete or graduate and then extrapolate from those data a final rate. In this regard, the Secretary only requires that the institution's methodology be reasonable, and that the completion or graduation rate yielded by that methodology represent an accurate description of the completion or graduation rate at the institution. However, the Secretary invites comments on this proposal, and particularly wishes to hear the views of the higher education community with regard to issues of comparability between those institutions that use fall cohorts, and those institutions that count all students who enter during the year.

The Department will publish a sample methodology that institutions may use to satisfy the requirements of this statute, and will work with the higher education community to identify other satisfactory methodologies.

With regard to the statutory provision that institutions base their graduation rate on students who ''enter'' between every July 1 and June 30, the Department's July 10, 1992 NPRM would have excluded transfer students from the completion or graduation rate calculation, on the grounds that those students were not ''first-time students.'' The Secretary received comments from the higher education community that failure to consider transfer students in an institution's completion or graduation rate did not accurately reflect the true completion or graduation rate for institutions that admit a considerable number of transfer students. In light of these comments, the Secretary proposes to require the inclusion of transfer students—as well as first-time students—in the denominator of the institution's completion or graduation rate fraction.

Thus, the Secretary proposes in § 668.46(a)(1)(ii) of these regulations that ''entering students'' include both first-time students and students who enter the institution by transfer. The Secretary also believes that for both first-time and transfer students, ''enter'' would mean a student's attendance of at least one day of class.

The concept of ''entering'' raises in addition the question of how to track students' performance. The July 10, 1992 NPRM proposed for institutions without continuous enrollment the tracking of first-time students entering in the fall, as defined by the Integrated Postsecondary Educational Data System (IPEDS), or, for institutions with continuous enrollment, the tracking of first-time students entering between July and September. These proposed regulations do not prescribe any specific tracking methodology. Instead, these regulations allow institutions the flexibility to choose the methodology that best suits the institution's circumstances, including tracking on a student by student basis, on a program by program basis, or on a cohort basis, so long as that methodology (a) is applied to a population of students based on the group of full-time, certificate- or degree-seeking students who enter between every July 1 and June 30; (b) is applied to both first-time students and transfer students, as discussed above; and (c) is reasonable and generates an accurate completion or graduation rate for the group of students described by the statute.

Nor do these regulations *per se* propose that institutions track students continuously during 150% of normal time for completion or graduation from their respective programs. These regulations only propose that an institution take a reasonable methodological approach to tracking students for purposes of calculating the completion or graduation rates required by the statute. One reasonable approach an institution may choose to take is to establish a cohort for a given year and look back after 150% of normal time has elapsed to see how many students in that cohort completed, graduated, or transferred to a program for which the student's prior program provided substantial preparation. This process entails no individual tracking and keeps administrative burden to a minimum. The Secretary plans to disseminate non-binding guidance at a later date that will contain a model methodology for tracking students that institutions may use (but will not be required to use) to satisfy the requirements of the statute and these regulations.

With regard to the issue of tracking, the Secretary is concerned that the goals of providing useful consumer information and of providing institutional flexibility both be met in these regulations, and solicits comments concerning how both these goals may be accomplished, and whether this portion of the proposed regulations does in fact accomplish both.

The Secretary is cognizant that tracking students who enter an institution creates particular kinds of administrative burdens on some schools. In view of these concerns, and the lack of statutory requirements on this point, the Secretary does not propose to regulate how institutions must track or place transfer students, but rather proposes that institutions adopt a reasonable approach for tracking transfer students, and placing them in groups of students that make up the denominators of particular completion or graduation rate fractions. However, the Secretary expects institutions to place a transfer student in the group of students that most closely matches the transfer student's academic status. For example, the Secretary would not deem it reasonable for an institution that offers only four-year programs to place a transfer student that it classifies academically as a junior in a group of students that it classifies as freshmen. The Secretary solicits comments on this issue, especially with regard to possible abuses, and whether the Department should include in the final regulations specific guidance regarding the placement of transfer students.

Section 668.46(a)(2)(i) of these regulations proposes that an institution disclose its first graduation rate no later than the October 1st following the

lapsing of 150% of normal time for all certificate- or degree-seeking, full-time undergraduate students who enter the institution between July 1, 1996 and June 30, 1997. If an institution offers programs of varying lengths, these regulations allow the institution to disclose its graduation rate no later than the October 1st following the lapse of 150% of normal time for its longest program. An institution may report earlier if it wishes, or on a program by program basis. The Secretary would expect, however, that an institution would report on the basis of the length of its predominant program, ''predominant'' being measured by the standards of both the number of programs of a particular length, and the number of students in programs of a particular length. The Secretary also solicits comments on the entire issue of reporting dates, and how the Secretary should balance flexibility in reporting with students' need for timely consumer information.

While these proposed regulations would not require institutions to provide information on groups of students who enter before July 1, 1996, the Secretary encourages institutions to disclose the completion or graduation rates for earlier groups. If an institution does disclose information on earlier groups, it should use the statutory methodology described below for counting the students it places in the completion or graduation rate denominator.

Section 668.46(a)(2)(ii) of these regulations proposes that an institution subsequently disclose its graduation rate no later than the October 1st following the lapsing of 150% of normal time for all certificate- or degree-seeking, full-time undergraduate students who enter between every July 1 and June 30. This date represents the latest time that an institution may disclose its graduation rate for that group, except in cases where 150% of normal time elapses on a date between July 1 and October 1. In those cases the Secretary will allow institutions to report no later than the following October 1.

In all cases, these regulations allow an institution to report earlier than the latest reporting date described above. For example, an institution may choose to report before the lapse of 150% of normal time. And, as discussed above, an institution that has programs of different lengths may choose to report on the basis of 150% of the normal time for its longest program, or a program other than its longest program, subject to the Secretary's expectations on this matter regarding the institution's ''predominant'' programs. But regardless of the length of the program on which the institution bases its disclosure date, each student would still be limited to 150% of normal time for his or her program to complete, graduate or transfer in order to count in the numerator of the institution's completion or graduation rate calculation. For example, the students enrolled in a two-year program at an institution would receive three years to complete or graduate in order to count as completers or graduates for these purposes, and students in a year-long program at the same institution would only receive eighteen months to complete or graduate, even if the institution bases its disclosure date on 150% of the normal time for the two-year program.

Under the flexible provisions of these regulations, an institution would have to decide the following: (a) Whether it will track students on a cohort basis, a program by program basis, or an individual basis; (b) whether its methodology will track the entire group of students who enter between July 1 and June 30, or will track some appropriate portion (e.g., fall enrollment); and (c) the length of the program on which the reporting date will be based.

For example, suppose an institution (a) uses a cohort methodology; (b) uses a fall only cohort, and admits students in the fall up to September 1; and (c) offers only four-year programs on a fall and spring semester schedule. The institution would tag students who enter during the fall of 1996, allow 150% of normal time to elapse (six years), and disclose its first graduation rate no later than October 1, 2002. That rate would be based on the percentage of students in the original cohort who completed or graduated no later than the end of the institution's sixth academic year at the end of the spring semester of 2002. If the institution had chosen to track the cohort of students who entered up to the beginning of the spring semester of 1997, rather than the fall only cohort, disclosure would take place no later than October 1, 2003, and would include all students who completed, graduated, or transferred as of the end of the fall semester of 2002.

If an institution (a) tracked students on a student by student basis, (b) tracked all students who entered between July 1 and June 30, and (c) offered two-year associate degree programs only, the latest that institution could disclose a graduation rate for students entering the institution between July 1, 1996 and June 30, 1997 would be October 1, 2000. This would allow 150% of normal time—that is, three years—to elapse for all students who entered up to June 30, 1997 and would include in the numerator of the fraction all students in the group who completed, graduated, or transferred by June 30, 2000.

If an institution (a) tracked on a program by program basis, (b) offered six-month programs, and (c) tracked students admitted to programs between July 1 and June 30, the last class entering the program by June 30, 1997 would complete 150% of normal time in March, 1998, and the institution would disclose its completion or graduation rate information on the entire group no later than October 1, l998, reflecting students who completed, graduated, or transferred no later than the end of March 1998 (nine months after the beginning of the program).

Section 668.46(b)(1) of the proposed rules follows the statute in specifying that institutions count a student as having completed or graduated from his or her program only if the student completed or graduated from his or her program within 150% of the normal time for completion or graduation from that program, or, within that time frame, subsequently enrolled in any program of an eligible institution for which the prior program provided substantial preparation.

The Secretary is proposing institutional flexibility with respect to the determination of substantial preparation for transferring students, with the exception that the student must be in good academic standing at the time the student transfers to another eligible program. Each institution must document that substantial preparation has taken place in order to comply with the statute. However, unlike the provisions of the July 10, 1992 NPRM, the Secretary is not proposing regulations that specify the kinds of documentation an institution must collect as proof that a student has transferred. Rather, the Secretary asks for comments regarding which methods for documenting transfers the Department should accept as reasonable interpretations of the statute. For example, should the Department accept as sufficient proof of transfer a simple request that an academic transcript be sent to another institution? Or should the Department only accept a request made by an institution to which the student intends to transfer or has already transferred? The Secretary is also interested in comments proposing other methods for determining the number of students who transfer, other than a student by student count, that would fulfill the requirements of the statute. For example, should the

Department accept the use of a methodology by which an institution samples students who leave the institution and extrapolates from those data a transfer percentage reflecting the entire population?

Also in contrast with the July 10, 1992 NPRM, the Secretary does not propose in these regulations that the transferring student, in order to be counted as a completer or graduate, be required to enter a higher-level program. Several commenters on the earlier NPRM argued that counting only those students who transfer to higher-level programs unfairly penalizes institutions who prepared students to transfer to parallel or other programs. Since the statute only speaks to substantial preparation for a program, the Secretary would allow institutions to count as completers or graduates all transfers that the institution can document as transferring with substantial preparation. However, the Secretary solicits comments on whether this position sufficiently protects against potential abuses, and if there are alternative ways of providing relief in this area that may better protect against potential abuse.

In § 668.46(b)(1)(iii) the Secretary also proposes allowing institutions to count as a completer or graduate for these purposes a student who originally enrolled in a program longer than the program on which the institution bases its disclosure and who is still enrolled in that program and in good academic standing, so long as 150% of the normal time for completion or graduation for the student's program has not elapsed by the date the institution makes its completion or graduation rate information available. The Secretary believes that this is necessary to allow institutions to report on a basis earlier than 150% of normal time for their longest programs and not be penalized for their inability to count students who would complete or graduate from those longer programs. In this case, the Secretary believes that the value derived from encouraging an institution to report its completion or graduation rate information sooner rather than later outweighs any loss of precision that may arise from counting these students who are still enrolled in longer-term programs as completers or graduates. However, the Secretary reiterates the expectation that an institution use as the program on which it bases its reporting date a predominant or other program that best reflects the overall profile of the institution's program offerings.

The July 10, 1992 NPRM proposed the disclosure of what was essentially a persistence rate for all students until such time that the graduation rate could be disclosed. For institutions that wish to consider the disclosure of a persistence rate, the Secretary considers the use of a persistence rate as a reasonable proxy for a graduation rate until such time that the graduation rate can be disclosed. These proposed regulations, however, would not require that institutions disclose a persistence rate. The Secretary also notes that a persistence rate cannot substitute for the graduation rate mandated by the statute except in the limited circumstances regarding an enrolled student in a program longer than the program on which the institution's disclosure date is based, as described above.

The statute and § 668.46(b)(2) allow an institution to exclude certain students from the calculation of a graduation rate, namely, students who leave the institution to serve: In the Armed Forces; on official church mission assignments; and with a foreign aid service of the Federal Government, such as the Peace Corps. The Secretary also proposes in these regulations to allow an institution to exclude those students who have died, or are unable to continue enrollment because of a permanent and total disability. The Secretary believes that institutions should not be required to include these students in their completion and graduation rate calculation because these students are unable to complete or graduate.

Some commenters on the July 10, 1992 NPRM believed that documenting these statutory exclusions would be difficult. The Secretary notes that the statute and these regulations do not require an institution to exclude these students; rather, an institution may choose whether to do so.

In § 668.46(c) of these regulations the Secretary proposes that institutions disclose as part of their completion or graduation rate the separate ratios of the following to the denominator of the completion or graduation rate fraction: (1) The number of completers or graduates included in the numerator; (2) the number of transfer students included in the numerator; and (3) the number of students in good academic standing still enrolled in programs longer than the program the institution uses as the basis of its disclosure date included in the numerator. The Secretary believes that it is useful and important for students and potential students to have this breakdown of the completion or graduation rate on hand, because it allows them to separate the completion rate of students who received a degree or certificate from the rate of those students who transfer, and from the rate of those who are still persisting in longer programs. The Secretary also believes that this reporting requirement is not burdensome, as it only requires the reporting of details that the institution would have assembled in order to calculate its completion or graduation rate.

Section 668.46(d) of these proposed rules contains the statutory provision that authorizes the Secretary to waive the requirements of this section if the institution belongs to an athletic association or conference that publishes substantially comparable information, and if the institution, or athletic association or conference, satisfies the Secretary that this information is accurate and substantially comparable. An institution is still responsible for making this information available under the provisions listed in § 668.41(a)(3) even if it does successfully request waivers for this portion of the regulations.

Section 668.49 Report on Completion or Graduation Rates for Student Athletes

This section incorporates section 485(e) of the HEA by requiring each institution that awards athletically related student aid to disclose the completion or graduation rates of various student populations at the institution, including student athletes, beginning July 1, 1997.

Specifically, the statute and § 668.49(a) require an institution that awards athletically related student aid to disclose to the potential student-athlete and his or her parents, high school coach, and guidance counselor the following information at the time the institution makes the potential student-athlete an offer of athletically related student aid: (1) The number of students at the institution, categorized by race and gender, and (2) the number of those students, by sport, who receive athletically related student aid, categorized by race and gender. The Secretary proposes that the data under these provisions be based on students who attended the institution during the year preceding the year in which the institution discloses the data. This section would also require an institution to supply information concerning the completion or graduation rate for each category (race, gender, and sport) of these students within the group defined in §§ 668.46(a)(1)(i) and 668.46(a)(1)(ii) of these proposed rules. It also requires the provision of a four-year average of the graduation rates of the group of students defined in §§ 668.46(a)(1)(i) and 668.46(a)(1)(ii), categorized by race and gender. An institution that has

completion or graduation rates for fewer than four classes would have to disclose the average rate of those classes for which it has rates.

For these purposes, a sport is defined by the statute, and § 668.49(a)(2) of these proposed regulations, as basketball; football; baseball; cross-country and track combined; and all other sports combined. A ''sport'' is also defined under the Equity in Athletics Disclosure Act, but it is defined in that statute to include all varsity teams. Normally the Secretary, as encouraged by the higher education community, prefers consistency of definitions under the student aid programs. However, in this case the Secretary has no discretionary authority under either statute to allow for consistent treatment. The Secretary does note that the institutions affected by this section of the proposed regulations are a subset of those covered by the Equity in Athletics Disclosure Act, and that they may obtain waivers to these provisions as described below.

In order to reduce burden on institutions, § 668.49(b) proposes that the calculation of graduation rates in this section follow the regulations contained in § 668.46(b) and (c).

The statute and § 668.49(c) of these proposed regulations provide that an institution may, if it so wishes, provide supplemental information to the Secretary, potential student-athletes, and others regarding: (1) The graduation rate of those students who transfer into the institution, and (2) the number of students who transfer out of the institution.

In addition, as under § 668.46(d), the Secretary is authorized to waive the requirements of this section if the institution belongs to an athletic association or conference that publishes substantially comparable information, and the institution, or conference or association applying on its behalf, satisfies the Secretary that this information is accurate and substantially comparable to the information this statute requires institutions to produce.

Executive Order 12866

l. Assessment of Costs and Benefits

These proposed regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order, the Secretary has assessed the potential costs and benefits of the regulatory action. The potential costs associated with the proposed regulations are those resulting from statutory requirements. Burdens specifically associated with information collection requirements are identified and explained elsewhere in the preamble under the heading Paperwork Reduction Act of 1995.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on how to minimize potential costs or to increase potential benefits resulting from these proposed regulations consistent with the purposes of the Student Right-to-Know Act.

2. Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the regulations clearly stated? (2) Do the regulations contain technical terms or other wording that interferes with their clarity? (3) Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a numbered heading: For example, § 668.46 *Report on completion or graduation rates*). (4) Is the description of the proposed regulating in the ''Supplementary Information'' section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand? (5) What else could the Department do to make the regulations easier to understand?

A copy of any comments that concern how the Department could make these proposed regulations easier to understand should be sent to Mr. Stanley M. Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue SW. (room 5121, FOB–10), Washington, DC 20202–2241.

Paperwork Reduction Act of 1995

Sections 668.41, 668.46 and 668.49 contain information collection requirements. As required by the Paperwork Reduction Act of 1995, the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Collection of Information: Student Right-to-Know.

These regulations affect the following types of entities eligible to participate in the Title IV, HEA programs: Educational institutions that are public or nonprofit institutions, and businesses and other for-profit institutions. The information to be collected includes the graduation rate of full-time, certificate- or degree-seeking undergraduate students entering the institution; the number of students attending the institution; the number of students attending the institution who received athletically related student aid, broken down by race and gender; the completion or graduation rate of full-time, certificate- or degree-seeking undergraduate students broken down by race and gender; the completion or graduation rate of full-time, certificate- or degree-seeking undergraduate students who received athletically related student aid, broken down by race and gender within each sport; and the average completion or graduation rate of full-time, certificate- or degree-seeking undergraduate students for the four most recent completing or graduating classes, broken down by race and gender. Institutions of higher education that participate in title IV, HEA programs will need and use the information required by these regulations to meet the eligibility requirements for participation in those programs that were added by the Student Right-to-Know Act. Institutions must make available to current and prospective students the information regarding completion or graduation rates of full-time, certificate- or degree-seeking, undergraduate students described above, and the general and completion or graduation rate information of students who received athletically related student aid to students offered athletically related student aid, and to the parents, coaches, and guidance counselors of those students. Institutions that award athletically related student aid must also provide a report to the Secretary of the completion or graduation rate information those institutions must provide to students offered athletically related student aid. The Secretary needs and uses this report to fulfill statutory requirements under the Student Right-to-Know Act to publish that information broken down by institution and athletic conference.

Information is to be collected and disclosed once each year for institutions covered by §§ 668.41(a)(3) and 668.46, and collected, disclosed, and reported to the Secretary once each year for institutions covered by §§ 668.41(b) and 668.49. Annual public reporting and recordkeeping burden is estimated to average 24.5 hours for each response for 8,000 respondents for § 668.46, and 24.5

hours for each response for 1,800 respondents for § 668.49. These hours include the time needed for searching existing data sources and gathering, maintaining and disclosing the data. Educational institutions that are public or nonprofit institutions or businesses or other for-profit institutions may participate in the Title IV, HEA programs. Institutions of higher education that participate in title IV, HEA programs will need and use the information required by these regulations to meet the eligibility requirements for participation in those programs that were added by the Student Right-to-Know Act. Thus, the total annual reporting and recordkeeping burden for this proposed collection is estimated to be 240,100 hours.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on these proposed collections of information in—

Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical use;

Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;

Enhancing the quality, usefulness, and clarity of the information to be collected; and

Minimizing the burden of the collection of information on those who are to respond, including 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.

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

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 3045, Regional Office Building 3, 7th and D Streets SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Student aid.

Dated: September 14, 1995.

Richard W. Riley,

Secretary of Education.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Stafford Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 State Student Incentive Grant Program; 84.268 Federal Direct Student Loan Program; and 84.272 National Intervention and Scholarship and Partnership Program. Catalog of Federal Domestic Assistance Number for the Presidential Access Scholarship Program has not been assigned.)

The Secretary proposes to amend part 668 of title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099c and 1141, unless otherwise noted.

2. Section 668.41 is amended by adding a new paragraph (a)(3); redesignating paragraph (b) as paragraph (c) and revising the newly redesignated paragraph (c); and by adding new paragraph (b) to read as follows:

§ 668.41 Scope and special definitions.

(a) * * *

(3) The institution's completion or graduation rate, produced in accordance with § 668.46.

(b)(1) Each institution participating in any title IV, HEA program, when it offers a potential student-athlete athletically related student aid, shall provide to the potential student-athlete, and his or her parents, high school coach, and guidance counselor, the information on graduation rates and other data produced in accordance with § 668.49.

(2) The institution shall also submit to the Secretary the report produced in accordance with § 668.49 by July 1, 1997 and by every July 1 thereafter.

(c) The following definitions apply to this subpart:

Athletically related student aid means any scholarship, grant, or other form of financial assistance, offered by an institution, the terms of which require the recipient to participate in a program of intercollegiate athletics at the institution in order to receive that assistance.

Full-time means the student workload, measured in credit or clock hours, that the institution customarily designates as a full-time workload.

Normal time means the amount of time necessary for a full-time student continuously attending the institution to complete a certificate or degree program.

Prospective students means individuals who have contacted an eligible institution requesting information concerning admission to that institution.

(Authority: 20 U.S.C. 1092)

3. Section 668.46 is added to subpart D, to read as follows:

§ 668.46 Information on completion or graduation rates.

(a) An institution shall prepare annually information regarding the completion or graduation rate of the certificate- or degree-seeking, full-time undergraduate students entering that institution on or after July 1, 1996.

(1)(i) An institution must base its completion or graduation rate calculation on the group of certificate- or degree-seeking, full-time undergraduate students who enter the institution between every July 1st and June 30th.

(ii) An institution shall count as entering students—

(A) First-time students; and

(B) Students who enter the institution by transfer.

(2)(i) Beginning with the group of students who enter the institution between July 1, 1996 and June 30, 1997,

an institution shall disclose its graduation or completion rate information no later than the October 1 immediately following the point in time when 150% of the normal time for completion or graduation has elapsed for all the students in the group.

(ii) An institution shall disclose no later than October 1 each year thereafter its completion or graduation rate information for each succeeding group of students who, as of the preceding June 30, completed or graduated within 150% of normal time for completion or graduation from their programs.

(b)(1) In calculating the completion or graduation rate under paragraph (a) of this section, an institution shall count as completed or graduated—

(i) Students who have completed or graduated within 150% of the normal time for completion or graduation from their program;

(ii) Students who, within 150% of the normal time for completion or graduation from the program in which the student was enrolled, subsequently enroll in any program of an eligible institution for which the prior program provides substantial preparation; or

(iii) Students who are in good standing and still enrolled in a program of greater length than the length of the program on which the institution bases its reporting date, unless 150% of the normal time for graduation or completion from that longer program has elapsed by the reporting date.

(2) For the purpose of calculating a completion or graduation rate, an institution may exclude from the calculation of completion or graduation rates students who—

(i) Have left school to serve in the Armed Forces;

(ii) Have left school to serve on official church missions;

(iii) Have left school to serve with a foreign aid service of the Federal Government, such as the Peace Corps; or

(iv) Are deceased, or totally and permanently disabled.

(c) In reporting the graduation or completion rate as calculated in paragraph (b) of this section, the institution shall, as part of its disclosure of its overall rate of graduation or completion rate, disclose the ratio of each of the following to the group:

(1) The number of students who graduated or completed, as described in paragraph (b)(1)(i) of this section.

(2) The number of students who transferred, as described in paragraph (b)(1)(ii) of this section.

(3) The number of students who are persisting in programs that are longer than the program on which the disclosure date is based, as described in paragraph (b)(1)(iii) of this section, if the institution includes these students in its graduation or completion rate.

(d)(1) The Secretary grants a waiver of the requirements of this section to any institution that is a member of an athletic association or conference that has voluntarily published completion or graduation rate data, or has agreed to publish data, that the Secretary determines are substantially comparable to the data required by this section.

(2) An institution, or athletic association or conference applying on behalf of an institution, that seeks a waiver under paragraph (d)(1) of this section shall submit a written application to the Secretary that explains why it believes the data the athletic association or conference publishes are accurate and substantially comparable to the information required by this section.

(Authority: 20 U.S.C. 1092)

4. Section 668.49 is added to subpart D, to read as follows:

§ 668.49 Report on completion or graduation rates for student-athletes

(a)(1) By July 1, 1997, and by every July 1 thereafter, each institution that is attended by students receiving athletically related student aid shall produce an annual report containing the following information:

(i) The number of students, categorized by race and gender, who attended that institution during the year prior to the submission of the report.

(ii) The number of students described in paragraph (a)(1)(i) of this section who received athletically related student aid, categorized by race and gender within each sport.

(iii) The completion or graduation rate of all the entering, certificate- or degree-seeking, full-time, undergraduate students described in § 668.46(a)(1)(i) and § 668.46(a)(1)(ii), categorized by race and gender.

(iv) The completion or graduation rate of the entering students described in § 668.46(a)(1)(i) and § 668.46(a)(1)(ii) who received athletically related student aid, categorized by race and gender within each sport.

(v) The average completion or graduation rate for the four most recent completing or graduating classes of entering students described in § 668.46(a)(1)(i) and § 668.46(a)(1)(ii), categorized by race and gender. If an institution has completion or graduation rates for fewer than four of those classes, it shall disclose the average rate of those classes for which it has rates.

(2) For purposes of this section, *sport* means—

(i) Basketball;

(ii) Football;

(iii) Baseball;

(iv) Cross-country and track combined; and

(v) All other sports combined.

(b) The provisions of § 668.46(b) and (c) apply for purposes of calculating the completion or graduation rates required under paragraphs (a)(1)(iii), (a)(1)(iv), and (a)(1)(v) of this section.

(c) Each institution of higher education described in paragraph (a) of this section may also provide to students and the Secretary supplemental information containing—

(i) The graduation or completion rate of the students who transferred into the institution; and

(ii) The number of students who transferred out of the institution.

(d) Section 668.46(d) applies for purposes of this section.

(Authority: 20 U.S.C. 1092)

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September 21, 1995

Part XII

Department of Agriculture

Agricultural Marketing Service

7 CFR Parts 55 and 59

Voluntary and Mandatory Egg and Egg Products Inspection; Final Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 55 and 59

[Docket No. PY–93–001]

RIN 0581–AA58

Voluntary and Mandatory Egg and Egg Products Inspection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations implementing the voluntary and mandatory egg and egg products inspection programs authorized by the Agricultural Marketing Act of 1946, as amended, and the Egg Products Inspection Act in response to new technology and current production and processing practices within the egg products industry. The revisions redefine dirty eggs; define nest-run eggs and washed ungraded eggs; and clarify the type of facilities and equipment to be supplied to the grader/inspector, officially identifying products, appeal procedures, equipment requirements, sanitizing shell eggs prior to breaking, and general operating procedures. The revisions also provide for less than quarterly visits to hatcheries and update the types of nonallowed discrimination in providing service.

EFFECTIVE DATE: October 23, 1995.

FOR FURTHER INFORMATION CONTACT: Larry W. Robinson, Chief, Grading Branch, 202/720–3271.

SUPPLEMENTARY INFORMATION: This rule has been determined to be not significant for purpose of Executive Order 12866 and therefore has not been reviewed by OMB.

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. It is not intended to have retroactive effect. This rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

The Administrator, Agricultural Marketing Service (AMS), has determined that this rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The information collection requirements contained in 7 CFR Parts 55 and 59 have been approved by the Office of Management and Budget and assigned OMB Control Numbers 0581–0146 and 0581–0113, respectively, under the Paperwork Reduction Act of 1980.

Background

The rule encompasses amendments for two separate, but related regulations. Regulations for voluntary inspection of egg products and grading (7 CFR Part 55) are authorized by the Agricultural Marketing Act of 1946, as amended, (AMA) (7 U.S.C. 1621–1627). These regulations cover several types of inspection and grading activities and product identification or certification which are not covered by the mandatory inspection regulations. Regulations for the mandatory inspection of eggs and egg products (7 CFR Part 59) are authorized by the Egg Products Inspection Act (EPIA) (21 U.S.C. 1034). The regulations require and provide for the continuous inspection of the processing of egg products and the control and disposition of restricted eggs. The EPIA and regulations were designed to provide a safe food source for the consuming public. The revisions will clarify and update the regulatory provisions commensurate with changes in industry technology and marketing practices, or are editorial in nature.

For the voluntary inspection program, the amendments update the types of prohibited discrimination (§ 55.11). They specify the facilities and equipment to be provided for sampling, weighing, and examination of product and the office space and equipment to be furnished (§ 55.95). Alternative work schedules also are provided (§ 55.96). The amendments provide for application of the official plant number at alternative locations on official labels (§ 55.310) and specify the permitted disposition of labels and packaging materials bearing official identification when inspection service is terminated by USDA (§ 55.330). The amendments also clarify appeal gradings and inspections including certificate issuance (§ 55.410 through § 55.460).

For the mandatory inspection program, the amendments redefine dirty eggs by deleting the term prominent stains. The amendments also define nest-run eggs and washed ungraded eggs (§ 59.5). The amendments also update the types of nonallowed discrimination (§ 59.17). The amendments provide a minimum of one visit each fiscal year to hatcheries since present operating practices pose minimal risk of incubator reject eggs or other restricted eggs from these operations entering consumer channels (§ 59.28). In official egg products plants, the amendments define or specify the following: time of inspection, basis of billing, and the type of facilities and equipment to be furnished by the plant (§§ 59.122 through 59.136). The amendments clarify the conditions under which labeling of product is to be corrected in the appeal procedure (§§ 59.300 through 59.360). They also clarify the labeling requirements with regard to approval, format, terminology, identification, and disposition (§§ 59.411 through 59.417). In addition, the amendments expand on equipment requirements and general plant operational procedures, including the shipment of nondenatured inedible, use of approved compounds, candling and transfer room facilities, and equipment and egg sanitizing requirements (§§ 59.502 through 59.515) due to changes in industry technology. The amendments also provide for liquid egg cooling and frozen egg defrosting with a definition of ''cold tap water'' (§§ 59.530 through 59.539). The disposition of restricted eggs and the labeling and sale of nest-run and washed ungraded eggs are further defined (§§ 59.720 through 59.801). The section dealing with imported shell eggs and egg products is revised to require that the date of production be provided for shell eggs, to exempt certain shell eggs imported for breaking from primary container labeling requirements, and to clarify the provisions for relabeling imported egg products. (§§ 59.900 through 59.956).

Comments

AMS published proposed revisions in the Federal Register (60 FR 20054) on April 24, 1995, to the Regulations Governing the Voluntary Inspection of Egg Products and Grading in 7 CFR part 55 and to the Regulations Governing the Inspection of Eggs and Egg Products in 7 CFR part 59. A 60-day comment period was provided. Effective May 28, 1995, the voluntary and mandatory egg products inspection program activities were transferred from AMS to the Food Safety and Inspection Service (FSIS). AMS retained authority under EPIA for the shell egg surveillance program. This program requires quarterly visits to egg packers and hatcheries to determine the disposition of certain types of undergrade eggs.

In response to the notice of proposed rulemaking, AMS received sixteen comments, the majority of which addressed the shell egg surveillance portion of the regulations. The comments were received from six industry members, six State Governments, two industry associations, one university, and one State Government organization.

Three commenters expressed overall support of the proposal.

Several commenters responded to the proposal to change the number of inspection visits to hatcheries from each calendar quarter to once each fiscal year. Three commenters supported the proposal; one commenter supported the proposal, but questioned if even one visit a year was necessary; one commenter recommended eliminating all visits to hatcheries; and three commenters objected to the change because they believed that the reduced visits would increase the likihood of incubator rejects and other restricted eggs entering consumer channels.

When the regulations implementing the EPIA were promulgated, the Agency determined that hatcheries should be subject to quarterly inspections similar to shell egg packers packing eggs for the ultimate consumer. Hatcheries, in addition to supplying chicks to the poultry industry traditionally sold surplus shell eggs to the consuming public. Likewise, before the enactment of the EPIA, hatcheries could legally process restricted eggs into egg products which were sold for human consumption.

As the industry evolved from many small independent hatcheries to a fewer number of very large integrated firms, the volume of shell eggs supplied to consumer channels by hatcheries has diminished significantly. Additionally, incidents involving hatcheries processing restricted eggs for human consumption are a rare exception.

The Agency also considered other issues when it proposed reducing the required number of inspection visits to hatcheries. These considerations included recent reviews of the quarterly inspection reports which revealed only a few minor violations, such as recordkeeping and labeling; the increased emphasis and importance of biosecurity at all hatchery facilities; and a potential cost savings which would result from fewer visits to hatcheries.

Under the revision, hatcheries will be subject to a minimum of one inspection visit each fiscal year. However, if at anytime, the Agency has reason to believe that a hatchery is in violation of the EPIA and its regulations, the Agency is authorized to perform as many inspection visits as necessary to assure that the hatchery or any egg handler, for that matter, is in compliance with the Act.

The Agency is not making any changes as a result of the comments made in response to this revision. The regulations authorize and the Agency believes that inspection visits to hatcheries are an important vital part of its regulatory responsibilities. The revision reduces the number of required visits to a frequency that is in accordance with the current makeup of the industry while not limiting the Agency's ability to perform inspection visits and administer the program.

One commenter recommended utilizing funds saved by the reduction of inspection visits to hatcheries to perform inspection visits to distributors.

We did not accept the recommendation. In 1987, the Agency discontinued inspection visits to wholesalers/distributors except in cases such as performing destination gradings or following up on an alleged violation of the EPIA. The Agency decided to concentrate its inspection activities on the egg handlers packing eggs destined for the ultimate consumer and does not plan to resume routine inspection visits to wholesalers/distributors at this time except on a case-by-case basis. Funds saved will be used to administer other segments of the shell egg surveillance program in the most cost effective manner.

One commenter recommended revising the proposed definition of washed ungraded eggs to include ''except some dirties or other obvious undergrades may have been removed.''

The Agency did not accept the recommendation because the suggested addition did not describe washed ungraded eggs. The suggested addition more correctly describes nest-run eggs for which it is appropriate to remove obvious dirties and undergrade eggs to facilitate egg grading and/or processing. Washed ungraded eggs do not require this exception because dirties and undergrades have been either already eliminated by the washing operation or previously removed if the eggs were packed as nest-run.

One commenter expressed support of the proposal to revise the definition of dirty eggs and recommended that containers used to transport washed ungraded eggs be labeled with the size of the eggs in the lot to facilitate the standardization of total solids of liquid whole eggs.

We did not accept the recommendation to allow washed ungraded shell eggs to be identified by size because any such further identification could indicate that the product was intended for consumer sales by obscuring the fact that the product was nest-run eggs which had not been graded for quality. The purpose of defining washed ungraded shell eggs was to categorize shell eggs from inline operation facilities which could not be defined as nest-run eggs because they had been washed. In many inline operations, shell eggs move through washing equipment as part of the collection process. Management determines at a later time if the washed product will be sized and graded for quality or sold as a washed ungraded product.

One commenter expressed support for the revisions but recommended that the addition of previously frozen egg or egg products to unpasteurized liquid be permitted for the purpose of complying with liquid cooling requirements.

The Agency did not accept this recommendation. The addition of previously frozen egg or egg products to liquid product (either pasteurized of unpasteurized) for the purpose of complying with liquid cooling requirements is not a recommended good manufacturing practice due to the potential for contamination of the resultant liquid. We find it inappropriate to approve a procedure which has the potential to contaminate a product even if the product is subject to further processing (pasteurization).

One commenter generally supported the revisions but questioned the elimination of ''or prominent stains'' from the definition of dirty egg.

The Agency is making this change to make the regulations consistent with the language of the EPIA. Since the EPIA does not define dirty by prominent stains, the regulations should not include a stain criteria in its definition.

The commenter also took exception to the removal of the last sentence of 7 CFR 59.155.

When the Egg Products Inspection Act took effect on July 1, 1971, the subject sentence provided plants the authority to maintain possession of any egg products they had processed prior to July 1, 1971, and their inauguration of service. The sentence is out-of-date and obsolete and will be removed from the regulations.

Additionally, the commenter suggested that the word ''place'' in new paragraph 7 CFR 59.350(a) was too restrictive and that we should consider using ''establishment'' instead.

We did not accept this recommendation. The term ''place'' generally means any location where product is located, whereas the term ''establishment'' generally means the location of a business or firm where product is located. Accordingly, ''place'' is the least restrictive term to use when describing the location of product.

The Agency is also withdrawing from the final rule the proposal to define a recognized laboratory and a split sample (§ 59.5), the proposal to provide an alternate operating schedule (§ 59.124), the proposal to specify the requirements

for blueprints, changes and approval (§ 59.146), and the proposal to specify the sampling of egg products (§ 59.580 (b), (d), and (e)). The current regulations for these sections will not be amended at this time pending further review by FSIS.

With the exception of the above changes, the regulatory text contained in the proposed rule is hereby adopted.

List of Subjects

7 CFR Part 55

Eggs and egg products, Food grades and standards, Food labeling, Reporting and recordkeeping requirements.

7 CFR Part 59

Eggs and egg products, Exports, Food grades and standards, Food labeling, Imports, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, title 7, Code of Federal Regulations, Parts 55 and 59 are amended as follows:

PART 55—REGULATIONS GOVERNING THE VOLUNTARY INSPECTION OF EGG PRODUCTS AND GRADING

1. The authority citation for Part 55 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

§ 55.11 [Amended]

2. Section 55.11 is amended by removing the words ''or national origin'' and adding in its place ''national origin, age or disability''.

3. Section 55.95 is revised to read as follows:

§ 55.95 Facilities and equipment to be furnished for use of graders and inspectors in performing service on a resident inspection basis.

(a) Facilities and equipment for proper sampling, weighing, examination of products and monitoring processing procedures shall be furnished by the official plant for use by inspectors and graders. Such facilities and equipment shall include but not be limited to a room or area suitable for sampling product, and acceptable candling light, flashlight, heavy duty, high speed drill with an eleven sixteenths-inch or larger bit of sufficient length to reach the bottom of containers used for frozen eggs, metal stem thermometer(s), test thermometer(s), stop watch, test weighing scale(s) and test weight(s), test kit for determining the bactericidal strength of sanitizing solutions, and stationary or adequately secured storage box or cage (capable of being locked only by the inspector) for holding official samples.

(b) Acceptable furnished office space and equipment, including but not being limited to, a desk, lockers or cabinets (equipped with a satisfactory locking device) suitable for the protection and storage of supplies, and with facilities for inspectors and graders to change clothing.

4. Section 55.96 is amended by adding a sentence before the last sentence and revising the last sentence of the section to read as follows:

§ 55.96 Schedule of operation of official plants.

* * * * *

As an alternative, the normal operating schedule shall consist of a continuous 10-hour period per day (excluding not to exceed 1 hour for lunch), 4 consecutive days per week, within the administrative workweek, Sunday through Saturday for each full shift required. Graders are to be given reasonable advance notice by management of any change in the hours that grading service is requested.

5. In § 55.310, paragraph (b) is revised to read as follows:

§ 55.310 Form of official identification symbol and inspection mark.

* * * * *

(b) The inspection marks which are permitted to be used on products shall be contained within the outline of a shield and with the wording and design set forth in Figure 2 of this section, except the plant number may be preceded by the letter ''P'' in lieu of the word ''plant''. Alternatively, it may be omitted from the official shield if applied on the container's principal display panel or other prominent location and preceded by the letter ''P'' or the word ''Plant''.

6. In section 55.330, paragraph (c) is revised to read as follows:

§ 55.330 Unauthorized use or disposition of approved labels.

* * * * *

(c) Upon termination of inspection service in an official plant pursuant to the regulations in this part, all labels or packaging material bearing official identification to be used to identify product packed by the plant shall either be destroyed, or have the official identification completely obliterated under the supervision of a USDA representative, or, if to be used at another location, modified in a manner acceptable to the Service.

7. In § 55.410, paragraph (b) is amended by removing the words ''in the regional office'' and adding in its place ''with the Regional Director in the region'', and revising the heading of paragraph (a) to read as follows:

§ 55.410 Where to file an appeal.

(a) *Appeal of resident grader's or inspector's grading or decision in an official plant.* * * *

8. Section 55.420 is revised to read as follows:

§ 55.420 How to file an appeal.

The request for an appeal grading or inspection or review of a grader's or inspector's decision may be made orally or in writing. If made orally, written confirmation may be required. The applicant shall clearly state the identity of the product, the decision which is questioned, and the reason(s) for requesting the appeal service. If such appeal request is based on the results stated on an official certificate, the original and all copies of the certificate available at the appeal grading or inspection site shall be provided to the appeal grader or inspector assigned to make the appeal grading or inspection.

§ 55.430 [Amended]

9. Section 55.430 is amended by adding after the words ''or not substantial,'' the words ''class, quality, quantity,'' and removing the word ''such'' after the words ''reason(s) for''.

10. Section 55.450 is amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c) and adding a new paragraph (a) to read as follows:

§ 55.450 Procedures for selecting appeal samples.

(a) Prohibition on movement of product. Products shall not have been moved from the place where the grading or inspection being appealed was performed and must have been maintained under adequate refrigeration, when applicable.

* * * * *

11. In § 55.460, the last sentence is revised to read as follows:

§ 55.460 Appeal certificates.

* * * * *

When the appeal grader or inspector assigns a different class to the lot or determines that a net weight shortage exists, the lot shall be retained pending correction of the labeling or approval of the product disposition by the National Supervisor.

PART 59—INSPECTION OF EGGS AND EGG PRODUCTS (EGG PRODUCTS INSPECTION ACT)

12. The authority citation for part 59 continues to read as follows:

Authority: 21 U.S.C. 1031–1056.

13. Section 59.5 is amended by revising the definition for the term ''Dirty egg'' or ''Dirties''; adding

alphabetically two new terms; and by removing the word ''salmonella'' and adding the word ''Salmonella'' in its place everywhere it appears in the Part.

§ 59.5 Terms defined.

* * * * *

Dirty egg or ''Dirties'' means an egg(s) that has an unbroken shell with adhering dirt or foreign material.

* * * * *

Nest-run eggs means eggs which are packed as they come from the production facilities without having been washed, sized and/or candled for quality, with the exception that some checks, dirties, or other obvious undergrades may have been removed.

* * * * *

Washed ungraded eggs means eggs which have been washed but not sized or segregated for quality.

* * * * *

§ 59.17 [Amended]

14. Section 59.17 is amended by removing the words ''or national origin'' and adding in its place ''national origin, age, or disability''.

15. Section 59.28 (a) (1) is amended by revising the last sentence and adding an additional sentence, to read as follows:

§ 59.28 Other inspections.

(a) * * *

(1) * * * In the case of shell egg packers packing eggs for the ultimate consumer (i.e., packed for direct use of household consumers, restaurants, institutions, etc.), such inspections shall be made a minimum of once each calendar quarter. Hatcheries are to be inspected a minimum of once each fiscal year.

* * * * *

16. Section 59.122 is revised to read as follows:

§ 59.122 Time of inspection.

The inspector who is to perform the inspection in an official plant shall be given reasonable advance notice by plant management of the hours when such inspection will be required.

17. Section 59.130 is amended by adding two sentences at the end of the section to read as follows:

§ 59.130 Basis of billing plants.

* * * In addition, fees will be charged and collected for certifications requested by and provided for the official plant that are not within the scope of these regulations. Unless otherwise provided in this part, the fees to be charged and collected for any service performed (other than an appeal) shall be based on the applicable rates specified in the Regulations Governing the Voluntary Inspection of Egg Products and Grading (7 CFR, 55.510 through 55.560).

18. In § 59.136, the heading and paragraph (a) are revised to read as follows:

§ 59.136 Facilities and equipment to be furnished by official plants for use of inspectors in performing service.

(a) Such facilities and equipment shall include but not be limited to a room or area suitable for sampling product, and acceptable candling light, flashlight, heavy duty, high speed drill with an eleven sixteenths-inch or larger bit of sufficient length to reach the bottom of containers used for frozen eggs, metal stem thermometer(s), test thermometer(s), stop watch, test weighing scale(s) and test weight(s), test kit for determining the bactericidal strength of sanitizing solutions, and stationary or adequately secured storage box or cage (capable of being locked only by the inspector) for holding official samples.

* * * * *

§ 59.155 [Amended]

19. Section 59.155 is amended by removing the last sentence of the section.

§ 59.300 [Amended]

20. Section 59.300 is amended by adding immediately after the word ''class'' the word '', quantity,''.

§ 59.310 [Amended]

21. In section 59.310, paragraph (a) is amended by removing the word ''from'' in the heading and replacing it with the word ''of'', and in the first sentence, adding a comma followed by the word ''quantity,'' immediately after the words ''determination of the class'', and adding a comma immediately after the words ''left such plant''.

22. Section 59.320 is revised to read as follows:

§ 59.320 How to file an appeal.

The request for an appeal inspection or review of an inspector's decision may be made orally or in writing. If made orally, written confirmation may be required. The applicant shall clearly state the identity of the product, the decision which is questioned, and the reason(s) for requesting the appeal service. If such appeal request is based on the results stated on an official certificate, the original and all copies of the certificate available at the appeal inspection site shall be provided to the inspector assigned to make the appeal inspection.

23. A new § 59.330 is added to read as follows:

§ 59.330 When an application for an appeal grading or inspection may be refused.

When it appears to the official with whom an appeal request is filed that the reasons given in the request are frivolous or not substantial, or that the condition of the product has undergone a material change since the original grading or inspection, or that the original lot has changed in some manner, or the Act or the regulations in this part have not been complied with, the applicant's request for the appeal inspection may be refused. In such case, the applicant shall be promptly notified of the reason(s) for such refusal.

24. Section 59.350 is amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c) and adding a new paragraph (a) to read as follows:

§ 59.350 Procedures for selecting appeal samples.

(a) Prohibition on movement of product. Products shall not have been moved from the place where the inspection being appealed was performed and must have been maintained under adequate refrigeration when applicable.

* * * * *

25. Section 59.360 is amended by revising the last sentence to read as follows:

§ 59.360 Appeal inspection certificates.

* * * When the appeal inspector assigns a different class to the lot or determines that a net weight shortage exists, the lot shall be retained pending correction of the labeling or approval of the product disposition by the National Supervisor.

26. Section 59.411 is amended by revising (b)(1) and (c)(3), revising the first sentence of (c)(1) and (e), and revising the last sentence of (e)(3) to read as follows:

§ 59.411 Requirement of formulas and approval of labels for use in official egg products plants.

* * * * *

(b) * * *

(1) A statement showing by their common or usual names the kinds and percentages of the ingredients comprising the egg product. A range may be given in cases where the percentages may vary from time to time. Formulas are to be expressed in terms of a liquid product except for products which are dry blended. Also, for products to be dried, the label may show the ingredients in the order of descending proportions by weight in the dried form. However, the formula

submitted must include the percentage of ingredients in both liquid and dried form.

* * * * *

(c) * * *

(1) The common or usual name, if any, and if the product is comprised of two or more ingredients, such ingredients shall be listed in the order of descending proportions by weight in the form in which the product is to be marketed (sold), except that ingredients in dried products (other than dry blended) may be listed in either liquid or dried form. * * *

* * * * *

(3) The lot number or approved alternative code number indicating date of production;

* * * * *

(e) Nutrition information may be included on labels used to identify egg products, providing such labeling complies with the provisions of 21 CFR part 101, promulgated under the Federal Food, Drug, and Cosmetic Act and the Fair Packaging and Labeling Act. * * *

* * * * *

(3) * * * All labels showing nutrition information or claims are subject to review by the Food and Drug Administration prior to approval by the Department.

* * * * *

27. In § 59.412, paragraph (b) is revised to read as follows:

§ 59.412 Form of official identification symbol and inspection mark.

* * * * *

(b) The inspection mark which is to be used on containers of edible egg products shall be contained within the outline of a shield and with the wording and design set forth in Figure 2 of this section, except the plant number may be preceded by the letter ''P'' in lieu of the word ''plant''. Alternatively, it may be omitted from the official shield if applied on the container's principal display panel or other prominent location and preceded by the letter ''P'' or the word ''Plant''.

* * * * *

28. Section 59.415 is amended by revising the second sentence of the introductory text to read as follows:

§ 59.415 Use of other official identification.

* * * The plant number may be omitted from the identification if applied elsewhere on the container's principal display panel or other prominent location and preceded by the letter ''P'' or the word ''plant''.

* * * * *

29. In § 59.417, paragraph (c) is revised to read as follows:

§ 59.417 Unauthorized use or disposition of approved labels.

* * * * *

(c) Upon termination of inspection service in an official plant pursuant to these regulations, all labels or packaging materials indicating product packed by the plant which bear official identification shall either be destroyed under the supervision of the Service or, if used in another location, modified in a manner acceptable to the Service before use.

30. In § 59.502, paragraph (b) is revised to read as follows:

§ 59.502 Equipment and utensils; PCB-containing equipment.

* * * * *

(b) Except as authorized by the Administrator, in new or remodeled equipment and equipment installations, the equipment and installation shall comply with the applicable 3–A or E–3–A Sanitary Standards and accepted practices currently in effect for such equipment.

* * * * *

31. In § 59.504, the last sentence of paragraph (c) and paragraph (h) are revised to read as follows:

§ 59.504 General operating procedures.

* * * * *

(c) * * * In addition, product shipped from the official plant for industrial use or animal food need not be denatured or decharacterized, provided, that such product is properly packaged, labeled, segregated, and inventory controls are maintained, and that such product is shipped under Government seal and certificate and received at the destination location by an inspector or grader as defined in this part.

* * * * *

(h) Only germicides, insecticides, rodenticides, detergents, or wetting agents or other similar compounds which will not deleteriously affect the eggs or egg products when used in an approved manner and which have been approved by the Administrator, may be used in an official plant. The identification, storage, and use of such compounds shall be in a manner approved by the Administrator.

* * * * *

32. In § 59.506, paragraph (d) is revised to read as follows:

§ 59.506 Candling and transfer-room facilities and equipment.

* * * * *

(d) Candling devices of an approved type shall be provided to enable candlers to detect loss, inedible, dirty eggs, and eggs other than chicken eggs.

* * * * *

33. Section 59.515 is amended by removing the last sentence of paragraph (a)(8), removing (a)(9), and removing paragraph (c).

34. A new § 59.516 is added to read as follows:

§ 59.516 Sanitizing and drying of shell eggs prior to breaking.

(a) Immediately prior to breaking, all shell eggs shall be spray rinsed with potable water containing an approved sanitizer of not less than 100 ppm nor more than 200 ppm of available chlorine or its equivalent. Alternative procedures may be approved by the Administrator in lieu of sanitizing shell eggs washed in the plant.

(b) Shell eggs shall be sufficiently dry at time of breaking to prevent contamination or adulteration of the liquid egg product from free moisture on the shell.

35. In § 59.530, paragraph (g) is added to read as follows:

§ 59.530 Liquid egg cooling.

* * * * *

(g) Previously frozen egg or egg product cannot be added to liquid product for the purpose of complying with liquid cooling requirements.

36. In § 59.539, paragraph (d)(1) is revised to read as follows:

§ 59.539 Defrosting operations.

* * * * *

(d) * * *

(1) Frozen eggs packed in metal or plastic containers may be placed in running tap water (70 F° or lower) without submersion to speed defrosting.

* * * * *

37. Section 59.580 is amended by revising paragraph (c) to read as follows:

§ 59.580 Laboratory tests and analyses.

* * * * *

(c) Results of all analyses and tests performed under paragraphs (a) and (b) of this section shall be provided to the inspector promptly upon receipt by the plant. If samples of pasteurized products or heat treated dried egg whites, in addition to those described in paragraphs (a) and (b) of this section, are analyzed for the presence of Salmonella, the plant shall immediately advise the inspector of any such samples which are determined to be Salmonella positive.

* * * * *

38. In § 59.720, paragraphs (a)(1) and (b) are revised to read as follows:

§ 59.720 Disposition of restricted eggs.

(a) * * *

(1) Checks and dirties shall be labeled in accordance with § 59.800 and shipped directly or indirectly to an official egg products plant for segregation and processing. Inedible and loss eggs shall not be intermingled in the same container with checks and dirties.

* * * * *

(b) Eggs which are packed for the ultimate consumer and which have been found to exceed the tolerance for restricted eggs permitted in the official standards for U.S. Consumer Grade B shall be identified as required in §§ 59.800 and 59.860 and shall be shipped directly or indirectly:

(1) To an official egg products plant for proper segregation and processing; or

(2) Be regraded so that they comply with the official standards; or

(3) Used as other than human food.

* * * * *

39. Section 59.800 is amended by revising the next to last sentence to read as follows:

§ 59.800 Identification of restricted eggs.

* * * When eggs are packed in immediate containers, e.g., cartons, sleeve packs, overwrapped 2½- or 3-dozen packs, etc., for sale to household consumers under the exemptions provided for in section 59.100 (c), or (f), they shall be deemed to be satisfactorily identified in accordance with the requirements of this part if such immediate containers bear the packer's name and address and the quality of the eggs. * * *

40. In § 59.801, the section is revised to read as follows:

§ 59.801 Nest run or washed ungraded eggs.

Nest run or washed ungraded eggs are exempt from the labeling provisions in § 59.800. However, when such eggs are packed and sold to consumers, they may not exceed the tolerance for restricted eggs permitted in the official standards for U.S. Consumer Grade B shell eggs.

41. In § 59.905, paragraph (a) is revised to read as follows:

§ 59.905 Importation of restricted eggs or eggs containing more restricted eggs than permitted in the official standards for U.S. Consumer Grade B.

(a) No containers of restricted egg(s) other than checks or dirties shall be imported into the United States. The shipping containers of such eggs shall be identified with the name, address, and country of origin of the exporter, and the date of pack and quality of the eggs (e.g., checks, or dirties) preceded by the word ''Imported'' or the statement ''Imported Restricted Eggs—For Processing Only In An Official USDA Plant,'' or ''Restricted Eggs—Not To Be Used As Human Food.'' Such identification shall be legible and conspicuous. Alternatively, for properly sealed and certified shipments of shell eggs imported for breaking at an official egg products plant, the shipping containers need not be labeled, provided that the shipment is segregated and controlled upon arrival at the destination breaking plant.

* * * * *

§ 59.915 [Amended]

42. In § 59.915, paragraph (b)(8) is amended by adding after the words ''shell eggs'' the words '', including date of pack,''.

§ 59.940 [Amended]

43. In § 59.940, the last sentence is removed.

44. In § 59.945, paragraph (b) is revised to read as follows:

§ 59.945 Foreign eggs and egg products offered for importation; reporting of findings to customs; handling of products refused entry.

* * * * *

(b) Consignees shall, at their own expense, return immediately to the collector of customs, in means of conveyance or packages sealed by the U.S. Department of Agriculture, any eggs or egg products received by them under this part which in any respect do not comply with this part.

* * * * *

45. Section 59.950 is amended by revising paragraphs (a)(3) and (a)(8), redesignating paragraph (b) as (c), and adding a new paragraph (b) to read as follows:

§ 59.950 Labeling of containers of eggs or egg products for importation.

(a) * * *

(3) The quality or description of shell eggs, including date of pack;

* * * * *

(8) The date of production and plant number of the plant at which the egg product was processed and/or packed.

(b) For properly sealed and certified shipments of shell eggs imported for breaking at an official egg products plant, the immediate containers need not be labeled, provided that the shipment is segregated and controlled upon arrival at the destination breaking plant.

* * * * *

46. Section 59.955 is amended by redesignating paragraph (b) as (c) and adding a new paragraph (b) to read as follows:

§ 59.955 Labeling of shipping containers of eggs or egg products for importation.

* * * * *

(b) For properly sealed and certified shipments of shell eggs imported for breaking at an official egg products plant, the shipping containers need not be labeled, provided that the shipment is segregated and controlled upon arrival at the destination breaking plant.

* * * * *

47. A new § 59.956 is added to read as follows:

§ 59.956 Relabeling of imported egg products.

(a) Egg products eligible for importation may be relabeled with an approved label under the supervision of an inspector at an official egg products plant or other location. The new label for such product shall indicate the country of origin except for products which are reprocessed (repasteurized, or in the case of dried products, dry blended with products produced in the United States) in an official egg products plant.

(b) The label for relabeled products must state the name, address, and zip code of the distributor, qualified by an appropriate term such as ''packed for'', ''distributed by'' or ''distributors''.

Dated: September 13, 1995.

Lon Hatamiya,

Administrator.

[FR Doc. 95–23193 Filed 9–20–95; 8:45 am]

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September 21, 1995

Part XIII

Department of Education

Part A of Title I of the Elementary and Secondary Education Act of 1965, as Amended; Notice

DEPARTMENT OF EDUCATION

Part A of Title I of the Elementary and Secondary Education Act of 1965, as amended

AGENCY: Department of Education.

ACTION: Notice exempting schoolwide programs under Part A of Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended, from statutory or regulatory requirements of other Federal education programs.

SUMMARY: The U.S. Secretary of Education (the Secretary) exempts schoolwide programs under Part A of Title I, ESEA, from complying with statutory or regulatory provisions of most Federal education programs, if the intent and purposes of those programs are met in the schoolwide program. This notice complements the final Title I regulations that were published in the Federal Register on July 3, 1995 (60 FR 34800). Those final regulations explain schoolwide programs in greater detail, including eligibility requirements and program components. This notice identifies which Federal education program funds and services may be incorporated in a schoolwide program and provides guidance on satisfying the intent and purposes of the programs included.

FOR FURTHER INFORMATION CONTACT: Mary Jean LeTendre, Director, Compensatory Education Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 600 Independence Avenue, SW (Portals Building, room 4400), Washington, D.C. 20202–6132. Telephone (202) 260–0826. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Schoolwide Programs in General

One of the most promising changes in the recent reauthorization of Title I, ESEA, is the expansion of schoolwide programs. A schoolwide program permits a school to use funds under Part A of Title I to upgrade the entire educational program of the school and to raise academic achievement for all children in the school, in contrast to a Title I targeted assistance program, in which Part A funds may be used only for supplementary educational services for eligible children. Under the reauthorized ESEA, this authority has now been expanded to include other Federal education funds (see the heading ''Inclusion of other Federal Funds'').

Schoolwide programs grew out of research about what makes schools work for disadvantaged students. Repeated findings show that the principals, teachers, and other staff in highly successful schools develop and carry out comprehensive schoolwide reform strategies and expect high academic achievement from every child. They establish safe environments that are conducive to learning and support enriched instruction in an expanded core of subjects. Over the years, researchers have documented that when the entire school is the target of change, schools serving even the most disadvantaged youth can achieve success.

Section 1114 of Title I authorizes a school with a concentration of poverty of at least 60 percent in the 1995–96 school year and 50 percent in subsequent years to use funds under Part A to operate a schoolwide program and upgrade the entire educational program in the school. Under section 1114(b) of Title I and § 200.8(d) of the final regulations, each schoolwide program must include a number of specific components. A schoolwide program school, for example, must conduct a comprehensive needs assessment of the entire school to determine the performance of its children in relation to the State's challenging content and performance standards; implement schoolwide reform strategies that are based on effective means of improving the achievement of children and that address the needs of all children in the school; use highly qualified professional staff; provide professional development for teachers and other staff; and implement strategies to increase parental involvement. Under a schoolwide program, a school is not required to identify particular children as eligible to receive Part A services, demonstrate that the services provided with Part A funds are supplemental to services that would otherwise be provided, or document that Part A funds are used to benefit only the intended beneficiaries.

Inclusion of Other Federal Education Funds

For the first time, a schoolwide program school may also use funds from other Federal education programs in addition to Part A funds to upgrade the entire educational program. Specifically, section 1114(a)(4) of Title I authorizes the Secretary, through publication of a notice in the Federal Register, to exempt schoolwide programs from statutory or regulatory provisions of any other noncompetitive, formula grant program or any discretionary grant program administered by the Secretary (other than formula or discretionary grant programs under the Individuals with Disabilities Education Act), if the intent and purposes of those programs are met.

This authority affords a schoolwide program school significant flexibility to serve better all children in the school and their families through comprehensive reforms of the entire instructional program, rather than by providing separate services to specific target populations. The Secretary emphasizes that a school with a schoolwide program must address the needs of all children in the school, particularly the needs of children who are members of the target population of any other Federal education program that is included in the schoolwide program.

Through this notice, the Secretary authorizes a schoolwide program school to use funds from most Federal education programs administered by the Secretary (including programs under the School-to-Work Opportunities Act, which is jointly administered by the Secretary and the U.S. Secretary of Labor) to support its schoolwide program. This authority also extends to services, materials, and equipment purchased with those funds and provided to the school. To provide schoolwide program schools maximum discretion in using resources from Federal education programs to their best advantage, the Secretary encourages local educational agencies (LEAs), to the extent possible, to provide Federal funds directly to those schools, rather than providing personnel, materials, or equipment.

Programs That May Be included

Except as provided below and consistent with this notice and section 1114 of Title I, the Secretary authorizes a schoolwide program school to use funds or services that the school receives from any Federal education program administered by the Secretary to upgrade its entire educational program. This authority does not apply to funds from the following types of programs:

- Formula or discretionary grant programs under the Individuals with Disabilities Education Act (excluded by section 1114(a)(4)(A) of Title I) and funds provided for eligible children with disabilities under section 8003(d) of the ESEA.
- Funds provided under the Schools Facilities Infrastructure Improvement

Act to ensure the health and safety of students through the repair, renovation, alteration, and construction of school facilities.

• Programs under Subpart 1 of Part D of Title I, ESEA, to State agencies for services to children in State institutions for neglected or delinquent children, unless funds are used for transition services involving a schoolwide program school.

• Programs under the Adult Education Act or Subpart 3 of Part A of Title IX of the ESEA (adult Indians), unless adult literacy services are integrated within a schoolwide program plan. Adult education funds could be included, for example, if they provide adult literacy as part of a family literacy activity under a schoolwide program plan.

• Funds awarded to institutions of higher education, unless those funds support elementary or secondary schools (e.g., the School, College, and University Partnerships program).

• Programs that are not administered by the Secretary, such as the National School Lunch Program and Head Start.

In addition, the authority to use funds under other programs in schoolwide program schools does not apply to funds that are allocated by formula to nonschoolwide program schools in an LEA. This is not an authority to redistribute funds among schools. Any redistribution of funds would have to be consistent with the authorizing statute.

Satisfying ''Intent and Purposes''

In general, a school that combines funds from other Federal education programs in a schoolwide program is not required to meet the statutory or regulatory requirements of those programs. Combining funds to meet the collective needs of the included programs allows schools to address needs in an integrated way and frees schools from documenting that a specific program dollar was spent only for a specific program activity. However, the school must meet the intent and purposes of the included programs to ensure that the needs of the intended beneficiaries of those programs are addressed by the school. In so doing, the school must be able to demonstrate that its schoolwide program contains sufficient activities to reasonably address those needs and thus meet the intent and purposes of each included program. However, the school need not document that it used funds from a particular program to meet the specific intent and purposes of that particular program.

The following examples illustrate how a schoolwide program could meet the intent and purposes of specific Federal education programs:

• A secondary school may use funds received under the Carl D. Perkins Vocational and Applied Technology Education Act to support its schoolwide program if its program improves vocational education in the school, for example, by integrating academic and vocational education, and its program improves access to vocational education for special populations in the school.

• A schoolwide program school may use funds received under the Dwight D. Eisenhower Professional Development program provided the school has a sustained and intensive high-quality professional development program for school staff in core academic subjects that is aligned with the State's content and performance standards, reflects recent research on teaching and learning, and incorporates methods and practices to meet the educational needs of diverse student populations.

• A schoolwide program school may use funds received under Subpart 1 of Part A of the Safe and Drug-Free Schools and Communities program provided the school has a comprehensive drug and violence prevention program designed for all students and employees to create a disciplined environment conducive to learning, prevent violence and promote school safety, prevent the use, possession, and distribution of tobacco, alcohol, and illegal drugs by students, and prevent the illegal use, possession, and distribution of those substances by employees.

• A school may use funds received under Subpart 1 of the Bilingual Education Act to support its schoolwide program provided the program implements a bilingual education or special alternative instruction program that reforms, restructures, and upgrades the programs and operations that serve limited-English proficient children and youth in the school.

• A secondary school may use funds received under the School-to-Work Opportunities Act to support its schoolwide program provided the program integrates school-based and work-based learning, establishes effective linkages between secondary and postsecondary education, and is part of a comprehensive State model school-to-work opportunities system that provides for the early selection of career majors and the awarding of skill certificates.

The Department will provide examples from schoolwide schools when they become available.

Requirements With Which a Schoolwide Program School Must comply.

Even though a schoolwide program school combines funds from other Federal programs in its schoolwide program and is thus freed from most statutory and regulatory requirements of those programs, the school and its LEA, as appropriate, must still comply with requirements applicable to those programs relating to—

• Health and safety requirements.

• Civil rights requirements. These requirements include Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Americans with Disabilities Act of 1990. In addition, if a schoolwide program school receives Magnet Schools Assistance funds, to eliminate, reduce, or prevent minority group isolation, the school must continue to operate under its desegregation plan.

• Gender equity requirements.

• Participation and involvement of parents and students. A schoolwide program school must implement extensive parent involvement requirements under Part A that would likely satisfy most, if not all, parent involvement requirements in other Federal education programs.

• Private school children, teachers, and other educational personnel. In other words, applicable requirements concerning the equitable participation of eligible private school children, teachers, and other educational personnel under other Federal education programs must be met even though funds from those programs are combined in schoolwide program schools.

• Maintenance of effort. For programs covered under the maintenance of effort requirements in section 14501 of the ESEA, those requirements would be met through participation in Part A.

• Comparability of services. For example, a secondary schoolwide program school within an LEA that receives funds under the Carl D. Perkins State Vocational and Applied Technology Education Program must be provided services from State and local funds that, taken as a whole, are at least comparable to the services being provided in other secondary schools or sites within the same LEA that are not being served with Perkins funds.

• Use of Federal funds to supplement, not supplant non-Federal funds. In other words, a schoolwide program school must receive at least the same amount of State and local funds that, in

the aggregate, it would have received in the absence of the schoolwide program, including funds needed to provide services that are required by law for children with disabilities and children with limited-English proficiency. The school, however, does not have to demonstrate that the specific services provided with those funds are supplemental to services that would have been provided in that school in the absence of the schoolwide program.

• Distribution of funds to State educational agencies (SEAs) and LEAs. In addition, a school must comply with the following requirements if it combines funds from these programs in its schoolwide program:

• Consistent with section 1306(b)(3) of Title I and § 200.8(c)(3)(ii)(B)(1) of the proposed Title I regulations, a schoolwide program school that combines funds received under Part C of Title I, ESEA, for the education of migratory children must, in consultation with parents of migratory children or organizations representing those parents, first address the identified needs of migratory children that result from the effects of their migratory lifestyle or are needed to permit those children to participate effectively in school and document that services to address those needs have been provided.

• Consistent with section 9115(c) of the ESEA and § 200.8(c)(3)(ii)(B)(2) of the Title I regulations, a schoolwide program school may combine funds received under Subpart 1 of Part A of Title IX of the ESEA regarding Indian education if the parent committee established by the LEA under section 9114(c)(4) of the ESEA approves the inclusion of those funds.

Cross-cutting Federal Requirements

There are requirements contained in the General Education Provisions Act and in the Education Department General Administrative Regulations that apply generally to Department of Education grants, including Title I. To the extent that these requirements affect activities in schools, they would also apply to a schoolwide program school by virtue of its participation in Title I. The consolidation of Department programs in a schoolwide program, however, would not add to these requirements or require that they be applied separately on a program-by-program basis.

Discretionary Grant Funds

In general, a schoolwide program school may combine funds it receives from discretionary (competitive) grants as well as from formula grants. If a schoolwide program school combines funds from discretionary grant programs, the school must still carry out the activities described in the application under which the funds were awarded. For example, if a schoolwide program is based in a school receiving Federal funds under the Magnet Schools Assistance program, the school must implement activities described in its plan to eliminate, reduce, or prevent minority group isolation. However, a schoolwide program school would not need to account separately for specific expenditures of the combined Federal funds. Although not required, the applicant LEA or school preferably should indicate in its application for discretionary funds that some or all of the funds would be used to support a schoolwide program and describe its activities accordingly. Moreover, if authorized by the program statute, the Department or an SEA could include in its selection criteria for a particular program extra points for conducting activities in a schoolwide program school. For example, an SEA could include such points when awarding subgrants under the Even Start Family Literacy program, which requires an SEA to give priority to applicants that target services to families in need of family literacy services residing in areas with high levels of poverty, illiteracy, or other such need-related factors, including projects that serve a high percentage of children to be served who reside in participating areas under Part A.

Limitations

The authority in this notice does not apply to nonschoolwide program schools that participate in Title I. Those schools must comply with all statutory and regulatory requirements that apply to funds or benefits they receive. This authority also does not relieve an LEA from complying with all requirements that do not affect the operation of a schoolwide program. For example, to the extent an LEA is required under the Stewart B. McKinney Homeless Assistance Act to designate a homeless liaison to ensure, among other things, that homeless children and youth enroll and succeed in school, the LEA would not be relieved of this requirement by virtue of operating one or more schoolwide programs.

Guidance and Technical Assistance

The Secretary intends to issue additional guidance on schoolwide programs in the near future. In addition, staff in the office of Compensatory Education Programs, in conjunction with staff in the other affected Federal program offices, are available to assist LEAs and schools operating schoolwide programs to implement the authority contained in this notice. If LEAs or schools have specific questions, they should contact Mary Jean LeTendre, Director, Compensatory Education Programs, as provided at the beginning of this notice.

National Assessment of Schoolwide Programs

The Department is directed by section 1501 of Title I to examine, in a national assessment of Title I programs, how well schools are providing participating children an enriched and accelerated educational program through schoolwide programs and how schoolwide programs are meeting the needs of children from migratory families. In this assessment, the Department will examine how the authority contained in this notice has been implemented.

Dated: September 15, 1995.

Richard W. Riley,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number 84.010, Improving Programs Operated by Local Educational Agencies)

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September 21, 1995

Part XIV

Department of Education

34 CFR Part 668

Student Assistance General Provisions; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840–AC17

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the Student Assistance General Provisions (General Provisions) regulations. The General Provisions regulations govern elements common to all the Federal Student Financial Aid programs authorized by Title IV of the Higher Education Act of 1965, as amended (HEA) (hereafter Title IV Programs). These amendments would modify the Secretary's Federal Family Education Loan (FFEL) Program default reduction initiative and implement default prevention measures in the William D. Ford Federal Direct Loan (Direct Loan) Program. These regulations would streamline the Secretary's ability to take limitation, suspension, and termination (L,S, and T) action against an institution and would prevent an institution from evading the consequences of a high FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate.

DATES: Comments must be received on or before October 31, 1995.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Mr. Douglas Laine, Program Specialist, Direct Loan Policy Group, Policy Development Division, U.S. Department of Education, P.O. Box 23272, Washington, DC 20026–3272. Comments may also be sent through the internet to DIRECT__LOANS@ED.GOV.

To ensure that public comments have maximum effect in developing the final regulations, the Department urges that each comment clearly identify the specific section or sections of the regulations that the comment addresses and that comments be in the same order as the regulations.

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. A copy of those comments may also be sent to the Department representative named in the preceding paragraph.

FOR FURTHER INFORMATION CONTACT: Mr. Douglas Laine, Program Specialist, Direct Loan Policy Group, Policy Development Division, U.S. Department of Education, 600 Independence Avenue, SW, room 3045, Regional Office Building 3, Washington, DC 20202–5400, telephone: (202) 708–9406. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

The Secretary is proposing to revise 34 CFR part 668 to enhance the Secretary's FFEL Program default reduction initiative and provide additional default prevention measures in the Direct Loan Program. The Secretary first published regulations to begin the FFEL Program default reduction initiative on June 5, 1989. This gave the Department the authority to take action to limit, suspend or terminate an institution's participation in the Title IV programs based on a high FFEL Program cohort default rate. The June 5, 1989 regulations provided that the Department may take L, S, and T action against an institution if it has an FFEL Program cohort default rate that exceeds 40 percent.

On July 19, 1991, the Secretary further expanded the default reduction initiative to reflect new legislation that made an institution ineligible to participate in the FFEL Program if that institution had a high FFEL Program cohort default rate for three consecutive years, unless the institution could demonstrate to the Secretary that exceptional mitigating circumstances would make the loss of eligibility inequitable. Currently, under that legislation, an institution is subject to the loss of eligibility if it has an FFEL Program cohort default rate that equals or exceeds 25 percent for three consecutive fiscal years. Under the exceptional mitigating circumstances criteria in the Department's regulations, an institution may appeal this loss of eligibility if it can demonstrate to the satisfaction of the Secretary that it has a completion and placement rate of at least 66.6 percent, and either less than 15 percent of its students borrow under the FFEL Program or at least 66.6 percent of its students come from economically disadvantaged backgrounds.

The Direct Loan Program was authorized by the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66) with the first loans made in July 1994. When the Direct Loan Program was authorized, the statute mandating the calculation of FFEL Program cohort default rates was not revised to include Direct Loan Program loans. Moreover, the statute authorizing the Direct Loan Program does not specifically require the Secretary to calculate a similar rate for institutions that participate in the Direct Loan Program or contain a specific provision under which an institution would lose its eligibility to participate in the Direct Loan Program based on a default rate. The Secretary has determined, however, that it is appropriate to establish a measurement similar to the FFEL cohort default rate in the Direct Loan Program. Therefore, the Secretary is proposing in regulations to define a measurement similar to the FFEL Program cohort default rate under the Direct Loan Program, a ''cohort rate'' for Direct Loans, and to establish similar institutional eligibility requirements based on the repayment of Direct Loans by the institution's former students. The Secretary is proposing this change because FFEL Program cohort default rates have been a useful measure of institutional performance and have provided the Secretary an effective means to reduce defaults by removing high default institutions from participation in the FFEL Program. The potential loss of eligibility to participate in the FFEL Program based on high FFEL Program cohort default rates provides a powerful incentive for institutions to keep their FFEL Program cohort default rates low. This has resulted in increased protection for students and taxpayers, and has improved the integrity of the FFEL Program.

As in the FFEL Program, the Secretary proposes that exceptional mitigating circumstances be taken into consideration in determining whether an institution may continue to participate in the Direct Loan Program on the basis of its cohort rate. Further, the Secretary is proposing to modify the regulations for the FFEL Program to simplify the cohort default rate appeal process and to establish fair and reasonable measures for exceptional mitigating circumstances, while reducing the substantial burden on institutions and the Department that exists under the current regulations. Exceptional mitigating circumstances under the Direct Loan and FFEL Programs would be the same.

Finally, to make the L, S, and T process more effective, the Secretary is proposing to streamline the current L, S, and T procedures and to limit the grounds on which the institution may appeal when the L, S, or T action is warranted by high default rates. The current L, S, and T procedures are exceedingly lengthy and have not effectively protected students and Federal taxpayers from institutions

whose high FFEL Program cohort default rates are evidence of abuse of the Title IV programs. Additionally, the Secretary is proposing to prescribe timeframes that would reduce the amount of time an L, S, and T action would take to complete. Finally, the Secretary is proposing to remove the ''Appendix D defense'' which contains measures for an institution to follow to help the institution to reduce its cohort default rate. The Secretary believes that the measures included in the Appendix D defense, while effective for helping an institution reduce its default rate, do not support the continuation of a high FFEL Program cohort default rate institution's participation in the Title IV programs. The Secretary is proposing that the only means by which an institution may successfully appeal an L, S, and T action against its participation in the Title IV programs is to demonstrate to the hearing officer that its FFEL Program cohort default rate, Direct Loan Program cohort rate, or if applicable, weighted average cohort rate, is inaccurate, and that a correct recalculation of the rate would result in the institution having a rate that is beneath the thresholds that make the institution subject to L, S, and T action.

Proposed Regulatory Changes

Due to the complex nature of these proposed regulations, a chart is provided in each major section of the preamble that provides an overview of the proposed changes.

Section 668.17 Default Reduction and Prevention Measures

L, S, and T Authority. The proposed regulations would provide the Secretary with the authority to take L, S, and T action against an institution if it has an FFEL Program cohort default rate, a Direct Loan Program cohort rate, or, if applicable, a weighted average cohort rate that is greater than 40 percent for a fiscal year. The Secretary is proposing this 40 percent threshold to make his authority to take L, S, and T action against an institution participating in the Direct Loan Program comparable with such authority under the FFEL Program.

The proposed regulations would also provide the Secretary with the authority to take L, S, and T action against an institution's participation in the FFEL Program if it has any combination of an FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, a weighted average cohort rate that equals or exceeds 25 percent for three consecutive fiscal years. Having a combination of these rates for three consecutive fiscal years is analogous to having FFEL Program cohort default rates that exceed the thresholds for three consecutive years. The Secretary is proposing this measure to prevent an institution that would not be eligible to participate in the Direct Loan Program based on consecutively high Direct Loan Program cohort rates or weighted average cohort rates from participating in the FFEL Program. The Secretary believes that this action is consistent with the statutory requirement that institutions with consecutively high default rates lose their eligibility to participate in the FFEL Program.

ACTION TAKEN AGAINST SCHOOLS BY TYPE OF RATE

Type of rate	Direct loan program schools	FFEL program schools
40+ percent FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate for one year.	L, S, and T for Title IV	L, S, and T for Title IV.
25 percent or greater Direct Loan Program cohort rate for three consecutive years.	Loss of eligibility for Direct Loan Program.	L, S, and T for FFEL Program.
25 percent or greater weighted average cohort rate for three consecutive years.	Loss of eligibility for Direct Loan Program.	L, S, and T for FFEL Program.

Direct Loan Program cohort rate and weighted average cohort rate. The Secretary proposes to calculate a Direct Loan Program cohort rate or weighted average cohort rate to use as a measure to determine if an institution should remain eligible to participate in the Direct Loan Program. The Secretary is proposing to use different formulas to calculate these rates for different sectors of institutions.

For a public institution, private nonprofit institution, or degree-granting proprietary institution, the Secretary proposes to calculate a Direct Loan Program cohort rate or weighted average cohort rate based on the number of an institution's current and former students who enter repayment on a Direct Loan in a fiscal year and who, by the end of the following fiscal year, are in default on those loans. This is the same formula the Secretary is required by section 435(a) of the HEA to use to calculate cohort default rates under the FFEL Program.

For non-degree-granting proprietary institutions, the Secretary is proposing to calculate Direct Loan Program cohort rates or weighted average cohort rates based on the percentage of students who enter repayment in a fiscal year and who, by the end of the following fiscal year, are either in default or are in repayment under the income contingent repayment (ICR) plan, and have scheduled monthly payments that are less than $15 per month, and that payment is less than the interest that is accruing on the loan (i.e., in negative amortization).

If there are both FFEL Program and Direct Loan Program loans entering repayment in the institution's cohort, the Secretary will calculate a weighted average cohort rate for the institution. As in the FFEL Program, the Secretary will base the Direct Loan Program cohort rate or weighted average cohort rate on borrowers, not loans. For example, if a student enters repayment on both FFEL Program and Direct Loan Program loans so as to be in the same cohort, the student will be counted only once in the calculation used to calculate the rate. However, an institution will continue to have an FFEL Program cohort default rate as long as it has former students entering repayment on FFEL Program loans. Such an institution will continue to be subject to loss of eligibility to participate in the FFEL Program or be subject to L, S, and T action based on its FFEL Program cohort default rate.

A ''weighted average'' cohort rate is calculated by taking the percentage of students who entered repayment on FFEL Program and Direct Loan Program loans in a fiscal year received for attendance at the institution (or on the portion of a loan made under the Federal Direct Consolidation Loan or Federal Consolidation Loan Programs that is used to repay those loans), who are in default before the end of the fiscal year immediately following the year in which they entered repayment, and, for non-degree-granting institutions, are in repayment under the income contingent

repayment plan at the end of that following fiscal year and have scheduled payments that are less than $15 per month and that payment results in negative amortization.

BORROWERS INCLUDED IN TYPES OF RATES

Type of institution	Type of rate	Defaulted borrowers	ICR component
Public, private-nonprofit, and degree-granting proprietary institutions.	FFEL Program Cohort Default Rate	Yes	No.
	Direct Loan Program Cohort Rate	Yes	No.
	Weighted Average Cohort Rate	Yes	No.
Non-Degree-Granting Proprietary Institutions.	FFEL Program Cohort Default Rate	Yes	No.
	Direct Loan Program Cohort Rate	Yes	Yes.
	Weighted Average Cohort Rate	Yes	Yes.

If an institution has less than 30 former students entering repayment in a fiscal year on Direct Loan and FFEL Program loans received at that institution, the Secretary will calculate the institution's Direct Loan Program cohort rate or weighted average cohort rate for that fiscal year based on the institution's former students who enter repayment on their Direct Loans or FFEL Program loans over the three most recent fiscal years.

A loan will be considered in default for purposes of a Direct Loan Program cohort rate or weighted average cohort rate for all institutions if a borrower or endorser has failed to make an installment payment when due provided that this failure has persisted for 270 days. The Secretary has chosen 270 days because this closely approximates the date a default claim is paid under the FFEL Program. The date a default claim is paid by a guaranty agency is used as the date the loan defaults for FFEL Program cohort default rates. A loan will not be considered in default if, after going into default, the borrower has made 12 consecutive on-time monthly payments under 34 CFR 685.211(e) on the loan before the end of the fiscal year following the fiscal year the loan entered repayment.

The Secretary has chosen to include a minimum payment component in defining the Direct Loan Program cohort rate and weighted average cohort rate for non-degree-granting proprietary institutions for several reasons. The Secretary believes that this is an appropriate performance-based measure to assess a borrower's ability to repay a student loan and the institution's quality of training. The Secretary is concerned that without such a measure an institution could have a low Direct Loan Program cohort rate or weighted average cohort rate when its former students are only making minimal payments on their loans. The Secretary believes that this measure is needed to prevent an institution from effectively avoiding the effects of its failure to provide appropriate training by encouraging its students to repay their loans under the ICR plan. Under the ICR plan, a borrower with a low income may have scheduled monthly payments that are very low or zero. The $15 payment rate was chosen because it is the approximate amount a borrower would have to pay if his or her income is at the poverty level as determined by the Department of Health and Human Services. The Secretary believes that if a sufficient proportion of borrower incomes is so low that the scheduled monthly payments for those borrowers under the ICR program are less than $15 per month and those payment amounts result in negative amortization, this is generally evidence that the institution has not provided those borrowers with the education or training needed to obtain gainful employment that can provide the borrowers with sufficient incomes to repay the student loans incurred to attend the institution. The Secretary believes that such loans would likely go into default if the ICR plan were not available. The negative amortization factor was included with the $15 dollar payment in order to exclude from the default calculation borrowers with incomes much higher than the poverty level who have small debts. The Secretary is proposing to use the minimum payment rate for non-degree-granting proprietary institutions because these institutions are in business to provide students with education or training needed to secure employment. A borrower's repayment schedule under the ICR plan will directly reflect the value of the education or training provided by the institution in the marketplace. Further, the former student borrowers of non-degree-granting proprietary institutions are at the highest risk of default among all the sectors of institutions and the Secretary believes that for this reason, the use of the ICR plan by former students of these institutions be closely monitored.

The Secretary invites public comment regarding the use of the minimum payment under the ICR plan that may be used for the Direct Loan Program cohort rate for certain sectors of institutions. In addition, the Secretary is interested in knowing if the public believes the Secretary should implement measures to prevent an institution from evading the proposed rules under which a Direct Loan Program cohort rate and weighted average cohort rate are calculated for non-degree-granting proprietary institutions if such an institution switched to a non-profit status. The Secretary is also interested in receiving public comment regarding other possible measures that may be used to determine if an institution should be able to continue to participate in the Direct Loan Program or FFEL Program. The Secretary is especially interested in public comment on the following possible alternative measures to determine if an institution should continue to participate in the Direct Loan Program: (1) A percentage of Direct Loan borrowers paying under the ICR plan whose scheduled payments are less than the amount of interest that accrues monthly on their loans, i.e., in negative amortization, and (2) a percentage of the institution's former students who are making payments under the ICR plan whose income is less than a certain amount, such as $15,000 (because income is a major factor in calculating monthly payments under the ICR plan).

The Secretary is also interested in public comment regarding a measure for borrowers for whom payment has been deferred for an extended period of time under the economic hardship or

unemployment deferment or forbearance. The Secretary is considering using such a measurement to trigger L, S, and T action against an institution participating in the FFEL and Direct Loan programs if a high percentage of its former students have forborne repayment on their loans or have deferred repayment on their loans for an extended period of time because of unemployment or economic hardship. Similar to the Secretary's concern that institutions may attempt to evade the consequences of a high Direct Loan Program cohort rate or weighted average cohort rate by encouraging students to use the ICR plan, the Secretary is concerned that institutions are evading the consequences of a high FFEL Program cohort default rate by encouraging and assisting a high percentage of their former students to obtain deferments or forbearance solely for the purpose of keeping their loans out of default until the period the Department uses to calculate FFEL Program cohort default rate has elapsed. Because a deferment or forbearance generally lasts for one year, an institution generally needs to assist a former student to obtain only one deferment or forbearance to ensure that the former student does not default during the period the Department uses to calculate the FFEL Program cohort default rate. Finally, the Secretary specifically requests comment regarding how a borrower who has a scheduled ICR payment of less than $15 and who would qualify for the economic hardship deferment should be treated in the Direct Loan Program cohort rate or weighted average cohort rate calculation.

Loss of eligibility to continue to participate in the Direct Loan Program. An institution with any combination of an FFEL Program cohort default rate, a Direct Loan Program cohort rate, or a weighted average cohort rate calculated by the Secretary that is equal to or greater than 25 percent for three consecutive fiscal years would cease to be eligible to participate in the Direct Loan Program beginning 30 days from the date it receives notification of the loss of eligibility unless it can demonstrate to the satisfaction of the Secretary that exceptional mitigating circumstances would make the loss of eligibility inequitable. The Secretary will place such an institution on reimbursement until the 30th day following the institution's receipt of the notification of the loss of eligibility or, if the institution appeals, until the appeal is decided. Once the institution's appeal is decided, the Secretary will take the institution off reimbursement only if the appeal is successful. If the appeal is denied, the institution will not be eligible to participate in the Direct Loan Program for the remainder of the current fiscal year plus the following two fiscal years.

ELIGIBILITY STATUS OF INSTITUTIONS WITH HIGH RATES

Type of rate	Direct loan program	FFEL program
25 percent or greater FFEL Program cohort default rate for three consecutive years.	Loss of eligibility for Direct Loan Program.	Loss of eligibility for the FFEL Program.
25 percent or greater Direct Loan Program cohort rate for three consecutive years.	Loss of eligibility for Direct Loan Program.	L,S, and T for FFEL Program only.
25 percent or greater weighted average cohort rate for three consecutive years.	Loss of eligibility for Direct Loan Program.	L,S, and T for FFEL Program only.

The Secretary has chosen to eliminate institutions from the Direct Loan Program based on high cohort rates for several reasons. First, the Secretary believes it is imperative that institutions that would have high FFEL Program cohort default rates not be able to evade the consequences of that rate by participating in the Direct Loan Program, which currently has no default rate definition. Second, the Secretary is firmly committed to protecting students and Federal taxpayers from unscrupulous institutions that participate heavily in the loan programs but do not provide quality educational services to their students. The sanctions the Secretary is authorized to impose under the HEA and regulations on institutions that participate in the FFEL Program have proven to be a successful way to protect students, the Federal taxpayer, and the integrity of the loan programs. Therefore, the Secretary is proposing these regulations to provide him with the authority to take similar actions against institutions that have a high percentage of students that do not repay their Direct Loan Program loans.

The Secretary does not have the authority to amend or add to the definition of the FFEL Program cohort default rate because that definition is specifically mandated in statute. The Secretary is, therefore, prohibited from adding to the FFEL Program cohort default rate a component that measures a minimum payment amount. The Secretary also does not have the authority to immediately terminate an institution's eligibility to participate in the FFEL Program if it has a Direct Loan Program cohort rate or weighted average cohort rate that equals or exceeds 25 percent for three consecutive years. This means that an institution could have an FFEL Program cohort default rate of 25 percent or more for two years and a Direct Loan Program cohort rate of 25 percent for one year and remain eligible for the FFEL Program after it has lost its eligibility to participate in the Direct Loan Program. In this case, the Secretary will take L, S, and T action against the institution's participation in the FFEL Program.

Under these proposed rules, if an institution's former students enter repayment under both the FFEL Program and the Direct Loan Program in a fiscal year, the Secretary would calculate a weighted average cohort rate to determine if an institution would lose its eligibility to participate in the Direct Loan Program. The Secretary will continue to use only FFEL Program loans to calculate an FFEL Program cohort default rate for that institution which will trigger a statutory loss of eligibility to participate in the FFEL Program. True equity between the Direct Loan and FFEL programs on this issue would require a statutory change that gives the Secretary authority to establish, in regulations, institutional eligibility requirements for the FFEL Program similar to the statutory authority for the Direct Loan Program, thus allowing him to move quickly to terminate any institution's participation in the FFEL Program when that institution's FFEL Program cohort default rate, Direct Loan cohort rate, or weighted average cohort rate warrants an action. The loss of eligibility provision in section 435 (a) of the HEA does not authorize the Secretary to make an institution ineligible to participate in the FFEL Program if it has Direct Loan Program cohort rates or weighted average cohort rates that exceed 25 percent for three consecutive years. However, under these regulations, the

Secretary will consider excessive Direct Loan Program cohort rates or weighted average cohort rates as a basis to take L, S, and T action against an institution's participation in the FFEL Program.

In addition to establishing this strict eligibility requirement under the Direct Loan Program, the Secretary will provide Direct Loan institutions with certain tools to help manage and reduce their Direct Loan Program cohort default rates. While the Secretary believes that the repayment plans available under the Direct Loan Program, coupled with the frequent borrower contact maintained by the Department's loan servicing efforts, will result in fewer defaults than in the FFEL Program, the Secretary is committed to developing, and making available to institutions, tools that will enable them to work effectively with borrowers to prevent defaults. These tools will include reports on delinquent borrowers, access to borrower information on the toll-free servicing telephone number, and free loan counseling materials for use during both entrance and exit interviews with borrowers. The Secretary invites public comment on the types and frequency of assistance that institutions need to help prevent Direct Loan defaults.

Exceptional Mitigating Circumstances. The Secretary proposes to modify the exceptional mitigating circumstances and the appeal process under which an institution may appeal the statutory loss of its eligibility to participate in the FFEL Program and the proposed loss of its eligibility to participate in the Direct Loan Program. Exceptional mitigating circumstances would be the same for both the Direct Loan and FFEL Programs. The Secretary believes that the current standards for exceptional mitigating circumstances are burdensome on an institution and administratively difficult for the Department to administer. For these reasons, the Secretary is proposing to change the exceptional mitigating circumstances and require that any appeal based on an exceptional mitigating circumstance be verified by an independent auditor prior to its submission to the Secretary. Under the proposed rules, any of the following criteria may be used as exceptional mitigating circumstances:

Exceptional Mitigating Circumstances

1. Participation Rate Index equal to or less than 0.0375 (Rate times percentage of students participating in the FFEL or Direct Loan programs)

2. 70 percent or greater completion rate and 70 percent or more students come from economically disadvantaged backgrounds, for public or private-nonprofit institutions.

3. 50 percent or greater placement rate and 70 percent or more students come from economically disadvantaged backgrounds, for proprietary institutions.

- Participation rate index: The participation rate index is a new criterion based on an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate and the percent of an institution's students who were enrolled on at least a half-time basis that borrow under the FFEL or Direct Loan programs. This rate would be calculated by multiplying the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, its weighted average cohort rate by the percent of the institution's students who were enrolled on at least a half-time basis that borrowed under that loan program during a 12-month period that ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers for the institution's rate. If this product is equal to or less than 0.0375, the institution would meet an exceptional mitigating circumstance. The Secretary has chosen 0.0375 as the participation rate index standard because, under the current mitigating circumstances, a borrower participation rate of 15 percent or less is acceptable as part of one of the exceptional mitigating circumstances. A cohort default rate of 25 percent for three consecutive years was the minimum rate that would trigger loss of eligibility. The Secretary has formulated the 0.0375 participation rate index criterion based on these percentages; $0.25 \times 0.15 = 0.0375$. Therefore the Secretary is proposing to use 0.0375 as the index.

For example, under this formula, an institution with an FFEL Program cohort default rate of 28 percent and a student borrower participation rate of 13 percent would be able to continue to participate in the FFEL program because $0.28 \times 0.13 = 0.0364$, which is less than 0.0375. The participation rate index criterion may be used by any institution that has an FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, a weighted average cohort rate of less than 40 percent for the most recent fiscal year. In order to appeal under this criterion, an institution would only need to submit to the Secretary a statement certifying the number of its students who were enrolled on at least a half-time basis during a 12-month period that has ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers for the institution's borrower participation rate, and the number of those students that borrowed under the FFEL Program or Direct Loan Program, along with identifying information for those borrowers so they may be verified by the Secretary. In particular, the institution would need to provide the Secretary with the name, address, and social security number of each of those students. This will help the Department to verify this information through the National Student Loan Data System.

- Economically disadvantaged background rate and completion or placement rate: This exceptional mitigating circumstance criterion is derived from the current criteria which use completion rates, placement rates and the percent of the institution's students from economically disadvantaged backgrounds. Under this proposed rule, an institution would meet this exceptional mitigating circumstance if it can demonstrate that 70 percent or more of its student population, over a 12-month period that ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers for the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, came from an economically disadvantaged background, and either:

(1) For a public or private nonprofit institution, 70 percent of its students who were enrolled on at least a half-time basis, and were originally scheduled to complete their programs during a 12-month period that has ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers in the institution's rate, have completed their programs; or

(2) For a proprietary institution, 50 percent of its students originally scheduled to complete the programs during a 12-month period that has ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers used to calculate the institution's rate are currently employed, or were employed for at least 13 weeks, in an occupation related to the training they received, or are enrolled in a higher level educational program at another institution, or were enrolled such an institution for at least 13 weeks, for which the appealing institution's educational program provided substantial preparation.

For purposes of the completion rate and placement rate, a student is originally scheduled, at the time of

enrollment, to complete the educational program on the date when the student will have been enrolled in the program for the amount of time normally required to complete the program. The ''amount of time normally required to complete the program'' is the period of time specified in the institution's enrollment contract, catalog, or other materials, for completion of the program by a full-time student, or the period of time between the date of enrollment and the anticipated graduation date appearing on the student's loan application, if any, whichever is less.

For purposes of the completion rate, a student is considered to have completed the program if the student received a degree, certificate, or other recognized educational credential from the institution, transferred to a higher level educational program at another institution, or remained enrolled and was making satisfactory academic progress toward completion of the educational program.

The Secretary has chosen a 50 percent placement rate based on the completion rate and placement rate standards that are used to determine if certain programs are eligible for purposes of the FFEL Program. See section 481(e) of the HEA. This section mandates that such a program have a verified completion rate of at least 70 percent and a verified placement rate of 70 percent. The 50 percent threshold is derived from these two percentages. If an institution has a 70 percent completion rate and 70 percent of those students obtain employment in a relevant occupation, the institution will have a 49 percent placement rate under the proposed placement rate. The Secretary has chosen 50 percent because he believes an institution should exceed this threshold to be considered under an exceptional mitigating circumstance.

For purposes of the placement rate, a former student is considered placed if the student is employed or had been employed for at least 13 weeks following his or her last day of attendance at the institution, or enrolled in a higher level educational program at another institution for which the appealing institution's educational program provided substantial preparation.

The Secretary is proposing to remove the 15 percent or less student loan borrower rate as well as the 66.6 percent completion rate and 66.6 placement rate as an exceptional mitigating circumstance. In place of the loan borrower rate, the Secretary is proposing to add the participation rate index criterion because he believes that, when an institution has such a small percent of its students borrow under the Direct Loan or FFEL Programs, borrower behavior may not reflect the quality of education at the institution. An appeal under this criterion is limited to institutions that have a Direct Loan Program cohort rate, an FFEL Program cohort default rate, or, if applicable, a weighted average cohort rate, that is less than 40 percent for a fiscal year. When more than 40 percent of all students at an institution are not repaying their loans, even if this percentage is based on a small proportion of the student body, the Secretary considers the institution to represent a significant financial risk for the taxpayers. Further, the Secretary believes that future student borrowers at the institution should be protected from the risks associated with borrowing Federal loans to pay for attending the institution.

Under the current exceptional mitigating circumstances, an institution can appeal if it has a completion rate of 66.6 percent or more, a placement rate of 66.6 percent or more, and if 66.6 percent or more of its students came from an economically disadvantaged background. The proposed regulations would make an appeal less burdensome to institutions because it would examine the completion, placement, and economically disadvantaged rates of the institution's former students over a shorter period of time. These modifications will also make the students who are included in the completion, placement and economically disadvantaged rates more representative of the borrowers included in the cohort used to determine the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate. Although the formula used for calculating the completion rate and student population from economically disadvantaged backgrounds is essentially the same, the institution would only need to review students who attended the institution (or for the completion rate, those students who were scheduled to complete their programs), during the 12-month period that preceded the fiscal year used to determine the cohort for the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate. The current regulations require an institution to review students over a 24-month period.

The Secretary is also proposing to modify the placement rate criterion for appeals to make it available only to proprietary institutions of higher education. The proposed placement rate will be measured by using the percent of the institution's former students who were scheduled to complete their programs, during a 12-month period that ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers for the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, who either received a job in an occupation related to the training they received for at least 13 weeks or transferred to a higher level educational program. The current regulations base the placement rate on only those students who complete their educational programs in a recent 24-month period chosen by the institution. The Secretary has decided to use the students who were scheduled to graduate during the 12-month period preceding the fiscal year in which the cohort is determined for the institution's rate because it will be more representative of the former students in that cohort. The Secretary also believes that the calculation of a completion rate in this fashion is more equitable for proprietary institutions because students receiving training to obtain employment in a particular field may gain such employment before they complete their programs.

The Secretary is also proposing to revise the appeal procedures to make them easier for the institutions as well as the Department to manage while maintaining program integrity to ensure speedy resolution of appeals. Under the current appeal process, to remain eligible to participate in the FFEL Program during an appeal process, an institution is required to notify the Secretary within seven days following its receipt of its notification of the loss of eligibility that it intends to appeal the loss. The institution must then submit all the required information to support its appeal within 30 calendar days following the notification of loss of eligibility. The Secretary is proposing to remove from the regulations the requirement that the institution notify the Secretary in writing within the seven days that it intends to appeal in order to remain eligible during the appeal.

The Secretary is also proposing to remove the requirement that an institution notify the Secretary that it has requested verification of its FFEL Program cohort default rate data from the relevant guaranty agencies. Under the proposed regulations, an institution would remain eligible to participate in the FFEL Program or Direct Loan Program during the appeal if it submits a complete and accurate appeal, under the guidelines for exceptional mitigating

circumstances or inaccurate data, within 30 days from the date it is notified by the Secretary that it is no longer eligible to participate in the FFEL Program or Direct Loan Program.

Under the current regulations, if an institution requests verification of the data used to determine its cohort default rate from a guaranty agency, the institution remains eligible to participate in the FFEL Program until the guaranty agency verifies the data. Under the proposed rules, an institution would not remain eligible to participate beyond the 30-day period if the Secretary has not received the verified data by the 30th day following the notification of loss of eligibility. The Secretary believes that the new procedures for issuance and review of draft FFEL Program cohort default rates, that allow an institution to review the draft rates for error prior to the issuance of the official rates, will significantly improve the accuracy of the official FFEL Program cohort default rate. The Secretary will provide Direct Loan Program institutions with Direct Loan Program cohort rates, or if applicable, weighted average cohort rates, a similar opportunity to review the data used to determine those rates to ensure that they are accurate before the rates are made official. An institution should be able to resolve any additional discrepancies it believes exist in the FFEL Program cohort default rate, Direct Loan cohort rate, or weighted average cohort rate within 30 days.

Exceptional Mitigating Circumstances Appeal Process

- Institution receives notice that its participation in the FFEL or Direct Loan program will end in 30 days unless the institution appeals.
- The institution must submit a complete written appeal within 30 days after receiving the notice of loss of eligibility. An appeal will not be accepted after the 30th day.
- The Secretary issues a final decision on the institution's appeal within 45 days after receiving the appeal.
- No oral hearing is provided.

Subpart G—Fine, Limitation, Suspension, and Termination Proceedings

The proposed rules would provide the Secretary with the authority to take L, S, and T action against an institution that has a Direct Loan Program cohort rate or weighted average cohort rate that is greater than 40 percent for a fiscal year. The Secretary believes that such an authority is needed to protect students and taxpayers from abuse of the Direct Loan Program. The Secretary has chosen a 40 percent Direct Loan Program cohort rate to parallel the 40 percent default rate threshold that triggers L, S, and T action against an institution that participates in the FFEL Program under 34 CFR 668.17(a)(1). Further, under the proposed rules, the Secretary could initiate an L, S, or T action against an institution's participation in the FFEL Program if it has a combination of an FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate that equals or exceeds 25 percent for three consecutive years. For example, an L, S, and T action could be taken against the institution if it has an FFEL Program cohort default rate that equals or exceeds 25 percent for one fiscal year, and a weighted average cohort rate for each of the two following fiscal years that equals or exceeds 25 percent. Such an institution is not subject to statutory loss of eligibility to participate in the FFEL Program. The Secretary is proposing this provision to prevent an institution that has lost its eligibility to participate in the Direct Loan Program, or attempts to evade a potential loss of eligibility to participate in the Direct Loan Program, from participating in the FFEL Program. The Secretary believes that such an institution presents an unreasonable risk to students and the Federal taxpayer. Under the proposed rules, the Secretary will cease any L, S, and T action against an institution's participation in the FFEL Program if that institution successfully appeals its loss of eligibility to participate in the Direct Loan Program under exceptional mitigating circumstances.

The Secretary is also proposing to revise the procedures and appeals for an L, S, and T action he may initiate when an institution has an FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, a weighted average cohort rate above 40 percent for a fiscal year or a combination of an FFEL Program cohort default rate, Direct Loan Program cohort rate or weighted average cohort rate that equals or exceeds 25 percent for three consecutive fiscal years. Under these revised procedures, an institution would have 30 days to notify the designated department official that it intends to appeal the L, S, or T; otherwise the action would become effective on the 31st day. If the institution intends to appeal, it may request a hearing or it may send written material to the designated department official within 30 days after it receives notice of the Secretary's intent to initiate L, S, or T action. If a hearing is requested, the hearing officer must schedule a hearing within 15 days of the date the institution notifies the designated department official that it requests the hearing.

The designated department official or the hearing officer may only consider the accuracy of the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, the weighted average cohort rate to determine if the L, S, or T action should be upheld or dismissed. In light of the extensive process for determining default rates, the institution will have the burden of proving that the calculation of the rate was wrong. The Secretary believes it is appropriate to presume that the rates are accurate unless the institution can present clear and convincing evidence that the rate identified in the notice of intent is not final (i.e., the default rate appeal is pending) or does not accurately reflect the final rate determined by the Department. The designated department official or the hearing officer shall issue a final determination to uphold or dismiss the L, S, or T action within 30 days after the date the written material is received by the designated department official or the date the hearing is concluded, whichever is later.

In addition to streamlining the L, S, and T process, the Secretary is proposing to eliminate Appendix D as a defense from L, S, and T action. Appendix D was created to protect institutions from the consequences of L, S, and T action while they took action to reduce their FFEL Program cohort default rates. The Secretary believes that institutions have had ample time to exercise the measures provided in this section to reduce their FFEL Program cohort default rates and keep them low. The Secretary does not believe that the implementation of default reduction measures by an institution justifies the continued participation of a high default institution in the Title IV programs. However, the Secretary encourages institutions to continue to implement these measures to keep their default rates low.

Streamlined L, S, and T Procedures

- Institution receives notice stating that the L, S, or T action will be effective in 30 days unless the institution requests a hearing.
- Institution must request the hearing prior to the effective date.
- The hearing will be scheduled within 15–20 days after the request is received.

• The institution may appeal the proposed action only on the basis of the accuracy of the rate.

• The L, S, and T action is effective 30 days after the hearing if the hearing officer decides the action is warranted.

Executive Order 12866

1. Assessment of Costs and Benefits

These proposed regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this proposed regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering the Title IV, HEA programs effectively and efficiently. Burdens specifically associated with information collection requirements, if any, are explained elsewhere in this preamble under the heading of Paperwork Reduction Act of 1995.

In assessing the potential costs and benefits—both quantitative and qualitative—of these proposed regulations, the Secretary has determined that the benefits of the proposed regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the Title IV, HEA programs.

2. Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the regulations clearly stated? (2) Do the regulations contain technical terms or other wording that interferes with their clarity? (3) Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a numbered heading; for example, § 668.17 *Default Reduction and Prevention Measures*) (4) Is the description of the proposed regulations in the ''Supplementary Information'' section of this preamble helpful in the understanding of the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand? (5) What else could the Department do to make the regulations easier to understand?

A copy of any comments that concern whether these proposed regulations are easy to understand should also be sent to Stanley Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue, SW., (Room 5100 FB–10), Washington, D.C. 20202.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. Certain reporting, recordkeeping, and compliance requirements are imposed on institutions by the regulations. These requirements, however, would not have a significant impact because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision.

Paperwork Reduction Act of 1995

Section 668.17 contains information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of this section to the Office of Management and Budget (OMB) for its review.

Collection of Information: Exceptional Mitigating Circumstances Appeals

The Student Assistance General Provisions regulations codify the procedures and the exceptional mitigating circumstances criteria under which an institution may appeal a loss of eligibility to participate in the FFEL Program or Direct Loan Program. The information to be collected may include one of the following: (1) For the participation rate index, the number of an institution's students enrolled on at least a half-time basis who enrolled in the appealing institution during a 12-month period and the number of those students who borrowed under the FFEL and Direct Loan programs during that 12-month period and the name, address and social security number of those students; (2) for the completion rate, the number of an institution's students who were scheduled to complete their programs in a 12-month period and the name, address and social security number and, if applicable, the name of the institution and program to which the student transferred, for each of those students who actually completed; (3) for the placement rate, the number of students who were scheduled to complete their programs during a 12-month period and the name, address, social security number, job title, dates during which the student was employed, and the employer's name and address for all those students who obtained employment in an occupation related to the education or training received. The Department needs and uses the information to determine whether the institution may continue to participate in the FFEL or Direct Loan programs.

All information is to be collected and reported only once and only if the institution has a FFEL Program cohort default rate, Direct Loan Program cohort rate or weighted average cohort rate that equals or exceeds 25 percent for three consecutive fiscal years. Annual public reporting and recordkeeping burden contained in the collection of information proposed in these regulations is estimated to be 80 hours per response for 200 respondents (total annual reporting and recordkeeping burden equals 16,000 hours) including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing collection of information, and submitting materials.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on this proposed collection of information in—

• Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical use;

• Evaluating the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhancing the quality, usefulness, and clarity of the information to be collected; and

• Minimizing 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.

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

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in room 3045, Regional Office Building 3, 7th and D Streets, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except federal holidays.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

Dated: September 14, 1995.

Richard W. Riley,

Secretary of Education.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Supplemental Educational Opportunity Grant Program; 84.032 Stafford Loan Program; 84.032 PLUS Program; 84.032 Supplemental Loans for Students Program; 84.033 College Work-Study Program; 84.038 Perkins Loan Program; 84.063 Pell Grant Program; 84.069 State Student Incentive Grant Program; and 84.226 Income Contingent Loan Program)

The Secretary proposes to amend part 668 of title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, and 1148, unless otherwise noted.

2. Section 668.17 is amended by redesignating paragraphs (f), (g), and (h) as paragraphs (g), (h) and (i) respectively, and revising paragraphs (a) through (f) to read as follows:

§ 668.17 Default reduction and prevention measures.

(a) *Default rates.* (1) If the FFEL Program cohort default rate, Direct Loan Program cohort rate, or if applicable, weighted average cohort rate for an institution exceeds 20 percent for any fiscal year, the Secretary notifies the institution of that rate.

(2) The Secretary may initiate a proceeding under subpart G of this part to limit, suspend, or terminate the participation of an institution in the Title IV, HEA programs, if—

(i) For an institution whose former students enter repayment only on FFEL Program loans in a fiscal year, the FFEL Program cohort default rate for that institution exceeds 40 percent for that fiscal year;

(ii) For an institution whose former students enter repayment only on Direct Loan Program loans in a fiscal year, the Direct Loan Program cohort rate for that institution exceeds 40 percent for that fiscal year; or

(iii) For an institution that has both FFEL Program and Direct Loan Program loans entering repayment in the same fiscal year, the weighted average cohort rate for that institution exceeds 40 percent for that fiscal year.

(3) Unless an institution is subject to loss of eligibility to participate in the FFEL Program under paragraph (b)(1) of this section, the Secretary initiates a proceeding under subpart G of this part to limit, suspend, or terminate an institution's participation in the FFEL Program if the institution, for three consecutive fiscal years, has a combination of—

(i) An FFEL Program cohort default rate that is equal to or greater than 25 percent if only FFEL loans enter repayment in that cohort;

(ii) A Direct Loan Program cohort rate that is equal to or greater than 25 percent if only Direct Loan Program loans enter repayment in that cohort; or

(iii) A weighted average cohort rate that is equal to or greater than 25 percent if both FFEL Program and Direct Loan Program loans enter repayment in that cohort.

(4) The Secretary may require an institution that meets the criteria under paragraph (a)(2) of this section to submit to the Secretary, within a timeframe determined by the Secretary, any reasonable information to help the Secretary make a preliminary determination as to what action should be taken against the institution.

(5) The Secretary will cease any limitation, suspension, or termination action against an institution under paragraph (a)(3) of this section if the institution satisfactorily demonstrates to the Secretary that, pursuant to a timely submitted appeal under paragraph (b)(6) of this section, the institution meets one of the exceptional mitigating circumstances under paragraph (c)(1)(ii) of this section.

(b) *End of participation.* (1) Except as provided in paragraph (b)(6) of this section, an institution's participation in the FFEL Program ends 30 days after the date the institution receives notification from the Secretary that its FFEL Program cohort default rate for each of the three most recent fiscal years for which the Secretary has determined the institution's rate, is equal to or greater than 25 percent.

(2) Except as provided in paragraph (b)(6) of this section, an institution's participation in the Direct Loan Program ends 30 days after the date the institution receives notification from the Secretary that for each of the three most recent fiscal years the institution has any combination of—

(i) An FFEL Program cohort default rate that is equal to or greater than 25 percent if only FFEL Program loans enter repayment in that cohort;

(ii) A Direct Loan Program cohort rate that is equal to or greater than 25 percent if only Direct Loan Program loans enter repayment in that cohort; or

(iii) A weighted average cohort rate that is equal to or greater than 25 percent if both FFEL Program and Direct Loan Program loans enter repayment in that cohort.

(3) Except as provided in paragraph (b)(6) of this section, an institution whose participation in the FFEL Program or Direct Loan Program ends under paragraph (b)(1) or (2) of this section respectively may not participate in that program on or after the 30th day after the date it receives notification from the Secretary that its FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate exceeds the thresholds specified in paragraph (b)(1) or (2) of this section and continuing—

(i) For the remainder of the fiscal year in which the Secretary determines that

the institution's participation has ended under paragraph (b)(1) or (2) of this section; and

(ii) For the two subsequent fiscal years.

(4) An institution whose participation in the FFEL Program or Direct Loan Program ends under paragraph (b)(1) or (2) of this section may not participate in that program until the institution satisfies the Secretary that the institution meets all requirements for participation in the FFEL Program or Direct Loan Program and executes a new agreement with the Secretary for participation in that program following the period described in paragraph (b)(3) of this section.

(5) Until July 1, 1998, the provisions of paragraph (b)(1) or (2) of this section and the provisions of § 668.16(m) do not apply to a historically black college or university within the meaning of section 322(2) of the HEA, a tribally controlled community college within the meaning of section 2(a)(4) of the Tribally Controlled Community College Assistance Act of 1978, or a Navajo community college under the Navajo Community College Act.

(6) An institution may, notwithstanding § 668.26, continue to participate in the FFEL Program or Direct Loan Program, if the Secretary receives an appeal that is complete, accurate, and timely in accordance with paragraph (c) of this section.

(c) *Appeal procedures*. (1) An institution may appeal the loss of participation in the FFEL Program or Direct Loan Program under paragraph (b)(1) or (2) of this section by submitting an appeal in writing to the Secretary that must be received by the 30th calendar day following the date the institution receives notification of the end of participation. The institution may appeal on the grounds that—

(i)(A) The calculation of the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, for any of the three fiscal years relevant to the end of participation is not accurate; and

(B) A recalculation of the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, with corrected data verified by the cognizant guaranty agency or agencies for the FFEL Program loans, or the Secretary for Direct Loan Program loans would produce an FFEL Program cohort default rate, a Direct Loan Program cohort rate, or weighted average cohort rate for any of those fiscal years that is below the threshold percentage specified in paragraph (b) (1) or (2) of this section; or

(ii) The institution meets one of the following exceptional mitigating circumstances:

(A) The institution has a participation rate index of 0.0375 or less. The participation rate index is determined by multiplying the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate or, if applicable, weighted average cohort rate, by the percentage of the institution's students who were enrolled on at least a half-time basis who received a loan made under either the FFEL Program or Direct Loan Program, for a 12-month period that has ended during the six months immediately preceding the fiscal year for which the cohort of borrowers used to calculate the institution's rate is determined.

(B) For a 12-month period that has ended during the six months immediately preceding the fiscal year for which the cohort of borrowers used to calculate the institution's rate is determined, 70 percent or more of the institution's students who are enrolled on at least a half-time basis are individuals from disadvantaged economic backgrounds, as established by documentary evidence submitted by the institution. Such evidence must relate to either qualification by those students for an expected family contribution (EFC) of zero for any award year that generally coincides with the 12-month period, or attribution to those students of an adjusted gross income of the student and his or her parents or spouse, if applicable, reported for any award year that generally coincides with the 12-month period, of less than the poverty level, as determined under criteria established by the Department of Health and Human Services.

(*1*) For a public or private nonprofit institution, 70 percent or more of the institution's students who were initially enrolled on a full-time basis, and were scheduled to complete their programs during a 12-month period that has ended during the six months immediately preceding the fiscal year for which the cohort of borrowers used to calculate the institution's rate is determined, completed the educational programs in which they were enrolled. This rate is calculated by comparing the number of students who were classified as full-time at their initial enrollment in the institution and were originally scheduled, at the time of enrollment, to complete their programs within the relevant 12 month period, with the number of these students who received a degree, certificate, or other recognized educational credential from the institution; transferred from the institution to a higher level educational program at another institution for which the prior program provided substantial preparation; or, at the end of the 12-month period, remained enrolled and were making satisfactory academic progress toward completion of their educational programs; or

(*2*) For a proprietary institution, the institution had a placement rate of 50 percent or more with respect to its former students who were enrolled in a program to receive a degree, certificate, or other recognized educational credential from the institution, and who remained in the program beyond the point the students would have received a 100 percent tuition refund from the institution. This rate is based on those students who were scheduled to complete their educational programs during the 12-month period ending prior to the fiscal year for which the cohort for the institution's rate is determined. This rate is calculated by determining the percentage of all those students who, based on evidence submitted by the institution, are, on the date the institution submits the appeal, employed, or had been employed for at least 13 weeks following their last day of attendance at the institution, in the occupation for which the institution provided training, or are enrolled, or had been enrolled for at least 13 weeks following receipt of the credential from the institution, in a higher level educational program at another institution for which the prior educational program provided substantial preparation.

(2) For purposes of the completion rate and placement rate described in paragraph (c)(1)(ii)(B) (*1*) and (*2*) of this section, a student is originally scheduled, at the time of enrollment, to complete the educational program on the date when the student will have been enrolled in the program for the amount of time normally required to complete the program. The ''amount of time normally required to complete the program'' is the period of time specified in the institution's enrollment contract, catalog, or other materials, for completion of the program by a full-time student, or the period of time between the original date of enrollment and the anticipated graduation date appearing on the student's loan application, if any, whichever is less.

(3) The Secretary issues a decision on the institution's appeal within 45 days after the institution submits a complete appeal that addresses the applicable criteria in paragraph (c)(1)(i) or (ii) of this section to the Secretary.

(4) The Secretary's decision is based on the consideration of written material

submitted by the institution. No oral hearing is provided.

(5) The Secretary withdraws the notification of loss of participation in the FFEL Program or Direct Loan Program sent to an institution under paragraph (b)(1) or (2) of this section, if he determines that the institution's appeal satisfies one of the grounds specified in paragraph (c)(1)(i) or (ii) of this section.

(6) An institution must include in its appeal a certification by the institution's chief executive officer that all information provided by the institution in support of its appeal is true and correct.

(7) An institution that appeals on the grounds that it meets the exceptional mitigating circumstances criteria contained in paragraph (c)(1)(ii) of this section must include in its appeal the following information:

(i) A written statement from an independent auditor that the information contained in the appeal is complete, accurate and determined in accordance with the requirements of this section;

(ii) For purposes of the participation index under paragraph (c)(1)(ii)(A) of this section—

(A) A statement indicating the number of students who were enrolled on at least a half-time basis at the institution in the relevant 12-month period; and

(B) The name, address, and social security number of each of the institution's current and former students who received Federal Stafford, Federal SLS, or Direct Loan Program loans during that 12-month period.

(iii) For purposes of the institution's percentage of students coming from disadvantaged economic backgrounds under paragraph (c)(1)(ii)(B) of this section:

(A) The number of students who were enrolled on at least a half-time basis at the institution in the relevant 12-month period; and

(B)(*1*) If EFC is used to determine if a student comes from an economically disadvantaged background, the name, address, and social security number, of each student with an EFC of zero, for an award year that, in whole or part, coincides with the relevant 12-month period, who was enrolled on at least a half-time basis at the institution in the relevant 12-month period; or

(*2*) If poverty level income as determined by the Department of Health and Human Services is used to measure an economically disadvantaged background, the name, address, and social security number of each student with an adjusted gross income, or attribution to that student of an adjusted gross income of that student and his or her parents or spouse, if applicable, reported for the most recent calendar year that is less than the poverty level, and documentation of that income.

(iv) For purposes of the completion rate under paragraph (c)(1)(ii)(B)(*1*) of this section—

(A) The number of students who were initially enrolled on a full-time basis at the institution and were scheduled to complete their programs in the relevant 12-month period;

(B) For each of those former students who received a degree, certificate, or other recognized educational credential from the institution, the student's name, address, and social security number;

(C) For each of those former students who transferred to a higher level educational program at another institution, the name, address, social security number of the student, and the name and address of the institution to which the student transferred and the name of the higher level program; and

(D) For each of those students who remained enrolled and was making satisfactory academic progress toward completion of the educational program, the student's name, address, and social security number.

(v) For purposes of the placement rate under paragraph (c)(1)(ii)(B)(*2*) of this section—

(A) The number of students who were scheduled to receive a degree, certificate, or other recognized educational credential at the institution during the relevant 12 month period who remained enrolled beyond the point in the program in which he or she would receive a 100 percent tuition refund from the institution;

(B) For each of those former students who is employed or had been employed for at least 13 weeks following his or her last day of attendance at the institution, the student's name, address, and social security number, the employer's name and address, the student's job title, and the dates the student was so employed; and

(C) For each of those former students who enrolled in a higher level educational program at another institution for which the appealing institution's educational program provided substantial preparation, the former student's name, address, and social security number, the subsequent institution's name and address, the name of the educational program, and the dates the former student was so enrolled.

(d) *Definitions.* The following definitions apply to this section and § 668.90:

(1)(i) For purposes of the FFEL Program, except as provided in paragraph (e)(1)(ii) of this section, the term FFEL Program cohort default rate means—

(A) For any fiscal year in which 30 or more current and former students at the institution enter repayment on Federal Stafford loans or Federal SLS loans (or on the portion of a loan made under the Federal Consolidation Loan Program that is used to repay such loans) received for attendance at the institution, the percentage of those current and former students who enter repayment in that fiscal year on those loans who default before the end of the following fiscal year; or

(B) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on Federal Stafford loans or Federal SLS loans (or on the portion of a loan made under the Federal Consolidation Loan Program that is used to repay such loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on such loans in any of the three most recent fiscal years, who default before the end of the fiscal year immediately following the year in which they entered repayment.

(C) In determining the number of students who default before the end of that following fiscal year, the Secretary includes only loans for which the Secretary or a guaranty agency has paid claims for insurance.

(ii)(A) In the case of a student who has attended and borrowed at more than one institution, the student (and his or her subsequent repayment or default) is attributed to each institution for attendance at which the student received a loan that entered repayment in the fiscal year.

(B) A loan on which a payment is made by the institution, its owner, agent, contractor, employee, or any other affiliated entity or individual, in order to avoid default by the borrower, is considered as in default for purposes of this definition.

(C) Any loan that has been rehabilitated under section 428F of the HEA before the end of that following fiscal year is not considered as in default for purposes of this definition.

(D) For the purposes of this definition, an SLS loan made in accordance with section 428A of the HEA (or a loan made under the Federal Consolidation Loan Program, a portion of which is used to repay a Federal SLS loan) shall not be considered to enter repayment

until after the borrower has ceased to be enrolled in an educational program leading to a degree, certificate, or other recognized educational credential at the participating institution on at least a half-time basis (as determined by the institution) and ceased to be in a period of forbearance or deferment based on such enrollment. Each eligible lender of a loan made under section 428A (or a loan made under the Federal Consolidation Loan Program, a portion of which is used to repay a Federal SLS loan) of the HEA shall provide the guaranty agency with the information necessary to determine when the loan entered repayment for purposes of this definition, and the guaranty agency shall provide that information to the Secretary.

(iii)(A) An FFEL Program cohort default rate of an institution applies to all locations of the institution as the institution exists on the first day of the fiscal year for which the rate is calculated.

(B) An FFEL Program cohort default rate of an institution applies to all locations of the institution from the date the institution is notified of that rate until the institution is notified by the Secretary that the rate no longer applies.

(iv)(A) For an institution that changes its status from that of a location of one institution to that of a free-standing institution, the Secretary determines the FFEL Program cohort default rate based on the institution's status as of October 1 of the fiscal year for which an FFEL Program cohort default rate is being calculated.

(B) For an institution that changes its status from that of a free-standing institution to that of a location of another institution, the Secretary determines the FFEL Program cohort default rate based on the combined number of students who enter repayment during the applicable fiscal year and the combined number of students who default during the applicable fiscal years from both the former free-standing institution and the other institution. This FFEL Program cohort default rate applies to the new, consolidated institution and all of its current locations.

(C) For free-standing institutions that merge to form a new, consolidated institution, the Secretary determines the FFEL Program cohort default rate based on the combined number of students who enter repayment during the applicable fiscal year and the combined number of students who default during the applicable fiscal years from all of the institutions that are merging. This FFEL Program cohort default rate applies to the new consolidated institution.

(D) For a location of one institution that becomes a location of another institution, the Secretary determines the FFEL Program cohort default rate based on the combined number of students who enter repayment during the applicable fiscal year and the number of students who default during the applicable fiscal years from both of the institutions in their entirety, not limited solely to the respective locations.

(2) Fiscal year means the period from and including October 1 of a calendar year through and including September 30 of the following calendar year.

(e)(1) *Direct Loan Program cohort rate.* For purposes of the Direct Loan Program, the Secretary calculates Direct Loan Program cohort rates using the following formulas:

(i) For public institutions, private nonprofit institutions, or proprietary degree granting institutions—

(A) For any fiscal year in which 30 or more current and former students at the institution enter repayment on a Direct Loan Program loan (or on the portion of a loan made under the Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who enter repayment in that fiscal year on those loans who are in default before the end of the following fiscal year; or

(B) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on a Direct Loan Program loan (or on the portion of a loan made under the Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on those loans in any of the three most recent fiscal years, who are in default before the end of the fiscal year immediately following the year in which they entered repayment.

(ii) For proprietary non-degree granting institutions—

(A) For any fiscal year in which 30 or more current and former students at the institution enter repayment on a Direct Loan Program loan (or on the portion of a loan made under the Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who enter repayment in that fiscal year on those loans who are in default before the end of the following fiscal year, or are in repayment under the income-contingent repayment plan at the end of that following fiscal year whose scheduled payments are less than 15 dollars per month and that payment results in negative amortization; or

(B) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on a Direct Loan Program loan (or on the portion of a loan made under the Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on those loans in the three most recent fiscal years, who are in default before the end of the fiscal year immediately following the year in which they entered repayment, or are in repayment under the income contingent repayment plan at the end of that following fiscal year and whose scheduled payments are less than 15 dollars per month and that payment results in negative amortization.

(2) In the case of a student who has attended and borrowed at more than one institution, the student (and his or her subsequent repayment or default) is attributed to each institution for attendance at which the student received a loan that entered repayment in the fiscal year.

(3) A loan on which a payment is made by the institution, its owner, agent, contractor, employee, or any other affiliated entity or individual, in order to avoid default by the borrower, is considered as in default for purposes of this definition.

(4) Any loan on which the borrower has made 12 consecutive monthly on-time payments under 34 CFR 685.211(e) before the end of that following fiscal year is not considered as in default for purposes of this definition.

(5) A Direct Loan Program cohort rate of an institution applies to all locations of the institution as the institution exists on the first day of the fiscal year for which the rate is calculated.

(6) A Direct Loan Program cohort rate of an institution applies to all locations of the institution from the date the institution is notified of that rate until the institution is notified by the Secretary that the rate no longer applies.

(7) For an institution that changes its status from that of a location of one institution to that of a free-standing institution, the Secretary determines the Direct Loan Program cohort rate based on the institution's status as of October 1 of the fiscal year for which the rate is being calculated.

(8) For an institution that changes its status from that of a free-standing institution to that of a location of another institution, the Secretary determines the Direct Loan Program cohort rate based on the combined

number of students who enter repayment during the applicable fiscal year from both the former free-standing institution and the other institution. This Direct Loan Program cohort rate applies to the new, consolidated institution and all of its current locations.

(9) For free-standing institutions that merge to form a new, consolidated institution, the Secretary determines the Direct Loan Program cohort rate based on the combined number of students who enter repayment during the applicable fiscal year from all of the institutions that are merging. This Direct Loan Program cohort rate applies to the new consolidated institution.

(10) For a location of one institution that becomes a location of another institution, the Secretary determines the Direct Loan Program cohort rate based on the combined number of students who enter repayment during the applicable fiscal year from both of the institutions in their entirety, not limited solely to the respective locations.

(11) Fiscal year means the period from and including October 1 of a calendar year through and including September 30 of the following calendar year.

(12) For purposes of an institution's Direct Loan cohort rate, a Direct Loan Program loan is considered in default when the borrower's or endorser's failure to make an installment payment when due has persisted for 270 days.

(f)(1) *Weighted average cohort rate.* For purposes of an institution that has former students entering repayment in a fiscal year on both Direct Loan Program and FFEL Program, the Secretary calculates a weighted average cohort rate using the following formulas;

(i) For public institutions, private nonprofit institutions, or proprietary degree granting institutions—

(A) For any fiscal year in which 30 or more current and former students at the institution enter repayment on an FFEL Program or Direct Loan Program loan (or on the portion of a loan made under the Federal Consolidation Loan Program or Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who enter repayment in that fiscal year on those loans who are in default before the end of the following fiscal year; and

(B) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on an FFEL Program or Direct Loan Program loan (or on the portion of a loan made under the Federal Consolidation Loan Program or Federal Direct Consolidation Loan Program that is used to repay such loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on such loans in the three most recent fiscal years, who are in default before the end of the fiscal year immediately following the year in which they entered repayment.

(ii) For proprietary non-degree granting institutions—

(A) For any fiscal year in which 30 or more current and former students at the institution enter repayment on an FFEL Program or Direct Loan Program loan (or on the portion of a loan made under the Federal Consolidation Loan or Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who enter repayment in that fiscal year on such loans who are in default before the end of the following fiscal year, or are in repayment under the income-contingent repayment plan at the end of that following fiscal year and whose scheduled payments are less than 15 dollars per month and that payment results in negative amortization; or

(B) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on an FFEL Program or Direct Loan Program loan (or on the portion of a loan made under the Federal Consolidation Loan Program or Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on those loans in any of the three most recent fiscal years, who are in default before the end of the fiscal year immediately following the year in which they entered repayment or are in repayment under the income contingent repayment plan at the end of that following fiscal year whose scheduled payments are less than 15 dollars per month and that payment results in negative amortization.

(2) In the case of a student who has attended and borrowed at more than one institution, the student (and his or her subsequent repayment or default) is attributed to each institution for attendance at which the student received a loan that entered repayment in the fiscal year.

(3) A loan on which a payment is made by the institution, its owner, agent, contractor, employee, or any other affiliated entity or individual, in order to avoid default by the borrower, is considered as in default for purposes of this definition.

(4) Any Direct Loan Program loan on which the borrower has made 12 consecutive monthly on-time payments under 34 CFR 685.211(e) or has an FFEL Program loan that has been rehabilitated under section 428F of the HEA before the end of that following fiscal year is not considered as in default for purposes of this definition.

(5) A weighted average cohort rate of an institution applies to all locations of the institution as the institution exists on the first day of the fiscal year for which the rate is calculated.

(6) A weighted average cohort rate of an institution applies to all locations of the institution from the date the institution is notified of that rate until the institution is notified by the Secretary that the rate no longer applies.

(7) For an institution that changes its status from that of a location of one institution to that of a free-standing institution, the Secretary determines the weighted average cohort rate based on the institution's status as of October 1 of the fiscal year for which the rate is being calculated.

(8) For an institution that changes its status from that of a free-standing institution to that of a location of another institution, the Secretary determines the weighted average cohort rate based on the combined number of students who enter repayment during the applicable fiscal year from both the former free-standing institution and the other institution. This weighted average cohort rate applies to the new, consolidated institution and all of its current locations.

(9) For free-standing institutions that merge to form a new, consolidated institution, the Secretary determines the weighted average cohort rate based on the combined number of students who enter repayment during the applicable fiscal year from all of the institutions that are merging. This weighted average cohort rate applies to the new consolidated institution.

(10) For a location of one institution that becomes a location of another institution, the Secretary determines the weighted average cohort rate based on the combined number of students who enter repayment during the applicable fiscal year from both of the institutions in their entirety, not limited solely to the respective locations.

(11) Fiscal year means the period from and including October 1 of a calendar year through and including September 30 of the following calendar year.

(12) For purposes of an institution's weighted average cohort rate cohort rate, a Direct Loan Program loan is considered in default when a borrower's or endorser's failure to make an installment payment when due has persisted for 270 days.

3. Section 668.85 is amended by revising paragraph (b)(1)(ii) and revising paragraph (b)(3) to read as follows:

§ 668.85 Suspension proceedings.

* * * * *

(b)(1) * * *

(ii)(A) Specifies the proposed effective date of the suspension, which is at least 20 days after the date of mailing of the notice of intent; or

(B) In the case of a suspension action taken due to the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the proposed effective date of the suspension is no more than 30 days after the date of the mailing of the notice of intent.

* * * * *

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official sets the date and place. The date is at least 15 days after the designated department official receives the request. In the case of a hearing for an institution subject to suspension action because of its FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the hearing is set no later than 20 days after the date the designated department official receives the request. The suspension does not take place until after the requested hearing is held.

* * * * *

4. Section 668.86 is amended by revising paragraph (b)(1)(ii) and revising paragraph (b)(3) to read as follows:

§ 668.86 Limitation or termination proceedings.

* * * * *

(b)(1) * * *

(ii)(A) Specifies the proposed effective date of the limitation or termination, which is at least 20 days after the date of mailing of the notice of intent; or

(B) In the case of a limitation or termination action based on an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the proposed effective date of the termination is no more than 30 days after the date of the mailing of the notice of intent.

* * * * *

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official sets the date and place. The date is at least 15 days after the designated department official receives the request. In the case of a hearing for an institution subject to limitation or termination action because of its FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the hearing is set no later than 20 days after the date the designated department official receives the request. The limitation or termination does not take place until after the requested hearing is held.

* * * * *

5. Section 668.90 is amended by adding a new paragraph (a)(1)(iii)(D), and revising paragraph (a)(3)(iv) to read as follows:

§ 668.90 Initial and final decisions.

* * * * *

(a)(1) * * *

(iii) * * *

(D) For hearings regarding the limitation, suspension, or termination of an institution based on an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the 30th day after the conclusion of the hearing.

* * * * *

(3) * * *

(iv) In a limitation, suspension, or termination proceeding commenced on the grounds described in § 668.17(a)(1), if the hearing official finds that an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate meets the conditions specified in § 668.17(a)(1) for initiation of limitation, suspension, or termination proceedings, the hearing official also finds that the sanction sought by the designated department official is warranted, except that the hearing official finds that no sanction is warranted if the institution presents clear and convincing evidence demonstrating that its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate is not final or does not accurately reflect the final rate determined by the Department and that the correct rate would result in the institution having an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate that is beneath the thresholds that make the institution subject to limitation, suspension, or termination action.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

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federal register

Thursday
September 21, 1995

Part XV

Department of Health and Human Services

Food and Drug Administration

Ephedrine Alkaloids: Reports of Adverse Events; Availability; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 95N–0304]

Ephedrine Alkaloids: Reports of Adverse Events; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of reports of adverse events associated with the consumption of food products containing ephedrine alkaloids as well as redacted copies of any accompanying medical records where available. In addition, a bibliography listing of published medical and scientific literature relevant to the adverse event reports is available. FDA is announcing the availability of this information to ensure that all interested parties have the opportunity to review these documents before an upcoming meeting of the working group of the Food Advisory Committee at which the effects of consuming food products that contain ephedrine alkaloids will be considered.

ADDRESSES: The adverse event reports, redacted accompanying medical records, and the bibliography listing are available for public examination in the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, between 9 a.m. and 4 p.m., Monday through Friday. Submit written comments identified with the docket number found in brackets in the heading above to Dockets Management Branch (address above).

FOR FURTHER INFORMATION CONTACT: Margaret C. Binzer, Center for Food Safety and Applied Nutrition (HFS–456), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–5372.

SUPPLEMENTARY INFORMATION: FDA will soon be announcing a meeting of a working group of the Food Advisory Committee to be held in October, 1995. The purpose of the meeting is to have the working group consider the significance and extent of the serious adverse events associated with the consumption of food products that contain a source of ephedrine alkaloids, including ephedrine, pseudoephedrine, and norpseudoephedrine from *Ephedra sinica* Stapf. and other related species (e.g., Ma huang and Chinese ephedra). FDA is announcing the availability of the adverse event reports associated with these products and other materials relevant to the working group's discussion.

To date, FDA has received over 300 adverse event reports associated with food products containing ephedrine alkaloids. Because of the volume of adverse event reports received by the agency, the agency would be unable to respond to any Freedom of Information Act requests for the reports before this meeting. FDA is, therefore, taking the unusual step of making available properly redacted copies of the adverse event reports through Dockets Management Branch to ensure that all interested parties have access to these documents before this meeting so that they will be able to fully understand the issues that are the subject of the working group's discussion.

Copies of the adverse event reports, redacted accompanying medical records, and a bibliography listing of documents available from other sources, may be seen in the Dockets Management Branch (address above). Copies of these documents will not be available at the working group meeting.

Dated: September 15, 1995.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 95–23557 Filed 9–19–95; 12:43 pm]

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