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Thursday
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Briefings on How To Use the Federal Register
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4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC

[Two Sessions]

WHEN:	January 9, 1996 at 9:00 am and January 23, 1996 at 9:00 am
WHERE:	Office of the Federal Register Conference Room, 800 North Capitol Street, NW., Washington, DC (3 blocks north of Union Station Metro)
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New Feature in the Reader Aids!
Beginning with the issue of December 4, 1995, a new listing will appear each day in the Reader Aids section of the Federal Register called ''Reminders''. The Reminders will have two sections: ''Rules Going Into Effect Today'' and ''Comments Due Next Week''. Rules Going Into Effect Today will remind readers about Rules documents published in the past which go into effect ''today''. Comments Due Next Week will remind readers about impending closing dates for comments on Proposed Rules documents published in past issues. Only those documents published in the Rules and Proposed Rules sections of the Federal Register will be eligible for inclusion in the Reminders.
The Reminders feature is intended as a reader aid only. Neither inclusion nor exclusion in the listing has any legal significance.
The Office of the Federal Register has been compiling data for the Reminders since the issue of November 1, 1995. No documents published prior to November 1, 1995 will be listed in Reminders.

Electronic Bulletin Board
Free Electronic Bulletin Board service for Public Law numbers, Federal Register finding aids, and a list of documents on public inspection is available on 202–275–1538 or 275–0920.

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

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

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 24

[Docket No. 95–33]

RIN 1557–AB46

Community Development Corporation and Project Investments

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is amending its Community Development Corporation and Project Investments regulation. This final rule removes a provision that requires a bank to reinvest profits, dividends, and other distributions from community development investments in activities that promote the public welfare. The purpose of the final rule is to encourage public welfare investments by national banks.

EFFECTIVE DATE: January 1, 1996.

FOR FURTHER INFORMATION CONTACT: Karen Bellesi, Program Coordinator, Community Development Investments, Community Development Division, 202/874–4930; Michele Meyer, Attorney, Community and Consumer Law Division, 202/874–5750; or Karen McSweeney, Attorney, Legislative and Regulatory Activities Division, 202/874–5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

Introduction

The OCC is currently reviewing 12 CFR part 24 as a component of its Regulation Review Program. As part of this review, on October 26, 1995 (60 FR 54819), the OCC published a notice of proposed rulemaking (NPRM) to remove one provision from part 24. Another NPRM proposing more comprehensive changes to other part 24 provisions is published elsewhere in this issue of the Federal Register.

Part 24 permits public welfare investments by national banks, subject to certain limitations. Currently, part 24 requires a bank to reinvest the profits, dividends, and other distributions from its equity and debt investments in a community development corporation (CDC) or community development (CD) project in activities that primarily promote the public welfare. This final rule removes the reinvestment requirement from part 24.

Background

Under 12 U.S.C. 24 (Eleventh) (section 24 (Eleventh)), a national bank is authorized to make investments designed primarily to promote the public welfare, including the welfare of low- and moderate-income families and communities (such as through the provision of housing, services, or jobs) consistent with safe and sound banking practices.[1] The OCC issued part 24 on December 27, 1993 (58 FR 68464), to establish various requirements for these permissible public welfare investments.

The part 24 requirements include a provision, currently codified at 12 CFR 24.4(a)(4), that prescribes how a bank may use certain proceeds from its section 24 (Eleventh) investments. This provision requires that a national bank devote the profits, dividends, tax credits, and other distributions from equity investments, or interest income from debt investments received by a bank from a CDC or CD project investment, to activities that primarily promote the public welfare as determined by the OCC. Further, in the case of an investment in a for-profit CDC subsidiary, a national bank must reinvest the profits, dividends, and other distributions in the CDC during its first three years of operation.

Section 24 (Eleventh) does not require reinvestment of public welfare investment proceeds. The OCC included this provision in part 24 based on its practice in implementing 12 U.S.C. 24 (Eighth) (section 24 (Eighth)), which was enacted prior to section 24 (Eleventh). Section 24 (Eighth) generally allows a national bank to contribute to community funds, or to charitable, philanthropic, or benevolent instrumentalities conducive to the public welfare. Interpretive Ruling 7.7480, which implemented section 24 (Eighth),[2] permitted a bank to make investments, as long as the investments were of a predominantly civic, community, or public nature. At that time, the OCC concluded that it could be inconsistent with the underlying charitable purpose of section 24 (Eighth) for a bank to retain profits on these investments. Interpretive Ruling 7.7480 was, therefore, interpreted to require a bank to reinvest profits, dividends, and other distributions in public purpose activities.

Although part 24 was drafted under the authority of section 24 (Eleventh), which provides direct authority for public welfare investments, it included a reinvestment requirement as a means of furthering the public welfare nature of investments made pursuant to this authority.

Description of the Proposal and Comments Received

In its October 26, 1995, NPRM, the OCC proposed to remove the current part 24 reinvestment requirement. The statute does not restrict an institution from earning and retaining profits on investments made pursuant to section 24 (Eleventh), as long as the investments are designed primarily to promote the public welfare. In addition, reaction to the current rule indicates that in some instances the reinvestment provision has discouraged banks from making part 24 investments. For example, the requirement that a bank reinvest low-income housing tax credits in restricted activities has diminished the economic incentive for a bank to participate in this type of low-income housing project.

The OCC received 13 comments on its proposed removal of the reinvestment requirement. Twelve of the commenters supported the proposal. The majority of these commenters either indicated that the proposal would provide an incentive for a national bank to make part 24 investments or indicated that the proposal would eliminate a disincentive

[1] Paragraph Eleventh was added to 12 U.S.C. 24 by the Depository Institutions Disaster Relief Act of 1992, enacted on October 23, 1992. Pub. L. 102–485, Section 6(a), 106 Stat. 2774 (1992).

[2] Interpretive Ruling 7.7480, which was codified at 12 CFR 7.7480, was removed in 1993 when 12 CFR part 24 was promulgated.

that currently results from the reinvestment provision.

Several commenters also predicted that the change would not have a negative effect on national banks' safety and soundness. One commenter suggested that the proposed rule might promote safety and soundness by allowing bank management increased flexibility in its use of part 24 investment proceeds.

Several commenters indicated that the proposed change would decrease the cost or burden associated with part 24 compliance. These comments generally were made with regard to low-income housing tax credits for which determining compliance with the reinvestment provision may be cumbersome. One commenter noted that the reinvestment requirement furthers the misperception that public welfare investments are adverse to bank profitability.

One commenter opposed the proposal based on a concern that it might result in fewer part 24 investments. This commenter suggested that the OCC monitor the level of national bank public welfare investments on an ongoing basis to assess whether the change made by this final rule yields the anticipated results.

Discussion of the Final Rule

In this final rule, the OCC adopts the proposal and removes the reinvestment requirement from part 24. The OCC believes that removal of the reinvestment provision will further the basic objective of section 24 (Eleventh) by encouraging banks to make more investments. The OCC also believes that the change made by this final rule is consistent with bank safety and soundness. It will enable a bank to use profits, dividends, and other distributions from its part 24 investments for any purpose based upon an overall assessment by the bank's management of its financial needs and public welfare investment objectives.

Removing the reinvestment requirement will encourage banks to make investments that promote the public welfare. It will not, however, constrain a bank's use of investment proceeds nor hamper its ability to ensure the sound operation of the bank as a whole.

The OCC will continue to monitor public welfare investment levels and trends, as it has since public welfare investments were specifically authorized by part 24. Based on this monitoring, the OCC periodically will evaluate the effectiveness of part 24, as amended.

Regulatory Flexibility Act

It is hereby certified that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. The final rule will reduce somewhat the regulatory burden on national banks, regardless of size, by removing the requirement that a national bank must reinvest the proceeds of its public welfare investments.

Executive Order 12866

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The OCC has determined that this final rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of more than $100 million in any one year. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Reform Act of 1995.

Effective Date

This final rule will become effective on January 1, 1996. The final rule will apply to profits from both existing and new public welfare investments. Thus, public welfare investment profits, dividends, tax credits, interest, and other distributions that a national bank earns prior to January 1, 1996, but which the bank has not reinvested by January 1, 1996, do not have to be reinvested. In addition, public welfare profits, dividends, tax credits, interest, and other distributions that a national bank earns after January 1, 1996, which stem from a public welfare investment undertaken by the national bank prior to January 1, 1996, will not have to be reinvested. Finally, profits, dividends, tax credits, interest, and other distributions from a public welfare investment undertaken after January 1, 1996, will not be subject to the reinvestment requirement.

The Administrative Procedure Act (5 U.S.C. 553(d)(1)) (APA) states that a substantive rule shall not be published less than 30 days before its effective date unless the rule grants or recognizes an exemption or relieves a restriction. Because the current regulation restricts the manner in which a national bank can use its pubic welfare investment returns and the final rule removes this restriction, this final rule satisfies the terms of the APA's exception to the requirement for a delayed effective date.

In addition, section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 generally restricts the effective date of Federal banking agency regulations that impose additional reporting, disclosure, or other new requirements on insured depository institutions. The OCC believes that section 302 is not applicable to this final rule because the final rule does not impose any additional reporting, disclosure, or other new requirements on national banks. Instead, this final rule removes the current reinvestment requirement.

List of Subjects in 12 CFR Part 24

Community development, Credit, Investments, National banks, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, part 24 of title 12, chapter I, of the Code of Federal Regulations is amended as set forth below:

PART 24—COMMUNITY DEVELOPMENT CORPORATION AND PROJECT INVESTMENTS

1. The authority citation for part 24 continues to read as follows:

Authority: 12 U.S.C. 24 (Eleventh), 93a, 161, 481 and 1818.

§ 24.4 [Amended]

2. Paragraph (a)(2) of § 24.4 is amended by adding at the end of the paragraph ''and''.

3. Paragraph (a)(3) of § 24.4 is amended by removing ''; and'' at the end of the paragraph and adding a period.

4. Paragraph (a)(4) of § 24.4 is removed.

Dated: December 15, 1995.

Eugene A. Ludwig,

Comptroller of the Currency.

[FR Doc. 95–31020 Filed 12–27–95; 8:45 am]

BILLING CODE 4810–33–P

FEDERAL RESERVE SYSTEM

12 CFR Part 211

[Regulation K; Docket No. R–0896]

International Operations of United States Banking Organizations

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: This final rule amends Subpart A of Regulation K (International Operations of U.S. Banking Organizations) to provide expanded general consent authority for investments in foreign companies by

U.S. banking organizations that are strongly capitalized and well managed. This expanded authority is designed to permit U.S. banking organizations meeting these requirements to make larger investments without the need for prior approval or review. Certain investments or activities, however, are not eligible for the expanded authority. The final rule requires an investor making use of the expanded authority to provide the Board with certain information after an investment has been made. In addition, for those investments requiring prior notice to the Board, the rule would streamline the processing of such notices.

EFFECTIVE DATE: December 21, 1995.

FOR FURTHER INFORMATION CONTACT: Kathleen M. O'Day, Associate General Counsel (202/452–3786), Sandra L. Richardson, Managing Senior Counsel (202/452–6406), Jonathan D. Stoloff, Senior Attorney (202/452–3269), or Andres L. Navarrete, Attorney (202/452–2300), Legal Division; William A. Ryback, Associate Director (202/452–2722), Michael G. Martinson, Assistant Director (202/452–2798), or Betsy Cross, Manager (202/452–2574), Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System. For the users of Telecommunication Device for the Deaf (TDD) *only*, please contact Dorothea Thompson (202/452–3544), Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, D.C. 20551.

SUPPLEMENTARY INFORMATION: Subpart A of the Board's Regulation K sets out the rules governing the foreign activities of U.S. banking organizations, including procedures for making investments in foreign banking and non-banking organizations. Under section 211.5(c), all such investments, whether made directly or indirectly, are required to be made in accordance with the general consent, prior notice, or specific consent procedures contained in that paragraph. 12 CFR 211.5(c). No prior notice or application is required for any investment that falls within the general consent authority. Such authority at present is limited to investments where the total amount invested in any one organization, in one transaction or a series of transactions, does not exceed the lesser of $25 million or 5 percent of the investor's Tier 1 capital where the investor is a member bank, bank holding company, or Edge corporation engaged in banking.[1]

On September 25, 1995, the Board requested public comment on a proposed rule that would expand the general consent authority for strongly capitalized and well-managed banking organizations. 60 FR 49350. The expanded general consent authority (expanded authority) was intended to reduce the burden associated with obtaining approval for such investments for U.S. banking organizations meeting these requirements. The comment period ended on October 30, 1995. The Board received nine public comments on the proposal. Comments were submitted by six banking organizations and three trade associations. The Board has considered the comments and, as a result of its further review, has made several changes to address these comments in the final rule.

The final rule removes the current $25 million cap on general consent investments, which is currently the binding constraint on such investment in almost all cases, and instead ties the expanded general consent limits to the capital of the investor. An aggregate limit on investments made in any 12-month period under the expanded authority is established. The final rule also specifies the nature of investments eligible for the expanded authority, as well as the types of activities that may be conducted by the organization in which the investment is to be made. Comments received regarding each of these areas are discussed below.

Investor Eligibility for Expanded General Consent

The final rule limits the expanded general consent authority to those investors that are strongly capitalized and well managed. The expanded authority is available for investments by member banks, bank holding companies, Edge corporations that are not engaged in banking, and agreement corporations. The expanded authority is available only where the investor, its parent member bank, if any, and the bank holding company are strongly capitalized and well managed, as those terms are defined by the Board. *Strongly capitalized*, in relation to member banks, is defined with reference to the definition of ''well capitalized'' set out in the prompt corrective action standards, which requires, at a minimum, a 6 percent tier 1 and 10 percent total risk-based capital ratio and a leverage ratio of 5 percent.[2] 12 CFR 208.33(b)(1). Edge or agreement corporations and bank holding companies are required to have a total risk-based capital ratio of 10 percent or more in order to be considered strongly capitalized for purposes of the expanded authority.

One commenter asked for clarification with respect to the applicability of the capital tests, maintaining that the capital requirement should apply only to the investor and entities that control the investor. Section 211.5(c)(2)(i)(F) of the proposed rule indicates that this is in fact the requirement.

Another commenter pointed out that risk-based capital ratios have not been applicable previously to Edge corporations not engaged in banking. The Board notes this comment but considers that calculating such a ratio would not impose an undue burden on those investors seeking to utilize the expanded authority.

The definition of *well managed* included in the proposed rule provided that, in order to be considered well managed, the Edge or agreement corporation, its parent member bank, if any, and the bank holding company must each have received a composite rating of at least 1 or 2, with no component below 3, at its most recent examination or review. Comments submitted advocated relying solely upon the composite rating for purposes of the ''well managed'' definition. The final rule incorporates this change. However, an additional element also has been incorporated in the definition to clarify that any investor that is under a formal supervisory action would be ineligible to take advantage of the expanded authority. The Board believes the existence of any such supervisory action would be indicative of managerial deficiencies such that the expanded authority should not be available.

Individual Investment Limit

Limits were proposed on the expanded authority that were tied to the level of capital of the investor. For Edge or agreement corporations, the relevant limits were proposed to be no more than the lesser of 20 percent of the Edge or agreement corporation's tier 1 capital or 2 percent of the tier 1 capital of its parent member bank. For member banks and bank holding companies, the proposed limit was no more than 2 percent of tier 1 capital.

One commenter proposed that the limit be raised to at least 2.5 percent of total capital. Several commenters noted that the existing general consent authority in Regulation K sets the limit at 5 percent of tier 1 capital, and advocated retention of the higher limit.

[1] In the case of an Edge corporation not engaged in banking, the relevant general consent limit is the lesser of $25 million or 25 percent of its Tier 1 capital.

[2] The member bank also may not be subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the Board to meet and maintain a specific capital level for any capital measure. 12 CFR 208.33(b)(1).

The Board notes, however, that the current limit is expressed as *the lesser of* $25 million or 5 percent of tier 1 capital; the $25 million limit on general consent investments has proved to be the constraining factor, particularly for U.S. banking organizations that would meet the strongly capitalized standard. The Board believes that a general consent limit of 5 percent of tier 1 capital, in the absence of an absolute dollar cap, would be too high even for organizations that are strongly capitalized and well managed because an initial capital investment in, for example, a subsidiary, may be leveraged many times resulting in a potential total exposure far in excess of the initial 5% of capital. The Board has therefore decided to retain the proposed 2 percent limit in the final rule.

In response to a comment seeking clarification that the existing authorization for general consent investments will continue to be available, the Board notes that the expanded authority is parallel authority for making investments by banking organizations that meet the strongly capitalized and well managed standards. As is clear from section 211.5(c)(2)(i)(B) and (C) of Regulation K, however, the limits on investment in any one organization apply on a cumulative basis over time and include investments made under the existing as well as the expanded authority.

Several commenters argued that expanded authority should be available for additional investments in existing subsidiaries. The Board notes that, as indicated in section 211.5(c)(2)(iv)(D) of the final rule, using the expanded authority for making additional investments in existing subsidiaries and joint ventures is permissible under the terms of the final rule, subject to the investment limits and the other investment restrictions.

Aggregate Investment Limit

The proposed rule provided for an overall aggregate investment limit on all investments made during the previous 12-month period under the existing and the expanded authority. Under this limit, all such investments, when aggregated with the proposed investment, may not exceed the lesser of 50 percent of the Edge or agreement corporation's total capital or 5 percent of the parent member bank's total capital, in the case of an Edge or agreement corporation, or 5 percent of its total capital, in the case of a member bank or a bank holding company. A number of commenters supported the Board's position that the aggregate limits apply only to general consent investments and not to investments made pursuant to prior notice or specific consent.

However, one commenter argued that investments made under existing general consent authority should not count toward the aggregate limit because once the aggregate limit is reached, prior notice would be required for small investments representing little risk to the investor. The Board agrees that the additional regulatory burden associated with including investments made under the existing general consent authority in calculating the aggregate limits outweighs any supervisory benefits. Accordingly, the aggregate limit shall apply only to investments made under the expanded general consent authority.

The proposal also provided that, in determining compliance with the aggregate limits and in order to avoid double counting of investments, an investment in a subsidiary shall be counted only once notwithstanding that such subsidiary may, within the next 12 months, downstream all or part of such investment to another subsidiary. Several commenters argued for a longer time period in which to make downstream investments or that no time limit should be imposed. The Board believes the 12 month time limit should be retained as it strikes an appropriate balance between easing regulatory burden and maintaining adequate oversight, given that the condition of a banking organization may change over time. Supervisory views regarding downstreaming investments also may change over time in light of changed circumstances.

One commenter argued that downstream investments should not be subject to the individual investment limits as well as the aggregate investment limits. However, the Board believes that supervisory concerns regarding the need to monitor diversification of investments in view of any changed circumstances relating to the investor means that the limits on investments in one organization should include downstream investments.

Finally, a commenter argued that restructurings (through the contribution of an investment from one affiliate to another) should also be encompassed within the same exclusion as that provided for downstream investments. The Board notes in response to this comment that Regulation K already provides general consent authority for transfers among affiliates at net asset value.

Eligible Investments

The proposal limited the types of investments eligible for the expanded authority, as well as the types of activities that may be conducted by the organization in which the investment is to be made. Ineligible investments included an investor's initial entry into a foreign country, the establishment or acquisition of an initial subsidiary bank in a foreign country, investments in general partnerships or unlimited liability companies, and an acquisition of shares or assets of a corporation that is not an affiliate of the investor. Exclusion of the latter type of acquisition was intended to limit the expanded authority to investments in de novo subsidiaries (including subsequent investments in such subsidiaries) by excluding the acquisition of going concerns.

Commenters requested clarification as to whether additional investments made in existing subsidiaries and joint ventures would be eligible investments under the expanded authority. The final rule authorizes investments in existing subsidiaries and joint ventures, provided they meet the remaining criteria for eligible investments and the criteria for eligible activities.

Several commenters opposed the proposal's exclusion of initial acquisitions of going concerns from the expanded investment authority. However, the Board continues to believe such exclusion is appropriate in light of the potential additional risk associated with such investments. These risks are greater than simply the amount of capital invested, extending also, for example, to the value and quality of the acquired organization's assets. The Board therefore considers that prior notice of such an investment is appropriate.

Several commenters argued that the acquisition or establishment of an initial bank subsidiary in a foreign country should be permissible without prior notice to the Board where the investor already has a branch in that country. The Board believes that such a change may be inconsistent with its responsibility as home country supervisor under the Minimum Standards for Supervision of Internationally Active Banks established by the Basle Supervisors Committee, in those cases where the Board has not previously approved or reviewed the establishment of a significant subsidiary bank in that country. The Minimum Standards contemplate that the home country supervisor should specifically authorize any outward expansion by a bank, both to inform the home country

supervisor of the intention of the bank to operate in another country and to provide the host supervisor with the comfort that the home supervisor does not object to the expansion and takes responsibility for the supervision of the branch or subsidiary bank. Consequently, the Board believes it is appropriate to retain the prior notice requirement for establishment of an initial subsidiary bank in another country under the expanded authority.

Post-investment Notice

The proposal required an investor making use of the expanded authority to provide the Board with a post-investment notice within 10 business days of making the investment. However, the Board requested comment on whether the requirements relating to the post-investment notice could be incorporated into existing reporting requirements.

Several commenters argued the post-investment notice would be unnecessary and inconsistent with the goal of reducing regulatory burden, particularly since investors are required to report acquisitions of shares in foreign organizations on an existing Federal Reserve form (F.R. 2064) by the end of the month following the month in which the investment was made. Commenters maintained that the Board already has sufficient information to monitor investments in foreign subsidiaries through existing reporting and examination authority. Based upon the comments, the Board has decided to eliminate the 10 business day notice requirement. However, the Board has determined that certain limited additional information that is not at present provided in the FR 2064 is required to be submitted; such information may be submitted on the same schedule as the FR 2064, namely, by the end of the month following the month in which the investment was made.

The Board agrees with those commenters who argued that additional information should be limited to cover specific areas of potential risks regarding investments made under the expanded general consent authority and accordingly has narrowed the information that would be required to be submitted following exercise of the expanded authority. More specifically, the information that would be required under the final rule is limited to: the respective responsibilities of the parties if the investment is a joint venture; one year projections for the organization in which the investment is made; and, where the investment is to redress a loss, a description of the reasons for the loss and the steps taken to address the problem. This would provide to the Board the minimum information necessary to monitor any additional risks posed by such investments.

One commenter requested clarification as to whether or not the post-investment notice is intended to cover investments made pursuant to the existing general consent authority, which would make the proposal more restrictive than the present requirements for general consent investments. The Board notes that the post-investment notice would be required only in relation to investments made under the expanded authority.

In response to another comment, the Board wishes to clarify that investments in newly established companies are not precluded by the restriction on the acquisition of shares or assets of an organization that is not an affiliate or joint venture of the investor.

Processing Procedures

The final rule incorporates the change in processing procedures indicating that the 45 day period commences upon receipt of the notice or application to invest in a foreign company. Commenters generally supported this change in processing procedures.

Finally, one commenter noted generally that Regulation K is a technically difficult regulation and expressed concern that the proposed revisions, by incorporating additional technical language, would have the side effect of further diminishing the readability of the regulation. The Board notes that the five year review of Regulation K mandated by the International Banking Act of 1978 is now underway. Ways in which Regulation K may be simplified will be considered during the course of that review.

Regulatory Flexibility Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 *et seq.*), the Board certifies that this final rule will not have a significant economic impact on a substantial number of small entities that are subject to the regulation.

Pursuant to 5 U.S.C. 553(d), this amendment to Regulation K will become effective immediately. This final rule grants an exemption for certain U.S. banking organizations, and therefore the Board waives the 30 day general requirement for publication of a substantive rule.

Paperwork Reduction Act Analysis

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

The collection of information requirements in this regulation are found in 12 CFR 211.5(c). The submission of this information is mandatory under sections 25 and 25A of the Federal Reserve Act (12 U.S.C. 601–604(a) and 611–631) and sections 4(c)(13), 4(c)(14), and 5(c) of the Bank Holding Company Act (12 U.S.C. 1843(c)(13), 1843(c)(14) and 1844(c)) to evidence compliance with the requirements of Regulation K. The Federal Reserve uses the information to monitor the international operations of U.S. banking organizations, and to fulfill its supervisory responsibilities under Regulation K. The respondents are banks, bank holding companies, and Edge and agreement corporations.

The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100–0107.

No comments specifically addressing the estimate burden were received.

The Federal Reserve estimates that, based on 1995 data, 10 responses per year will be filed by U.S. banking organizations under the expanded general consent authority. Currently, the investments that will be permitted under expanded general consent require prior notification on the form for International Applications and Prior Notifications under Subparts A and C of Regulation K (FR K–1; OMB No. 7100–0107). The estimated burden for each prior notification can range from 1 to 10 hours, depending on its complexity. Under the revised rule, an investor will no longer submit information prior to the investment; instead, it will submit limited information regarding specific areas of potential risks of the investment after the investment is made. The volume of this information will vary depending on the type of investment; the annual burden per respondent is estimated to be .5 hours, on average. Based on an hourly cost of $20, the annual cost to the public is estimated to be $100. There are no start up costs or capital costs.

The information collected is not deemed confidential. The applying organization has the opportunity to request confidentiality for information that it believes will qualify for a Freedom of Information Act exemption.

Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100–0107), Washington, DC 20503.

List of Subjects in 12 CFR Part 211

Exports, Federal Reserve System, Foreign banking, Holding companies, Investments, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Board of Governors amends 12 CFR Part 211 as set forth below:

PART 211—INTERNATIONAL BANKING OPERATIONS (REGULATION K)

1. The authority citation for Part 211 is revised to read as follows:

Authority: 12 U.S.C. 221 *et seq.*, 1818, 1841 *et seq.*, 3101 *et seq.*, 3901 *et seq.*

2. Section 211.2 is amended by redesignating paragraphs (u) and (v) as paragraphs (v) and (w), respectively, and by adding new paragraphs (u) and (x) to read as follows:

§ 211.2 Definitions.

* * * * *

(u) *Strongly capitalized* means:

(1) In relation to a parent member bank, that the standards set out in 12 CFR 208.33(b)(1) are satisfied; and

(2) In relation to an Edge or Agreement corporation or a bank holding company, that it has a total risk-based capital ratio of 10.0 percent or greater.

* * * * *

(x) *Well managed* means that the Edge or Agreement corporation, its parent member bank, if any, and the bank holding company have each received a composite rating of 1 or 2 at its most recent examination or review and are not subject to any supervisory enforcement action.

3. Section 211.5 is amended by:

a. Redesignating paragraphs (c)(2) and (c)(3) as paragraphs (c)(3) and (c)(4) respectively and by adding a new paragraph (c)(2); and

b. In newly designated paragraph (c)(3), by removing the word ''accepted'' in the third sentence and adding in its place the word ''received''.

The addition reads as follows:

§ 211.5 Investments and activities abroad.

* * * * *

(c) * * *

* * * * *

(2)(i) *Expanded general consent for de novo investments.* Notwithstanding the amount limitations of paragraph (c)(1) of this section, but subject to the other limitations of this section, the Board grants expanded general consent authority for investments in an organization by an investor that is strongly capitalized and well managed if:

(A) The activities of the organization are limited to activities in which a national bank may engage directly or in which a subsidiary may engage under paragraph (d) of this section;

(B) In the case of an investor that is an Edge corporation that is not engaged in banking or an Agreement corporation, the total amount invested in such organization (in one transaction or a series of transactions) does not exceed the lesser of 20 percent of the investor's Tier 1 capital or 2 percent of the Tier 1 capital of the parent member bank;

(C) In the case of a bank holding company or member bank investor, the total amount invested in such organization (in one transaction or a series of transactions) directly or indirectly does not exceed 2 percent of the investor's Tier 1 capital;

(D) All investments made, directly or indirectly, by an Edge corporation not engaged in banking or an Agreement corporation during the previous 12-month period under paragraph (c)(2) of this section, when aggregated with the proposed investment, would not exceed the lesser of 50 percent of the total capital of the Edge or Agreement corporation, or 5 percent of the total capital of the parent member bank;

(E) All investments made, directly or indirectly, by a member bank or a bank holding company during the previous 12-month period under paragraph (c)(2) of this section, when aggregated with the proposed investment, would not exceed 5 percent of its total capital; and

(F) Both before and immediately after the proposed investment the investor, its parent member bank, if any, and any parent bank holding company are strongly capitalized and well managed.

(ii) *Determining aggregate investment limits.* For purposes of determining compliance with the aggregate investment limits set out in paragraphs (c)(2)(i)(D) and (E) of this section, an investment by an investor in a subsidiary shall be counted only once notwithstanding that such subsidiary may, within 12 months of the date of making the investment, downstream all or any part of such investment to another subsidiary.

(iii) *Additional investments.* An investor that makes investments under paragraph (c)(2)(i) of this section may also make additional investments in an organization under the standards set forth in paragraphs (c)(1)(ii), (c)(1)(iii) and (c)(1)(iv) of this section.

(iv) *Ineligible investments.* The following investments are not eligible for the general consent under paragraph (c)(2)(i) of this section:

(A) An investment in a foreign country where the investor does not have an affiliate or a branch;

(B) The establishment or acquisition of an initial subsidiary bank in a foreign country;

(C) Investments in general partnerships or unlimited liability companies; and

(D) An acquisition of shares or assets of an organization that is not an affiliate or joint venture of the investor.

(v) *Post-investment notice.* By the end of the month following the month in which the investment is made, the investor shall provide the Board with the following information relating to the investment:

(A) If the investment is in a joint venture, the respective responsibilities of the parties to the joint venture;

(B) Projections for the organization in which the investment is made for the first year following the investment; and

(C) Where the investment is made in an organization that incurred a loss in the last year, a description of the reasons for the loss and the steps taken to address the problem.

* * * * *

By order of the Board of Governors of the Federal Reserve System, December 21, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–31362 Filed 12–27–95; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

Assessments

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule; correction.

SUMMARY: The FDIC published a final rule (60 FR 42680, August 16, 1995) that established a new assessment rate schedule of 4 to 31 basis points for institutions whose deposits are subject to assessment by the Bank Insurance Fund (BIF); widened the assessment rate spread from 8 to 27 points; and established a procedure for adjusting the rate schedule semiannually as necessary to maintain the designated reserve ratio at 1.25 percent. This document corrects three typographical errors in the final rule.

EFFECTIVE DATE: September 15, 1995.

FOR FURTHER INFORMATION CONTACT: Jenetha M. Hickson, Alternate Liaison Officer, (202) 898–3807.

SUPPLEMENTARY INFORMATION: In preparing the final rule for publication in the Federal Register, typographical errors were inadvertently made. Accordingly, the final rule is corrected as follows:

§ 327.9 [Corrected]

1. On page 42741, second column, in § 327.9, in the fifth line of paragraph (b)(3)(i), ''paragraph (c)(2)(i) through (iv)'' is corrected to read ''paragraph (b)(2)(i) through (iv)''.

2. On page 42741, third column, in § 327.9:

a. In the second line of paragraph (c)(2) introductory text ''§ 327.7(a)(3)'' is corrected to read ''§ 327.7(a)(2)''; and

b. In the second line of paragraph (c)(3), ''§ 327.7(b)(3)'' is corrected to read ''§ 327.7(b)(2)''.

Dated: December 22, 1995.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 95–31412 Filed 12–27–95; 8:45 am]

BILLING CODE 6714–02–M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 101

[T.D. 96–4]

Name Change for Consolidated Port of Philadelphia

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to change the name of the Consolidated Port of Philadelphia to the Consolidated Port of the Delaware River and Bay, and to identify the participating ports within the consolidated port. This change is being made to more clearly reflect that the port encompasses Wilmington, Delaware and other cities and territory as well as Philadelphia, Pennsylvania.

EFFECTIVE DATE: January 29, 1996.

FOR FURTHER INFORMATION CONTACT: A. Donald Gilman, Office of Congressional and Public Affairs, (202) 927–1169.

SUPPLEMENTARY INFORMATION:

Background

Section 101.3, Customs Regulations (19 CFR 101.3), lists as one of Customs ports of entry Philadelphia-Chester, Pa. and Wilmington, De. This port includes the named cities and includes Camden, Gloucester City and Salem, New Jersey and territory described in T. D. 84–195. The port of entry is popularly known as the Consolidated Port of Philadelphia.

After a meeting with trade community representatives from both Wilmington, Delaware and Philadelphia, Pennsylvania, Customs proposed in a document published in the Federal Register (60 FR 47505) on September 13, 1995, that the name of the consolidated port should be changed to the Consolidated Port of the Delaware River and Bay. The name change would reflect that the port encompasses Wilmington, Delaware and other cities and territory as well as Philadelphia, Pennsylvania. As noted in the proposal, the Wilmington, Delaware trade community strongly favors such a name change, and the Philadelphia trade community has not expressed any objection to that suggestion.

Comments Received

A total of seven entities responded to the proposal. All seven were in favor of the name change.

Conclusion

After review of the comments and further consideration, Customs has determined to proceed with changing the name of the port.

Accordingly, Customs is amending section 101.3, Customs Regulations (19 CFR 101.3) to change the name of the port of Philadelphia-Chester, Pa. and Wilmington, De., popularly known as the Consolidated Port of Philadelphia, to the Consolidated Port of the Delaware River and Bay, and to identify the participating ports within the consolidated port.

Territory of the Consolidated Port

The geographical limits of the consolidated port are as follows:

The ports of Philadelphia, Pennsylvania (comprising the territory within the corporate limits of Philadelphia, Pennsylvania, and Camden, Gloucester City, and Salem, New Jersey; the territory within the limits of the Boroughs of Brooklawn, National Park, and Paulsboro, and the Townships of West Deptford and Greenwich, all in New Jersey; the Borough of Folcroft and the Townships of Darby and Tinicum, all in Pennsylvania; and the territory between the Delaware River and U. S. Highway No. 13, in Bucks County, Pennsylvania, from the corporate limits of Philadelphia to and including Morrisville, Pennsylvania; and the territory between the Delaware River and U. S. Highway No. 130 and U. S. Highway No. 206, in Camden, Burlington, and Mercer Counties, New Jersey, from the corporate limits of Camden, New Jersey, to and including Trenton, New Jersey); Chester, Pennsylvania (comprising the territory within the corporate limits of Chester, Pennsylvania; the territory within the limits of the Boroughs of Marcus Hook, Trainer, Upland, Parkside, and Eddystone, and the Townships of Lower Chichester and Ridley, all in Pennsylvania; and the territory extending along the Pennsylvania side of the Delaware River from Darby Creek to the Delaware State line, a distance of approximately 10 miles); and Wilmington, Delaware (comprising the territory within the corporate limits of Wilmington, Delaware; the territory within the limits of New Castle, Newport, and Claymont, Delaware; the territory within the limits of Carneys Point and Deep Water Point, New Jersey; and the territory lying between U. S. Highway No. 13 and the Delaware River, from the corporate limits of Wilmington to the Chesapeake and Delaware Canal, Delaware.)

Regulatory Flexibility Act

Although this document was issued for public comment, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553 because it relates to agency management and organization. Accordingly, the document is not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604.

Executive Order 12866

Agency organization matters such as this are exempt from Executive Order 12866.

Drafting Information

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

List of Subjects in Part 101

Customs duties and inspection, Harbors, Organization and functions (Government agencies), Seals and insignia, Vessels.

Amendments to the Regulations

For the reasons set forth in the preamble, part 101 of the Customs Regulations (19 CFR 101) is amended as set forth below.

PART 101—GENERAL PROVISIONS

1. The general authority citation for Part 101 and the relevant specific

authority citation continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

Sections 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

* * * * *

2. Section 101.3(b)(1) is amended by removing the entry for Philadelphia-Chester, PA and Wilmington, DE under the states of Delaware, New Jersey, and Pennsylvania and adding in appropriate alphabetical order under those states the following entries:

§ 101.3 Customs service ports and ports of entry.

* * * * *

(b) *List of Ports of Entry and Service Ports.* * * *

(1) *Customs ports of entry.* * * *

Ports of entry	Limits of port
* * *	* * * *
	Delaware
Wilmington	Included in the Consolidated Port of the Delaware River and Bay described in T.D. 96–4.
* * *	* * * *
	New Jersey
Camden, Gloucester City, and Salem	Included in the Consolidated Port of the Delaware River and Bay described in T.D. 96–4.
* * *	* * * *
	Pennsylvania
Chester	Included in the Consolidated Port of the Delaware River and Bay described in T.D. 96–4.
* * *	* * * *
Philadelphia	Included in the Consolidated Port of the Delaware River and Bay described in T.D. 96–4.
* * *	* * * *

George J. Weise,

Commissioner of Customs.

Approved: December 13, 1995.

Dennis M. O'Connell,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 95–31327 Filed 12–27–95; 8:45 am]

BILLING CODE 4820–02–P

19 CFR Part 101

[T.D. 96–3]

Customs Service Field Organization—Sioux Falls, SD

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations pertaining to the field organization of Customs by establishing Sioux Falls, South Dakota, as a port of entry. The change is made as part of Customs continuing efforts to obtain more efficient use of its personnel, facilities, and resources and to provide better service to carriers, importers, and the general public.

EFFECTIVE DATE: January 29, 1996.

FOR FURTHER INFORMATION CONTACT: Bob Jones, Office of Field Operations (202–927–0456).

SUPPLEMENTARY INFORMATION:

Background

As part of its continuing efforts to obtain more efficient use of its personnel, facilities, and resources and to provide better service to carriers, importers, and the general public, Customs published a document in the Federal Register (60 FR 52347) on October 6, 1995, proposing to amend § 101.3 of the Customs Regulations (19 CFR 101.3) by establishing a port of entry at Sioux Falls, South Dakota encompassing the counties of Minnehaha and Lincoln in the State of South Dakota.

As the proposal stated, South Dakota presently does not have a port of entry and the Governor of the State of South Dakota requested the establishment of the port of entry in the state. In support of the establishment of the port at Sioux Falls, it was stated to Customs that the port would yield significant immediate and future economic benefits for the State of South Dakota, including the retention and expansion of jobs, the more efficient transportation of imported and exported merchandise, the opportunity for the establishment of a foreign trade zone, the expanded development of infrastructure within the proposed port area, an enhanced business competitiveness for existing enterprises and the opportunity to encourage new businesses to locate within South Dakota.

As further stated in the proposal, the Customs office within the port of entry would be located at the Joe Foss Field airport in Sioux Falls, which is the largest urban area within the State of South Dakota. It has been represented to Customs that the cost to the Federal Government would only involve the services of one full-time Customs official and therefore would be minimal compared to the significant benefits that port of entry status would impart to the South Dakota business community.

Sioux Falls is located at the junction of two major state interstate highways (Interstate 90 and Interstate 29), is serviced by a major national freight railway company, and is serviced at the Joe Foss Field airport by national passenger and cargo airlines, express air freight services and commuter airlines.

The proposal set forth representations to Customs that the greater metropolitan areas of Sioux Falls has a population of 139,236 based on 1990 census figures and that a population of well over 300,000 exists within a 70-mile radius of Sioux Falls. It was projected that existing businesses would file between 2,709 and 3,253 import entries within the proposed port of entry in the years 1996 through 1998, with no single company accounting for more than half of the projected entries. It was further stated in the request for a port of entry that the Sioux Falls Regional Airport Authority is committed to making optimal use of electronic date transfer capability to permit integration with the Customs Automated Commercial System for processing entries. Regarding the Joe Foss Field airport, it was stated the airport has exceptional cargo and passenger facilities, that passenger areas can be secured to accommodate international arrival passenger clearance, and that there are several warehouse facilities in close proximity to the airport that are suitable for the secure storage of cargo pending inspection and release by Customs. Further, the Sioux Falls Regional Airport Authority committed to providing certain space and equipment to Customs.

Based on the information provided to Customs, the proposal set forth Customs belief that Sioux Falls meets the current minimum criteria for port of entry designation set forth in T.D. 82–37 (47 FR 10137), as revised by T.D. 86–14 (51 FR 4559) and by T.D. 87–65 (52 FR 16328).

Determination

No comments were received in response to the proposal. After further review and consideration by Customs, it has been determined to establish Sioux Falls as a port of entry with port limits as described below. Section 101.3 is amended accordingly. It is noted, however, that because the representations set forth in the proposal rely on potential, rather than actual, workload figures, Customs will in 3 years review the actual workload generated within the port of Sioux Falls to evaluate whether Sioux Falls may retain port of entry status. If that review indicates that the actual workload is below the standard set forth in T.D. 82–37, as revised, procedures will be instituted to revoke port of entry status. Of course, if port of entry status is revoked, the City of Sioux Falls will have the opportunity to apply for user fee airport status under 19 U.S.C. 58b.

Limits of Port of Entry

The geographical limits of the port of entry of Sioux Falls are as follows:

All of Minnehaha and Lincoln Counties in the State of South Dakota.

Regulatory Flexibility Act and Executive Order 12866

Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although this document was issued for public comment, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553 because it relates to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Agency organization matters such as this are exempt from consideration under Executive Order 12866.

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Harbors, Organization and functions (Government agencies), Seals and insignia, Vessels.

Amendments to the Regulations

For the reason set forth in the preamble, part 101 of the Customs Regulations is amended as set forth below:

PART 101—GENERAL PROVISIONS

1. The general authority citation for part 101 and specific authority citation for § 101.3 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

Sections 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

* * * * *

2. Section 101.3(b)(1) is amended by adding the following entry in appropriate alphabetical order:

§ 101.3 Customs service ports and ports of entry.

* * * * *

(b) * * *

(1) * * *

Ports of entry	Limits of port
* * * * *	
South Dakota	
Sioux Falls	T. D. 96–3
* * * * *	

Approved: December 1, 1995.

George J. Weise,

Commissioner of Customs.

Dennis M. O'Connell,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 95–31324 Filed 12–27–95; 8:45 am]

BILLING CODE 4820–02–P

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19 CFR Part 162

[T.D. 96–2]

RIN 1515–AB62

Seizure of Merchandise

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: In this document, Customs is amending its regulations in response to enactment of the Customs Modernization Act (''The Mod Act''). Among its other provisions, the Mod Act amended Section 596(c) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)) to clarify and codify Customs authority to seize and forfeit merchandise introduced or attempted to be introduced into the United States contrary to law. The Mod Act distinguishes between circumstances under which seizure of such merchandise is mandatory and those in which it is permissive. The amendment follows the legislation and specifies the circumstances under which the mandatory and permissive seizures may take place. The amendment also contains provisions for the detention of merchandise and the remission of articles subject to seizure and forfeiture.

EFFECTIVE DATE: January 29, 1996.

FOR FURTHER INFORMATION CONTACT: Todd Schneider, Penalties Branch (202) 482–6950.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, the President signed the North American Free Trade Agreement Implementation Act (Pub. L. 103–182). The Customs Modernization portion of this Act (Title VI), popularly known as the Customs Modernization Act, or ''the Mod Act'' became effective when it was signed. Section 624 of Title VI amended section 596(c) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)) to codify and clarify the circumstances under which merchandise may be seized and forfeited by Customs.

On May 3, 1995, Customs published a Notice of Proposed Rulemaking in the Federal Register (60 FR 21788), which proposed amending the Customs Regulations to reflect these statutory

changes. Because no comments were received in response to the Notice of Proposed Rulemaking, Customs is now amending its regulations as proposed.

The Mod Act amendments to § 1595a(c) provide that merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated in two different manners depending upon the circumstances of the introduction or attempted introduction. In instances where the merchandise is stolen, smuggled, or clandestinely imported or introduced or is a controlled substance or contraband article, seizure is mandatory.

Paragraph (a) of the amendment addresses conditions where seizure is mandatory.

Paragraph (b) of the amendment covers those situations in which seizure is permissive. Seizure is permissive in instances where the merchandise is subject to health, safety or conservation restrictions which have not been complied with; when licenses, permits or other authorizations of a U.S. Government agency are required but do not accompany the merchandise; when copyright, trademark, or trade name violations are involved; when trade dress merchandise involved is in violation of a court order citing section 43 of the Act of July 5, 1946 (15 U.S.C. 1125); and when the merchandise is marked intentionally in violation of section 304, Tariff Act of 1930 (19 U.S.C. 1304). The legislation also provides that merchandise may be seized if it is merchandise for which the importer has received written notices that previous importations of identical merchandise from the same supplier were found to have been marked in violation of section 304, Tariff Act of 1930 (19 U.S.C. 1304).

Paragraph (c) of the amendment provides instructions on procedures which Customs will follow in resolving questions which result from seizures which have been made under section 1595a(c).

Paragraph (d) of the amendment contains language specifying that merchandise which is misclassified or incorrectly valued, where there is no issue of admissibility, will be subject to seizure only under section 1592.

The Mod Act also provides that merchandise which is subject to quantitative restrictions requiring a visa, permit, license or other similar document from the United States Government or a foreign government or issuing authority pursuant to a bilateral or multilateral agreement shall be subject to detention until the appropriate visa, license, permit or similar document or stamp is presented to Customs. However, if the visa, license, permit, or similar document or stamp is counterfeit as presented, the merchandise may be seized. This provision is contained in paragraph (e) of the amendment.

Regulatory Flexibility Act

Insofar as the regulations closely follow legislative direction, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12866

This amendment does not meet the criteria for a ''significant regulatory action'' as specified in E.O. 12866.

Drafting Information

The principal author of this document was Peter T. Lynch, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 162

Customs duties and inspection, Law enforcement, Seizures and forfeitures.

Amendment

Section 162, Customs Regulations (19 CFR Part 162) is amended as set forth below:

PART 162—RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

1. The general authority citation for Part 162 is revised and a new specific cite for § 162.23 is added to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624.

* * * * *

Section 162.23 also issued under 19 U.S.C. 1595a(c).

* * * * *

2. In part 162, a new section 162.23 is added to read as follows:

§ 162.23 Seizure under section 596(c), Tariff Act of 1930, as amended (19 U.S.C. 1595a(c)).

(a) *Mandatory seizures.* The following, if introduced or attempted to be introduced into the United States contrary to law, shall be seized pursuant to section 596(c), Tariff Act of 1930, as amended (19 U.S.C. 1595a(c)):

(1) Merchandise that is stolen, smuggled, or clandestinely imported or introduced;

(2) A controlled substance, as defined in the Controlled Substance Act (21 U.S.C. 801 *et seq.*), not imported in accordance with law; or

(3) A contraband article, as defined in section 1 of the Act of August 9, 1939 (49 U.S.C. 80302).

(b) *Permissive seizures.* The following, if introduced or attempted to be introduced into the United States contrary to law, may be seized pursuant to section 596(c), Tariff Act of 1930, as amended (19 U.S.C. 1595a(c)):

(1) Merchandise the importation or entry of which is subject to any restriction or prohibition imposed by law relating to health, safety, or conservation, and which is not in compliance with the applicable rule, regulation or statute;

(2) Merchandise the importation or entry of which requires a license, permit or other authorization of a United States Government agency, and which is not accompanied by such license, permit or authorization;

(3) Merchandise or packaging in which copyright, trademark or trade name protection violations are involved (including, but not limited to, a violation of sections 42, 43 or 45 of the Act of July 5, 1946 (15 U.S.C. 1124, 1125 or 1127), sections 506 or 509 of title 17, United States Code, or sections 2318 or 2320 of title 18, United States Code);

(4) Trade dress merchandise involved in the violation of a court order citing section 43 of the Act of July 5, 1946 (15 U.S.C. 1125);

(5) Merchandise marked intentionally in violation of 19 U.S.C. 1304;

(6) Merchandise for which the importer has received written notices that previous importations of identical merchandise from the same supplier were found to have been in violation of 19 U.S.C. 1304; or

(7) Merchandise subject to quantitative restrictions, found to bear a counterfeit visa, permit, license, or similar document, or stamp from the United States or from a foreign government or issuing authority pursuant to a multilateral or bilateral agreement (but see paragraph (e), of this section).

(c) *Resolution of seizure under § 1595a(c).* When merchandise is either required or authorized to be seized under this section, the forfeiture incurred may be remitted in accord with 19 U.S.C. 1618, to include as a possible option the exportation of the merchandise under such conditions as Customs shall impose, unless its release would adversely affect health, safety, or conservation, or be in contravention of a bilateral or multilateral agreement or treaty.

(d) *Seizure under 19 U.S.C. 1592.* If merchandise is imported, introduced or attempted to be introduced contrary to a provision of law governing its classification or value, and there is no issue of admissibility, such merchandise shall not be seized pursuant to 19 U.S.C. 1595a(c). Any seizure of such merchandise shall be in accordance with section 1592 (see § 162.75 of this chapter).

(e) *Detention only.* Merchandise subject to quantitative restrictions requiring a visa, permit, license, or other similar document, or stamp from the United States Government or from a foreign government or issuing authority pursuant to a bilateral or multilateral agreement, shall be subject to detention in accordance with 19 U.S.C. 1499, unless the appropriate visa, permit, license, or similar document, or stamp is presented to Customs (but see paragraph (b)(7), of this section for instances when seizure may occur).

George J. Weise,

Commissioner of Customs.

Approved: November 29, 1995.

Dennis M. O'Connell,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 95–31325 Filed 12–27–95; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972; Amendment

AGENCY: Department of the Navy, DOD.

ACTION: Final Rule.

SUMMARY: The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (Admiralty) of the Navy has determined that USS LABOON (DDG 58) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with certain provisions of the 72 COLREGS without interfering with its special functions as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

EFFECTIVE DATE: December 5, 1995.

FOR FURTHER INFORMATION CONTACT: Captain R. R. Pixa, JAGC, U.S. Navy, Admiralty Counsel, Office of the Judge Advocate General, Navy Department, 200 Stovall Street, Alexandria, VA 22332–2400; Telephone number: (703) 325–9744.

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR Part 706. This amendment provides notice that the Deputy Assistant Judge Advocate General (Admiralty) of the Navy, under authority delegated by the Secretary of the Navy, has certified that USS LABOON (DDG 58) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Annex I, paragraph 3(a), pertaining to the location of the forward masthead light in the forward quarter of the vessel, the placement of the after masthead light, and the horizontal distance between the forward and after masthead lights; Annex I, paragraph 2(f)(i) pertaining to placement of the masthead light or lights above and clear of all other lights and obstructions; and, Annex I, paragraph 3(c) pertaining to placement of task lights not less than two meters from the fore and aft centerline of the ship in the athwartship direction. The Deputy Assistant Judge Advocate General (Admiralty) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR Parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

List of Subjects in 32 CFR Part 706

Marine safety, Navigation (water), and Vessels.

Accordingly, 32 CFR Part 706 is amended as follows:

PART 706—[AMENDED]

1. The authority citation for 32 CFR Part 706 continues to read:

Authority: 33 U.S.C. 1605.

2. Table Five of § 706.2 is amended by revising the entry for ''USS LABOON'' to read as follows:

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

* * * * *

TABLE FIVE

Vessel	No.	Masthead lights not over all other lights and obstructions. annex I, sec. 2(f)	Forward masthead light not in forward quarter of ship. annex I, sec. 3(a)	After masthead light less than ½ ship's length aft of forward masthead light. annex I, sec. 3(a)	Percentage horizontal separation attained.
* * * *		*	*	*	
USS LABOON	DDG 58	X	X	X	20.4
* * * *		*	*	*	

Dated: December 5, 1995.

R.R. Pixa,

Captain, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty).

[FR Doc. 95–31258 Filed 12–27–95; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 3

[CGD 95–081]

RIN 2115–AF22

Fifth and Eighth District Marine Inspection and Captain of the Port Zone Boundaries

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is amending the descriptions of several Marine Inspection and Captain of the Port zone boundaries in the Fifth Coast Guard District as a result of the consolidation of the Marine Safety Office Baltimore and Group Baltimore into a single unit, Activities Baltimore. The Coast Guard is also revising the descriptions of the former Marine Inspection and Captain of the Port Zones for Houston, TX and Galveston, TX to reflect their merger into a single zone. These changes will clarify Coast Guard geographic area responsibilities both in the Fifth and in the Eighth Coast Guard Districts. These changes are administrative and will not impact the type or level of Coast Guard services performed.

EFFECTIVE DATES: This rule is effective on December 28, 1995.

ADDRESSES: Unless otherwise indicated, documents referred to in this preamble are available for inspection or copying at the office of the Executive Secretary, Marine Safety Council (G–LRA/3406), U.S. Coast Guard Headquarters, 2100 Second Street SW., room 3406, Washington, DC 20593–0001 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267–1477.

FOR FURTHER INFORMATION CONTACT: Janet Walton, Project Manager, Standards Evaluation and Development Division (G–MES–2), (202) 267–0257.

SUPPLEMENTARY INFORMATION:

Background and Purpose

Fifth District—Activities Baltimore

During 1995, the Coast Guard reorganized the Marine Safety Office Baltimore and Group Baltimore units by consolidating them into a single unit and redefining its geographic area of responsibility. The new unit, Activities Baltimore, is now the location of the Baltimore Marine Inspection Office (MI) and Captain of the Port Office (COTP), and its area of responsibility is now limited to the upper Chesapeake Bay and its tributaries, all within the State of Maryland. The Philadelphia Marine Inspection Zone and Captain of the Port Zone were enlarged to add those portions of the Chesapeake and Delaware Canal, and upper portions of the Nanticoke River located within the state of Delaware which formerly were in the Baltimore zone. The Hampton Roads Marine Inspection Zone and Captain of the Port Zone has been expanded to include portions of eastern Maryland, northern Virginia and the Atlantic Ocean which formerly had been part of the Baltimore Marine Inspection Zone and Captain of the Port Zone. The boundary between the Baltimore and Hampton Roads MI and COTP zones is now, starting from the intersection of the Virginia-Maryland-West Virginia boundaries, the southern bank of the Potomac River as it follows the Virginia-Maryland and Virginia-District of Columbia boundaries, the Virginia-Maryland boundary across the Chesapeake Bay and the western portion of Delmarva Peninsula, and a north-south line along 75°30′ W. longitude from the Virginia-Maryland boundary to the Maryland-Delaware boundary. The entire Commonwealth of Virginia and the eastern portion of Maryland along the Atlantic coast are now included within the Hampton Roads Marine Inspection Zone and COTP Zone.

Eighth District—Houston-Galveston

Previously, the Coast Guard Marine Safety Offices in Houston and Galveston each exercised MI and COTP authority in their respective regions. The Coast Guard has consolidated the MI and COTP authority for both of these regions into one MI and COTP zone, Houston-Galveston. This merger streamlined the command and control of Marine Safety activities for the Houston and Galveston areas.

Discussion of Changes

The current descriptions do not reflect the changes in these MI/COTP zones. This rule will revise these descriptions. The Coast Guard is proceeding directly to a final rule under section 553(b)(3)(A) of the Administrative Procedures Act (5 U.S.C. § 551 et seq.) which excludes rulemakings relating to agency organization, procedure, or practice from the requirements of public notice and comment. These changes are administrative and will not impact the type or level of Coast Guard services performed.

§ 3.25–05. This section, describing the Philadelphia Marine Inspection Zone and Captain of the Port Zone, is revised to add those portions of the Chesapeake and Delaware Canal, and upper portions of the Nanticoke River located within the state of Delaware which previously were in the Baltimore zone. As a result, the entire state of Delaware will be within the boundaries of the Philadelphia Marine Inspection and Captain of the Port Zones.

§ 3.25–10. This section, describing the Hampton Roads Marine Inspection Zone and Captain of the Port Zone, is being revised to add the northern portion of Virginia, the eastern portion of Maryland, and the portion of the Atlantic Ocean which previously were in the Baltimore MI and COTP Zones. Instead of the boundary between the Baltimore and Hampton Roads MI/COTP zones currently described by a line through northern Virginia and the Virginia-Maryland boundary across the Chesapeake Bay and the Delamarva Peninsula, the boundary is now, starting from the intersection of the Virginia-Maryland-West Virginia boundaries, the southern bank of the Potomac River as it follows the Virginia-Maryland and Virginia-District of Columbia boundaries, the Virginia-Maryland boundary across Chesapeake Bay and the western portion of Delmarva Peninsula, and a north-south line along 75°30′ W. longitude from the Virginia-Maryland boundary to the Maryland-Delaware boundary, and then along that boundary to the ocean and further seaward. The entire Commonwealth of Virginia, the eastern portion of Maryland along the Atlantic coast, and the Atlantic Ocean adjacent to the Maryland coast to the outermost extent of the EEZ are now included within the Hampton Roads Marine Inspection Zone and Captain of the Port Zone. The Hampton Roads zones will border the Philadelphia Marine Inspection and Captain of the Port Zones from a point on the Maryland-Delaware boundary (75°30′ W. longitude) and along that boundary to the ocean and further seaward in the same manner as did the Baltimore MI/COTP zones.

§ 3.25–15. This section, describing the Baltimore Marine Inspection Zone and Captain of the Port Zone, is revised to describe its new boundaries. The Chesapeake and Delaware Canal, and Nanticoke River, which were wholly within the Baltimore Marine Inspection and COTP Zones, are now divided between the Baltimore and Philadelphia zones at the Maryland-Delaware

boundary. This section is also being revised so that Baltimore's common boundary with the Hampton Roads Marine Inspection and COTP Zones matches that described for section 3.25–10. The result will be that the Baltimore Marine Inspection Zone and COTP Zone will encompass the whole of the State of Maryland, including the Potomac River to the Virginia and District of Columbia boundaries, with the exception of that portion of Maryland east of 75°30′ N. longitude.

§ 3.40–25. This section, describing the Houston Marine Inspection Zone and Captain of the Port Zone, is removed.

§ 3.40–28. This section, describing the Houston-Galveston Marine Inspection Zone and Captain of the Port Zone, is added. The MSO Houston remains at the same location, is renamed MSO Houston-Galveston, and assumes MI and COTP authority. MSO Galveston remains at the same location, becomes Marine Safety Unit (MSU) Galveston, and is a subordinate office to MSO Houston-Galveston with no independent MI or COTP authority.

§ 3.40–30. This section, describing the Galveston Marine Inspection Zone and Captain of the Port Zone, is removed.

Regulatory Evaluation

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

Collection of Information

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

Federalism

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

Environment

The Coast Guard considered the environmental impact of this rule and concluded that under paragraph 2.B.2 of Commandant Instruction M16475.1B, this rule is categorically excluded from further environmental documentation. This exclusion is in accordance with paragraphs 2.B.2.e.(34)(a) and (b), concerning regulations that are editorial or procedural and concerning internal agency functions or organization. A ''Categorical Exclusion Determination'' is available in the docket for inspection or copying where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 3

Organization and functions (Government agencies).

For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 3 as follows:

PART 3—COAST GUARD AREAS, DISTRICTS, MARINE INSPECTION ZONES, AND CAPTAIN OF THE PORT ZONES

1. The authority citation for part 3 continues to read as follows:

Authority: 14 U.S.C. 633; 49 CFR 1.45, 1.46.

2. In § 3.25–05, paragraph (b) is revised to read as follows:

§ 3.25–05 Philadelphia Marine Inspection Zone and Captain of the Port Zone.

* * * * *

(b) The boundary of the Philadelphia Marine Inspection Zone and Captain of the Port Zone starts at the New Jersey coast at 39°57′ N. latitude, thence proceeds westward to 39°57′ N. latitude, 74°27′ W. longitude; thence north-north-westerly to the intersection of the New York-New Jersey-Pennsylvania boundaries at Tristate; thence north following the course of and including the waters of the Delaware River until it meets the New York boundary; thence west along the New York-Pennsylvania boundary to 78°55′ W. longitude; thence south to 41°00′ N. latitude; thence west to 79°00′ W. longitude; thence south to the Pennsylvania-Maryland boundary; thence east to the intersection of the Maryland-Delaware boundary; thence south and east along the Maryland-Delaware boundary to the sea, including Fenwick Island Light. The offshore boundary starts at Fenwick Island Light and proceeds east along 38°28′ N. latitude, to 71°00′ W. longitude; thence northwesterly along a line bearing 122°T from the New Jersey coast at 39°57′ N. latitude.

3. In § 3.25–10, paragraph (b) is revised to read as follows:

§ 3.25–10 Hampton Roads Marine Inspection Zone and Captain of the Port Zone.

* * * * *

(b) The boundary of the Hampton Roads Marine Inspection Zone and Captain of the Port Zone starts at the intersection of the Maryland-Delaware boundary and the coast and proceeds along the Maryland-Delaware boundary to a point 75°30′ W. longitude; thence southerly to a point 75°30′ W. longitude on the Maryland-Virginia boundary; thence westerly along the Maryland-Virginia boundary as it proceeds across the Delmarva Peninsula, Pocomoke River, Tangier and Pocomoke Sounds, and Chesapeake Bay; thence northwesterly along the Maryland-Virginia boundary and the District of Columbia-Virginia boundary as those boundaries are formed along the southern bank of the Potomac River to the intersection of the Virginia-Maryland-West Virginia boundaries; thence southerly along the Virginia-West Virginia boundary and the Virginia-Kentucky boundary to the Tennessee boundary; thence eastward along the Virginia-Tennessee boundary to the Virginia-North Carolina boundary; thence eastward along the Virginia-North Carolina boundary to Kerr (Buggs Island) Lake; thence along the shore of Kerr Lake in North Carolina back to the Virginia-North Carolina boundary; thence eastward along the Virginia-North Carolina boundary to the west bank of the Chowan River; thence southerly along the west bank of the Chowan River to a point 36°00′ N. latitude, 76°41′ W. longitude; thence generally southerly and easterly along the western boundaries of Washington, and Hyde Counties to a point 35°37′ N. latitude, 76°32′ W. longitude; thence easterly to a point 35°37′ N. latitude, 76°00.5′ W. longitude; thence generally southwesterly to a point 35°01.5′ N. latitude, 76°20′ W. longitude; thence easterly to the sea at 34°59.8′ N. latitude, 76°07.8′ W. longitude. The offshore boundary starts at the intersection of the Maryland-Delaware boundary and the coast and proceeds east to a point 38°28′ N. latitude, 71°00′ W. longitude; thence southeasterly on a line bearing 122°T to the outermost extent of the EEZ; thence southerly along the outermost extent of the EEZ to 34°59.8′ N. latitude; and thence westerly along 34°59.8′ N. latitude to the coast at 76°07.8′ W. longitude.

4. In § 3.25–15, paragraph (b) is revised to read as follows:

§ 3.25–15 Baltimore Marine Inspection Zone and Captain of the Port Zone

* * * * *

(b) The boundary of the Baltimore Marine Inspection Zone and Captain of the Port Zone starts at a point of 75°30′ W. longitude on the Delaware-Maryland boundary and proceeds along the Delaware-Maryland boundary west and north to the Pennsylvania boundary; thence west along the Pennsylvania-Maryland boundary to the West Virginia boundary; thence southerly and easterly along the Maryland-West Virginia boundary to the Virginia boundary; thence southeasterly along the Maryland-Virginia boundary and the District of Columbia-Virginia boundary as those boundaries are formed along the southern bank of the Potomac River; thence easterly along the Maryland-Virginia boundary as it proceeds across the Chesapeake Bay, Tangier and Pocomoke Sounds, Pocomoke River, and Delmarva Peninsula to a point 75°30′ W. longitude on the Maryland-Virginia boundary; thence northerly to a point 75°30′ W. longitude on the Delaware-Maryland boundary.

§ 3.40–25 [Removed]

5. Section 3.40–25 is removed.

6. Section 3.40–28 is added to read as follows:

§ 3.40–28 Houston-Galveston Marine Inspection Zone and Captain of the Port Zone

(a) The Houston-Galveston Marine Inspection Office and the Captain of the Port Office are located in Houston, Texas. The Galveston Marine Safety Unit is a subordinate unit of the Marine Safety Office and is located in Galveston, Texas.

(b) The boundary of the Houston-Galveston Marine Inspection Zone and Captain of the Port Zone starts at the intersection of the sea and 94°23′ W. longitude; thence proceeds north along 94°23′ W. longitude to 30°00′ N. latitude; thence west along 30°00′ N. latitude to the east bank of the Trinity River; thence northerly along the east bank of the Trinity River; thence northwesterly along the eastern shore of Lake Livingston; thence northwesterly along the east bank of the Trinity River to the southern boundary of Dallas County, Texas; thence westerly along the southern boundary of Dallas County, Texas to 97°00′ W. longitude; thence north along 97°00′ W. longitude to the Texas-Oklahoma boundary; thence northwesterly along the Texas-Oklahoma boundary; thence north along the New Mexico-Oklahoma boundary; thence west along the New Mexico-Colorado boundary; thence south along the New Mexico-Arizona boundary; thence easterly along the southern boundary of New Mexico to the southeast corner of New Mexico at 32°00′ N. latitude; thence southeasterly to 29°18′ N. latitude, 96°07′ W. longitude on the east bank of the Colorado River; thence southerly along the east bank of the Colorado River to the sea; thence along a line bearing 140°T to the outermost extent of the EEZ; thence easterly along the outermost extent of the EEZ to 93°25′ W. longitude; thence north to 27°49′ N. latitude, 93°25′ W. longitude; thence northwesterly to 29°30′ N. latitude, 93°48′ W. longitude; thence westward following a line 10.3 nautical miles from the coast to 29°24′ N. latitude, 94°20′ W. longitude; thence northwesterly to the coast at 94°23′ W. longitude.

§ 3.40–30 [Removed]

7. Section 3.40–30 is removed.

Dated: December 19, 1995.

J.C. Card,

Rear Admiral, U.S. Coast Guard, Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 95–31375 Filed 12–27–95; 8:45 am]

BILLING CODE 4910–14–M

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46 CFR Part 16

[CGD 95–090]

RIN 2115–AF25

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel; Delay of Implementation Dates

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is delaying the effective date of regulations governing drug testing, insofar as those regulations would require testing of persons onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government. Under this final rule, the Coast Guard continues to delay the effective date for foreign implementation until January 2, 1997, to allow completion of a permanent change to the regulations affecting foreign implementation of its drug testing rules.

EFFECTIVE DATE: December 28, 1995.

ADDRESSES: Unless otherwise indicated, documents referred to in this preamble are available for inspection or copying at the office of the Executive Secretary, Marine Safety Council (G–LRA/3406), U.S. Coast Guard Headquarters, 2100 Second Street SW., room 3406, Washington, DC 20593–0001 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267–1477.

FOR FURTHER INFORMATION CONTACT: Lieutenant Jerry Hilton, Project Manager, Marine Investigation Division (G–MAO–1), Office of Marine Safety, Security and Environmental Protection, (202) 267–0686.

SUPPLEMENTARY INFORMATION:

Drafting Information

The principal persons involved in drafting this document are Lieutenant Jerry Hilton, Project Manager, Office of Marine Safety, Security and Environmental protection, and Christena Green, Project Counsel, Office of Chief Counsel.

Background and Purpose

On November 21, 1988, the Coast Guard, along with other agencies of the Department of Transportation (DOT), adopted regulations requiring pre-employment, post-accident, reasonable cause, and random drug testing. Those individuals required under Federal law or regulation to have periodic medical examinations were also required to undergo a drug test at the same time. The drug testing required by the rule applies to some persons located outside of the United States. However, the rules provided that they would not apply outside the United States in any situation in which application of the rules violated foreign local laws or policies.

At the same time, the Coast Guard stated that the DOT and other elements of the government would enter into discussions with foreign governments to attempt to resolve any conflict between our rules and foreign government laws or policies. The Coast Guard stated that if, as a result of those discussions, it was found that amendments to the rule were necessary, timely amendments would be issued. An amendment was issued on December 21, 1989, and published on December 27, 1989 (54 FR 53286). Under that amendment, drug testing for persons onboard U.S. vessels in waters subject to the jurisdiction of a foreign government was scheduled to begin by January 2, 1992. A final Rule was published on April 24, 1991, delaying the implementation date to January 2, 1993 (56 FR 18982); a Final Rule was published on July 14, 1992, delaying the implementation date to January 2, 1995 (57 FR 31274); and another Final Rule was published on December 20, 1994, delaying the implementation date to January 2, 1996 (59 FR 6500).

During the past few years, discussions with other countries have been held, and the difficulty of achieving effective bilateral agreements has become clear. Although the Coast Guard could allow its regulations to take effect in foreign

waters, the Coast Guard continues to recognize that: (1) It would be difficult for U.S. carriers to effectively implement the regulations without cooperation from foreign governments; (2) in response, foreign governments could impose restrictions on U.S. operations; and, perhaps most importantly, (3) there are distinct advantages to be gained in aligning foreign measures and U.S. measures, especially as they relate to international transportation operations.

For these reasons, the Coast Guard has proposed not to require testing under part 16 in waters subject to the jurisdiction of a foreign government [CGD95–011; 60 FR 43426; August 21, 1995]. The comment period on that NPRM ended October 20, 1995.

In order to allow time to further consider these issues and to formulate a final decision, the Coast Guard has again determined that additional time is necessary. Another delay of approximately one year should provide sufficient time to complete the rulemaking on foreign applicability. Accordingly, the Coast Guard has determined to postpone again the date by which testing programs would commence for persons onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government.

This final rule delays the applicability of the regulations where they may conflict with foreign law or policy. This rule imposes no additional burdens on the regulated industry. Without this delay in the implementation date, persons onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government would become subject to the requirements of part 16 on January 2, 1996. Delaying the implementation date ensures that the applicability of part 16 will continue unchanged. Accordingly, the Coast Guard finds that good cause exists under 5 U.S.C. 553(b) to publish this rule without notice and comment and to make this rule effective less than 30 days after publication in the Federal Register.

Regulatory Evaluation

This final rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has not been reviewed by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 CFR 11034; February 26, 1979). The economic impact of these changes is so minimal that further evaluation is not necessary. This final rule modifies the effective date for compliance with Coast Guard regulations governing drug testing, insofar as those regulations would require testing of persons onboard U.S. vessels that are subject to the jurisdiction of a foreign government. It does not change the basic regulatory structure of that rule.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this proposal will have a significant economic impact on a substantial number of small entities. ''Small entities'' include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as ''small business concerns'' under section 3 of the Small Business Act (15 U.S.C. 632). This rule does not require a general notice of proposed rulemaking and, therefore, is exempt from the regulatory flexibility requirements. Although exempt, the Coast Guard has reviewed this rule for potential impact on small entities.

The amendment in this final rule only extends a compliance data, and imposes no costs on affected entities. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

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

Federalism

The Coast Guard has analyzed this rule in accordance with the principles and criteria contained in Executive Order 12612 and has determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The authority to require programs for chemical drug and alcohol testing of commercial vessel personnel has been committed to the Coast Guard by Federal statutes. This final rule does, therefore, preempt State and local regulations regarding drug testing programs requiring the testing of persons onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government.

Environment

The Coast Guard has considered the environmental impact of this final rule, and has concluded that, under section 2.B.2.e(34)(c) of Commandant Instruction M16475.1B, it is categorically excluded from further environmental documentation. This final rule merely extends an implementation date and clearly has no environmental impact.

List of Subjects in 46 CFR Part 16

Drug testing, Marine safety, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set forth in the preamble, the Coast Guard amends 46 CFR part 16 as follows:

PART 16—CHEMICAL TESTING

1. The authority citation for part 16 continues to read as follows:

Authority: 46 U.S.C. 2103, 3306, 7101, 7301 and 7701; 49 CFR 1.46.

2. In § 16.207, paragraph (b) is revised to read as follows:

§ 16.207 Conflict with foreign laws.

* * * * *

(b) This part is not effective until January 2, 1997, with respect to any person onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government. On or before December 1, 1996, the Commandant shall issue any necessary amendment resolving the applicability of this part to such person on and after January 2, 1997.

Dated: December 20, 1995.

J.C. Card,

Rear Admiral, U.S. Coast Guard, Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 95–31370 Filed 12–27–95; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 950605147–5288–03; I.D. 112895A]

RIN 0648–AH33

Final List of Fisheries for 1996

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

ACTION: Final rule.

SUMMARY: In accordance with the Marine Mammal Protection Act of 1972, as amended (MMPA), NMFS publishes its MMPA final List of Fisheries (LOF) for 1996. The LOF classifies fisheries as either Category I, II, or III, based on their

level of incidental mortalities and serious injuries of marine mammals. After February 29, 1996, the owner or authorized representative of a fishing vessel or nonvessel fishing gear (hereinafter vessel owner) which participates in a Category I or II fishery must register for and obtain a valid Authorization Certificate.

EFFECTIVE DATE: March 1, 1996.

ADDRESSES: A copy of the Environmental Assessment (EA) prepared for the section 118 implementing regulations may be obtained by writing to Chief, Marine Mammal Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. Information and registration material for the region in which a fishery occurs, and reporting forms, may be obtained from the following addresses: NMFS, Northeast Region, One Blackburn Drive, Gloucester, MA 01930–2298, Attn: Sandra Arvilla; NMFS, Southeast Region, 9721 Executive Center Drive North, St Petersburg, FL 33702; NMFS, MMAP, Protected Species Management Division, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; NMFS, Northwest Region, 7600 Sand Point Way NE, Seattle, WA 98115 Attn: Permits office; NMFS–PMRD, P.O. Box 22668, 709 West 9th Street, Juneau, AK 99082.

FOR FURTHER INFORMATION CONTACT: Robyn Angliss, Office of Protected Resources, 301–713–2322; Douglas Beach, Northeast Region, 508–281–9254; Charles Oravetz, Southeast Region, 813–570–5301; James Lecky, Southwest Region, 310–980–4015; Brent Norberg, Northwest Region, 206–526–6140; Steven Zimmerman, Alaska Region, 907–586–7235.

SUPPLEMENTARY INFORMATION: Publication of the LOF, which places all U.S. commercial fisheries into three categories based on their levels of incidental mortality and serious injury of marine mammals, is required by section 118 of the MMPA. The following provides the history of this final 1996 LOF, clarification of the process used to classify fisheries, and a description of difference between the LOF published under section 114 of the MMPA and this final 1996 LOF.

History of the Final List of Fisheries for 1996

A proposed LOF for 1996 was published on June 16, 1995 (60 FR 31666) with proposed regulations implementing section 118. An EA was prepared concurrently with the development of the proposed regulations and the LOF and was made available when the proposed regulations were published. The public comment period for the proposed regulations ended on July 31, 1995; the public comment period for the proposed LOF ended September 14, 1995.

The process used to develop the proposed and final rule implementing section 118 included many opportunities for public involvement, such as working sessions, public hearings, written comments, press releases, and a regulatory alert. Additional details on these activities are found in the preamble to the final regulations implementing section 118, published on August 30, 1995 (60 FR 45086).

During July 1995, NMFS held 10 public hearings at various locations throughout the country to receive comments on the proposed implementing regulations and proposed LOF. A total of 86 individuals attended these hearings, 28 of whom submitted oral comments on the proposed rule, LOF or both. NMFS also received 23 written letters of comment specifically on the LOF. Comments were received from fishers, fishing industry groups, environmental groups, animal rights groups, state departments of fisheries, other executive branch departments, and members of the general public.

This final LOF responds only to those public comments addressing the proposed LOF. Comments addressing the proposed implementing regulations for section 118 were included in the preamble to the section 118 final implementing regulations.

Definitions of Category I, II, and III Fisheries

The regulations implementing section 118 of the MMPA introduced a new three category fishery classification scheme (50 CFR part 229) based on a two-tiered, stock-specific approach that first addresses the total impact of all fisheries on each marine mammal stock and then addresses the impact of individual fisheries on each stock. This approach is based on the rate, in numbers of animals per year, of serious injuries and mortalities due to commercial fishing relative to a stock's potential biological removal (PBR) level.

Tier 1: If the total annual mortality and serious injury across all fisheries that interact with a stock is less than or equal to 10 percent of the PBR of such a stock, then all fisheries interacting with this stock are placed in Category III. Otherwise, these fisheries are subject to the next tier to determine their classification.

Tier 2—Category I: Annual mortality and serious injury of a stock in a given fishery is greater than or equal to 50 percent of the PBR level.

Tier 2—Category II: Annual mortality and serious injury in a given fishery is greater than 1 percent but less than 50 percent of the PBR level.

Tier 2—Category III: Annual mortality and serious injury in a given fishery is less than or equal to 1 percent of the PBR level.

Tier 1, therefore, considers the cumulative fishery mortality and serious injury for a particular stock, while Tier 2 considers fishery-specific mortality for a particular stock. Additional details regarding how threshold percentages between the categories were determined are provided in the final rule implementing section 118.

Differences Between the LOF Under Section 114 and the LOF Under Section 118

There are several key differences between the LOF required and prepared under expired section 114 and the new LOF required and prepared under section 118.

Under section 114, fisheries were classified based on the number of incidental takes of marine mammals. As defined in 50 CFR 216.3, takes include harassment. Under section 118, fisheries are to be classified based on the number of serious injuries and mortalities that occur incidental to that fishery. Also, under section 118 intentional lethal mortalities and serious injuries of marine mammals are prohibited. Thus, incidental or intentional harassment, or intentional lethal takes are no longer used to classify fisheries into a particular category.

The fishery classification criteria under section 114 were dependent on the rate of all marine mammal takes per 20 days. The criteria are now based on the annual rate of incidental, species-specific serious injury and mortality of marine mammals relative to a particular marine mammal stock's PBR level.

Under section 114, fisheries were typically classified primarily based on observer data and logbook data, although analogy to fisheries with similar gear types could be made. Under the new regulations pursuant to section 118, observer data, logbook data, stranding data, fishers' reports, anecdotal reports, and analogy are used to classify fisheries.

Both sections 114 and 118 require that the marine mammal species involved in interactions with each fishery be identified in the LOF. Under section 114, ''involved'' was interpreted broadly and included those marine mammals

known or reported to be harassed by fisheries, and those marine mammals suspected to be injured, killed, or harassed incidental to commercial fishing operations. The list of marine mammal species identified in the final LOF for 1996 includes only those marine mammals that have been documented as having been injured or killed in observer programs, logbook reports, strandings data, or by fishers' reports or anecdotal reports. This list includes only those marine mammals that have been injured or killed incidental to commercial fisheries since 1989.

Registration Requirements for Vessels Participating in Category I and II Fisheries

Vessel owners participating in Category I or II fisheries must register under the MMPA, as required by 50 CFR 229.4. Registration under the MMPA is conducted on a NMFS Region-specific basis. Thus, how registration materials are distributed and the cost of registration differ between Regions. Under 50 CFR 229.4, the granting and administration of Authorization certificates is to be integrated and coordinated with existing fishery license, registration, or permit systems and related programs, whenever possible. Alternative registration programs have been or are being implemented in the Alaska Region, Northwest Region, and Southeast Region. Special procedures and instructions for registration in these Regions appear below.

If the granting and/or administration of authorizations has not been integrated with state licensing, registration, or permit systems, vessel owners may obtain registration forms from the NMFS Region in which their fishery operates. NMFS Regional Offices will endeavor to send these packets to known participants in Category I or II fisheries. The registration packet will typically include an MMAP registration form, a list of those fisheries in each region that require authorization in order to incidentally kill or injure marine mammals (Category I and II fisheries), and an explanation of the new management regime, including instructions on reporting requirements. The registration packet may also include an explanation of the changes in the fishery classification criteria, guidance on deterring marine mammals, and a reminder that intentional lethal takes of marine mammals are no longer permitted except under certain specific conditions.

Vessel owners must submit the registration form and the $25 fee to the NMFS Regional Office in which their fishery operates. NMFS will send the vessel owner an Authorization Certificate, program decals, and reporting forms within 60 days of receiving the registration form and application fee.

Procedures for registering in each NMFS region are outlined in the following section.

Region-Specific Registration Requirements for Category I and II Fisheries

If the granting and administration of authorizations under 50 CFR 229.4 is not integrated or coordinated with existing fishery licenses, registrations, or related programs, requests for registration forms and completed registration forms should be sent to the NMFS Regional Offices listed in this notice under **ADDRESSES.**

Alaska Region (AKR) MMAP Registration for 1996

Vessel owners in Category I and II state and Federal fisheries, as well as all vessel owners with Alaska Department of Fish and Game commercial vessel licenses, will receive a registration packet. Fishers may not register with other regions for Alaska fisheries. If a fisher plans to participate in a Category I or II fishery and does not receive a registration packet, AKR should be contacted see **ADDRESSES**.

Northwest Region (NWR) MMAP Registration for 1996

Oregon: Under an agreement developed between NMFS and the Oregon Department of Fish and Wildlife (ODFW), information collected for licensing purposes by the state of Oregon will be provided to NMFS in lieu of NMFS requiring a separate MMAP registration. Vessel owners in Oregon who apply for and obtain a Developmental Fisheries Permit to harvest and land swordfish using drift gillnet gear (CA/OR thresher shark/swordfish drift gillnet fishery; Category I) or a Developmental Fisheries Permit to harvest and land swordfish or blue shark using surface longline gear (OR swordfish/blue shark surface longline fishery; Category II) will automatically receive an Authorization for the incidental take of marine mammals at the time of permit issuance. Vessel owners will receive marine mammal injury and mortality reporting forms along with their fisheries permit and Authorization.

The number of available Developmental Permits for these fisheries is limited and the information necessary to fulfill the requirements of the MMPA is already being collected by ODFW for Developmental Permit processing. NMFS will provide limited support to ODFW for the issuance of the Authorizations. Processing costs for ODFW are expected to be minimal, and hence, MMAP registration fees will not be charged to Developmental Fishery permitholders in 1996.

Since the Authorization will be issued in combination with the Developmental Fisheries Permit, it is specific to the permit and will only authorize the incidental take of marine mammals during fishing activities conducted under this permit. Fishers who participate in the CA/OR thresher shark/swordfish drift gillnet fishery under permits to harvest and land in California must apply for and obtain a MMAP Authorization Certificate from the NMFS Southwest Region.

ODFW will provide NMFS with the following information:

(1) Name, address, and phone number of the Vessel Owner;

(2) Name, address, and phone number of the Permit Holder;

(3) Vessel name, U.S. Coast Guard documentation number, or state registration (OR) number (as applicable), and ODFW Developmental Fishery Permit number for the permitted vessel. NMFS will incorporate the information into a national data base of registered Category I and II fishers.

Washington: Under an agreement developed between NMFS and the Washington Department of Fish and Wildlife (WDFW), information collected by the State for licensing purposes will be provided to NMFS in lieu of NMFS requiring a separate MMAP registration. Vessel owners in Washington who apply for and obtain a Puget Sound Gillnet License to harvest and land salmon using drift gillnet gear (WA Puget Sound Region salmon drift gillnet fishery; includes all inland waters south of US-Canada border and eastward of the Bonilla-Tatoosh line—Treaty Indian fishing is excluded; Category II) will automatically receive an Authorization for the incidental take of marine mammals at the time of license issuance. Fishers will receive marine mammal injury/mortality reporting forms along with their fisheries license and Marine Mammal Authorization.

The information necessary to fulfill the requirements of the MMPA is already being collected by WDFW for Fishing License processing and NMFS will provide limited support for the issuance of the Authorization. Processing costs for WDFW are expected to be minimal, and hence, MMAP registration fees will not be charged to licenseholders in 1996. Since the

Authorization will be issued in combination with the Puget Sound Gillnet License, it is specific to this license and will only authorize the incidental take of marine mammals during fishing activities conducted under this state-issued license. Fishers who participate in other Category I or II fisheries to harvest and land fish in other States must apply for and obtain an MMAP Authorization Certificate from the appropriate NMFS regional office to cover that activity (see procedures for the applicable state/Federal fishing activity).

WDFW will provide NMFS with a copy of the following information:

(1) Name, address, and phone number of the Owner of the Designated Vessel;

(2) Name(s), address(es), and phone number(s) of License Owner, Primary Operator, and Alternate Operators;

(3) Vessel name, U.S. Coast Guard documentation number, or state registration (WN) number (as applicable), and WDFW registration number of the designated vessel. NMFS will incorporate the information into a national data base of registered Category I and II fishers.

Southwest Region (SWR) MMAP Registration for 1996

SWR is in the process of integrating MMAP registration for Category I and II fisheries that occur in California with the California Department of Fish and Game's commercial fishery permit registration program. However, this integration will not be completed before 1997. For this reason, Category I and II vessel owners in California will continue to register with SWR. In December 1995, vessel owners who engaged in a Category I or II fishery in 1995 will receive a registration packet in the mail. Any Category I or II vessel owner who has not received an application package by December 1, 1995, may request one from NMFS SWR (see **ADDRESSES**).

Southeast Region (SER) MMAP Registration for 1996

The only state fisheries in Category I or II that are under SER jurisdiction occur in North Carolina. State fishers in North Carolina will receive a registration packet in the mail. If a fisher plans to participate in any state or federal fishery in Category I or II and a registration packet is not received, fishers should contact SER (see **ADDRESSES**).

Northeast Region (NER) MMAP Registration for 1996

NER will distribute registration packets to those fishers on existing lists of registrants in the MMEP program, fishing vessel permit holder lists, and lists of state fishers obtained from New Jersey, Delaware, Maryland, and Virginia. Fishers participating in Category I or II fisheries should contact NER (see **ADDRESSES**).

Extension of Effective Period for Current List of Fisheries and Extension of Current Registrations of Vessel Owners

The preamble to the final regulations implementing section 118 stated that vessel owners holding a valid Exemption Certificate under section 114 will be deemed by NMFS to have registered under section 118 through December 31, 1995. Because it has taken longer than expected to publish the MMPA final LOF for 1996, the current MMPA LOF will remain in effect until March 1, 1996, and vessel owners holding a valid Exemption Certificate under section 114 will be deemed to have registered under section 118 until March 1, 1996. This extension will also allow vessel owners sufficient time to register under section 118 of the MMPA. In general, NMFS recommends that completed registration forms be submitted as soon as possible in advance of fishing in order to ensure that a valid Authorization Certificate has been received.

Extension of Interim Permit for the Incidental Taking of Threatened or Endangered Marine Mammals

On August 31, 1995, NMFS issued a single interim permit, valid through December 31, 1995, to certain vessel owners currently registered in Category I and II commercial fisheries for the incidental, but not intentional, taking of marine mammal stocks listed as threatened or endangered under the Endangered Species Act (60 FR 45399). Individual permits for 1996, 1997, and 1998 will be issued in conjunction with the issuance Authorization Certificates under section 118 of the MMPA. Because the current MMPA LOF will remain in effect until March 1, 1996, and vessel owners holding a valid Exemption Certificate under section 114 will be deemed to have registered under section 118 until March 1, 1996, NMFS hereby extends the interim permit until March 1, 1996.

Reporting Requirements for All Vessels

Vessel owners or operators in Category I, II, or III fisheries must comply with 50 CFR 229.6 and report all incidental mortality and injury of marine mammals during the course of commercial fishing operations to NMFS Headquarters or appropriate NMFS Regional Office. ''Injury'' is defined in 50 CFR 229.2 as a wound or other physical harm. In addition, any animal that ingests fishing gear, or any animal that is released with fishing gear entangling, trailing or perforating any part of the body will be considered injured and must be reported. Instructions for submission of reports is found in 50 CFR 229.6(a).

Responses to Comments

Many comments were lengthy and raised many points of concern. Key issues and concerns are summarized and responded to as follows:

Comments on Fisheries in the Alaska Region

Comment 1: Incidental and intentional mortality of marine mammals appear to be under reported for the Alaska Yakutat salmon set gillnet fishery, indicating the fishery should be in Category I instead of Category II. It is strongly recommended that an observer program be established in Yakutat and Dry Bay, so that more reliable information on intentional killing of marine mammals might be available.

Response: The intentional lethal take of marine mammals was made illegal by the 1994 amendments to the MMPA, except in situations where it is imminently necessary in self defense or to save the life of a person in immediate danger. Since intentional lethal takes are no longer authorized, NMFS cannot use rates of this type of take to categorize fisheries for the section 118 regime. Incidental, but not intentional, marine mammal serious injury or mortality rates, are used for categorizing fisheries for this final LOF. With the information available to NMFS at this time, the incidental serious injury and mortality rate of marine mammals in the Yakutat set gillnet fishery places them in Category II. Fishery categories are evaluated each year, and as more information becomes available, it will be used in these evaluations.

Comment 2: The report of low injury rates to humpback whales and Steller sea lions in many fisheries appears to be due to a lack of data rather than to a solid understanding of the rate of injury.

Response: NMFS agrees that there is a lack of data regarding serious injury and mortality rates for many fisheries in Alaska. Only three fisheries are regularly observed for marine mammal interactions, and only three other fisheries have ever been observed; one for two seasons and two others for one season each. NMFS is currently evaluating observer needs in the region and intends to formulate and implement a long-term plan for observer coverage of Alaska fisheries. The extent of future

coverage will depend on the availability of funds.

Comment 3: The Bering Sea and the Aleutian Islands trawl fisheries should be separated for the purpose of setting categories. Many of the commercial fishing quotas are set separately for the Bering Sea and Aleutian districts and the ecosystems have somewhat different characteristics. There is no justification for declaring both areas the same fishery for purposes of categorization if marine mammal interactions occur in only one area. To classify all the Bering Sea and Aleutian trawl fisheries as the same category for marine mammal interactions that occur in only one target fishery or in only one portion of the area is arbitrary and capricious and inflicts unwarranted regulations on a large number of vessels.

Response: Splitting the fishery into smaller statistical areas would isolate the portions of those fisheries that are responsible for marine mammal takes. However, because the Bering Sea and Aleutian Islands statistical areas are contiguous and most participants fish in both areas, categorizing the two areas separately would have little practical value and would make management difficult.

Comment 4: Being classified as a Category I or II fishery imposes serious reporting requirements on many small business entities.

Response: Since the publication of the final implementing regulations for section 118 of the MMPA, on August 30, 1995, logbooks of fishing effort and marine mammal interactions are no longer required to be kept and turned in annually. The reporting requirements now in effect have been reduced to submitting a one-page report on a form supplied by NMFS within 48 hours of returning from the fishing trip (or from tending non-vessel gear) in which an incidental injury or mortality to a marine mammal occurred. Thus, the reporting requirements are limited to occurrences of an injury or mortality to a marine mammal in the course of fishing operations.

Comment 5: Although commenters supported the use of scientific evidence to determine the total allowable fishery induced mortality for a marine mammal stock, serious questions were raised regarding the data used to classify the Bering Sea/Aleutian Island (BSAI) groundfish trawl fishery. The take of two killer whales during the period 1990–93 resulted in moving BSAI trawl fisheries from Category III to Category II. However, the 1995 marine mammal stock assessment for killer whales indicates that the minimum population estimate is based on a direct count, with no available correction factors. Commenters also indicated that no reliable data on the population abundance of killer whale stocks were available and neither was a reliable estimate of maximum net productivity rate. Therefore the use of overly conservative measures in setting the acceptable level of fishing induced mortality should be discouraged. Better and more relevant data are needed before reclassifying all BSAI trawl fisheries as Category II.

In the NMFS stock assessment report (SAR) for the Alaska region, the killer whale chapter is divided into two sections, resident (759 animals) and non-resident (245 animals) populations. The total population size is 1004 animals. The total killer whale take is two animals—the population from which each was taken is listed as unknown. A commenter calculated the PBR level based on the entire population ($1004 \times 0.02 \times 0.5$) which resulted in a PBR level of 10.4 animals. The annual take as reported in the SAR is 0.8 animals per year. This number (0.8) divided by 10.4 animals (PBR) results in a take of 7.69 percent of PBR, not 10 percent as stated in the proposed LOF. It should be noted that the two sections of the killer whale chapter each calculate PBR level separately, 7.6 for resident killer whales and 2.4 for the non-resident population. The proposed LOF notice does not say which number was used to move the BSAI trawl fishery into Category II. Obviously, the killer whale population was not considered as a whole.

Response: NMFS believes that calculating the percentages of the PBR level separately for the two killer whale stocks is the most risk-averse approach.

The BSAI groundfish trawl fishery will be classified in Category III. This fishery was proposed to be classified in Category II in the proposed LOF based on serious injuries and mortalities of killer whales. However, because the level of serious injury and mortality to killer whales in this fishery is low (0.8 to 1.4 animals per year), the fishery is observed with over 60 percent observer coverage, and the population estimates for both the resident and transient stocks of killer whales are direct counts of known individuals and thus underestimate the total stock size, it is likely that the serious injury or mortality of approximately one killer whale per year is not adversely impacting the population. In addition, the final SARs for resident and transient killer whales notes that these stocks are not considered to be strategic.

If information becomes available that indicates that this observed fishery has excessive incidental serious injuries or mortalities from killer whale stocks or other stocks of marine mammals, it will be reclassified as necessary.

Comment 6: The August 9, 1994, draft stock assessment shows ''zero'' Pacific coast fishery mortalities of humpback whales. Yet the current proposed LOF would reclassify the Southeast Alaska salmon purse seine fishery from Category III to Category II, because ''total known humpback whale mortality and serious injury level across all fisheries exceed 10 percent of this stock's PBR, and the known serious injury level for this fishery is 0.4 animals per year.'' The EA implies that the take in this fishery was documented through a single voluntary report, but does not describe the nature of the interaction (i.e., mortality, entanglement, etc). According to the proposed LOF, the Southeast Alaska salmon drift gillnet fishery also has a known mortality and serious injury rate of 0.13 animals per year, but the EA makes no mention of any humpback takes by this fishery.

Response: The reports of humpback whale mortalities in the Southeast Alaska purse seine fishery were identified after the publication of the August 9, 1994 draft stock assessments. There were two mortalities of humpback whales in this fishery, one in 1989 and one in 1994. In both cases, individual whales became entangled in purse seine nets being actively fished. One whale was entangled in the bunt and subsequently in the net. The second whale became entangled in the lead line and then wrapped in the net as it tried to free itself. The fishers involved tried to free the whales, but were unsuccessful. Data on humpback whale entanglements in the Southeast Alaska salmon drift gillnet fishery came from stranding network data, but, in addition, there have been several cases where fishers have notified the Coast Guard or NMFS, and NMFS personnel assisted with freeing the whales. This kind of cooperation is greatly appreciated by NMFS.

Comment 7: One commenter was disturbed by the weight one unsubstantiated anecdotal report of a marine mammal take was given in determining the category status of the Southeast Alaska salmon purse seine fishery and believed the procedures used to document and authenticate this report were seriously lacking. The commenter asserted that while NMFS may be erring on the side of caution because humpback whales are a strategic stock and because of a low population estimate, a low estimate does not validate an unconfirmed

report. Based on the commenter's experience, mortalities and serious injuries to humpback whales due to interactions with purse seine gear are extremely rare, and seiners will expend a great deal of effort to avoid any interaction with whales because of damage to the gear and a substantial loss of fishing time. The commenter believed that a Category III listing is more appropriate for this fishery. Even if the Southeast Alaska salmon purse seine fishery were to remain in Category III, NMFS could still use alternative monitoring methods to acquire reliable information on the fishery's humpback interactions.

Response: Fisheries are classified based on the annual number of incidental serious injuries and mortalities relative to the PBR level for each marine mammal stock. Thus, a fishery could be placed in Category I or II as a result of a high mortality level or a low population abundance estimate, or some combination of the two. The weight that any number of serious injuries or mortalities in a given marine mammal stock has on categorization of fisheries is directly related to the PBR level for that stock. In the case of the central North Pacific stock of humpback whales, the PBR level is 2.8 animals. There were three mortalities reported for all fisheries between 1989 and 1994. In a Tier I categorization evaluation, this calculates to a rate of 0.5 animals per year, or 17.9 percent of the PBR level. Because this rate is higher than 10 percent of the PBR level, the effects of individual fisheries must be evaluated. There were two reported mortalities to humpbacks in the Southeast Alaska purse seine fishery, one in 1989 and one in 1994. The mortality rate for this fishery calculates to 0.33 animals per year, or 11.9 percent of the PBR level. Because this rate is greater than 1 percent, but less than 50 percent of the PBR level, the fishery is placed in Category II.

NMFS does not consider these Category III reports to be unreliable and has full confidence in their veracity. These data were reported by a crew member aboard the vessel(s) that interacted with the whales. The reports have been given no special treatment or additional weight.

NMFS agrees that the mortality and serious injury rate of humpbacks in the Southeast Alaska salmon purse seine fishery were low. However, the annual rate of serious injury and mortality in this fishery does fit the definition of a Category II fishery. If the categorization criteria were ignored, and the fishery was placed in Category III, NMFS would have no mechanism except for voluntary cooperation of Category III fishers, short of an emergency rule, to monitor the fishery interactions with humpbacks. Because the incidental serious injury or mortality of a humpback whale in a purse seine net is a ''no-win'' situation for all parties concerned, NMFS would like to work with the fishing industry to understand the nature of these interactions and develop means for fishers to avoid them, as well as effective responses if an interaction does occur.

Comment 8: Using the PBR level to classify fisheries has advantages, but it is only as accurate as the data being used. It is our understanding that the population estimate for humpbacks is 12 years old and is based on a survey done in Hawaii. How often will NMFS update its population estimates for strategic stocks?

Response: Stock assessment reports (SAR) for strategic stocks are required by the MMPA to be reviewed annually. Additional data for population estimates will be gathered according to the greatest need and subject to the availability of funds.

NMFS acknowledges that the population estimates for the Central North Pacific stock of humpback whales are problematic, and intends to address them in the next couple of years through new analyses of recent data and population surveys.

Comment 9: The Alaska Peninsula/Aleutian Island salmon drift gillnet should be classified in Category III and not in Category II as proposed. The rationale presented for a Category III categorization is that the drift gillnet fishery takes 1.8 percent of the PBR level for Dall's porpoise, although the Alaskan Dall's porpoise stock is one of the few stocks for which a determination has been made that the optimum sustainable population level is met. The PBR level is calculated to be 1,537 and the SAR indicates total estimated fishery mortality is 41 per year, well less than 10 percent of the PBR level. This, by itself, should result in a Category III classification. Further, using extrapolated data, the estimated mortality rate for the Alaska Peninsula drift gillnet fishery is 1.8 percent, just over the Tier 2 threshold of 1 percent of the PBR level for a Category II classification.

Response: NMFS agrees that classification of commercial fisheries should be based on reliable information. The most reliable source for this information are observer programs, which can be employed for fisheries classified in Category I or II but can only be employed for a Category III fishery if emergency regulations are in effect. Because of this statutory limitation, NMFS is uncomfortable with classifying a fishery as Category III if data exist that suggest the marine mammal incidental take level may be above the relevant threshold. The Alaska Peninsula/Aleutian Islands salmon drift gillnet fishery, like other salmon drift gillnet fisheries in Alaska, has documented takes of a variety of marine mammal stocks (Dall's porpoise, harbor porpoise, harbor seals, northern fur seals, walrus and unidentified small cetaceans). Because of inadequate observer coverage across fisheries in Alaska, NMFS considers the current information on take levels for many stocks to be underestimates. Dall's porpoise serious injury and mortality is documented in the logbooks from six fisheries. Based on those levels, NMFS believes that if more accurate observer information were available, the level of Dall's porpoise takes would exceed the 10 percent threshold across all fisheries. In that case, the Alaska Peninsula drift gillnet fishery, with its Dall's porpoise take level of 1.8 percent the PBR level, would be classified in Category II.

Additional support for placement of this fishery in Category II is based on low levels of harbor porpoise serious injuries and mortalities documented in logbook reports submitted in this fishery. Because the documented annual serious injury and mortality of harbor porpoise in Alaska is greater than the 10 percent threshold level across all fisheries, and because logbook reports represent an underestimate of the total number of serious injuries and mortalities in a fishery, the total impact to the harbor porpoise population may be above the 1 percent of PBR level that would cause this fishery to be classified as Category II.

Comment 10: The rationale regarding the proposed Category II classification of Alaska Peninsula set gillnet fishery is weak. It states that this fishery takes a substantial number of marine mammals. The proposed LOF does not discuss what data suggest that levels of mortality and serious injury may exceed 10 percent of each stock's PBR level if observer information were available, why it is to be expected that incidental mortality may exceed certain levels, or why this fishery would interact with similar species as do set gillnet fisheries in other areas. In this case, classification is too speculative and supports classification of the Alaska Peninsula/Aleutian Islands salmon set gillnet fishery in Category III.

Response: Because this fishery has documented mortalities and serious injuries to marine mammals at an unknown rate, has never been observed,

and uses a gear type with the potential to take various species of marine mammals, NMFS believes that placing this fishery in Category II is warranted until additional information can be collected. When more reliable information becomes available, the level of marine mammal mortality and serious injury in this fishery will be reassessed. (See response to Comment 9 regarding the level of harbor porpoise serious injuries and mortalities in this fishery.)

Comment 11: One commenter noted that there is no mention of humpback whale interactions with the Prince William Sound salmon drift gillnet or the AK Peninsula/Aleutians salmon drift gillnet fisheries. The commenter believed that this species may have been inadvertently omitted from the list of species involved in interactions with these fisheries.

Response: NMFS has no information regarding any humpback mortalities or serious injuries in the Prince William Sound or Alaska Peninsula/Aleutian Islands drift gillnet fisheries.

Comment 12: The proposed LOF states that the classification of the Southeast Alaska salmon drift gillnet fishery is based on observer and strandings data and does not mention logbook data. The stock assessment for humpback whales mentions that logbook data from salmon and herring gillnet fisheries indicate that humpbacks are entangled. The commenter presumed that since the Southeast Alaska salmon drift gillnet fishery is the only gillnet fishery with humpbacks listed as taken, it is logbook reports from this fishery that led to the statement in the SARs. Given that logbooks are known to under report interactions, the commenter believed that this fishery might be more appropriately classified as a Category I fishery.

Response: Stranding data is used to document humpback whale interactions with the Southeast Alaska salmon drift gillnet fishery. There are no reported humpback mortalities or serious injuries for this fishery in the logbook data. The currently available data support placing this fishery in Category II based on humpback whale and harbor porpoise mortalities. The annual level of harbor porpoise mortality and serious injury in this fishery based on logbook reports was 3.25 per year, or 1.3 percent of the PBR level. There were no humpback mortalities or serious injuries reported in logbooks for drift gillnet fisheries, but there were Category III reports from fishers indicating mortalities occurred in 1989 and 1994, not 1993 and 1994 as stated in the SAR.

Comment 13: Drift and set gillnet fisheries in Cook Inlet, Yakutat, Alaska Peninsula/Aleutian Islands, Kodiak Island and Bristol Bay are not listed as interacting with humpback whales. Given the information in the SARs that logbook data from salmon and herring gillnet fisheries indicate that humpbacks are entangled, these fisheries should be considered to interact with this species. It also seems likely that these fisheries all interact with harbor porpoise. The commenter noted that a NMFS Federal Register notice dealing with harbor porpoise acknowledged that wherever harbor porpoise and gillnets coincide, harbor porpoise are caught. Further, in the Federal Register notice (60 FR 45399) that lists fisheries permitted to take endangered and threatened species under section 101(a)(5)(e) of the MMPA, these set gillnet fisheries are specifically permitted to take Steller sea lions, although no Steller sea lions are listed in the LOF as interacting with these fisheries. Also, the Southeast Alaska salmon purse seine, Alaska herring roe food/bait purse seine fisheries and salmon troll do not have humpbacks listed as a species with which it interacts, even though the SARs indicate they do interact. Finally, there are fisheries with ''none documented'' listed as their interactions, but the commenter believes that analogy to other fisheries might indicate otherwise.

Response: The list of marine mammals that interact with each fishery has been revised. Only marine mammal species that have incurred documented mortalities and injuries in a given fisheries are included in this list. Analogy is not used to determine which stocks interact with a particular fishery.

There may be discrepancies between the list of marine mammal species identified in the LOF published pursuant to section 118 and the list published pursuant to section 101(a)(5)(E), due to an attempt by NMFS to issue interim permits to all fisheries that may have interactions with marine mammal species listed under the Endangered Species Act, while the section 118 LOF includes only those marine mammal species or stocks with documented injuries and mortalities incidental to a particular commercial fishery.

Comment 14a: The Alaska Kuskokwim, Yukon, Norton Sound, Kotzebue salmon gillnet fisheries are acknowledged as likely to have occasional interactions with marine mammals, yet have been placed in Category III because these interactions are believed to ''result in directed takes for subsistence purposes.'' Because these fisheries do not have observer data available, and given that they interact with harbor porpoise and beluga whales, the commenter believes these fisheries should be placed in Category II and be subject to observer coverage.

Response: NMFS believes that virtually all takes of marine mammals related to these fisheries are actually directed takes by Alaska Natives for subsistence use. Any marine mammals that are taken incidentally in these fisheries are likewise retained for subsistence use by Alaskan Natives. NMFS is currently developing co-operative agreements with Alaska Native organizations for the management of marine mammals in Alaska used for subsistence purposes. The number of animals taken in the above fisheries and used for subsistence will be considered through co-management agreements rather than under section 118.

Comment 14b: The Alaska salmon troll and sablefish longline/set line fisheries intentionally killed orcas in the past, and it is optimistic to believe that these intentional killings will cease simply because they are now illegal. The commenter believes that these fisheries warrant further monitoring and should be placed in Category II.

Response: See the response to Comment 1 for explanation of how intentional lethal takes will be addressed by NMFS. NMFS does not have data documenting incidental mortalities or serious injuries of killer whales for these fisheries.

Comments on Fisheries in the Northwest Region

Comment 15: The Columbia River salmon fishery is appropriately placed in Category III.

Response: NMFS agrees.

Comment 16: The California/Oregon/Washington (CA/OR/WA) thresher shark/swordfish/blue shark drift gillnet fishery should be renamed in the final LOF to accurately reflect the target species and the current state licensing practices for the fishery. The Washington portion of the fishery should be deleted since there is no Washington licensed swordfish gillnet fishery.

Response: The CA/OR thresher shark/swordfish drift gillnet fishery has been renamed. The reference to blue shark has been removed because this species may not be landed in Oregon and is not a target species in the California fishery. The reference to Washington has been removed because this fishery does not occur in waters off Washington, nor does Washington State permit the

harvest or landing of either thresher shark or swordfish.

Comment 17: NMFS should retain commercial fisheries classified in Categories I or II under the Interim Exemption on the basis of intentional lethal take in those categories until it has been demonstrated that the intentional lethal takes have ceased.

Response: Because intentional lethal takes of marine mammals are now illegal, except in cases of self defense or in order to save the life of a person in imminent danger, and because fisheries must be categorized based on incidental serious injury or mortality, commercial fisheries will not be classified on the basis of the number of intentional lethal takes. In addition, NMFS does not believe that continuing registration requirements for fisheries that have been moved to Category III based on the available information will have any effect on the degree of compliance with the intentional lethal take prohibition. To the extent that reporting requirements are consistent for all fisheries, regardless of category, NMFS anticipates that fishers reports will continue to provide qualitative information as an indicator of incidental take levels. This qualitative information can be useful in determining the need for more intensive monitoring. NMFS will continue to investigate illegal takes of marine mammals regardless of whether vessels are registered.

Comment 18: No information on incidental takes of marine mammals is available for the Washington/Oregon (WA/OR) herring, smelt, shad, sturgeon, bottom fish, mullet, perch, rockfish gillnet fishery. A lack of information does not mean that no serious injuries or mortalities have occurred. Analogy with other gillnet fisheries could justify placing this fishery in Category II.

Response: As indicated in the EA, non-salmon gillnet fisheries in the Northwest, (i.e., WA/OR herring, smelt, shad, sturgeon, bottomfish, mullet, perch, and rockfish gillnet) are predominantly in-river fisheries. NMFS is not aware of any information indicating that incidental takes of marine mammals are occurring in these fisheries.

Comment 19: Because salmon net pen and ranch fisheries, and the California/Oregon/Washington (CA/OR/WA) salmon troll fisheries have histories of lethal takes of pinnipeds, these fisheries should remain in Category II until NMFS receives documentation that the lethal takes have ceased.

Response: The incidence of intentional lethal take was not used for categorizing fisheries under section 118 of the MMPA. (See response to Comment 17.)

Comment 20: Serious injuries and mortalities of humpback whales caused the Southeast Alaska salmon purse seine fishery to be proposed for Category II. By analogy, the Washington (WA) salmon purse seine should also be placed in Category II and the humpback whale should be listed in the LOF as an interacting species.

Response: There are no records of interactions between the Washington salmon purse seine fishery and humpback whales. Humpback whales are only rarely sighted in the inland waters of Washington where the fishery operates.

Comment 21: The humpback whale should be listed in the LOF as an interacting species for the Washington/Oregon/California (WA/OR/CA) groundfish, bottomfish longline/set line fishery, and this fishery should be considered for classification in Category II.

Response: There are no records of humpback whale interactions with this fishery; thus this fishery is placed in Category III.

Comment 22: Analogy to the intentional lethal takes that occur during commercial net pen fisheries should be used to place salmon enhancement rearing pens in Category II.

Response: Because salmon enhancement rearing pens have not been considered a commercial fishing operation, in the past they have not been subject to requirements of section 118. If NMFS were to consider this a commercial fishery, analogy would indicate correct placement of salmon enhancement rearing pens in Category III, because interactions would be similar to commercial net pens without any active deterrence methods. As indicated in the EA, the incidence of mortality or serious injury resulting from gear interactions with net pens is less than one percent of the PBR for the stocks that interact with net pen fishery operations (harbor seals and California sea lions).

Because enhancement rearing pens are typically not considered commercial fisheries, NMFS will consider proposing to remove this fishery from the LOF in a future proposed LOF.

Comments on Fisheries in the Northeast and Southeast Regions

Comment 23: The mid-water squid fishery defined in the proposed LOF does not exist. It's a bottom trawl fishery, and not mid-water. It should not be lumped with other mid-water gear.

Response: Mackerel, butterfish, and squid are fished by trawl in a similar manner, with minimal modifications to gear. A mid-water squid trawl fishery does exist, although it is not the preferred fishing method for this species at this time. NMFS agrees that ''Atlantic mid-water trawl'' may not be an accurate description of the fishery. In this final LOF, this fishery is renamed ''Atlantic Squid, Mackerel, Butterfish Trawl'' with no reference to the depth at which the gear is fished. This fishery is placed in Category II based on serious injuries and mortalities of pilot whales recorded in fishers' logbooks. In addition, and regardless of the trawl method used, a potential for incidental interactions between this fishery and marine mammals exists, because squid, mackerel, and butterfish are important prey species for marine mammals.

Comment 25: The number of marine mammal mortalities and serious injuries as published in the proposed LOF and the method used to extrapolate raw data into a total estimated take needs to be explained, especially with regard to pilot whale mortalities in the longline fishery. In addition, the source of the data indicating humpback whale and minke whale interactions with the longline fishery should be cited. The number of participants listed in Table 2, 830, is a considerable overestimate of the total number of vessels in the fleet. If this information were used to extrapolate the observer data, the total number of takes in the fishery would be greatly overestimated. The Atlantic Ocean, Caribbean and Gulf of Mexico swordfish, tuna, and shark longline fishery should not be listed as a Category I fishery but should remain in Category II.

Response: NMFS observers recorded one mortality of a pilot whale in coverage scheduled between late 1992 and 1993. The mortality occurred in the U.S. Atlantic Ocean. In addition, 24 non-lethal interactions (2 injuries and 22 unspecified interactions) of pilot whales have been observed in the fishery. It is unknown how many of these animals eventually died due to injuries resulting from entanglement. Observed kills of other species include one Risso's dolphin in 1993, which occurred in the Gulf of Mexico.

The annual level of serious injury and mortality for this fishery was not calculated by extrapolating observed serious injuries and mortalities to the entire fishery using the number of permitted vessels. Rather, it was calculated by extrapolating observed serious injury and mortality in the whole fishery using the total number of sets reported in the mandatory fishing

vessel logbooks. The pilot whale mortality was not reported as coming from the long- or short-finned stock; however, the estimated total mortality of pilot whales exceeds the 50 percent of the PBR threshold for either long-finned or short-finned pilot whales. Therefore classification in Category I is warranted.

In addition, section 114 Marine Mammal Exemption Program (MMEP) logbook data support a Category I classification. Injuries and mortalities reported in the MMEP from 1990 through 1992 indicate that an average of nine pilot whales are injured or killed in longline gear each year. A variety of other marine mammal species, including but not limited to bottlenose dolphins, harbor porpoise, Risso's dolphins, and unidentified large cetaceans, have also been recorded as injured or killed. NMFS has also received sighting reports (both at sea and stranded) of whales carrying gear which may be attributable to the pelagic longline fishery. Species listed in these reports include humpback whale, sperm whale, long-finned pilot whale, and minke whale.

Comment 26: The Rhode Island, southern Massachusetts (to Monomoy Island), and New York Bight (Raritan and Lower New York Bays) inshore gillnet fishery, Long Island Sound inshore gillnet fishery, Delaware Bay inshore gillnet fishery, and North Carolina inshore gillnet fishery are currently, and incorrectly, listed as Category III fisheries. These fisheries interact on a sufficiently high level with humpback whales, minke whales, bottlenose dolphins and harbor porpoise that they should be moved to Category II.

Response: These inshore and bay fisheries were divided out from other mid-Atlantic coastal gillnet fisheries, because there were no observed takes in these areas, and because it is believed that there is a low probability of interaction. In the last several years, an interaction problem with small cetaceans has been identified in the mid-Atlantic based on observations of stranded animals. It is possible to identify evidence of gillnet interactions from a stranded specimen, but it is not yet possible to determine conclusively which gillnet fishery is responsible for the interaction unless the gear is recovered with the carcass, which is not usually the case. Based on the geographic distribution of strandings, marine mammal high-use areas, and concentrations of fishing gear, NMFS believes that the gillnet interactions in the mid-Atlantic occur largely in areas outside the ''inshore'' fishery division lines. Placement of these inshore fisheries into Category II is not warranted at this time. However, recent information (1994–1995) indicates that marine mammal incidental serious injury and mortality in some of these inshore fisheries may be higher than originally believed. These fisheries will be re-evaluated based on an examination of more recent stranding data when developing the next proposed LOF.

Comment 27: The pair trawl fishery should be renamed, as it occurs between Cape Hatteras and the Hague Line, and not in the Caribbean Ocean, the Gulf of Mexico, or off the Grand Banks of Newfoundland. The references to sharks should also be deleted from the name of the fishery, as sharks are not targeted and are, in fact, minimally represented in the bycatch. In addition, the number of participants in the fishery needs to be updated, as the number included in the proposed LOF is incorrect.

Response: NMFS agrees that the fishery should be renamed. Therefore, the fishery is now listed as ''U.S. Atlantic Large Pelagics Pair Trawl'' and the number of participants has been updated in the final LOF.

Comment 28: The average annual serious injury and mortality (extrapolated from observer data, 1992–93) of marine mammals incidentally taken in the pair trawl fishery appears to be highly inflated when compared to actual data, leading constituents to suspect that the data used to compile this information were not correct. Data from 1994 should be used in order for the LOF to be based on the best available information. Members of the fishing community have worked to change those aspects of the pair trawl fishery to reduce the number of marine mammal takes that occur incidental to the fishery, and none of those changes will have any significance in this final LOF. It is unfair to impose additional regulations on the fishing community without using every piece of data collected over all the years.

Response: See the response to Comment 25 for an explanation of how observer data are extrapolated to provide an annual estimate of the total serious injuries and mortalities of marine mammals in a commercial fishery.

Development of the new fisheries data reporting and analysis systems for the NMFS pair trawl observer program is ongoing. Observed serious injuries and mortalities from the pair trawl fishery in 1994 cannot be extrapolated to total kill numbers until the fishing effort data are available for the calculation. Data from the first half of 1994 were collected but were not available in the form necessary for the calculations used in developing the proposed LOF and cannot be finalized in time to allow the final LOF to be published before January 1, 1996. These data will be available for future consideration in making any necessary revisions for the next proposed LOF. Although serious injury and mortality of marine mammals incidental to the pair trawl fishery may have been below average in 1994, preliminary analysis of serious injury and mortality levels for 1995 suggests a bycatch increase and indicates an increase in the number of marine mammal species involved.

Comment 29: Data on marine mammal incidental mortalities and serious injuries from the 1994 pair trawl fishery have been made available to NMFS through reports and presentations in public forums. Because observer coverage was very high in 1994, this data set represents the most complete information for the pair trawl fishery to date. This information should be used to classify the pair trawl fishery.

Response: NMFS agrees that observer coverage was most intensive in 1994. However, incorporation of non-NMFS data presented in the aforementioned report would not result in reclassifying the pair trawl fishery as Category II. For example, if the non-NMFS information on the number of observed mortalities of the offshore stock of bottlenose dolphin and common dolphins are assumed to approximate the actual values, averaging these values with NMFS mortality and serious injury estimates from 1992 and 1993 results in average estimated serious injuries and mortalities of 53 and 22 animals, respectively. Both values exceed 50 percent of the PBR level for these stocks. In addition, the serious injury and mortality levels in 1995 seem to have increased substantially over the 1994 levels. To date, 25 marine mammals have been observed seriously injured or killed, including three dolphin species and long-finned pilot whales. Classifying this fishery as Category I is warranted.

Comment 30: In order to categorize a particular fishery, it is imperative that NMFS know how many vessels there are and where they fish. It is incumbent upon NMFS to make this number reflect reality to the best of its ability, because the extrapolation will make an erroneous result that could have extraordinary consequences. For example, for the pelagic longline fishery, NMFS has used 830 vessels to extrapolate the estimate of the ''takes'' for the fishery. According to the NMFS database, there were only 147 vessels that landed more than one swordfish in each of 5 or more months in 1993.

Response: NMFS appreciates the information regarding the total number of participants in the pelagic longline fishery. The numbers in the ''Estimated number of vessels/persons'' column in the proposed LOF sometimes represented the total number of permitted vessels/persons, and sometimes represented the total number of active vessels/persons. Because the number of active vessels/participants is a more valid indicator of the total effort in a fishery, this was included in the proposed LOF when that information was available. If the number of active participants was not available, the number of, or an estimate of, the permitted participants was used.

The number of vessels in the longline fishery was originally estimated based on the number of swordfish permits issued. There were 361 vessels reporting swordfish catch in 1994. (See response to Comment 25 regarding extrapolation of observer data.)

Comment 31: A more appropriate method of calculating effort for the fishery is the number of hooks used. If the reported number of hooks were used for calculating this estimate, NMFS must recognize that a hook in the Gulf of Mexico and a similar hook at the Grand Banks have a very different likelihood of interacting with a particular marine mammal species. NMFS should investigate splitting the longline fleet into different statistical areas, preferably using the five areas used by the fisheries statisticians.

It would be especially important to separate the fishery into northern and southern components, as many of the interactions occur in the northern portion of the fishery. For instance, it would be unjustified to severely restrict or close the yellowfin tuna fishery in the Gulf of Mexico if a northern marine mammal stock's PBR is taken. This approach would be consistent with the approach used for some of the Northwest Pacific fisheries that catch the same Pacific species with the same fishing gear but are separately categorized by the bays, inlets, sounds, etc., where they fish. Despite the effort involved to consider the variables and complexity of this fishery, NMFS must not take the ''easy'' way by leaving this wide-ranging fleet vulnerable to a complete closure that may not be warranted.

Response: NMFS agrees that the pelagic longline data should be analyzed to determine whether the fishery could be separated into different statistical areas. The most logical division based on the demographics of the fishery may be into a U.S. Atlantic component and a U.S. Gulf of Mexico component. This will be investigated during the development of the next proposed LOF.

The Take Reduction Teams that will be established pursuant to the 1994 MMPA amendments will consider all fisheries known to interact with each strategic marine mammal stock. NMFS anticipates that the teams will make recommendations on whether or not to proceed with a geographic partitioning of the fishery. In addition, it does not necessarily follow that the yellowfin tuna fishery in the Gulf of Mexico would be closed if a northern marine mammal stock's PBR is taken. Closures designed to protect marine mammals would most likely be designed to encompass areas where those marine mammals occur. For example, closures restricting groundfish gillnet effort in the Gulf of Maine to reduce porpoise bycatch are designed to encompass areas of high porpoise bycatch, not all areas where gillnetting traditionally occurs.

Comment 32: The pelagic longline fishery is classified based on the annual level of serious injury and mortality for pilot whales. The PBR for pilot whales is based upon conservative calculations using dated surveys.

Response: The 1995 SARs were prepared using the best available data. Because NMFS conducted surveys in 1995, this information will be incorporated in future calculations of PBR for pilot whale stocks. As both short- and long-finned pilot whales are considered strategic stocks, the SARs addressing these stocks must be reviewed on an annual basis, and new information can be incorporated at that time.

Comment 33: Atlantic commercial passenger fishing vessels should be categorized in the LOF to be consistent with the categorization of the Pacific commercial passenger fishing vessels.

Response: The 1996 LOF contains a listing of ''Atlantic Commercial Passenger Vessel'' in Category III. An estimate of 4000 participants is also given.

Comment 34: Some fishery names in the proposed LOF are vague. For example, there is a reference to the Atlantic mid-water trawl fishery, which is proposed to include the ''Mid-Atlantic squid trawl,'' and the ''Mid-Atlantic mackerel trawl.'' There is a small amount of mackerel caught by mid-water trawl, but the vast majority of squid are caught using bottom trawl gear.

Response: See response to Comment 23 for a discussion of this fishery.

Comment 35: The designation of the lobster fishery as Category III should be revisited, given the interactions of lobster gear with endangered right whales.

Response: NMFS will consider proposing to reclassify the lobster fishery as Category II in developing the next proposed LOF. Entanglement records indicate interactions between lobster pot fisheries and right whales, humpback whales, finback whales, and minke whales, but NMFS has no way of extrapolating these reports to the whole fishery.

Comment 36: The commenter questioned whether the estimated total take of 1.75 dolphins per year for the Atlantic menhaden fleet justifies classifying this fishery in Category II. Subjecting a fleet of vessels to permitting, decal, and observer requirements in these circumstances appears to be excessive given the size of the interaction and the fact that this particular fishery has been subject to intensive bycatch analysis in the past few years by agency scientists.

Response: The bottlenose dolphin takes were incorrectly attributed to the menhaden purse seine fishery. Because of this error, this fishery was inappropriately proposed for classification in Category II in the proposed LOF. This fishery is placed in Category III in this final LOF.

Comment 37: The classification of the menhaden purse seine fishery as a Category II fishery is based on a mortality and serious injury rate of 1.75 Atlantic coastal bottlenose dolphins per year in the entire fishery. As stated in the preamble to the proposed LOF, this species does not occur in the Gulf of Maine and therefore ''it may be appropriate to separate this fishery into northern and southern components.'' In view of the absence of bottlenose dolphins from the Gulf of Maine, the menhaden fishery should be separated into two components north and south of Cape Cod, and the Gulf of Maine menhaden purse seine fishery should continue to be classified as a Category III fishery.

Response: See response to Comment 36 regarding takes of bottlenose dolphins in the mid-Atlantic component of the menhaden purse seine fishery. However, because of the geographic ranges of the fisheries, the differences in marine mammal species likely to be encountered, and the harvested age-class in the two fisheries, the Gulf of Maine menhaden purse seine and the mid-Atlantic menhaden purse seine are separate fisheries in the final LOF.

Comment 38: Serious injuries and mortalities of the western North Atlantic coastal bottlenose dolphin drive the classification of several fisheries (mid-

Atlantic menhaden purse seine, mid-Atlantic coastal gillnet fishery). How is this population defined? Has it been shown to be reproductively isolated from the offshore dolphin stock?

Response: The final SAR states that there are ''two hematologically and morphologically distinct bottlenose dolphin ecotypes that correspond to a shallow, warm water ecotype and a deep, cold water ecotype . . . .'' (Blaylock, *et al.*, 1995).

Comment 39: The Gulf of Maine small pelagics surface gillnet fishery should be removed from Category 1. The EA states (p. 30) that this fishery no longer operates.

Response: Additional research on the Gulf of Maine small pelagics surface gillnet fishery indicates that, although there are few vessels participating, the fishery is still operational. This fishery operates in areas of high marine mammal concentrations. One report indicated that a white-sided dolphin was killed incidental to this fishery, and another report indicated that a humpback whale became entangled incidental to fishing operations and was later released by divers. Because there was a report of a mortality in this fishery, and because information is not available to justify a placement in Category I or III, the fishery is placed in Category II.

Comment 40: There is a small (5 boats) Gulf of Maine midwater trawl fishery for herring, separate from the Category II Atlantic midwater trawl fishery for squid and butterfish (620 boats). It should be listed as a Category III fishery. These boats also fish for herring in southern New England in the winter.

Response: In this final LOF, the trawl fishery for Atlantic herring has been renamed the ''Northeast U.S. Atlantic Herring Trawl.'' This fishery is separated from fisheries in the Southern North Atlantic and Gulf of Mexico because the Atlantic herring species only ranges as far south as Cape Hatteras. This fishery is placed in Category III, as no incidental mortalities or serious injuries have been reported for this fishery, nor are incidental mortalities or serious injuries expected to occur incidental to this fishery.

Comment 41: A commenter supports placement of new fisheries in Category II until observer data or other information can be used to properly place the fishery, unless information already exists to place a new fishery in a different category.

Response: NMFS agrees. This approach was included in the final regulations implementing section 118.

Comment 42: According to the proposed LOF, the U.S. mid-Atlantic coastal gillnet fishery interacts with humpback whales (PBR level = 1). Published data indicate that stranded humpback whales in the mid-Atlantic may be interacting at a significant rate with these fisheries (Wiley *et al.*, 1995). This information indicates that this fishery should be classified as Category I, as it may be responsible for greater than 1 percent of the annual mortality in this stock of humpbacks.

Response: The PBR level for this humpback whale stock is currently set at 10 animals. The stranding records mentioned in Wiley (1995) demonstrate that stranded humpbacks in the mid-Atlantic have been entangled in commercial fishing gear. However, none of those humpback stranding records conclusively identify which fishery is responsible. One of the fundamental problems with linking a large whale entanglement to a particular fishery is that the whales are capable of carrying many kinds of gear great distances from the original point of entanglement. Reports received usually do not include gear identification information that would identify the location in which the gear was originally set.

Recent cetacean entanglement records in the mid-Atlantic have been linked to this fishery. These records suggest that, although the level of humpback entanglement in coastal gillnets in the mid-Atlantic is greater than 1 percent of PBR, there is no evidence to suggest that it is greater than 50 percent of PBR. Therefore, classification of this fishery as Category I is not warranted at this time.

Comment 43: There is no mention of interactions with northern right whales in the U.S. South Atlantic shark gillnet fishery. State officials concluded that a juvenile right whale that was entangled in netting that likely came from this fishery was subsequently killed by a large ship in 1994. Right whales should be added as an interacting stock and this fishery should be classified as a Category I fishery.

Response: A seriously injured juvenile right whale was observed swimming with its mother off the coast of Georgia. Marks on the animal closely resembled the types of marks observed on other right whales that have been entangled in gill nets. The juvenile whale had apparently also been hit by the propellers of a ship, as its flukes had been nearly severed. No gear was recovered from this animal and it is unknown whether the animal actually died, although its demise was highly likely based upon its injuries. The only gillnet fishery operating in the vicinity was the Southeast U.S. Atlantic shark gill net fishery. Because this fishery's interaction with right whales is suspected but not confirmed, it is appropriate to place this fishery in Category II.

Comment 44: The North Atlantic bottom trawl fishery was classified as a Category III fishery despite observer data indicating a take of 62 percent of the PBR for striped dolphins. It is noted that there was minimal observer coverage (1 percent) and there is, therefore, a high coefficient of variation of the estimate. It is also possible with this high coefficient of variance that the mortality estimate is low. Furthermore, text in the proposed LOF states that the observers were not assigned to monitor marine mammal mortality but to ''monitor fishery management related issues.'' Similar observer objectives on the Gulf of Maine gillnet vessels resulted in an underestimate of marine mammal bycatch. NMFS should reconsider the category for this fishery.

Response: A justification for categorizing the North Atlantic bottom trawl fishery in Category III was provided in the proposed LOF. Although concerns regarding some observer programs that focus on fishery monitoring have been raised, other observer programs with the same goals, such as those operating in the BSAI groundfish trawl fishery and the U.S. Atlantic large pelagics drift gillnet fishery, have provided important information on the level of marine mammal incidental serious injury and mortality. NMFS anticipates receiving additional marine mammal bycatch information on the bottom trawl fishery from observer programs directed at fish bycatch. This fishery will be re-evaluated for potential listing in Category II in a future proposed LOF. The trawl and gillnet fisheries have very different methods for hauling the gear and removing catch from the gear. It is much less likely that an observer will miss a marine mammal from a trawl haul than from a gillnet haul.

Comment 45: It may be premature to place the finfish aquaculture fishery in Category III based on a presumption that, since intentional killing is now prohibited, participants will not shoot seals. Media accounts of fishers shooting hundreds of seals belie the NMFS contention that the industry is likely to stop killing seals (justifying reclassification from Category II to Category III). Thus, the fishery should remain in Category II.

Response: The finfish aquaculture fishery was placed in Category II in the previous LOF, because intentional lethal takes of harbor seals and grey seals were

thought to occur ''occasionally.'' The authority to intentionally kill the seals was revoked by the 1994 MMPA amendments. A fishery categorization under section 118 cannot be based on the supposition that aquaculturists will violate the law. Anyone who intentionally kills marine mammals to protect fishing gear or catch will be subject to enforcement actions. This fishery will be re-evaluated in developing a future proposed LOF based on recent seal entanglement records from the fishery.

Comment 46: The Gulf of Mexico inshore gillnet fishery has not been classified correctly. There are over 40 discrete stocks of bottlenose dolphins in the Gulf of Mexico bay, sound and estuarine stocks, each with a PBR of between 0 and 3 animals per year. If this fishery were to be classified based on analogy to U.S. inshore fisheries in the mid-Atlantic, then it must be supposed that it is likely to interact with bottlenose dolphins (see Long Island sound inshore gillnet, Delaware Bay inshore gillnet and North Carolina inshore gillnet). As such, this fishery should be either a Category I or II fishery, as it would have to kill 0.03 animals per year or less to be placed in Category III if it is operating in an area coincident with any of the Gulf bays stocks. If this fishery is not operating in bays, sounds and estuaries (as could be the case in an ''inshore'' fishery) and is instead interacting with coastal stocks, then the PBR for the Western Gulf of Mexico coastal stock is 29 animals (0.2=1 percent of PBR); the PBR level for the northern Gulf of Mexico coastal stock is 35 (0.3=1 percent of the PBR level); and the PBR level for the Eastern Gulf of Mexico coastal stock is 89 (0.8=1 percent of the PBR level). Thus, the fishery would have to kill less than one of these animals each year in order to properly be placed in Category III. This too appears unlikely, given the propensity of gillnets to interact with bottlenose dolphins. It would seem that this fishery is totally inappropriate for Category III. This new fishery should be either Category I or Category II based on its potential to interact with bottlenose dolphins.

Response: Because NMFS has no documented, direct observations of serious injury or mortality to marine mammals in this fishery, it has been classified as category III by analogy with Atlantic inshore gillnet fisheries. However, as explained under responses to comments on those fisheries, NMFS believes there is potential for interaction with marine mammals in this fishery. Several bottlenose dolphins were incidentally caught in research-related tangle nets set for turtles between Texas and Louisiana between 1993 and 1995. These nets are similar to, and used like nets used in the inshore gillnet fishery. In addition, these nets were fully tended specifically to prevent marine mammal entanglements from occurring. This information and any additional information that can be obtained with respect to this fishery may be considered in developing a future proposed LOF.

Comment 47: The offshore monkfish bottom gillnet fishery, a new fishery to the proposed LOF for 1996, was placed in Category III based on an expectation that there will be a remote likelihood of interactions between bottom gillnet gear and marine mammals. While it is true that deep-set gear is less likely to kill marine mammals, a number of stocks (e.g., sperm whales) do use deep water areas, and gillnets are the gear type most likely to interact with any marine mammal species in the area. Until such time as it can be ascertained that interactions are unlikely, this new fishery should be placed in Category II to allow observer coverage and the gathering of more reliable information on interactions.

Response: This fishery may have been listed incorrectly as Category III in the proposed LOF. Because this fishery may have a high potential to take several cetacean species based on analogy with other shelf-edge fisheries such as the large pelagic drift gillnet fishery, NMFS will examine available data during the development of the next proposed LOF for reclassification of this fishery as Category II.

Since the publication of the proposed LOF, two other components of the monkfish fishery have been recognized by NMFS. The following provides a description of each component, and its treatment in this final LOF:

U.S. Atlantic Monkfish Trawl Fishery, Unknown Number of Participants

The monkfish trawl fishery harvests monkfish in deep waters off the Atlantic coast. Some participants in this fishery use a modified beam trawl; most use otter trawls. In addition, some participants in the scallop dredge fishery target monkfish using dredge gear during off-days for scallops as well as simultaneously with scallops. Because the target species, gear type, and geographic range of this fishery is unique, it is considered a new fishery for the purposes of the LOF. There are no documented reports of incidental serious injury or mortality of marine mammals in this fishery, nor are incidental serious injuries or mortalities expected. Accordingly, this fishery is placed in Category III in this final LOF.

Monkfish Gillnetting in the Gulf of Maine

Fishers participating in the New England multispecies sink gillnet fishery have targeted monkfish for several years. When targeting this species, a large mesh (10–14″ stretched mesh) sink gillnet is used, and the net is either tied down, or is set upright without floats using a polyfoam core floatline. Reports indicate that at least some fishers target monkfish in the Gulf of Maine near Jeffrey's Ledge. This fishery is an extension of the New England multispecies sink gillnet fishery, but has not been specifically included in the name of the fishery. Because of the increasing dominance of monkfish in the groundfish catch, the name of the New England multispecies sink gillnet fishery has been changed to the ''New England multispecies sink gillnet fishery (includes all species as defined in the Multispecies FMP, spiny dogfish, and monkfish)'' to clarify that sink gillnet fishers targeting monkfish are included.

Comment 48: The Gulf of Maine, U.S. mid-Atlantic tuna, shark, swordfish hook-and-line/harpoon fishery is stated to have no documented interactions with marine mammals. This is incorrect. For example, NMFS records indicate that, on September 1, 1986 a humpback whale was reported by the U.S. Coast Guard off Nantucket shoals with tuna floats trailing; on November 14, 1986, the U.S. Coast Guard reported to NMFS that a right whale calf was seen with ''a tuna dart with line attached'' in its body; on July 7, 1989, a humpback whale was reported by the Cetacean Research Unit in Gloucester, MA, to have a tuna line from an identified Gloucester-based tuna boat around its left flipper and flukes, with the float attached. Furthermore, on August 29, 1995, a humpback whale was observed by both whale watching boats and the U.S. Coast Guard on Jeffreys Ledge, with a tuna boat anchor, line and float wrapped around and trailing from its body. While this most recent sighting may not yet have appeared in the main data base, the three earlier reports are from NMFS files. This information should be corrected in the LOF, and this fishery should be considered for reclassification.

Response: Because NMFS chose to use the most current data available, entanglement references prior to the Marine Mammal Exemption Program (MMEP) inception in 1989 were not used in developing the proposed LOF. This fishery may be considered for re-

classification in Category II in a future proposed LOF based on recent entanglement records. A humpback entanglement in tuna hand gear was conclusively identified in 1995, and the recent references presented in Comment 47, along with additional records, may be used to support this re-classification.

Comment 49: NMFS entanglement reports indicate that a number of animals have been seen entangled in trawl gear from an unspecified fishery. On February 15, 1983, a right whale calf was reported dead in an otter trawl, on February 23, 1986, a humpback whale was reported by the Cetacean Research Unit off Jeffreys Ledge ''caught in otter trawl,'' and on September 18, 1989, the Marine Mammal Stranding Center in New Jersey reported a failed attempt to rescue a humpback whale from trawl net and cable. Either the Gulf of Maine mackerel trawl or the mid-Atlantic multi-species trawl, or another trawl fishery operating in the area is apparently having interactions with endangered species. Thus, it may not be accurate to say that these fisheries have no documented interactions.

Response: The right whale calf entangled in otter trawl gear in 1983 was determined to have been dead and decomposed prior to this observation and should therefore not be attributed to the otter trawl fishery. The February 23, 1986 report of a humpback in an otter trawl was an incomplete report. The whale was still alive, but it is likely that the whale was weakened by a previous entanglement, a vessel collision, or other injury or disease. The carcass was not recovered, so no conclusions can be drawn from this incident. The September 18, 1989, entanglement of a humpback in trawl gear in New Jersey was not conclusively linked to the specific trawl type, and there was no information obtained that would give a location for the original point of entanglement. Because the fishery that caused the above entanglements cannot be specifically identified, the information may not be used to classify fisheries at this time.

Comment 50: It is stated that the Gulf of Maine, U.S. mid-Atlantic offshore lobster trap/pot fishery has no documented interactions. This is incorrect. A right whale, which washed up dead this summer (1995) in Rhode Island, was found with line from off-shore lobster gear wrapped so tightly around its flippers, that it cut through the bone and likely contributed to the animal's death. In addition, a NMFS report from April 25, 1981, states that a minke whale was found entangled in offshore lobster gear and released on April 28, 1981. Thus, it can be seen that this fishery does have interactions.

Response: Because NMFS chose to use the most current data available, entanglement references prior to the MMEP program inception in 1989 were not used in developing the current proposed LOF. These records may be considered in developing a future proposed LOF. The right whale that stranded in Rhode Island in July of 1995 had been entangled as early as December 1993, although the original point of entanglement is unknown. Although entanglement experts on-scene believed that the gear on the whale was probably offshore lobster gear, this could not be confirmed because no identification unique to this fishery was recovered. NMFS also anticipates that both inshore and offshore lobster fisheries may be considered by the Take Reduction Team that will be established to make recommendations to NMFS on reducing interactions between fisheries and large cetaceans.

Comment 51: A number of fisheries have had species of marine mammals listed as interacting species, based on analogy to similar fisheries that have interactions with marine mammal species known to occur in the area. The U.S. mid-Atlantic mixed species stop seine/weir fishery should therefore not have its interactions reported as ''none documented.'' Seines and weirs pose a significant interaction problem for a number of species of marine mammals. For instance, in 1981 a humpback whale was reported caught in a cod weir in Long Island and released by the Okeanos Research Center. In 1988, a weir in Truro, MA, caught two humpbacks: one on October 16 and one on December 6. Both animals were released by the Center for Coastal Studies. Furthermore, there is no justification for assuming that this fishery's interaction potential is significantly different than that of the Gulf of Maine herring and Atlantic stop seine/weir fishery, which has humpback, right whale, minke whale and harbor porpoise interactions. The final LOF should include these corrections.

Response: The entanglement records mentioned by the commenter were not considered for the proposed LOF. These records and any records received since the development of the proposed LOF may be considered while developing a future proposed LOF. In general, NMFS believes that potential for serious injury or mortality due to these fisheries is low.

Comments on Fisheries in the Southwest Region

Comment 52: Reclassify the California (CA) set/drift gillnet fisheries that use small mesh to Category II based on takes of central California harbor porpoise.

Response: California gillnet fisheries that use a mesh size of 3.5 inches or less target white croaker, bonito, flying fish, herring, smelt, shad sturgeon, bottomfish, mullet, perch, and rockfish. There have been no observed or reported incidental takes of central California harbor porpoise, or any marine mammal, in these fisheries. In addition, no mention of central California harbor porpoise mortalities or serious injuries in the small mesh gillnet fisheries were made in the final SAR. Due to the small mesh size used in this fishery, the likelihood of incidental marine mammal mortality and serious injury is very low. For these reasons, this fishery is placed in Category III.

Comment 53: Reclassify the CA herring, sardine, and squid purse seine fisheries into Category II, because the interactions are similar to those that occur in the CA anchovy, mackerel, and tuna purse seine fishery.

Response: The CA anchovy, mackerel, and tuna purse seine fishery has been classified as Category II, because mortality and serious injury of the offshore bottlenose dolphin stock across all fisheries is greater than 10 percent of this stock's PBR level, and the estimated annual average mortality and serious injury of this stock in the CA anchovy, mackerel, tuna purse seine fishery is 2 percent of this stock's PBR level. At this time, there are no data indicating that the herring, sardine, and squid purse seine fisheries have similar incidental serious injury and mortality rates to the anchovy, mackerel, and tuna purse seine fishery. For these reasons, the herring, sardine, and squid purse seine fisheries are placed in Category III.

Comment 54: Hawaii (HI) lobster trap/crab trap fishery should be considered to interact with humpback whales based on analogy with interactions between trap fisheries and large cetaceans on the U.S. Atlantic coast.

Response: There is no evidence to indicate that humpback whales interact with this fishery in Hawaii. Because there is no evidence of incidental mortality or serious injury of humpback whales, or other marine mammals in this fishery, this fishery is placed in Category III.

Changes from the Proposed LOF

The following is a list of other changes that have not been discussed in

the preamble or response to comments section, or that were made for editorial consistency:

Marine mammal species list. According to statute, the LOF must include a description of the marine mammal stocks that interact with each commercial fishery. The proposed LOF included marine mammals that are known, reported, or strongly suspected to be injured, killed, entangled, or harassed in a particular commercial fishery. All marine mammals listed as interacting with a particular commercial fishery in the 1994 LOF were also included. In this final LOF, the list of marine mammals specified as interacting with commercial fisheries is limited to those that have had documented incidental injuries or mortalities in commercial fisheries between 1989 and 1995. Information from observer programs, logbook data, stranding reports, and anecdotal reports were used to develop the species list. In addition, the names of the marine mammal species/stock involved are listed instead of a code.

Alaskan Bering Sea and Aleutian Islands groundfish trawl fishery. This fishery was proposed to move from Category III to Category II in the proposed LOF based on the serious injury and mortality of killer whales that is over 50 percent of the PBR. However, because the population estimates of both the resident and transient stocks of killer whales are known to be biased low, and because NMFS has good estimates of the level of mortality and serious injury in this observed fishery, this fishery will be placed in Category III.

AK southern Bering Sea, Aleutian Islands, and Western Gulf of Alaska sablefish longline/set line (federally regulated waters). This fishery was placed in Category II in the 1994 LOF and was proposed to remain in Category II in the proposed LOF. The proposed classification was based on an annual level of serious injury and mortality of both the resident and transient stocks of killer whales that is greater than 10 percent of the PBR level for all fisheries, and greater than 1 percent of the PBR level for this fishery. However, because the population estimates of both the resident and transient stocks of killer whales are known to be biased low, this fishery is placed in Category III.

Mid-Atlantic Menhaden Purse Seine. This fishery was erroneously proposed to be placed in Category II in the proposed LOF, because incidental takes of bottlenose dolphins that occurred in the Gulf of Mexico menhaden purse seine were attributed to the Mid-Atlantic menhaden purse seine. This error has been corrected, and the Mid-Atlantic menhaden purse seine is placed in Category III in this final LOF.

Gulf of Maine small pelagics surface gillnet. This fishery was identified in Category I in the 1994 LOF, and was proposed to remain in Category I in the proposed LOF, based on a lack of available information that could be used to place the fishery in a different category. Because only two reports of serious injury and mortality of marine mammals incidental to this fishery have been reported, Category I is not warranted. Thus, this fishery has been placed in Category II.

Occasional anecdotal reports of mortalities and injuries of marine mammals incidental to this fishery have been reported. Because there have been reports of mortalities in this fishery, it will be placed in Category II.

Atlantic squid, mackerel, butterfish trawl. The name of this fishery was the ''Atlantic mid-water trawl'' in the proposed LOF. In the proposed LOF, this fishery was defined as including those mid-water trawlers that target fish managed by the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan (FMP). Because both mid- and bottom-trawl gear are used to harvest squid, the name of this fishery has been changed to reflect the target species in lieu of the technique. Thus, this fishery is now called the ''Atlantic squid, mackerel, butterfish trawl'' in the final LOF.

Atlantic Ocean, Gulf of Mexico large pelagics drift gillnet fishery. The name of this fishery was the ''Atlantic Ocean, Caribbean, Gulf of Mexico swordfish, tuna, shark drift gillnet'' in the proposed LOF. The name of this fishery has been changed in the final LOF because the species targeted in this fishery have changed in the past and may change in the future.

U.S. Atlantic large pelagics pair trawl. The name of this fishery was proposed as the ''Atlantic Ocean, Caribbean, Gulf of Mexico Swordfish, Tuna, Shark Pair trawl'' in the proposed LOF. The name has been changed in the final LOF to encompass all large pelagic species targeted using this gear.

Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline. The name of this fishery was proposed as the ''Atlantic Ocean, Caribbean, Gulf of Mexico tuna, shark, swordfish longline'' in the proposed LOF. The name has been changed in the final LOF to encompass all large pelagic species targeted using this gear.

To remain consistent throughout the United States, the Atlantic Ocean, Gulf of Mexico, and Caribbean commercial passenger fishing vessel fishery has been added to the LOF. This fishery is placed in Category III, because there are no documented or suspected serious injuries or mortalities of marine mammals incidental to this fishery.

Number of participants in commercial fisheries. The LOF tables include estimates of the number of participants in each commercial fishery. Comments were received updating the number of participants in certain commercial fisheries, and these updates are reflected in Tables 1 and 2. The number of participants was updated for the following fisheries: Gulf of Mexico menhaden purse seine, Florida west coast purse seine, Southeast U.S. Atlantic, Gulf of Mexico snapper-grouper and other reef fish bottom longline/hook&line, and the Southeast U.S. Atlantic, Gulf of Mexico, Caribbean spiny lobster trap/pot.

All occurrences of ''South Atlantic'' in the fishery names in the LOF have been changed to ''Southeast U.S. Atlantic'' to more appropriately designate the geographic location of the commercial fisheries as occurring in southern U.S. waters and not south of the equator.

''Weakfish, mullet, spot, croaker'' were added to the list of target species in the ''Gulf of Mexico inshore gillnet'' fishery to better reflect the nature of the fishery.

The name of the Gulf of Maine, South Atlantic coastal shad, sturgeon gillnet has been changed to ''Gulf of Maine, Southeast U.S. Atlantic coastal shad, sturgeon gillnet fishery'' to better reflect the geographical range of this fishery, and to specifically include the waters of North Carolina.

The Gulf of Mexico, Southeast U.S. Atlantic coastal gillnet (includes mullet gillnet fishery in Louisiana and Mississippi) fishery has been separated into a Gulf of Mexico component and a Southeast U.S. Atlantic coastal gillnet, because the marine mammal stocks with which the fisheries interact are different.

The Florida mullet gillnet fishery has been removed from the LOF. This fishery no longer operates due to the net ban in Florida state waters. Some participants in this fishery have moved their operations to Louisiana and Mississippi; thus, the phrase ''includes mullet gillnet fishing in LA and MS'' has been added to the name of the Southeast U.S. Atlantic, Gulf of Mexico coastal gillnet fishery.

Responses to Comments

Justification for the Categorization of Commercial Fisheries

The following are justifications for the final categorization of commercial fisheries into Category I, II, or III based on the classification scheme defined in the final rule implementing section 118 (60 FR 45086, August 30, 1995). Justifications are presented for only those fisheries placed in Category I and II, or those fisheries placed in Category III for which observer, logbook, stranding or other information exist. The evaluation of each fishery at both the Tier 1 (total, species-specific marine mammal serious injuries and mortalities across all fisheries) and the Tier 2 (fishery-specific incidental marine mammal serious injury and mortality) levels is provided.

Commercial Fisheries in the Pacific Ocean

Category I

CA Angel Shark/Halibut and Other Species Using Large Mesh (>3.5 inches) Set Gillnet Fishery

Tier 1 evaluation: Based on observer data and fishing effort during 1991–93 (Barlow *et al.*, 1994, NMFS 1995), annual mortality and serious injury of the central California harbor porpoise across all fisheries, including the California angel shark/halibut large-mesh set gillnet fishery, exceeds 10 percent of this stock's PBR level.

Tier 2 evaluation: The CA angel shark/halibut large-mesh set gillnet fishery is responsible for an estimated annual removal level of 50 percent or more of the Central California harbor porpoise's PBR level. CA/OR Thresher Shark/Swordfish Drift Gillnet Fishery

Tier 1 evaluation: Based on observer data and fishing effort during 1991–93 (Barlow *et al.*, 1994, NMFS 1995), total annual mortality and serious injury of sperm whales across all fisheries, including the CA/OR drift gillnet fishery, exceeds 10 percent of this stock's PBR level.

Tier 2 evaluation: The CA/OR thresher shark/swordfish drift gillnet fishery is responsible for an estimated annual removal level of 50 percent or more of the CA/OR/WA sperm whale stock's PBR level.

Category II

AK Prince William Sound Salmon Drift Gillnet

Tier 1 evaluation: Total known harbor porpoise mortality and serious injury levels across all fisheries exceed 10 percent of the stock's PBR level.

Tier 2 evaluation: Known harbor porpoise mortality and serious injury in this fishery exceed 1 percent of the stock's PBR.

AK Peninsula/Aleutian Islands Salmon Drift Gillnet

Tier 1 evaluation: Total known harbor porpoise mortality and serious injury levels across all fisheries exceed 10 percent of the stock's PBR level.

Tier 2 evaluation: Known harbor porpoise mortality and serious injury in this fishery exceed 1 percent of the stock's PBR level.

AK Peninsula/Aleutian Island Salmon Set Gillnet

Tier 1 evaluation: Total known marine mammal mortality and serious injury levels across all fisheries does not exceed 10 percent of each stock's PBR level based on the current information. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks across all fisheries, and available data suggest that levels of mortality and serious injury may exceed 10 percent of some stocks' PBR levels if observer information were available, especially for harbor porpoise and Steller sea lions.

Tier 2 evaluation: Low levels of marine mammal mortalities and serious injuries have been documented for this fishery. This fishery has not been observed, and because levels of marine mammal mortalities and serious injuries in this fishery are expected to be similar to levels of other set gillnet fisheries that interact with similar marine mammal species, especially for harbor porpoise, this fishery is placed in Category II.

Southeast Alaska Salmon Drift Gillnet

Tier 1 evaluation: Total known harbor porpoise and humpback whale mortality and serious injury levels across all fisheries exceed 10 percent of each stock's PBR level.

Tier 2 evaluation: Known harbor porpoise and humpback whale mortality and serious injury levels in this fishery exceed 1 percent of each stock's PBR level.

AK Cook Inlet Drift Gillnet

Tier 1 evaluation: Total known marine mammal mortality and serious injury levels across all fisheries do not exceed 10 percent of the PBR of each stock taken by this fishery with currently available information. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks across all fisheries, and available data suggest that levels of mortality and serious injury may exceed 10 percent of some stocks' PBRs if observer information were available.

Tier 2 evaluation: Low levels of marine mammal mortalities and serious injuries have been documented for this fishery. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks, and available data suggest that levels of mortality and serious injury may exceed 1 percent of some stocks' PBR levels if observer information were available. Levels of marine mammal mortalities and serious injuries in this fishery are expected to be similar to levels of other drift gillnet fisheries that interact with similar marine mammal species.

AK Cook Inlet Salmon Set Gillnet

Tier 1 evaluation: Total known marine mammal mortality and serious injury levels across all fisheries do not exceed 10 percent of each stock's PBR level with the current information. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks across all fisheries, and available data suggest that levels of mortality and serious injury may exceed 10 percent of some stocks' PBR levels if observer information were available, especially for harbor porpoise.

Tier 2 evaluation: Low levels of marine mammal mortalities and serious injuries have been documented for this fishery. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks, and available data suggest that levels of mortality and serious injury may exceed 1 percent of some stocks' PBR levels if observer information were available. Levels of marine mammal mortalities and serious injuries in this fishery are expected to be similar to levels of other set gillnet fisheries that interact with similar marine mammal species, especially for harbor porpoise.

AK Yakutat Salmon Set Gillnet

Tier 1 evaluation: Total known harbor seal mortality and serious injury levels across all fisheries do not exceed 10 percent of the stock's PBR level with the current information. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks across all fisheries, and available data suggest that levels of mortality and serious injury may exceed 10 percent of some stocks' PBR levels if observer information were available.

Tier 2 evaluation: Known harbor seal mortality and serious injury levels

exceed 1 percent of the stock's PBR level.

AK Kodiak Salmon Set Gillnet

Tier 1 evaluation: Total known harbor porpoise mortality and serious injury levels across all fisheries exceed 10 percent of the stock's PBR level.

Tier 2 evaluation: Known harbor porpoise mortality and serious injury levels in this fishery exceed 1 percent of the stock's PBR level.

AK Bristol Bay Drift Gillnet

Tier 1 evaluation: Total known harbor seal and beluga whale mortality and serious injury levels across all fisheries do not exceed 10 percent of each stock's PBR level with the current information. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks across all fisheries, and available data suggest that levels of mortality and serious injury may exceed 10 percent of some stocks' PBR levels if observer information were available.

Tier 2 evaluation: Known harbor seal and beluga whale mortality and serious injury levels exceed 1 percent of each stock's PBR level.

AK Bristol Bay Set Gillnet

Tier 1 evaluation: Total known marine mammal mortality and serious injury levels across all fisheries do not exceed 10 percent of each stock's PBR level with the current information. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks across all fisheries, and available data suggest that levels of mortality and serious injury may exceed 10 percent of some stocks' PBR levels if observer information were available, especially for harbor porpoise, harbor seals and Steller sea lions.

Tier 2 evaluation: Low levels of marine mammal mortalities and serious injuries have been documented for this fishery. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks, and available data suggest that levels of mortality and serious injury may exceed 1 percent of some stocks' PBR levels if observer information were available. Levels of marine mammal mortalities and serious injuries in this fishery are expected to be similar to levels of other set gillnet fisheries that interact with similar marine mammal species, especially for harbor porpoise, harbor seals and Steller sea lions.

AK Metlakatla/Annette Island Salmon Drift Gillnet

This fishery is separated from the Southeast drift gillnet fishery only for purposes of registration. It is a tribal fishery and is thus exempt from the registration fee. For categorization purposes, it is considered the same as the Southeast drift gillnet fishery.

WA Puget Sound Region Salmon Drift Gillnet (Includes All Inland Waters South of the US-Canada Border and Eastward of the Bonilla-Tatoosh Line—Treaty Indian Fishing is Excluded)

Tier 1 evaluation: As reported in the final SAR, the estimated total fishery-related mortality for the inland Washington stock of harbor porpoise (16), exceeds 10 percent of the calculated PBR level (2.7) and, therefore, can not be considered insignificant.

Tier 2 evaluation: The reported incidental take estimate of 15 harbor porpoise per year was calculated from observed take in the sockeye salmon fishery. However, that estimate includes Treaty Indian fishing effort, which constitutes about one half of the effort in Puget Sound. Therefore, the estimated take of harbor porpoise for the non-tribal salmon drift gillnet fishery would be about one half of the total estimated take (7.5), which is greater than 1 percent but less than 50 percent of the calculated PBR level for this stock.

CA Anchovy, Mackerel, Tuna Purse Seine

Tier 1 evaluation: Based on observer data and fishing effort during 1991–93 and logbook data (1990–92) (Barlow *et al.*, 1995, NMFS 1995), the average annual mortality and serious injury of the offshore bottlenose dolphin across all fisheries, including the CA anchovy, mackerel, tuna purse seine fishery, exceeds 10 percent of this stock's PBR levels.

Tier 2 evaluation: The mortality and serious injury of the offshore bottlenose dolphin in the CA mackerel, anchovy, tuna purse seine fishery is two percent of this stock's PBR level.

AK Southeast Salmon Purse Seine

Tier 1 evaluation: Total known humpback whale mortalities and serious injuries across all fisheries exceed 10 percent of the stock's PBR level.

Tier 2 evaluation: Known humpback whale mortalities and serious injuries in this fishery exceed 1 percent of the stock's PBR level.

AK pair trawl

This is a new fishery in Alaskan waters and is therefore categorized by analogy with pair trawl fisheries in the U.S. North Atlantic. The U.S. North Atlantic large pelagics pair trawl fishery has demonstrated high levels of mortalities and serious injury for some marine mammal species. The Alaska pair trawl fishery is classified as Category II pending additional information on the level of marine mammal serious injuries and mortalities in the fishery.

OR Swordfish/Blue Shark Surface Longline

Categorization of this fishery is based on analogy with observed pelagic longline fisheries in the Atlantic Ocean. Based on observer data, the Atlantic Ocean pelagic longline fishery for swordfish and tuna has at least an occasional incidental serious injury and mortality of marine mammals. Accordingly, this fishery is placed in Category II.

Category III

AK Prince William Sound Set Gillnet

Tier 1 evaluation: Total known harbor seal and Steller sea lion mortality and serious injury levels across all fisheries do not exceed 10 percent of each stock's PBR level with the current information. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks across all fisheries, and available data suggest that levels of mortality and serious injury may exceed 10 percent of these stocks' PBR levels if observer information were available.

Tier 2 evaluation: Marine mammal mortality and serious injury levels approaching 1 percent are not expected for any stock by this fishery.

AK Kuskokwim, Yukon, Norton Sound, Kotzebue Salmon Gillnet

Interactions in these fisheries usually result in directed takes of marine mammals for subsistence purposes.

AK Roe Herring and Food/Bait Herring Gillnet

Tier 1 evaluation: No marine mammal serious injuries or mortalities have been documented incidental to this fishery.

Tier 2 evaluation: Although marine mammal mortalities and serious injuries have been documented for other gillnet fisheries, the roe herring gillnet fishery openers are of such short duration, marine mammal mortality and serious injury levels approaching 1 percent are not expected for any stock for this fishery.

WA Willapa Bay Drift Gillnet

Tier 1 evaluation: The estimated total fishery related mortality and serious injury for the Oregon and Washington coastal stock of harbor seals is greater than 10 percent of the PBR level.

Tier 2 evaluation: No harbor seal mortalities were observed incidental to fishing effort in 1991. However, harbor seals did interact with the fishery. Two incidents of entanglement were observed in which the seals were released alive and uninjured. Based on observer data, incidental mortality was estimated to be a rare event which would not exceed 1 percent of the calculated PBR level for this stock.

WA Gray's Harbor Salmon Drift Gillnet (Excluding Treaty Tribal Fishing)

Tier 1 evaluation: As reported in the final SAR, the estimated total fishery related mortality and serious injury for the Oregon & Washington coastal stock of harbor seals (233) is greater than 10 percent of the PBR level (170).

Tier 2 evaluation: The reported estimate of annual mortality and serious injury of harbor seals in this fishery (10), based on observer data, is less than 1 percent of the calculated PBR level for the stock (17).

WA, OR Lower Columbia River (Includes Tributaries) Drift Gillnet

Tier 1 evaluation: The estimated total fishery related mortality and serious injury for the Oregon and Washington coastal stock of harbor seals (233) is not less than 10 percent of the PBR level (170).

Tier 2 evaluation: Based on observations in 1991–92, the estimated annual mortality and serious injury of harbor seals in this fishery is 213. However, during the observation period, all but one of the observed mortalities occurred during the winter season. The extrapolated annual mortality of harbor seals in this fishery from 1991 to 1993 was 233 seals in 1991 (all during the winter season), 192 seals in 1992 (180 in the winter season and 12 in the fall), and 11 seals in 1993 (all during the winter season). Although the estimated annual mortalities of harbor seals in 1991 and 1992 could justify placing this fishery in Category II, reduced fishing seasons and or season closures (due to restrictions on the fishery to minimize impacts on Snake River chinook salmon, which are listed under the Endangered Species Act (ESA)) are unlikely to result in the levels of harbor seal mortality observed in 1991 and 1992. The winter season of 1993, when an estimated 11 harbor seals were taken, was restricted due to ESA considerations. The winter season was closed in 1994. The estimated annual harbor seal mortality for the fall fishery, 4 (0+11+0/3=3.66) is less than 1 percent of the calculated PBR level for this stock (17).

CA Set and Drift Gillnet Fisheries That Use a Stretched Mesh Size of 3.5 Inches or Less

Tier 1 evaluation: Based on logbook data (1991–1994) (NMFS 1995, Joe Cordaro, pers. com., SWO, NMFS), no annual mortality and serious injury of marine mammals has been reported in the CA set and drift gillnet fishery with small mesh.

AK Miscellaneous Finfish Set Gillnet

Tier 1 evaluation: No marine mammal serious injuries or mortalities have been documented incidental to this fishery.

Tier 2 evaluation: Marine mammal mortality and serious injury levels approaching 1 percent are not expected for any stock by this fishery.

HI Gillnet

Tier 1 evaluation: One bottlenose dolphin was reported entangled in a gill net in 1991 (Nitta and Henderson 1993); however, bottlenose dolphins are rarely reported as entangled in set gillnets in Hawaii. There are records of spinner dolphins being taken in nets or net fragments in Hawaiian waters, and one eyewitness account in 1990. There has been one reported incidental mortality of a Hawaiian monk seal in an inshore gillnet in 1976 (Barlow *et al.,* 1995). Due to the rarity of these interactions, this fishery is placed in Category III.

CA Herring Purse Seine

Tier 1 evaluation: Based on logbook data (1990–94) (Joe Cordaro, pers. comm.) the total mortality and serious injury of the CA coastal bottlenose dolphins across all fisheries, including the CA herring purse seine fishery, is less than 10 percent of this stock's PBR level (Barlow *et al.,* 1995).

CA Sardine Purse Seine

Tier 1 evaluation: Based on logbook data (1990–1992), no mortality or serious injury has been reported in this fishery.

CA Squid Purse Seine

Tier 1 evaluation: Based on logbook data (1990–92), the total annual average mortality and serious injury of California sea lions across all fisheries, including the squid purse seine fishery, exceeds 10 percent of this stock's PBR level.

Tier 2 evaluation: The total annual average mortality and serious injury of California sea lions in the CA squid purse seine fishery is less than one percent of this stock's PBR level.

CA Squid Dip Net

Tier 1 evaluation: Based on logbook data (1990–1992), no mortality or serious injury has been reported in the CA squid dip net fishery.

WA, OR Salmon Net Pens

Tier 1 evaluation: As reported in the final SAR, the total estimated fishery related mortality and serious injury of the U.S. stock of California sea lions (2,446) based on observer data collected from 1991 to 1993 exceeds 10 percent of the calculated PBR level for this stock (505). However, preliminary estimates for the first three quarters of 1994 indicate that a large reduction in the mortality rate has taken place and that mortality may be less than 10 percent of the calculated PBR for 1994.

Tier 2 evaluation: Based on logbook data the incidental take of marine mammals is infrequent and California sea lion mortality and serious injuries are at a level less than 1 percent of the calculated PBR level.

OR Salmon Ranch

Tier 1 evaluation: No incidental, but not intentional, mortalities or serious injuries of marine mammals have been reported for this fishery.

AK Salmon Troll

Tier 1 evaluation: Total known Steller sea lion mortalities and serious injuries across all fisheries do not exceed 10 percent of the stock's PBR level with the current information. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks across all fisheries, and available data suggest that levels of mortality and serious injury may exceed 10 percent of some stocks' PBR levels if observer information were available.

Tier 2 evaluation: Known Steller sea lion mortalities and serous injuries for this fishery do not exceed 1 percent of the stock's PBR level and current information does not indicate that this level would exceed 1 percent with observer coverage for this fishery.

CA/OR/WA Salmon Troll

Tier 1 evaluation: Based on logbook data (1990–92), the mortality and serious injury of California sea lions across all fisheries, including the CA/OR/WA salmon troll fishery, exceeds 10 percent of this stock's PBR level.

Tier 2 evaluation: A review of logbook data (1990–1992) indicated that the majority of fishers reported intentional

lethal takes for deterrence in both the deterrence columns and the gear columns, owing to ambiguities in the reporting instructions. However, based on an earlier study (Miller *et al.*, 1983) it is known that incidental mortalities in this fishery are the result of intentional deterrence efforts which are now illegal. Once the duplicate reports are removed, the annual average mortality and serious injury of California sea lions is below one percent.

AK State Waters Sablefish Longline/Set Line

Tier 1 evaluation: No marine mammal serious injuries or mortalities have been documented incidental to this fishery.

HI Swordfish, Tuna, Billfish, Mahi Mahi, Wahoo, Oceanic Sharks Longline/Set Line

Tier 1 evaluation: Evidence of interactions between the Hawaii pelagic longline fishery and Hawaiian monk seals began to accumulate in 1990, including 5 hooked seals and 13 unusual seal wounds that some believe were the result of interactions with the longline gear (Barlow *et al.* 1995). In October 1991, a permanent protected species zone was established around the Northwest Hawaiian Islands, which precludes longline fishing. One Risso's dolphin was observed ''hooked'' and was released alive in 1993 (pers. comm., Gene Nitta, Southwest Region, NMFS). Preliminary analysis of observer data from the swordfish longline fishery indicates that two Risso's dolphins were incidentally taken during 85 observed longline trips between February 1994 and October 1995 (NMFS unpublished data). One animal had ingested a hook and another appeared to be hooked in the caudal peduncle region. Both animals were released alive and swam away. Also, one bottlenose dolphin had ingested a hook and was also released alive. In 1994, a pygmy killer whale was hooked and released from longline gear. Furthermore, in 1991, a humpback whale was observed entangled in longline gear in Hawaii. Although the estimated PBR level for the central North Pacific humpback whale is 2.8 animals, no estimates of annual average humpback whale mortality and serious injury in the Hawaii longline fishery are available at this time. Thus, it is not possible to compare annual mortality and serious injury of humpback whales with its estimated PBR level. Estimates of PBR levels and annual mortality and serious injury for the other marine mammal species that have been documented interacting with the Hawaiian longline fishery are currently not available. For these reasons, this fishery is placed in Category III.

AK Southern Bering Sea, Aleutian Islands, and Western Gulf of Alaska Sablefish Longline/Set Line (Federally Regulated Waters)

Tier 1 evaluation: Total known mortalities or serious injuries of killer whales across all fisheries exceed 10 percent of the PBR level for transient, resident and transient and resident stocks together.

Tier 2 evaluation: Known killer whale mortalities or serious injuries in this fishery exceed 1 percent of the PBR level for transient, resident and transient and resident stocks together.

The majority of the serious injuries and mortalities of killer whales incidental to commercial fisheries occurred in the BSAI groundfish trawl. Because this trawl fishery has a high level of observer coverage, good mortality estimates for killer whales are available from this fishery. However, because the population estimates for killer whales are known to be underestimated and the low level of serious injury and mortality that occurs incidental to the trawl and longline fisheries are not likely to have a significant effect on the population, and because neither fishery has significant interactions with other species of marine mammals both fisheries are placed in Category III.

AK Gulf of Alaska Groundfish Trawl

Tier 1 evaluation: Total known Steller sea lion, harbor seal, northern elephant seal and Dall's porpoise mortalities or serious injuries across all fisheries do not exceed 10 percent of each stock's PBR level with the current information. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks across all fisheries, and available data suggest that levels of mortality and serious injury would exceed 10 percent of some stocks' PBR levels if observer information were available.

Tier 2 evaluation: Marine mammal mortalities and serious injuries levels approaching 1 percent are not expected for any stock by this fishery.

AK BSAI Groundfish Trawl

Tier 1 evaluation: Total known mortalities or serious injuries of killer whales across all fisheries exceed 10 percent of the PBR level for transient, resident, and transient and resident stocks combined.

Tier 2 evaluation: Known killer whale mortalities or serious injuries in this fishery exceed 1 percent of the PBR level for transient, resident and transient and resident stocks combined.

Killer whales are seriously injured and killed incidental to two fisheries: The AK southern BSAI, and Western Gulf of Alaska sablefish longline/set line (federally regulated waters) fishery and the AK BSAI groundfish trawl fishery. However, the majority of the serious injuries and mortalities of killer whales incidental to commercial fisheries occurred in the BSAI groundfish trawl. Because this trawl fishery has a high level of observer coverage, good mortality estimates for killer whales are available from this fishery. However, because the population estimates for killer whales are known to be underestimated, and the low level of serious injury and mortality that occurs incidental to the trawl and longline fisheries are not likely to have a significant effect on the population, both fisheries are placed in Category III.

AK Bering Sea, Gulf of Alaska (GOA) Finfish Pot

Tier 1 evaluation: Total known harbor seal mortalities or serious injuries across all fisheries do not exceed 10 percent of each stock's PBR level with the current information. Low levels of observer coverage have been inadequate to determine mortality and serious injury levels for these stocks across all fisheries, and available data suggest that levels of mortality and serious injury may exceed 10 percent of some stocks' PBR levels if observer information were available.

Tier 2 evaluation: Marine mammal mortalities and serious injuries levels approaching 1 percent are not expected for any stock by this fishery.

CA Lobster, Prawn, Shrimp, Rock Crab, Fish Pot

Tier 1 evaluation. Although the California Marine Mammal Stranding Network, NMFS, receives reports of gray whales entangled in lobster pot gear, these entanglements, while technically ''injuries'', do not appear to result in mortalities. No other reports of marine mammal incidental takes have been reported from these fisheries. For these reasons, this fishery is placed in Category III.

Commercial Fisheries in the Atlantic Ocean, Caribbean, and Gulf of Mexico

Category I

Atlantic Ocean, Caribbean, Gulf of Mexico Large Pelagics Pair Trawl

Tier 1 evaluation: Annual incidental mortality and serious injury across all fisheries for all stocks known to interact

with this fishery is greater than 10 percent of the PBR level.

Tier 2 evaluation: Extrapolation of observer data results in an estimated total incidental serious injury and mortality of 79 offshore bottlenose dolphins and 33 common dolphins per year from 1992–93. These take levels represent an annual incidental mortality and serious injury that is greater than 50 percent of the PBR levels for both species.

Atlantic Ocean, Caribbean, Gulf of Mexico Large Pelagics Drift Gillnet Fishery

Tier 1 evaluation: Incidental annual mortality and serious injury across all fisheries for all stocks (with known PBR levels) interacting with this fishery is greater than 10 percent of the PBR level.

Tier 2 evaluation: Extrapolation of observer data results in an annual estimated total serious injuries and mortalities of 59 Risso's dolphins, 424 common dolphins, 61 pilot whales, and 53 offshore bottlenose dolphins per year from 1989–1993. These serious injury and mortality levels represent an annual incidental mortality and serious injury that is greater than 50 percent of the PBR levels for these species.

The serious injury of a right whale in 1993 was reported by the observer program. It was not an observed mortality; therefore it was not reported as an ''observed kill.'' NMFS believes, however, that this whale probably died from injuries sustained in this incident. One serious injury or mortality of a right whale is greater than 50 percent of the PBR level for this species. Therefore, this fishery would also fall into Category I based on interactions with right whales. New England multispecies sink gillnet (including species as defined in the Multispecies Fisheries Management Plan and spiny dogfish and monkfish)

Tier 1 evaluation: Incidental annual mortality and serious injury across all fisheries for all stocks interacting with this fishery—with the exception of grey seals—is greater than 10 percent of the PBR level.

Tier 2 evaluation: Extrapolation of observer data results in an estimated total serious injury and mortality of 102 Atlantic white-sided dolphins and 1,875 harbor porpoise per year from 1990–93. These serious injury and mortality levels represent an annual incidental mortality and serious injury that is greater than 50 percent of the PBR levels for these species.

Atlantic Ocean, Caribbean, Gulf of Mexico Large Pelagics Longline Fishery

This fishery was listed as Category II in the previous LOF and is moved to Category I in this LOF and re-named ''Atlantic Ocean, Caribbean, Gulf of Mexico Large Pelagics Longline.''

Tier 1 evaluation: Incidental annual mortality and serious injury across all fisheries for pilot whale stock(s) interacting with this fishery is greater than 10 percent of the PBR level.

Tier 2 evaluation: Extrapolation of observer data results in an estimated total incidental mortality and serious injury of 26 pilot whales per year from 1992–93. This represents an annual incidental mortality and serious injury that is greater than 50 percent of the PBR level for either long-finned or short-finned pilot whales. Therefore, this fishery is moved from Category II to Category I.

This reclassification is supported by MMEP logbook data, which includes reports of injury or mortality of an average of nine pilot whales (stock unspecified) per year for the years 1990 to 1992. NMFS has also received sighting reports (both at sea and stranded) of whales carrying gear that may be attributable to the pelagic longline fishery.

Category II

U.S. Mid-Atlantic Coastal Gillnet Fishery

Tier 1 evaluation: Incidental mortality and serious injury across all fisheries for harbor porpoise, coastal bottlenose dolphins, and humpback whales, which are known to interact with this fishery, is greater than 10 percent of the PBR levels for these stocks. Therefore this fishery is subject to Tier 2 analysis.

Tier 2 evaluation: Little observer coverage occurred in this fishery between 1989 and 1993. No serious injuries and mortalities were observed during those years. Therefore, no annual incidental mortality and serious injury from this fishery can be reported from observer data for these years. Based on observer coverage in 1994, entanglements of humpback whales and dolphins observed by NMFS and the public (not the observer program) and evidence of gillnet entanglement observed in stranded harbor porpoise, bottlenose dolphins, and humpback whales, NMFS believes that annual serious injury and mortality for these species due to this fishery is greater than 1 percent but less than 50 percent of the PBR levels for these stocks. Therefore this fishery is placed in Category II. For clarification of how the stranding data were used in this analysis, see the proposed LOF (60 FR 31680, June 16, 1995).

Gulf of Maine Small Pelagics Surface Gillnet

Occasional anecdotal reports of mortalities and injuries of marine mammals incidental to this fishery have been reported. Because there have been reports of mortalities in this fishery, it is placed in Category II.

Southeast U.S. Atlantic Shark Gillnet Fishery

Tier 1 evaluation: Incidental annual mortality and serious injury across all fisheries for the western North Atlantic coastal bottlenose dolphin stock interacting with this fishery are greater than 10 percent of the PBR level.

Tier 2 evaluation: Observer data for this fishery indicate that mortality to the western North Atlantic coastal bottlenose dolphin stock due to this fishery is 4 percent; thus, the fishery belongs in Category II.

In addition, a young right whale calf was observed off the northern coast of Florida, which had wounds indicative of interaction with gillnet gear in February 1994. The animal also exhibited propeller wounds believed by researchers investigating the incident to have been inflicted by the fishery vessel responsible for the net wounds. It was concluded that the shark gillnet fishery was the only large mesh gillnet fishery operating in that area at the time. The animal has not been sighted since, and is presumed to be dead. Another suspected interaction between this fishery and a right whale cow was also reported in this same year, although it is believed that this particular interaction was not fatal.

Atlantic Squid, Mackerel, Butterfish Trawl

This fishery was proposed to combine ''Mid-Atlantic Squid Trawl'' and ''Mid-Atlantic Mackerel Trawl'' from the 1994 LOF. The proposed LOF called this fishery the ''Atlantic mid-water trawl.'' In the final LOF, the fishery is renamed ''Atlantic Squid, Mackerel, Butterfish Trawl'' with no reference to whether fishermen are using bottom or mid-water gear.

Tier 1 evaluation: Based on MMEP logbook reports from the squid and mackerel trawl fisheries, incidental annual mortality and serious injury across all fisheries for all stocks reported to interact with this fishery are greater than 10 percent of the PBR level.

Tier 2 evaluation: MMEP logbook data averaged over 1990–92 result in reported serious injuries and mortalities of five pilot whales per year. This represents a minimum serious injury and mortality level of greater than 1

percent but less than 50 percent of the PBR level for either long-finned or short-finned pilot whales. Therefore, this fishery is placed in Category II.

North Carolina Haul Seine

Representatives of the North Carolina marine mammal stranding network have noted interactions between this gear and western North Atlantic coastal bottlenose dolphins. Three dolphins were observed as they were released live from this gear; on another occasion, one dolphin was recovered dead from an interaction with a haul seine. These observations support the decision to place this new fishery in Category II until NMFS has more data with which to support this or another classification.

North Carolina Roe Mullet Stop Net

Tier 1 evaluation: Incidental annual mortality and serious injury across all fisheries for the coastal bottlenose dolphin stock interacting with this fishery is greater than 10 percent of PBR.

Tier 2 evaluation: Evidence of mortality due to stop net entanglement observed in stranded western North Atlantic coastal bottlenose dolphins indicate that annual serious injury and mortality related to this fishery for this stock is greater than 1 percent but less than 50 percent of PBR. Therefore, this fishery is placed in Category II.

Category III

Rhode Island, Southern Massachusetts (to Monomoy Island), and New York Bight (Raritan and Lower New York Bays) Inshore Gillnet

At this time there is no information available to suggest that serious injury and mortality of marine mammals occur incidental to this fishery. Based on patterns of marine mammal distribution, likelihood of encounters with cetaceans is low, but encounters with seals may occur. This fishery was separated from other Mid-Atlantic gillnet fisheries to account for differences in cetacean distribution. A closer examination of more recent stranding and entanglement records may provide information to support re-classification of this fishery in the future.

Long Island Sound Inshore Gillnet

At this time there is no available information to suggest that serious injury and mortality of marine mammals occur incidental to this fishery. Based on patterns of marine mammal distribution, likelihood of encounters with cetaceans is low, but encounters with seals may occur. This fishery was separated from other Mid-Atlantic gillnet fisheries to account for differences in cetacean distribution. A closer examination of more recent stranding and entanglement records may provide information to support re-classification of this fishery in the future.

Delaware Bay Inshore Gillnet

At this time, there is no available information to suggest that serious injury and mortality of marine mammals occur incidental to this fishery. Based on patterns of marine mammal distribution, likelihood of encounters is low. This fishery was separated from other Mid-Atlantic gillnet fisheries to account for differences in marine mammal distribution. A closer examination of more recent stranding and entanglement records may provide information to support re-classification of this fishery in the future.

Chesapeake Bay Inshore Gillnet

This fishery was listed as a Category III in the previous LOF and remains in Category III in this LOF. This listing was inadvertently omitted from the proposed LOF.

At this time, there is no available information to suggest that serious injury and mortality of marine mammals occur incidental to this fishery. Based on patterns of marine mammal distribution, likelihood of encounters is low. This fishery was separated from other Mid-Atlantic gillnet fisheries to account for differences in marine mammal distribution. A closer examination of more recent stranding and entanglement records may provide information to support re-classification of this fishery in the future.

North Carolina Inshore Gillnet

No marine mammal serious injuries or mortalities have been documented incidental to this fishery. All marine mammal strandings exhibiting evidence of gillnet fishery interactions recovered by the North Carolina marine mammal stranding network since at least 1992 have been from offshore locations. However, as marine mammals stranded in the marshes are difficult to detect, stranding data will reflect this bias. NMFS agrees that there is potential for interaction and will continue to collect stranding and other information on this fishery.

Gulf of Mexico Inshore Gillnet (black drum, sheepshead, weakfish, mullet, spot, croaker)

Inshore gillnet fisheries in the Gulf of Mexico have been classified by analogy with similar inshore fisheries in the mid-Atlantic. The PBR levels for stocks of bottlenose dolphins in the Gulf of Mexico bays, sounds, and estuaries are low, because dolphin numbers and densities in many of these areas are low. These low densities also decrease the likelihood of a fishery interacting with dolphins in these areas. Net bans and restrictions in states such as Texas, Florida, and Louisiana, further decrease chances of gillnet fisheries interactions with marine mammals in inshore waters of Gulf states. However, researchers have noted that dolphin densities in some Gulf bays/sounds may be higher than that commonly observed in similar Atlantic bays. Also, detection of stranded animals is much less likely along marshy coastlines than on coastal beaches; thus, stranding data will reflect this bias. NMFS agrees that there is potential for interaction between marine mammals and this fishery.

Offshore Monkfish Bottom Gillnet

This is a new fishery to the LOF and may have been listed incorrectly as Category III in the proposed LOF. Because this fishery may have a high potential to take many cetacean species based on analogy with other shelf-edge fisheries, such as the large pelagic drift net fishery, NMFS will examine available data during the development of the next proposed LOF for possible re-classification of this fishery as Category II.

Southeastern U.S. Atlantic, Gulf of Mexico Coastal Gillnet

Although coastal gillnet fisheries have been banned in Florida State waters, and only shark and shad/sturgeon may be fished using gillnet in South Carolina and Georgia State waters, the ''Southeastern U.S. Atlantic'' component of this fishery will be retained in this final LOF. If there are no participants in this component of the coastal gillnet fishery when the next proposed LOF is developed, NMFS will consider proposing to remove this fishery from the LOF. Any strandings that can be determined to have occurred incidental to gillnet operations in Florida, Georgia, or South Carolina, would have to be attributed to the other gillnet operations that occur in these areas (i.e., shark gillnet or shad/sturgeon gillnet fisheries).

Stranding data from the Gulf of Mexico indicate that gillnet interactions with coastal stocks of bottlenose dolphins may warrant classification of this fishery in Category II. This may be examined during preparation of a future proposed LOF.

Florida Mullet Gillnet

This fishery has been removed from LOF due to the Florida net ban. Some

fishers that previously fished in Florida waters may be working in Louisiana waters; what remains of this fishery is combined with the other Gulf of Mexico gillnet fisheries.

North Atlantic Bottom Trawl

Tier 1 evaluation: Incidental annual mortality and serious injury across all fisheries for all marine mammal stocks interacting with this fishery is greater than 10 percent of the PBR levels.

Tier 2 evaluation: Annual incidental mortality and serious injury from this fishery reported by the observer program (averaged over 1989–93) is greater than 50 percent of the PBR level for striped dolphins, coastal bottlenose dolphins, and pilot whales. Therefore, this fishery would have been placed in Category I. However, because the observer coverage in this fishery is low, the estimated serious injury and mortality levels are statistically weak. Thus, NMFS believes this fishery should remain in Category III at this time. The proposed LOF included further justification for this decision (60 FR 31680–31681, June 16, 1995). NMFS anticipates having additional information from other observer programs that may result in a reclassification of this fishery in a future proposed LOF.

Mid-Atlantic, U.S. South Atlantic, Gulf of Mexico Shrimp Trawl

Tier 1 evaluation: Incidental annual mortality and serious injury across all fisheries for all marine mammal stocks interacting with this fishery is less than 10 percent of the PBR level.

Over 10,000 hours of observer effort in this fishery have been logged in the Atlantic, and over 17,000 have been logged in the Gulf. No takes of any marine mammal species have been observed. However, a Category III report submitted from a shrimp trawl fisher off Key West indicated a dolphin mortality occurred due to entanglement with the lazy line. This incident took place offshore, on the Gulf side of Key West, and thus likely involved the eastern coastal Gulf of Mexico stock of bottlenose dolphins.

Gulf of Maine Menhaden Purse Seine

This fishery was grouped with the Mid-Atlantic menhaden purse seine fishery in the proposed LOF. In this final LOF, the fishery is divided into ''Gulf of Maine menhaden purse seine'' and ''Mid-Atlantic menhaden purse seine'' because serious injuries and mortalities of bottlenose dolphins in the Gulf of Maine portion of this fishery are unlikely.

The Gulf of Maine menhaden purse seine fishery is placed in Category III based on a low probability of marine mammal encounters resulting in serious injury or mortality. This fishery may interact with harbor seals, minke whales, and humpback whales. However, NMFS believes that these interactions would not represent a serious injury or mortality level above 1 percent of PBR levels for these species and that the Gulf of Maine menhaden purse seine fishery is appropriately placed in Category III.

Mid-Atlantic Menhaden Purse Seine

This fishery was grouped with the Gulf of Maine menhaden purse seine fishery in the proposed LOF. In this final LOF, the fishery is divided into ''Gulf of Maine menhaden purse seine,'' and ''Mid-Atlantic menhaden purse seine'' because serious injuries and mortalities of bottlenose dolphins in the Gulf of Maine portion of this fishery are unlikely.

This fishery was erroneously proposed to be placed in Category II in the proposed LOF, because incidental takes of bottlenose dolphins that occurred in the Gulf of Mexico menhaden purse seine were attributed to the Mid-Atlantic menhaden purse seine. This error has been corrected, and the Mid-Atlantic menhaden purse seine is placed in Category III in this final LOF.

Gulf of Mexico Menhaden Purse Seine

Information on bycatch studies in this fishery, recently made available to the NMFS Southeast Region, indicate that mortalities of bottlenose dolphin of the northern Gulf of Mexico coastal stock have been observed in this fishery (two observed mortalities in 1992, two caught live and released in 1994, and one mortality to date in 1995). Additionally, category III reports indicate that three dolphins were taken in 1993. Complete effort data for the bycatch study is not yet available; however, the available information indicates that reclassification of this fishery may be proposed in a future LOF. NMFS will continue to investigate available information as well as monitor future results of the bycatch study to determine whether reclassification is justified for this fishery.

Gulf of Maine, U.S. Mid-Atlantic Mixed Species Trap/Pot

U.S. Mid-Atlantic Black Sea Bass Trap/Pot

Gulf of Maine, U.S. Mid-Atlantic Inshore Lobster Pot

Gulf of Maine, U.S. Mid-Atlantic Offshore Lobster Trap/Pot

Atlantic Ocean, Gulf of Mexico Blue Crab Trap/Pot

U.S. South Atlantic, Gulf of Mexico, Caribbean Spiny Lobster Trap/Pot

Entanglements of cetacean stocks in pot and/or trap fisheries have been well documented. The degree to which marine mammals become entangled in pot and/or trap fisheries and whether a reclassification of some or all pot and/or trap fisheries is warranted, may be investigated in a future proposed LOF.

Gulf of Maine Herring and Atlantic Mackerel Stop Seine/Weir

No new information has been received which would change or confirm the placement of this fishery in Category III. NMFS believes that if interactions of this fishery with harbor porpoise occur, there would not be a serious injury or mortality level that would represent greater than 1 percent of the PBR level for harbor porpoise.

U.S. Mid-Atlantic Mixed Species Stop Seine/Weir (Except the North Carolina Roe Mullet Stop Net)

This fishery includes the pound net fishery. The EA states that there is one report of a bottlenose dolphin mortality in the observed Chesapeake Bay pound net fishery. However, data indicates that more than one stranded dolphin has been found wrapped in pound net gear. In addition, a Kogia was recovered from pound net gear in North Carolina, in 1993. Classification of this fishery will be re-evaluated in a future proposed LOF.

List of Fisheries

The following two tables list the commercial fisheries of the United States according to their MMPA section 118 categories. The estimated number of vessels is expressed in terms of the number of active participants in the fishery, when possible. If this information is not available, the estimated number of vessels or persons licensed for a particular fishery is provided. If no recent information is available on the number of participants in a fishery, the number from the 1994 LOF is used.

The information on which marine mammal species/stocks are involved in interactions with the fishery is based on observer data, logbook data, stranding reports, and fishers' reports. Only those species or stocks known to incur injury or mortality incidental to specific fisheries are listed. An asterisk (*) indicates that the stock is a strategic stock; a plus (+) indicates that the stock is listed as threatened or endangered under the ESA.

TABLE 1.—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN

Fishery description	Estimated No. of vessels/persons	Marine mammal species/stocks incidentally injured/killed
Category I:		
Gillnet fisheries:		
CA angel shark/halibut and other species large mesh (>3.5in) set gillnet fishery.	80	Harbor porpoise, central CA; Common dolphin, short-beaked, CA/OR/WA; Common dolphin, long-beaked, CA; California sea lion, U.S.; Harbor seal, CA; Northern elephant seal, CA breeding.
CA/OR thresher shark/swordfish drift gillnet fishery.	150	Steller sea lion, Eastern U.S.*+; Sperm whale, CA to WA*+; Dall's porpoise, CA/OR/WA; Pacific white sided dolphin, CA/OR/WA; Risso's dolphin, CA/OR/WA; Bottlenose dolphin, CA/OR/WA offshore Common dolphin, short-beaked, CA/OR/WA; Common dolphin, long-beaked, CA; Northern right whale dolphin, CA/OR/WA; Short-finned pilot whale, CA/OR/WA*; Baird's beaked whale, CA/OR/WA; Mesoplodont beaked whales, CA to WA*; Cuvier's beaked whale, CA/OR/WA; Pygmy sperm whale, CA/OR/WA*; California sea lion, U.S.; Harbor seal, CA; Northern elephant seal, CA breeding; Harbor porpoise, OR/WA coastal; Humpback whale, CA/OR/WA-Mexico.
Category II:		
Gillnet fisheries:		
AK Prince William Sound salmon drift gillnet.	509	Steller sea lion, Western U.S.*+; Northern fur seal, North Pacific*; Harbor seal, GOA; Pacific white-sided dolphin, central North Pacific; Harbor porpoise, AK; Dall's porpoise, AK.
AK Peninsula/Aleutians salmon drift gillnet fishery.	107	Northern fur seal, North Pacific; Harbor seal, GOA; Harbor seal, Bering Sea; Harbor porpoise, AK; Dall's porpoise, AK; Northern (Alaska) sea otter, Pacific.
AK Peninsula/Aleutian Island salmon set gillnet.	120	Steller sea lion, Western U.S.*+; Harbor porpoise, AK.
Southeast Alaska salmon drift gillnet fishery.	443	Steller sea lion, Eastern U.S.*+; Harbor seal, Southeast AK; Pacific white-sided dolphin, central North Pacific; Harbor porpoise, AK; Dall's porpoise, AK; Humpback whale, central North Pacific*+.
AK Cook Inlet drift gillnet	554	Steller sea lion, Western U.S.*+; Harbor seal, GOA; Harbor porpoise, AK; Dall's porpoise, AK.
AK Cook Inlet salmon set gillnet ..	633	Steller sea lion, Western U.S.*+; Harbor seal, GOA; Harbor porpoise, AK; Beluga, Cook Inlet.
AK Yakutat salmon set gillnet	152	Harbor seal, Southeast AK.
AK Kodiak salmon set gillnet	162	Harbor seal, GOA; Harbor porpoise, AK.
AK Bristol Bay drift gillnet	1,741	Steller sea lion, Western U.S.*+; Northern fur seal, North Pacific*; Harbor seal, Bering Sea; Beluga, Bristol Bay; Gray whale, Eastern North Pacific.
AK Bristol Bay set gillnet	888	Harbor seal, Bering Sea; Beluga, Bristol Bay; Gray whale, Eastern North Pacific.
AK Metlakatla/Annette Island salmon drift gillnet.	60	None documented.
WA Puget Sound Region salmon drift gillnet fishery (includes all inland waters south of US-Canada border and eastward of the Bonilla-Tatoosh line—Treaty Indian fishing is excluded).	1,044	Harbor porpoise, inland WA; Dall's porpoise, CA/OR/WA; Harbor seal, WA inland.
Purse seine fisheries:		
CA anchovy, mackerel, tuna purse seine.	150	Bottlenose dolphin, CA/OR/WA offshore; California sea lion, U.S.; Harbor seal, CA.
AK Southeast salmon purse seine	443	Humpback whale, central North Pacific*+.
Trawl fisheries:		
AK pair trawl	2	None documented.
Longline fisheries:		
OR swordfish/blue shark surface longline fishery.	30	None documented.
Category III:		
Gillnet fisheries:		
AK Prince William Sound set gillnet.	29	Steller sea lion, Western U.S.*+; Harbor seal, GOA.
AK Kuskokwim, Yukon, Norton Sound, Kotzebue salmon gillnet.	1,651	None documented.
AK roe herring and food/bait herring gillnet.	162	None documented.
WA, OR herring, smelt, shad, sturgeon, bottom fish, mullet, perch, rockfish gillnet.	913	None documented.
WA Willapa Bay drift gillnet	82	Harbor seal, OR/WA coast; Northern elephant seal, CA breeding.
WA Grays Harbor salmon drift gillnet (excluding treaty Tribal fishing).	24	Harbor seal, OR/WA coast.
WA, OR lower Columbia River (includes tributaries) drift gillnet.	40	California sea lion, U.S.; Harbor seal, OR/WA coast.

TABLE 1.—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated No. of vessels/persons	Marine mammal species/stocks incidentally injured/killed
CA set and drift gillnet fisheries that use a stretched mesh size of 3.5 in or less.	341	None documented.
AK miscellaneous finfish set gillnet.	9	Steller sea lion, Western U.S.*+.
Hawaii gillnet	115	Bottlenose dolphin, Hawaiian; Spinner dolphin, Hawaiian.
Purse seine, beach seine, round haul and throw net fisheries:		
AK salmon purse seine (except Southeast Alaska, which is in Category II).	1,053	Harbor seal, GOA.
AK salmon beach seine	34	None documented.
AK roe herring and food/bait herring purse seine.	866	None documented.
AK roe herring and food/bait herring beach seine.	14	None documented.
AK Metlakatla purse seine	3	None documented.
AK octopus/squid purse seine	3	None documented.
CA herring purse seine	100	Bottlenose dolphin, CA coastal; California sea lion, U.S.; Harbor seal, CA.
CA sardine purse seine	120	None documented.
CA squid purse seine	145	California sea lion, U.S.
AK miscellaneous finfish purse seine.	6	None documented.
AK miscellaneous finfish beach seine.	4	None documented.
WA salmon purse seine	440	None documented.
WA salmon reef net	53	None documented.
WA, OR herring, smelt, squid purse seine or lampara.	130	None documented.
WA (all species) beach seine or drag seine.	235	None documented.
HI purse seine	18	None documented.
HI opelu/akule net	16	None documented.
HI throw net, cast net	47	None documented.
Dip net fisheries:		
WA, OR smelt, herring dip net	119	None documented.
CA squid dip net	115	None documented.
Marine aquaculture fisheries:		
WA, OR salmon net pens	21	California sea lion, U.S.
CA salmon enhancement rearing pen.	>1	None documented.
OR salmon ranch	1	None documented.
Troll fisheries:		
AK salmon troll	1,450	Steller sea lion, Eastern U.S.*+.
CA/OR/WA salmon troll	4,300	None documented.
AK north Pacific halibut, AK bottom fish, WA, OR, CA albacore, groundfish, bottom fish, CA halibut non-salmonid troll fisheries.	1,354	None documented.
HI trolling, rod and reel	1,795	None documented.
Guam tuna troll	50	None documented.
Commonwealth of the Northern Mariana Islands tuna troll.	50	None documented.
American Samoa tuna troll	<50	None documented.
HI net unclassified	106	None documented.
Longline/set line fisheries:		
AK state waters sablefish long line/set line.	240	None documented.
Miscellaneous finfish/groundfish longline/set line.	838	Harbor seal, GOA; Harbor seal, Bering Sea; Northern elephant seal, CA breeding.
HI swordfish, tuna, billfish, mahi mahi, wahoo, oceanic sharks longline/set line.	140	Hawaiian monk seal, HI*+; Humpback whale, Central North Pacific*+; Risso's dolphin, Hawaiian; Bottlenose dolphin, Hawaiian.
WA, OR North Pacific halibut longline/set line.	350	None documented.
AK southern Bering Sea, Aleutian Islands, and Western Gulf of Alaska sablefish longline/set line (federally regulated waters).	226	Northern elephant seal, CA breeding; Killer whale, resident; Killer whale, transient.

TABLE 1.—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated No. of vessels/persons	Marine mammal species/stocks incidentally injured/killed
AK halibut longline/set line (state and Federal waters).	213	Steller sea lion, Western U.S.*+.
WA, OR, CA groundfish, bottomfish longline/set line.	367	None documented.
AK octopus/squid longline	1	None documented.
CA shark/bonito longline/set line	10	None documented.
Trawl fisheries:		
WA, OR, CA shrimp trawl	300	None documented.
AK shrimp otter trawl and beam trawl (statewide and Cook Inlet).	48	None documented.
AK Gulf of Alaska groundfish trawl	490	Steller sea lion, Western U.S.*+; Northern fur seal, North Pacific*; Harbor seal, GOA; Dall's porpoise, AK; Northern elephant seal, CA breeding.
AK Bering Sea and Aleutian Islands groundfish trawl.	490	Steller sea lion, Western U.S.*+; Northern fur seal, North Pacific*; Killer whale, resident; Killer whale, transient; Pacific white-sided dolphin, central North Pacific; Harbor porpoise, AK; Harbor seal, Bering Sea; Harbor seal, GOA; Bearded seal, AK; Ringed seal, AK; Dall's porpoise, AK; Spotted seal, AK; Ribbon seal, AK; Northern elephant seal, CA breeding; Northern (Alaska) sea otter, Pacific; Walrus, Pacific.
AK state-managed waters of Cook Inlet, Kachemak Bay, Prince William Sound, Southeast AK groundfish trawl.	8	None documented.
AK miscellaneous finfish otter or beam trawl.	324	None documented.
AK food/bait herring trawl	2	None documented.
WA, OR, CA groundfish trawl	585	Steller sea lion, Western U.S.*+; Northern fur seal, North Pacific*; Pacific white-sided dolphin, central North Pacific; Dall's porpoise, CA/OR/WA; California sea lion, U.S.; Harbor seal, OR/WA coast.
Pot, ring net, and trap fisheries:		
AK crustacean pot	1,951	None documented.
AK Bering Sea, GOA finfish pot	226	Harbor seal, GOA; Northern (AK) sea otter, Pacific.
WA, OR, CA sablefish pot	176	None documented.
WA, OR, CA crab pot	1,478	None documented.
WA, OR shrimp pot and trap	254	None documented.
CA lobster, prawn, shrimp, rock crab, fish pot.	608	None documented.
OR, CA hagfish pot or trap	25	None documented.
HI lobster trap	15	Hawaiian monk seal, HI*+.
HI crab trap	22	None documented.
HI fish trap	19	None documented.
HI shrimp trap	5	None documented.
Handline and jig fisheries:		
AK North Pacific halibut handline and mechanical jig.	84	None documented.
AK other finfish handline and mechanical jig.	474	None documented.
AK octopus/squid handline	2	None documented.
WA groundfish, bottomfish jig	679	None documented.
HI aku boat, pole and line	54	None documented.
HI inshore handline	650	Bottlenose dolphin, HI.
HI deep sea bottomfish	434	Hawaiian monk seal, HI*+.
HI tuna	144	Rough-toothed dolphin, HI; Bottlenose dolphin, HI; Hawaiian monk seal, HI*+.
Guam bottomfish	<50	None documented.
Commonwealth of the Northern Mariana Islands bottomfish.	<50	None documented.
American Samoa bottomfish	<50	None documented.
Harpoon fisheries:		
CA swordfish harpoon	228	None documented.
Pound net/weir fisheries:		
AK Southeast Alaska herring food/bait pound net.	7	None documented.
WA herring brush weir	1	None documented.
Bait pens:		
WA/OR/CA bait pens	13	None documented.
Dredge fisheries:		
Coastwide scallop dredge	106	None documented.
Dive, hand/mechanical collection fisheries:		
AK abalone	177	None documented.
AK dungeness crab	1	None documented.

TABLE 1.—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated No. of vessels/persons	Marine mammal species/stocks incidentally injured/killed
AK herring spawn-on-kelp	306	None documented.
AK urchin and other fish/shellfish	127	None documented.
AK clam hand shovel	125	None documented.
AK clam mechanical/hydraulic fishery.	3	None documented.
WA herring spawn-on-kelp	4	None documented.
WA/OR sea urchin, other clam, octopus, oyster, sea cucumber, scallop, ghost shrimp hand, dive, or mechanical collection.	637	None documented.
CA abalone	111	None documented.
CA sea urchin	583	None documented.
HI squiding, spear	267	None documented.
HI lobster diving	6	None documented.
HI coral diving	2	None documented.
HI handpick	135	None documented.
WA shellfish aquaculture	684	None documented.
WA, CA kelp	4	None documented.
HI fish pond	10	None documented.
Commercial passenger fishing vessel (charter boat) fisheries:		
AK, WA, OR, CA commercial passenger fishing vessel.	1,243	None documented.
AK octopus/squid ''other''	19	None documented.
HI ''other''	114	None documented.
Live finfish/shellfish fisheries:		
CA finfish and shellfish live trap/hook-and-line.	93	None documented.

TABLE 2.—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN

Description of fishery	Estimated No. of vessels/persons	Marine mammal species/stocks incidentally injured/killed
Category I:		
Pair trawl fisheries:		
U.S. Atlantic large pelagics pair trawl.	7	Risso's dolphin, WNA; Long-finned pilot whale, WNA*; Common dolphin, WNA*; Bottlenose dolphin, WNA offshore*.
Gillnet fisheries:		
Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics drift gillnet.	75	North Atlantic right whale, WNA*+; Humpback whale, WNA*+; Sperm whale, WNA*+; Dwarf sperm whale, WNA*; Pygmy sperm whale, WNA*; Cuvier's beaked whale, WNA*; True's beaked whale, WNA*; Gervais' beaked whale, WNA*; Blainville's beaked whale, WNA*; Risso's dolphin, WNA; Long-finned pilot whale, WNA*; Short-finned pilot whale, WNA*; White-sided dolphin, WNA*; Common dolphin, WNA*; Atlantic spotted dolphin, WNA*; Pantropical spotted dolphin, WNA*; Striped dolphin, WNA; Spinner dolphin, WNA; Bottlenose dolphin, WNA offshore*; Harbor porpoise, GME/BF*.
New England multispecies sink gillnet (including species as defined in the Multispecies Fisheries Management Plan and spiny dogfish and monkfish).	341	North Atlantic right whale, WNA*+; Humpback whale, WNA*+; Minke whale, Canadian east coast; Killer whale, WNA; White-sided dolphin, WNA*; Striped dolphin, WNA; Bottlenose dolphin, WNA offshore; Harbor porpoise, GME/BF*; Harbor seal, WNA; Gray seal, Northwest North Atlantic; Common dolphin; Fin whale; Spotted dolphin; False killer whale; Harp seal.
Longline fisheries:		
Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline.	361	Humpback whale, WNA*+; Minke whale, Canadian east coast; Risso's dolphin, WNA; Long-finned pilot whale, WNA*; Short-finned pilot whale, WNA*; Common dolphin, WNA*; Atlantic spotted dolphin, WNA*; Pantropical spotted dolphin, WNA; Striped dolphin, WNA; Bottlenose dolphin, WNA offshore*; Bottlenose dolphin, GMX Outer Continental Shelf; Bottlenose dolphin, GMX Continental Shelf Edge and Slope; Atlantic spotted dolphin, Northern GMX; Pantropical spotted dolphin, Northern GMX; Risso's dolphin, Northern GMX; Harbor porpoise, GME/BF*.
Category II:		
Gillnet fisheries:		
U.S. mid-Atlantic coastal gillnet fishery.	>655	Humpback whale, WNA*+; Minke whale, Canadian east coast; Bottlenose dolphin, WNA offshore*; Bottlenose dolphin, WNA coastal*+; Harbor porpoise, GME/BF*.
Gulf of Maine small pelagics surface gillnet.	133	Humpback whale, WNA*+; White-sided dolphin, WNA; Harbor seal, WNA.

TABLE 2.—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Description of fishery	Estimated No. of vessels/persons	Marine mammal species/stocks incidentally injured/killed
Southeastern U.S. Atlantic shark gillnet fishery.	10	Bottlenose dolphin, WNA coastal*; North Atlantic right whale, WNA*+.
Trawl fisheries:		
Atlantic squid, mackerel, butterfish trawl.	620	Common dolphin, WNA*; Risso's dolphin, WNA*; Long-finned pilot whale, WNA*; Short-finned pilot whale, WNA*; White-sided dolphin, WNA*.
Haul seine fisheries:		
North Carolina haul seine	unknown	Bottlenose dolphin, WNA coastal*; Harbor porpoise, GME/BF*.
Stop net fisheries:		
North Carolina roe mullet stop net	13	Bottlenose dolphin, WNA coastal*.
Category III:		
Gillnet fisheries:		
Rhode Island, southern Massachusetts (to Monomoy Island), and New York Bight (Raritan and Lower New York Bays) inshore gillnet.	32	Humpback whale, WNA*+; Bottlenose dolphin, WNA coastal*+; Harbor porpoise, GME/BF*.
Long Island Sound inshore gillnet	20	Humpback whale, WNA*+; Bottlenose dolphin, WNA coastal*+; Harbor porpoise, GME/BF*.
Delaware Bay inshore gillnet	60	Humpback whale, WNA*+; Bottlenose dolphin, WNA coastal*+; Harbor porpoise, GME/BF*.
Chesapeake Bay inshore gillnet ...	45	None documented.
North Carolina inshore gillnet	94	None documented.
Gulf of Mexico inshore gillnet (black drum, sheepshead, weakfish, mullet, spot, croaker)unknownNone documented..		
Offshore monkfish bottom gillnet ..	<50	None documented.
Gulf of Maine, Southeast U.S. Atlantic coastal shad, sturgeon gillnet (includes waters of North Carolina).	1,285	Minke whale, Canadian east coast; Harbor porpoise, GME/BF*; Bottlenose dolphin, WNA coastal*+.
Gulf of Mexico coastal gillnet (includes mullet gillnet fishery in LA and MS).	.....	Bottlenose dolphin, Western GMX coastal; Bottlenose dolphin, Northern GMX coastal; Bottlenose dolphin, Eastern GMX coastal; Bottlenose dolphin, GMX Bay, Sound, & Estuarine*.
Southeastern U.S. Atlantic coastal gillnet.	0.00	Bottlenose dolphin, WNA coastal*+.
Florida east coast, Gulf of Mexico pelagics king and Spanish mackerel gillnet.	271	Bottlenose dolphin, Western GMX coastal; Bottlenose dolphin, Northern GMX coastal; Bottlenose dolphin, Eastern GMX coastal; Bottlenose dolphin, GMX Bay, Sound, & Estuarine*.
Trawl fisheries:		
North Atlantic bottom trawl	1,052	Long-finned pilot whale, WNA*; Short-finned pilot whale, WNA*; White-sided dolphin, WNA*; Striped dolphin, WNA; Bottlenose dolphin, WNA offshore*.
Mid-Atlantic, Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl.	>18,000	Bottlenose dolphin, WNA coastal*+.
Gulf of Maine northern shrimp trawl.	320	None documented.
Gulf of Maine mackerel trawl	30	None documented.
Gulf of Maine, Mid-Atlantic sea scallop trawl.	215	None documented.
Gulf of Maine, Southern North Atlantic, Gulf of Mexico coastal herring trawl.	5	None documented.
Mid-Atlantic mixed species trawl ..	>1,000	None documented.
Gulf of Mexico butterfish trawl	2	Atlantic spotted dolphin, Northern GMX; Pantropical spotted dolphin, Northern GMX.
Georgia, South Carolina, Maryland whelk trawl.	25	None documented.
Calico scallops trawl	200	None documented.
Bluefish, croaker, flounder trawl ...	550	None documented.
Crab trawl	400	None documented.
U.S. Atlantic monkfish trawl	unknown	None documented.
Marine aquaculture fisheries:		
Finfish aquaculture	48	None documented.
Shellfish aquaculture	unknown	None documented.
Purse seine fisheries:		
Gulf of Maine Atlantic herring purse seine.	30	Harbor porpoise, GME/BF*; Harbor seal, WNA; Gray seal, Northwest North Atlantic.

TABLE 2.—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Description of fishery	Estimated No. of vessels/persons	Marine mammal species/stocks incidentally injured/killed
Mid-Atlantic menhaden purse seine.	22	Bottlenose dolphin, WNA coastal*+.
Gulf of Maine menhaden purse seine.	10	None documented.
Gulf of Mexico menhaden purse seine.	50	Bottlenose dolphin, Northern GMX coastal.
Florida west coast sardine purse seine.	10	Bottlenose dolphin, Eastern GMX coastal.
U.S. mid-Atlantic hand seine	>250	None documented.
Longline/hook-and-line fisheries:		
Gulf of Maine tub trawl groundfish bottom longline/ hook-and-line.	46	Harbor seal, WNA; Gray seal, Northwest North Atlantic.
Southeastern U.S. Atlantic, Gulf of Mexico snapper-grouper and other reef fish bottom longline/ hook-and-line.	3,800	None documented.
Southeastern U.S. Atlantic, Gulf of Mexico shark bottom longline/ hook-and-line.	124	None documented.
Gulf of Maine, U.S. mid-Atlantic tuna, shark swordfish hook-and-line/harpoon.	26,223	None documented.
Southeastern U.S. Atlantic, Gulf of Mexico & U.S. mid-Atlantic pelagic hook-and-line/harpoon.	1,446	None documented.
Trap/pot fisheries—lobster and crab:		
Gulf of Maine, U.S. mid-Atlantic mixed species trap/pot.	100	North Atlantic right whale, WNA*+; Humpback whale, WNA*+; Minke whale, Canadian east coast; Harbor porpoise, GME/BF*; Harbor seal, WNA; Gray seal, Northwest North Atlantic.
U.S. mid-Atlantic and Southeast U.S. Atlantic black sea bass trap/pot.	30	None documented.
U.S. mid-Atlantic eel trap/pot	>700	None documented.
Gulf of Maine, U.S. mid-Atlantic inshore lobster trap/pot.	10,613	North Atlantic right whale, WNA*+; Humpback whale, WNA*+; Fin whale, WNA*; Minke whale, Canadian east coast; White-sided dolphin, Western North Atlantic; Harbor seal, WNA.
Gulf of Maine, U.S. mid-Atlantic offshore lobster trap/pot.	2,902	North Atlantic right whale, WNA*; Humpback whale, WNA*+; Fin whale, WNA*; Minke whale, Canadian east coast; White-sided dolphin, WNA; Harbor seal, WNA.
Atlantic Ocean, Gulf of Mexico blue crab trap/pot.	20,500	Bottlenose dolphin, WNA coastal*; Bottlenose dolphin, Western GMX coastal; Bottlenose dolphin, Northern GMX coastal; Bottlenose dolphin, Eastern GMX coastal; Bottlenose dolphin, GMX Bay, Sound, & Estuarine*; Florida manatee, FL*+.
Southeastern U.S. Atlantic, Gulf of Mexico, Caribbean spiny lobster trap/pot.	750	Florida manatee, FL*+.
Stop seine/weir/pound fisheries:		
Gulf of Maine herring and Atlantic mackerel stop seine/weir.	50	North Atlantic right whale, WNA*; Humpback whale, WNA*+; Minke whale, Canadian east coast; Harbor porpoise, GME/BF*; Harbor seal, WNA; Gray seal, Northwest North Atlantic.
U.S. mid-Atlantic mixed species stop/seine/weir (except the North Carolina roe mullet stop net).	500	None documented.
U.S. mid-Atlantic crab stop seine/ weir.	2,600	None documented.
Dredge fisheries:		
Gulf of Maine, U.S. mid-Atlantic sea scallop dredge.	233	None documented.
U.S. mid-Atlantic offshore surfclam and quahog dredge.	100	None documented.
Gulf of Maine mussel	>50	None documented.
U.S. mid-Atlantic/Gulf of Mexico oyster.	7,000	None documented.
Haul seine fisheries:		
Southeastern U.S. Atlantic, Caribbean haul seine.	150	None documented.
Beach seine fisheries:		
Caribbean beach seine	15	Florida manatee, FL+.

TABLE 2.—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Description of fishery	Estimated No. of vessels/persons	Marine mammal species/stocks incidentally injured/killed
Dive, hand/mechanical collection fisheries:		
Gulf of Maine urchin dive, hand/mechanical collection.	>50	None documented.
Atlantic Ocean, Gulf of Mexico, Caribbean shellfish dive, hand/mechanical collection.	20,000	None documented.
Commercial passenger fishing vessel (charter boat) fisheries:		
Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel.	4,000	None documented.

*Marine Mammal stock is strategic.
+Stock is listed as threatened or endangered under the ESA, or as depleted under the MMPA.
List of Abbreviations Used in Table 2:
FL—Florida.
GA—Georgia.
GME/BF—Gulf of Maine/Bay of Fundy.
GMX—Gulf of Mexico.
NC—North Carolina.
SC—South Carolina
TX—Texas.
WNA—Western North Atlantic.

Classification

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

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. This rule will require certain fishers to pay a fee to obtain an Authorization Certificate that will allow the taking of marine mammals incidental to commercial fishing operations.

Approximately 20,000 fishers were required to register under the old section 114 regime and pay a $30 fee. The fee under the new section 118 regime is reduced to $25. This fee with respect to expected revenues is not significant.

This final rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number.

This final LOF determines which vessel owners must register under the MMPA, and which commercial fishers must report marine mammal mortalities and injuries within 48 hours of returning to port, as required by the section 118 implementing regulations. The collections associated with these registration and reporting requirements have been approved by OMB under OMB control numbers 0648–0224 and 0648–0225.

Dated: December 19, 1995.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

[FR Doc. 95–31252 Filed 12–20–95; 4:54 pm]

BILLING CODE 3510–22–W

Proposed Rules

Federal Register
Vol. 60, No. 249
Thursday, December 28, 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 THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 24

[Docket No. 95–35]

RIN 1557–AB46

Community Development Corporation and Project Investments and Other Public Welfare Investments

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing to revise its regulation governing national bank investments designed primarily to promote the public welfare. The revisions clarify banks' authority under this part; renumber and reorganize the regulation; provide the OCC greater flexibility for determining whether investments primarily promote the public welfare; and simplify the regulation's investment self-certification and prior approval processes. The proposed revisions reduce regulatory burden and inconsistencies while enhancing the ability of national banks to make public welfare investments.

DATES: Comments must be received on or before February 26, 1996.

ADDRESSES: Interested persons are invited to submit comments to Communications Division, Third Floor, Office of the Comptroller of the Currency, 250 E Street, S.W., Washington, D.C. 20219. Attention: Docket No. 95–35. Comments will be available for inspection and photocopying at that address. In addition, comments may be sent by facsimile to (202) 874–5274, or by electronic mail to reg.comments@occ.treas.gov.

FOR FURTHER INFORMATION CONTACT: Karen Bellesi, Program Coordinator, Community Development Investments, Community Development Division, (202) 874–4930; or Michele Meyer, Attorney, Community and Consumer Law Division, (202) 874–5750.

SUPPLEMENTARY INFORMATION:

Background

As part of its Regulation Review Program, the OCC is proposing revisions to 12 CFR Part 24. In December of 1993, the OCC adopted part 24 to implement the recently-enacted 12 U.S.C. 24(Eleventh). Section 24(Eleventh) authorizes national banks to make investments ''designed primarily to promote the public welfare, including the welfare of low- and moderate-income families and communities (such as through the provision of housing, services, or jobs),'' subject to certain percentage of capital limitations.

As currently written, part 24 reflects the statute's broad policy of promoting the public welfare and places particular emphasis on community development investments. Part 24 permits national banks to make investments in community development corporations (CDCs) and community development projects (CD Projects), consistent with safe and sound banking practices. Under part 24, banks may self-certify certain community development investments. Investments that do not qualify for self-certification are subject to one of two prior approval processes. The first requires that a bank file an investment proposal, which the OCC usually approves or disapproves within 30 days. The second consists of a five-day review period for investment proposals that the OCC has previously approved for another bank.

Part 24 was crafted carefully initially to permit the agency and the industry to gain experience with the new investment authority provided by the statute. The proposed revisions reflect the OCC's and the industry's successful experience with part 24. In the two years since the OCC adopted part 24, national banks and their community partners have invested millions of dollars in hundreds of CDCs and CD Projects. Based on this success, and the OCC's desire to facilitate increased community development lending and investment, the OCC believes that it can ease some restrictions and reduce the regulatory burden associated with part 24.

The proposed revisions preserve part 24's community development focus but provide greater flexibility for determining whether investments promote the public welfare. To encourage innovation in banks' public welfare investments, the proposal modifies the current test for determining whether an investment is designed primarily to promote the public welfare (public welfare test). In addition, the proposal simplifies part 24's self-certification and prior approval processes. The proposed revisions simplify the rule and enhance its clarity by using terms common to other recently adopted or revised regulations, such as the Federal Reserve Board's Community Development and Public Welfare Investments Regulation, 12 CFR Part 208.21, and the OCC's Community Reinvestment Act Regulation (CRA Regulation), 12 CFR Part 25. In addition, the proposal reorganizes part 24 and renumbers its provisions. A derivation table showing these changes appears at the end of this preamble.

Description of the Proposal

The following discussion identifies and explains the significant proposed changes to the regulation. The OCC requests comment on all aspects of the proposed regulation, as well as specific comment on the changes discussed in this preamble.

Title

The proposal reflects the OCC's view that national banks can promote the public welfare through a variety of authorized investments, including CDCs and CD Projects that develop affordable housing, foster revitalization and stabilization of low-and moderate-income areas, or provide equity or debt financing for small businesses. Thus, the OCC proposes to change the title of part 24 from ''Community Development Corporation and Project Investments'' to ''Community Development Corporation and Project Investments and other Public Welfare Investments.''

Authority, Purpose, and OMB Control Number (§ 24.1)

The proposal amends the ''purpose'' paragraph to reflect that CDCs and CD Projects that develop affordable housing, foster revitalization and stabilization of low-and moderate-income areas, or provide equity or debt financing for small businesses are just some of the types of investments that a national bank can make under part 24. The OCC continues to encourage

national banks to make these types of investments but also emphasizes that many kinds of investments can promote the public welfare.

Definitions (§ 24.2)

In keeping with the Regulation Review Program's goal of using terminology consistently throughout the OCC's regulations, the OCC is proposing definitions and terms common to other OCC regulations. For example, the definition of ''low-income and moderate-income'' now refers to the OCC's CRA Regulation. The definition of ''capital and surplus'' is the same as the definition of ''capital and surplus'' in the OCC's Lending Limit Regulation, 12 CFR Part 32. Twelve CFR 32.2 defines ''capital and surplus'' as a bank's Tier 1 and Tier 2 capital under the OCC's Minimum Capital Ratios in Appendix A to 12 CFR Part 3, plus the balance of a bank's allowance for loan and lease losses not included in the bank's Tier 2 capital, for purposes of the calculation of risk-based capital under 12 CFR Part 3.

The OCC continues to recognize CDCs and CD Projects as vehicles that national banks may use to make investments under this part. These terms are defined at proposed § 24.2. The proposal, however, omits the current regulation's definitions of community development limited partnership and community-based development corporation as unnecessary further examples of such vehicles. This change does not affect national banks' authority to invest in community development limited partnerships or community based development corporations. Consistent with the requirements of this part, national banks may continue to invest in these and other vehicles.

The proposal adds a definition of ''eligible bank'' that is the same as the ''eligible bank'' definition proposed by the OCC for corporate applications in its November 29, 1994 Notice of Proposed Rulemaking concerning 12 CFR Part 5 (59 FR 61034). The proposal provides that a bank may self-certify investments for purposes of part 24 if it has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System, has at least a satisfactory CRA rating, is well capitalized, and is not subject to any current OCC enforcement actions. As explained in proposed § 24.5(a)(4), a national bank that is at least adequately capitalized and that has a composite rating of at least 3 with improving trends may submit a letter to the OCC's Community Development Division requesting permission to self-certify investments. This is a change from the current rule, which allows an adequately capitalized, 1 or 2 rated bank that is not subject to a current OCC enforcement action to self-certify investments. The OCC believes this modification avoids the potential confusion of two different ''eligible bank'' definitions in different sections of the OCC's rules, and is appropriate in light of the proposal's significantly expanded self-certification opportunities for banks (See proposed § 24.6.)

In addition, the proposal changes the definition of ''significant risk to the deposit insurance fund'' to include risk to all federal deposit insurance funds.

Finally, the proposal makes two changes concerning the small business definitions in current part 24. First, the proposal removes the definition of ''minority-owned small businesses'' because these businesses are encompassed by the regulation's provisions concerning all small businesses. Second, the proposal updates the citation to the Small Business Administration regulations referenced in the definition of ''small business'' in the current regulation.

Public Welfare Investments (§ 24.3)

Part 24 currently delineates a public welfare test that consists of four requirements. Under current § 24.4, an investment in a CDC or CD Project is designed primarily to promote the public welfare only if: (1) the investment primarily benefits low- and moderate-income persons and families or small businesses; (2) the investment addresses community development needs not met by the private market in one or more communities served by the bank; (3) there is nonbank community involvement in the CDC or CD Project; *and* (4) the profits and distributions from a CDC or CD Project are reinvested in activities that primarily promote the public welfare.[1]

Based on its experience since it adopted part 24, the OCC believes that the existing public welfare test should be modified to reflect a more diverse standard for whether an investment promotes the public welfare. Therefore, proposed § 24.3(a) retains the first element of the public welfare test, benefit to low- and moderate-income individuals and small businesses, but makes clear that this benefit can be provided in a variety of ways. Section 24.3(a) sets forth a non-exhaustive list of permissible investment activities that provide the required benefit. The list incorporates the definition of ''community development'' provided in the CRA regulation, and reflects the factors for determining whether an institution qualifies as a Community Development Financial Institution under the Riegle Community Development and Regulatory Improvement Act and the OCC Community Development Division's experience with recent innovative investment proposals.

Proposed § 24.3(b) clarifies that, under the second element of the current public welfare test, a bank is not required to demonstrate that it is impossible to obtain private market financing. A bank must demonstrate, however, the reasons that it is difficult to secure such financing for its proposed investment. Proposed § 24.3(d) permits a bank to make an investment that also benefits an area outside those where the bank provides its core banking services. The bank must still demonstrate, however, the extent to which its investment benefits the communities where it provides these services.

The proposal also modifies the existing community participation requirement of the public welfare test. Current § 24.4(a)(3) requires a bank to demonstrate nonbank community involvement in a CDC or CD project by indicating support from the affected primary beneficiaries and representatives of local government. In the case of a CDC, a bank must demonstrate such support by the composition of the organization's board of directors.

The OCC believes that community involvement is vital to the success of banks' part 24 investment programs. Therefore, the proposal modifies the community participation requirement to allow banks and community groups to determine how best to structure community partnerships under part 24. Proposed § 24.3(c) requires that a bank demonstrate community support for or participation in an investment proposal. A bank could demonstrate such community support or participation in a variety of ways including non-bank community representation on a CDC board of directors, establishment of a community advisory board for the bank's community development activities, formation of a formal business relationship with a community-based organization, public sector or community group financing, or letters of support from community representatives. The OCC requests comment on the appropriate means of demonstrating community support for or participation in a bank's part 24

[1] On October 26, 1995, the OCC published a proposal to eliminate part 24's reinvestment requirement. 60 FR 54819. The public comment period on that proposal ended on November 27, 1995. The final rule is published elsewhere in this issue of the Federal Register.

investment and whether the final rule should specify some or all of them.

The proposal removes as unnecessary current § 24.4(e), which provides that a bank must manage its CDC and CD Project investments in a prudent manner. National banks must, of course, continue to manage their part 24 investments prudently.

Investment Limits (§ 24.4)

The current regulation contains investment limit provisions at current § 24.4(b) and (d). For ease of reference, the proposal groups the provisions concerning part 24 investment limits into a separately titled section. Proposed § 24.4(a) has been modified to clarify that, as provided in 12 U.S.C. 24(Eleventh), a bank's aggregate outstanding investments under part 24 may not exceed 5 percent of its capital and surplus unless the bank is at least adequately capitalized and the OCC determines, by written approval of a proposed investment, that a higher amount will pose no significant risk to the deposit insurance fund.

Public Welfare Investment Self-Certification and Prior Approval Procedures (§ 24.5)

Proposed § 24.5 simplifies, clarifies, and reduces the burden associated with the self-certification and prior approval procedures set forth in current § 24.11. Section 24.11 now provides three processes for approval of authorized investments. The first requires that a bank file an investment proposal, which the OCC usually approves or disapproves within 30 days. The second process consists of a five-day review period by the OCC for investment proposals that the OCC has previously approved for another bank. The third is a self-certification process for certain investments, under which a bank files a notice with the OCC within 10 days after it makes an investment, and the OCC sends a confirmation of receipt within five days.

The proposal eliminates the second approval process and streamlines the third. Under proposed § 24.5(a) and § 24.6(a), a bank may self-certify an investment previously approved by the OCC for another bank. Although not specified in the proposed rule, the OCC will continue its practice of sending a simple confirmation of receipt of a bank's self-certification notice within five days. Under the proposal, however, the OCC will not retroactively review a self-certified investment proposal. Instead, the OCC will review the self-certification documents simply to ensure that they meet the self-certification requirements set forth in proposed § 24.5(a).

The prior approval procedures for investment proposals that do not qualify for self-certification are set forth in proposed § 24.5(b).[2] In considering a bank's investment proposal, the OCC will consider whether the investment satisfies the requirements of § 24.3 and whether it is consistent with the bank's safe and sound operation and the OCC's policies.

Although not specified in the proposal, the OCC will continue its practice of sending a simple confirmation of receipt of an investment proposal within five days. Unless otherwise notified by the OCC, a bank may make a proposed investment 30 calendar days after the date on which the OCC receives the bank's investment proposal. The OCC may notify the bank that it is extending the review period. If so notified, the bank may make the investment only with the OCC's written approval.

Current § 24.11(b) contains a limit on the size of investments eligible for self-certification by banks with more than $250 million in assets. These banks must seek prior OCC approval for investments that exceed the lesser of 2 percent of their unimpaired capital and surplus or $10 million. The OCC proposes to remove this limitation in light of the proposed new standards that define the banks eligible to use the self-certification process.

Investments Eligible for Self-Certification (§ 24.6)

Proposed § 24.6 replaces the current § 24.13, which limits self-certification to investments using certain structures as well as certain activities. These structures include multi-bank CDCs; CDCs established by state or local government; community-based organizations; and certain community development limited partnerships. A CDC subsidiary is not currently an eligible structure for self-certification.

The OCC believes that a structure-based self-certification limitation is no longer necessary. This limitation was intended to allow the OCC to ensure that particular investments did not expose banks to safety and soundness risks or unlimited liability. However, by limiting self-certification to eligible banks (as defined in proposed § 24.2(e)), the OCC believes it can reasonably rely on bank management to determine the appropriate structures for part 24 investments.

In addition to eliminating the list of eligible structures, proposed § 24.6(a) expands the list of activities eligible for self-certification to reflect the industry's increasing innovation in making part 24 investments and the OCC's experience with self-certification under part 24. Part 24's self-certification provisions encourage public welfare investments by banks by reducing the regulatory steps associated with making the investments. In order to maximize the use of self-certification as an incentive for banks to make investments that primarily promote the public welfare, and to encourage banks' creativity in making these investments, the OCC has identified in proposed § 24.6(a) a clear and expanded list of eligible activities. This list includes, but is not limited to, certain investments that benefit low- and moderate-income persons and small businesses, investments that have been determined by the OCC to be permissible under part 24, and investments previously approved by the Federal Reserve Board under 12 CFR 208.21 for state member banks.

Notwithstanding the eligible activities listed in § 24.6(a), proposed § 24.6(b) provides that a bank may not self-certify investments that involve properties carried on the bank's books as ''other real estate owned'' (OREO properties) or that fund projects outside the states or metropolitan areas in which the bank's main office or branches are located. The latter limitation is similar to the limit on self-certification that appears in current part 24 but is revised to reflect that some national banks now have branches in more than one state.

Examination, Records, and Remedial Action (§ 24.7)

Proposed § 24.7 replaces current § 24.21 but makes no substantive change.

Accounting for Public Welfare Investments (Current § 24.4(c))

Current § 24.4(c) provides that a bank's investments in CDCs and CD Projects generally may be recorded as ''other assets at cost.'' The rule also sets forth circumstances under which a bank would be required to consolidate its investments on a line-by-line basis or account for them under the equity method of accounting. The proposal eliminates this section as unnecessary, because banks generally look to other sources for their accounting instructions. Banks should record their investments, as appropriate, pursuant to the instructions for Consolidated Reports of Condition and Income

[2] The proposal removes the current rule's provision for optional review as unnecessary. A national bank may continue to request prior OCC review and approval of any investment proposal, including one that qualifies for self-certification.

published by the Federal Financial Institutions Examination Council.

Policy Issue

Currently, the OCC does not generally use 12 U.S.C. 24(Eleventh), as implemented by part 24, as an alternative basis for approving activities that are otherwise permissible under other provisions of the National Bank Act, 12 U.S.C. 1, *et seq.* This is a policy position intended to prevent banks' activities from being subjected unnecessarily to part 24's capital limitation.[3] This position, however, does not reflect the OCC's general approach of allowing banks to decide how best to structure their investments.

The OCC requests comment on whether it should continue its policy of not using part 24 as a basis for approving activities otherwise permissible under the National Bank Act.

Derivation Table

This table directs readers to the provision(s) of the current regulation, if any, upon which the proposed provision is based.

Revised provision	Original provision	Comments
§ 24.1	§ 24.1	Modified.
§ 24.2(a)	§ 24.2(a)	Modified.
(b)	§ 24.2(m)	Substantial change.
(c)	§ 24.2(b)	Modified.
(d)	§ 24.2(e)	Modified.
(e)		Added.
(f)	§ 24.2(g), (h)	Substantial change.
(g)	§ 24.2(k)	Modified.
(h)	§ 24.2(l)	Modified.
	§ 24.2(c)	Removed.
	§ 24.2(d)	Removed.
	§ 24.2(f)	Removed.
	§ 24.2(i)	Removed.
(i)	§ 24.2(a)	Modified.
	§ 24.2(j)	Removed.
§ 24.3	§ 24.4(a).	Substantial change.
§ 24.4	§ 24.4(b), (d)	Modified.
	§ 24.4(c)	Removed.
	§ 24.4(e)	Removed.
§ 24.5(a)	§ 24.11(a)	Substantial change.
(b)	§ 24.11(b), (d), (e)	Substantial change.
	§ 24.11(c)	Removed.
§ 24.6(a)	§ 24.13(b)	Substantial change.
(b)	§ 24.11(b)	Modified.
	§ 24.13(a)	Removed.
§ 24.7	§ 24.21	Modified.

Regulatory Flexibility Act

It is hereby certified that this notice of proposed rulemaking, if adopted as a final rule, will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. This notice of proposed rulemaking, if adopted as a final rule, will reduce the regulatory burden on national banks, regardless of size, by replacing part 24's public welfare test with a non-exhaustive list of permissible public welfare investment activities, streamlining the self-certification and prior approval sections of the rule, and eliminating unnecessary provisions. While beneficial, these changes will not have a material impact on affected banks.

Executive Order 12866

The OCC has determined that this proposal is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The OCC has determined that this proposal will not result in expenditures by state, local and tribal governments, or by the private sector, of more than $100 million in any one year. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act of 1995

The OCC invites comment on:

(1) Whether the proposed collection of information contained in this notice of proposed rulemaking is necessary for the proper performance of its functions, including whether the information has practical utility;

(2) The accuracy of the OCC's estimate of the burden of the proposed information collection;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

Respondents are not required to respond to this collection of information unless it displays a currently valid OMB control number.

The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the Office of Management

[3] For example, a bank could make an affordable housing loan under both 12 U.S.C. 24(Seventh) and 24(Eleventh). If the bank made such a loan under the authority of 12 U.S.C. 24(Eleventh), the loan would be subject to a capital limitation that is stricter than the generally applicable lending limits.

and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (1557), Washington, DC 20503, with a copy to the Legislation and Regulatory Activities Division (1557), Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

The collection of information requirements in this proposed rule are found in 12 CFR 24.5. This information is required for the public welfare investment self- certification and prior approval procedures. The likely respondents are national banks.

Estimated average annual burden hours per respondent: 1.05 hours.

Estimated number of respondents: 400.

Estimated total annual reporting burden: 418 hours.

Start-up costs to respondents: None.

List of Subjects in 12 CFR Part 24

Community development, Credit, Investments, National banks, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, the OCC proposes to revise part 24, title 12, chapter I, of the Code of Federal Regulations to read as follows:

PART 24—COMMUNITY DEVELOPMENT CORPORATIONS, COMMUNITY DEVELOPMENT PROJECTS, AND OTHER PUBLIC WELFARE INVESTMENTS

Sec.

24.1 Authority, purpose, and OMB control number.
24.2 Definitions.
24.3 Public welfare investments.
24.4 Investment limits.
24.5 Public welfare investment self-certification and prior approval procedures.
24.6 Activities eligible for self-certification.
24.7 Examination, records, and remedial action.

Authority: 12 U.S.C. 24 (Eleventh) and 93a.

§ 24.1 Authority, purpose, and OMB control number.

(a) *Authority.* The Office of the Comptroller of the Currency (OCC) issues this part pursuant to its authority under 12 U.S.C. 24(Eleventh) 93a, and 481.

(b) *Purpose.* This part implements 12 U.S.C. 24(Eleventh), which authorizes national banks to make investments designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families, such as by providing housing, services, or jobs. It is the OCC's policy to encourage national banks to make investments described in § 24.3, consistent with safety and soundness. The OCC believes that national banks can promote the public welfare through a variety of investments, including those in community development corporations (CDCs) and community development projects (CD Projects), that develop affordable housing, foster revitalization or stabilization of low- and moderate-income areas, or provide equity or debt financing for small businesses. This part provides:

(1) The standards that the OCC uses to determine whether an investment is designed primarily to promote the public welfare; and

(2) The procedures that apply to these investments.

(c) *OMB Control Number.* The collection of information requirements contained in this part were approved by the Office of Management and Budget under OMB control number 1557–0194.

§ 24.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Adequately capitalized* has the same meaning as adequately capitalized in 12 CFR 6.4.

(b) *Capital and surplus* means:

(1) A bank's Tier 1 and Tier 2 capital under the OCC's Minimum Capital Ratios in Appendix A to 12 CFR Part 3; plus

(2) The balance of a bank's allowance for loan and lease losses not included in the bank's Tier 2 capital, for purposes of the calculation of risk-based capital under 12 CFR part 3.

(c) *Community development corporation* (CDC) means a corporation established by one or more insured financial institutions, or by insured financial institutions and other investors, to make one or more investments that meet the requirements of § 24.3.

(d) *Community development Project* (CD Project) means a project to make an investment that meets the requirements of § 24.3.

(e) *Eligible bank* means a national bank that:

(1) Is well capitalized;

(2) Has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (CAMEL);

(3) Has a Community Reinvestment Act (CRA) rating of ''Outstanding'' or ''Satisfactory''; and

(4) Is not subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive (see 12 CFR part 6, subpart B) or, if subject to any such order, agreement or directive, is informed in writing by the OCC that the bank may be treated as an ''eligible bank'' for purposes of this part.

(f) *Low-income and moderate-income* have the same meanings as low-income and moderate- income in 12 CFR 25.12(n).

(g) *Significant risk to the deposit insurance fund* means a substantial probability that any federal deposit insurance fund could suffer a loss.

(h) *Small business* means a business that meets the qualifications for Small Business Administration loan programs in 13 CFR 121.802 (a)(1) through (3).

(i) *Well capitalized* has the same meaning as well capitalized in 12 CFR 6.4.

§ 24.3 Public welfare investments.

A national bank may make an investment under this part if:

(a) The investment primarily benefits low- and moderate-income individuals or small businesses by providing or supporting one or more of the following activities:

(1) Affordable housing, community services, or permanent jobs for low- and moderate-income individuals;

(2) Equity or special debt financing for small businesses;

(3) Revitalization or stabilization of low- or moderate-income areas or other areas (including rural areas) targeted for redevelopment by local, state, or federal government; or

(4) Other activities, services, or facilities conducive to the public welfare;

(b) The bank sets forth the reasons why it is difficult to secure private market financing for the proposed investment;

(c) The bank demonstrates non-bank community support for or participation in the investment; and

(d) The bank demonstrates the extent to which the investment benefits communities otherwise served by the bank.

§ 24.4 Investment limits.

(a) *Limit on aggregate outstanding investments.* A national bank's aggregate outstanding investments under this part may not exceed 5 percent of its capital and surplus, unless the bank is at least adequately capitalized and the OCC determines, by written approval of the bank's proposed investment(s), that a higher amount will pose no significant risk to the deposit insurance fund. In no case may a bank's aggregate outstanding investments under this part exceed 10 percent of its capital and surplus.

(b) *Limited liability.* A national bank may not make an investment under this

part that would expose the bank to unlimited liability.

§ 24.5 Public welfare investment self-certification and prior approval procedures.

(a) *Self-certification of public welfare investments.* (1) Subject to § 24.4(a), an eligible bank may make an investment described in § 24.6(a) without prior notification to, or approval by, the OCC if the bank follows the self-certification procedures prescribed in this section.

(2) To self-certify an investment, an eligible bank shall submit, within 10 working days after an investment is made, a letter of self-certification to the Director, Community Development Division, Office of the Comptroller of the Currency, Washington, DC 20219.

(3) The bank's letter of self-certification must include:

(i) The name of the CDC, CD Project, or other entity in which the bank has invested;

(ii) The date the investment was made;

(iii) The type of investment (equity or debt), the investment activity listed in § 24.6(a) that the investment supports, and a brief description of the particular investment;

(iv) The bank's total investment in the CDC, CD Project or other entity, and the bank's aggregate outstanding investments under this part, including commitments and the investment being self-certified;

(v) The percentage of the bank's capital and surplus represented by the bank's aggregate outstanding investments under this part, including commitments and the investment being self-certified; and

(vi) A statement demonstrating compliance with § 24.3 and § 24.4.

(4) A national bank that is not an eligible bank but is at least adequately capitalized, and has a composite rating of at least 3 with improving trends under the Uniform Financial Institutions Rating System, may submit a letter to the Community Development Division requesting authority to self-certify investments. The Community Development Division considers these requests on a case-by-case basis.

(b) *Investments requiring prior approval.* (1) If a national bank or its proposed investment does not meet the requirements for self-certification set forth in paragraph (a) of this section, the bank shall submit a proposal for an investment to the Director, Community Development Division, Office of the Comptroller of the Currency, Washington, DC 20219.

(2) The bank's investment proposal must include:

(i) The name of the CDC, CD Project, or other entity in which the bank intends to invest;

(ii) The date on which the bank intends to make the investment;

(iii) The type of investment (equity or debt), the investment activity listed in § 24.3(a) that the investment supports, and a description of the particular investment;

(iv) The bank's total investment in the CDC, CD Project or other entity, and the bank's aggregate outstanding investments under this part (including commitments and the investment being proposed);

(v) The percentage of the bank's capital and surplus represented by the bank's aggregate outstanding investments under this part (including commitments and the investment being proposed); and

(vi) A statement demonstrating compliance with § 24.3 and § 24.4.

(3) In reviewing a proposal, the OCC considers the following factors and other available information including:

(i) Whether the investment satisfies the requirements of § 24.3;

(ii) Whether the investment is consistent with the safe and sound operation of the bank; and

(iii) Whether the investment is consistent with the requirements of this part and the OCC's policies.

(4) Unless otherwise notified by the OCC, and subject to § 24.4(a), the bank may make the proposed investment after 30 calendar days from the date on which the OCC receives the bank's investment proposal.

(5) The OCC, by notifying the bank, may extend its period for reviewing the investment proposal. If so notified, the bank may make the investment only with the OCC's written approval.

(6) The OCC may impose one or more conditions in connection with its approval of an investment under this part. All approvals are subject to the condition that a national bank must conduct the approved activity in a manner consistent with any published guidance issued by the OCC regarding the activity.

§ 24.6 Activities eligible for self-certification.

(a) *Eligible activities.* In accordance with the process described in § 24.5(a), a bank may self-certify the following investments without prior notice to, or approval by, the OCC:

(1) Investments in an entity that finances, acquires, develops, rehabilitates, manages, sells, or rents housing primarily for low- and moderate-income persons;

(2) Investments that stimulate economic development, community stabilization or revitalization, or permanent job creation or retention for low- and moderate-income persons by financing small businesses (including equity or debt financing and investments in an entity that provides loan guarantees);

(3) Investments that stimulate economic development, community stabilization or revitalization, or permanent job-creation or retention for low- and moderate-income persons by providing credit counseling, job training, community development research, and similar technical assistance services for small businesses, non-profit community development organizations, low- and moderate-income persons or areas, or other areas (including rural areas) targeted for redevelopment by state or local government;

(4) Investments in an entity that stimulates economic development, community stabilization or revitalization, or permanent job creation or retention for low- and moderate-income persons by acquiring, developing, rehabilitating, managing, selling, or renting commercial or industrial property that is located in a low- and moderate- income area or other area (including rural areas) targeted for redevelopment by state or local government, and which is occupied primarily by small businesses;

(5) Investments as a limited partner in a project with a general partner that is, or is primarily owned and operated by, a 26 U.S.C. 501(c)(3) or (4) non-profit corporation and that qualifies for the federal low-income housing tax credit;

(6) Investments in low- or moderate-income areas, or other areas (including rural areas) targeted for redevelopment by state or local government that create long term employment opportunities, the majority of which will be held by low- and moderate-income persons;

(7) Investments in a national bank that has been approved by the OCC as a national bank with a community development focus;

(8) Investments that have been approved by the Federal Reserve Board under 12 CFR 208.21 for state member banks; and

(9) Investments that have been previously determined by the OCC to be permissible under this part.

(b) *Ineligible activities.* Notwithstanding the provisions of this section, a bank may not self-certify an investment if:

(1) The investment involves properties carried on the bank's book as ''other real estate owned'';

(2) The investment funds projects in a state or metropolitan area other than

the states or metropolitan areas in which the bank maintains its main office or branches; or

(3) The OCC determines, in published guidance, that the investment is inappropriate for self-certification.

§ 24.7 Examination, records, and remedial action.

(a) *Examination.* National bank investments under this part are subject to the examination provisions of 12 U.S.C. 481.

(b) *Records.* Each national bank shall maintain in its files information adequate to demonstrate that it is in compliance with the requirements of this part.

(c) *Remedial action.* If the OCC finds that an investment under this part is in violation of law or regulation, is inconsistent with the safe and sound operation of the bank, or poses a significant risk to a federal deposit insurance fund, the national bank shall take appropriate remedial action as determined by the OCC.

Dated: December 14, 1995.

Eugene A. Ludwig,

Comptroller of the Currency.

[FR Doc. 95–31021 Filed 12–27–95; 8:45 am]

BILLING CODE 4810–33–P

FEDERAL RESERVE SYSTEM

12 CFR Part 202

[Regulation B; Docket No. R–0910]

Equal Credit Opportunity

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; official staff interpretation.

SUMMARY: The Board is publishing for comment proposed revisions to its official staff commentary to Regulation B (Equal Credit Opportunity). The commentary applies and interprets the requirements of Regulation B and substitutes for individual staff interpretations. The proposed revisions to the commentary provide guidance on issues that the Board has been asked to clarify, including credit scoring and spousal signature rules.

DATES: Comments must be received on or before February 28, 1996.

ADDRESSES: Comments should refer to Docket No. R–0910, and may be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551. Comments also may be delivered to Room B–2222 of the Eccles Building between 8:45 a.m. and 5:15 p.m. weekdays, or to the guard station in the Eccles Building courtyard on 20th Street, N.W. (between Constitution Avenue and C Street) at any time. Comments received will be available for inspection in Room MP–500 of the Martin Building between 9:00 a.m. and 5:00 p.m. weekdays, except as provided in 12 CFR 261.8 of the Board's rules regarding the availability of information.

FOR FURTHER INFORMATION CONTACT: Jane Jensen Gell, Sheilah A. Goodman, or Natalie E. Taylor, Staff Attorneys, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412. For users of the Telecommunications Device for the Deaf, contact Dorothea Thompson at (202) 452–3544.

SUPPLEMENTARY INFORMATION:

I. Background

The Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691–1691f, makes it unlawful for creditors to discriminate in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract), because all or part of an applicant's income derives from public assistance, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. This statute is implemented by the Board's Regulation B (12 CFR Part 202). The Board also has an official staff commentary (12 CFR Part 202 (Supp. I)) that interprets the regulation. The commentary provides general guidance to creditors in applying Regulation B to various credit transactions, and is updated periodically to address significant questions that arise.

II. Explanation of Proposed Commentary

Section 202.2—Definitions

2(p) Empirically Derived and Other Credit Scoring Systems

Comment 2(p)–2 would be revised to provide guidance on revalidation requirements for credit scoring systems.

Section 202.5—Rules Concerning Taking of Applications

5(e) Written Applications

Comment 5(e)–3 would be revised to cross-reference the proposed comments to section 202.13(b), which address applications submitted through an electronic medium.

Section 202.6—Rules Concerning Evaluation of Applications

6(b) Specific Rules Concerning Use of Information

6(b)(2)

Comment 6(b)(2)–2 would be revised to address the use of age in credit scoring systems that use scorecards for different age groups based on characteristics that are predictive for each group. Each scorecard considers the correlation among the predictive variables (representing characteristics such as income, length of residence, and credit history) for the age group. Each predictive variable is assigned the appropriate weight given the impact of the other predictive variables in that age group, so that comparable scores for each group reflect the same level of risk.

Under the ECOA and Regulation B, if a creditor considers age—whether by directly assigning a value to age or by some other means such as establishing scorecards for different age groups—the age of an elderly applicant must not be assigned a negative value. The Board believes that, to ensure that the treatment accorded applicants age 62 or older complies with the law, elderly applicants who do not qualify for credit under the factors assigned to the scorecard for their age group must be rescored under the factors assigned to the scorecards for all other age groups in the system. Comment 6(b)(2)–2 would be revised to incorporate this concept.

Proposed comment 6(b)(2)–4 addresses the use of age in a reverse mortgage transaction. A reverse mortgage is a home-secured loan in which the borrower receives payments from the creditor, and the repayment of these amounts does not become due until the borrower dies, moves permanently from the home, or transfers title to the home. The proposed comment clarifies that using age, as a proxy for life expectancy, in a reverse mortgage transaction to determine the line of credit or monthly payment amount that a borrower will receive does not violate the regulation.

6(b)(6)

Comment 6(b)(6)–1 would be revised to clarify that if a creditor considers credit history, it must consider information presented by the applicant that is not included in the credit report, if it is the type the creditor normally considers on a credit report. The comment also clarifies that when one spouse is applying for individual credit, the creditor must consider information presented by the applicant that would

tend to show that a credit history appearing in the name of both spouses is not reflective of the applicant's individual creditworthiness.

Section 202.7—Rules Concerning Extensions of Credit

7(d) Signature of Spouse or Other Person

7(d)(2)

Proposed comment 7(d)(2)–1 clarifies that in determining the value of an applicant's interest in property, a creditor must look to the actual form of ownership of the property prior to or at consummation.

Regulation B requires that if an applicant is not individually creditworthy and the creditor seeks the signature of a co-owner of property relied upon to establish creditworthiness, the signature may be required only on the documents that are reasonably necessary, under state law, to make the property available in the event of death or default of the applicant. In some states, a signature on the debt instrument itself may be necessary. In other states, a creditor may be able to protect its interest with a signature on an instrument that creates a limited obligation—a document allowing the creditor to reach the nonapplicant signatory's interest only in the property at issue in the event of default. Examples of such instruments include a security agreement, mortgage, deed of trust, or limited guarantee. The creditor could also consider requesting a signature on a document sometimes referred to as a status statement. This document ascertains the character of property that will be used in the credit decision; affirms the purpose of the loan (if a business purpose, affirms or disclaims any interest or participation in the business); and attests to or disclaims the non-applicant's desire to be an applicant or guarantor of the requested credit.

The Board proposes to revise comment 7(d)(2)–1 to clarify that where an individual applicant jointly owns property in a form and amount sufficient to establish creditworthiness, a creditor may not require the nonapplicant joint owner of the property to execute any instrument that forfeits or conveys that person's interest in the property to the applicant or other owners as a condition of credit. For example, a creditor could not require a non-applicant spouse to quitclaim their interest in jointly owned property relied upon to establish creditworthiness if the applicant spouse's interest in the property, and other resources, are sufficient to support the credit requested.

7(d)(6)

Proposed comment 7(d)(6)–1 clarifies that a creditor may require that the partners, officers or directors of a creditworthy business personally guarantee an extension of credit to the business, as long as a guarantee is not required on a prohibited basis—e.g., only those businesses owned by women or minorities.

Comment 7(d)(6)–2 would be revised to clarify that when the circumstances of a business loan require the guarantee of a spouse with no interest in the business, the creditor could ask the disinterested spouse to sign a limited guarantee.

Section 202.13—Information for Monitoring Purposes

13(a) Information To Be Requested

Comment 13(a)–6 would be revised to clarify that a refinancing involves the satisfaction of an existing obligation that is replaced by a new obligation undertaken by the same borrower. The proposed clarification is consistent with the definition of ''refinancing'' in other Board regulations, such as Regulation C (Home Mortgage Disclosure), 12 CFR 203, and Regulation Z (Truth in Lending), 12 CFR 226.

13(b) Obtaining of Information

Proposed comment 13(b)–4 addresses the collection of monitoring information for applications submitted through an electronic medium that does not permit the creditor to view the applicant. In these instances, the creditor should treat the application as if it were accepted by mail or telephone.

Proposed comment 13(b)–5 addresses the collection of monitoring information for applications submitted through an interactive video process. Regulation B requires a creditor to ask home mortgage loan applicants for monitoring information and, if the applicant chooses not to provide the information, requires the creditor to note the information on the application on the basis of visual observation or surname. There is an exception for telephone or mail applications. Where the creditor has the capability to view the applicant during the process, however, such as with an interactive video, the Board believes the application is like an in-person application. Thus, a creditor must ask the applicant for monitoring information and enter the information provided on the application form. If the applicant does not provide the information, the creditor must note the information to the extent the video display makes it possible to do so.

III. Form of Comment Letters

Comment letters should refer to Docket No. R–0910. The Board requests that, when possible, comments be prepared using a standard courier typeface with a type size of 10 or 12 characters per inch. This will enable the Board to convert the text into machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Comments may also be submitted on computer diskettes, using either the 3.5'' or 5.25'' size, in any IBM-compatible DOS-based format. Comments on computer diskettes must be accompanied by a paper version.

List of Subjects in 12 CFR Part 202

Aged, Banks, banking, Civil rights, Consumer protection, Credit, Discrimination, Federal Reserve System, Marital status discrimination, Penalties, Religious discrimination, Reporting and recordkeeping requirements, Sex discrimination.

Certain conventions have been used to highlight the proposed changes to the staff commentary. New language is shown inside bold-faced arrows, while language that would be removed is set off with brackets.

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR part 202 as set forth below:

PART 202—EQUAL CREDIT OPPORTUNITY (REGULATION B)

1. The authority citation for Part 202 continues to read as follows:

Authority: 15 U.S.C. 1691–1691f.

2. In Supplement I to Part 202, under *Section 202.2 Definitions,* under *2(p) Empirically derived and other credit scoring systems.,* three new sentences would be added at the end of paragraph 2 to read as follows:

Supplement I to Part 202—Official Staff Interpretations

* * * * *

Section 202.2 Definitions

* * * * *

2(p) Empirically derived and other credit scoring systems.

* * * * *

2. * * * fl To ensure that predictive ability is being maintained, the performance of the system should be monitored. This could be done, for example, by analyzing the loan portfolio to determine the delinquency rate for each score interval. If these data indicate that the system is no longer identifying risk as predicted, the system must

be revalidated and the variables for each score interval adjusted accordingly. fi

* * * * *

3. In Supplement I to Part 202, under *Section 202.5 Rules Concerning Taking of Applications*, under 5(e) *Written applications.*, paragraph 3. would be revised to read as follows:

* * * * *

Section 202.5 Rules Concerning Taking of Applications

* * * * *

5(e) Written applications.

* * * * *

3. *Computerized entry.* Information entered directly into and retained by a computerized system qualifies as a written application under this paragraph. (See the commentary to section 202.13(b) fl , *Applications through electronic media and Applications through interactive video* fi .)

* * * * *

4. In Supplement I to Part 202, *Section 202.6 Rules Concerning Evaluation of Applications* would be amended as follows:

a. Under Paragraph 6(b)(2), paragraph 2. would be revised; paragraphs 4. and 5. would be redesignated as paragraphs 5. and 6., respectively; and new paragraph 4. would be added; and

b. Paragraph 6(b)(6) would be revised.

The additions and revisions would read as follows:

* * * * *

Section 202.6—Rules Concerning Evaluation of Applications

* * * * *

Paragraph 6(b)(2)

* * * * *

2. *Consideration of age in a credit scoring system.* Age may be taken directly into account in a credit scoring system that is ''demonstrably and statistically sound,'' as defined in § 202.2(p), with one limitation: an applicant who is 62 years or older must be treated at least as favorably as anyone who is under 62. fl For example, an applicant who is 62 years or older may not be denied credit if an applicant under age 62 with the same characteristics would be approved for credit under the scoring system. Thus, a creditor using an age-based credit scoring system must ensure that elderly applicants who do not qualify under the factors assigned to elderly age groups are rescored using the factors or weights assigned to all other age groups in the system. fi

* * * * *

fl 4. *Consideration of age in a reverse mortgage.* A reverse mortgage is a home-secured loan in which the borrower receives payments from the creditor, and does not become obligated to repay these amounts until the expiration of a term or when the borrower dies, moves permanently from the home, or transfers title to the home. Disbursements to the borrower under a reverse mortgage typically are determined by considering the value of the borrower's home, the current interest rate, and the borrower's life expectancy. Age may be directly taken into account in setting the terms of a reverse mortgage without violating the regulation B. fi

* * * * *

Paragraph 6(b)(6)

1. [*Types of credit references.*]

fl *Evaluating credit history.* fi A creditor may restrict the types of credit history and credit references that it will consider, provided that the restrictions are applied to all credit applicants without regard to sex, marital status, or any other prohibited basis. However, on the applicant's request, a creditor must consider credit information not reported through a credit bureau when the information relates to the same types of credit references and history that the creditor would consider if reported through a credit bureau.

fl i. At the applicant's request, a creditor must consider credit information of the same type that the creditor would consider if reported through a credit bureau. For example, if a creditor normally considers car loan payments, and the consumer presents credible information (such as cancelled checks or money-order receipts) about payment history on a car loan from a finance company that did not report to a credit bureau, the creditor must consider this information in its evaluation of credit history.

ii. At the applicant's request, a creditor must consider information that a credit history reported in both spouses' names does not accurately reflect the applicant's ability or willingness to repay. For example, assume an applicant applies for individual credit and the credit bureau report shows late payments on a mortgage obligation held jointly with a former spouse. If the applicant can demonstrate that the former spouse alone was responsible for the late payments (such as by a transfer of title to the former spouse and a document from the mortgage creditor that released the applicant from liability for the debt) the creditor must disregard both the mortgage debt and the late payments in determining the applicant's creditworthiness. fi

* * * * *

5. In Supplement I to Part 202, *Section 202.7—Rules Concerning Extensions of Credit,* would be amended as follows:

a. Under Paragraph 7(d)(2), paragraph 1. would be revised; and

b. Paragraph 7(d)(6) would be revised.

The revisions would read as follows:

* * * * *

Section 202.7—Rules Concerning Extensions of Credit

* * * * *

Paragraph 7(d)(2)

1. *Jointly owned property.* fl a. *Valuation of applicant's interest.* fi In determining the value of [the] fl an fi applicant's interest in jointly owned property, a creditor may consider factors such as the [form of ownership and the] property's susceptibility to attachment, execution, severance, or partition and the cost of such action. fl This determination must be based on the actual form of ownership of the property prior to or at consummation, and not on the possibility of a subsequent change in the form of ownership. For example, in determining whether a married applicant's interest in property is sufficient to satisfy the creditor's standards of creditworthiness for individual credit, a creditor may not obtain the signature of the nonapplicant spouse based on the possibility that the applicant's separately-held property may be transferred into tenancy by the entirety after consummation. Similarly, a creditor may not routinely require a nonapplicant joint owner to execute any document (such as a quitclaim deed) that would change the nonapplicant joint owner's interest in property offered by the applicant to support the extension of credit.

b. *Other options to support credit.* fi If the applicant's interest in the property does not support the amount and terms of credit sought, the creditor may give the applicant some other option of providing additional support for the extension of credit[, f] fl . F fi or example[—] fl :

i. fi [r] fl R fi equiring an additional party under § 202.7(d)(5) fl ;

ii. fi [o] fl O fi ffering to grant the applicant's request on a secured credit basis fl ; or

iii. fi [a] fl A fi sking for the signature of the co-owner of the property on an instrument that ensures access to the property but does not impose personal liability unless necessary under state law fl (which could include, for example, a security agreement, deed of trust, mortgage, limited guarantee, quitclaim deed, or status statement from the nonapplicant owner). fi

* * * * *

Paragraph 7(d)(6)

1. *Guarantees.* A guarantee on an extension of credit is part of a credit transaction and therefore subject to the regulation. fl A creditor may require the personal guarantee of the partners, directors, or officers of a business even if the business itself is creditworthy. The guarantee must be based on the guarantor's relationship with the business, however, and not on a prohibited basis.

2. *Spousal guarantees.* The rules in § 202.7(d) bar a creditor from requiring the signature of a *guarantor's spouse* just as they bar the creditor from requiring the signature of an *applicant's spouse.* For example, although a creditor may require all officers of a closely held corporation to personally guarantee a corporate loan, the creditor may not automatically require that spouses of married officers also sign the guarantee. If an evaluation of the financial circumstances of an officer indicates that an additional signature is necessary, however, the creditor may require the signature of a spouse in appropriate circumstances—for example, if the property relied upon to meet the creditor's standards is held jointly. In such a case, the creditor could ask the spouse to sign an instrument that provides for liability to the extent of the spouse's interest in the property relied upon to support the credit (such as a limited guarantee). fi

* * * * *

6. In Supplement I to Part 202, *Section 202.13—Information for Monitoring purposes,* would be amended as follows:

a. Under *13(a) Information to be requested.*, paragraph 6. would be revised; and

b. Under *13(b) Obtaining of information.*, paragraphs 4. and 5. would be redesignated as paragraphs 6. and 7. respectively, and new paragraphs 4. and 5. would be added.

The revisions and additions would read as follows:

* * * * *

Section 202.13 Information for Monitoring purposes

13(a) Information to be requested.

* * * * *

6. *Refinancings.* fl A refinancing occurs when an existing obligation is satisfied and replaced by a new obligation undertaken by the same borrower. fi A creditor that receives an application to [change the terms and conditions of] fl refinance fi an existing extension of credit made by that creditor for the purchase of the applicant's dwelling may request the monitoring information again but is not required to do so if it was obtained in the earlier transaction.

* * * * *

13(b) Obtaining of information.

* * * * *

fl 4. *Applications through electronic media.* If an applicant applies through an electronic medium (for example, via the Internet or by facsimile) without any face-to-face interactive video capability, the creditor should treat the application as if it were accepted by mail or telephone. fi

fl 5. *Applications through interactive video.* If a creditor takes an application through an interactive application process with video capabilities, and the creditor can see the applicant, the creditor should treat these applications as taken in person and collect the monitoring information. fi

* * * * *

By order of the Secretary of the Board, acting pursuant to delegated authority for the Board of Governors of the Federal Reserve System, December 21, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–31363 Filed 12–27–95; 8:45 am]

BILLING CODE 6210–01–P

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12 CFR Part 211

[Regulation K; Docket No. R–0911]

International Banking Operations

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is proposing to amend its Regulation K regarding interstate banking operations of foreign banking organizations. The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Interstate Act) removed geographic restrictions on interstate banking by foreign banks effective September 29, 1995, and requires certain foreign banks without U.S. deposit-taking offices to select a home state for the first time. The proposed amendments to Regulation K would require these foreign banks to select a home state by March 31, 1996, and would immediately remove outdated restrictions on certain mergers by U.S. bank subsidiaries of foreign banks outside the home state of the foreign bank. Obsolete and superseded provisions of Regulation K concerning home state selection would be deleted. The Board is also requesting comment on other aspects of the Interstate Act as it applies to foreign banks.

DATES: Comments must be received by February 5, 1996.

ADDRESSES: Comments should refer to Docket No. R–0911 and may be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington D.C. 20551. Comments also may be delivered to Room B–2222 of the Eccles Building between 8:45 a.m. and 5:15 p.m. weekdays, or to the guard station in the Eccles building courtyard on 20th Street, N.W. (between Constitution Avenue and C Street, N.W.) at any time. Comments may be inspected in Room MP–500 of the Martin Building between 9:00 a.m. and 5:00 p.m. weekdays, except as provided in § 261.8 of the Board's rules regarding availability of information, 12 CFR 261.8.

FOR FURTHER INFORMATION CONTACT: Kathleen M. O'Day, Associate General Counsel (202/452–3786), Ann E. Misback, Managing Senior Counsel (202/452–3788), Douglas M. Ely, Senior Attorney (202/452–5289), Legal Division; Michael G. Martinson, Assistant Director (202/452–3640), Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System. For users of Telecommunication Device for the Deaf [TDD] *only,* please contact Dorothea Thompson (202/452–3544), Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, D.C. 20551.

SUPPLEMENTARY INFORMATION: The Interstate Act amended section 5 of the International Banking Act of 1978 (IBA), which governs interstate banking and branching operations of foreign banks. The Interstate Act also amended the Bank Holding Company Act of 1956 (BHC Act), the Federal Deposit Insurance Act and several other statutes regarding interstate banking operations of bank holding companies, national banks and state banks. In light of these amendments, the Board proposes to amend the provisions of its Regulation K regarding interstate banking operations of foreign banking organizations (12 CFR 211.22) as discussed below.

Determination of Home State

Section 104(d) of the Interstate Act modifies the existing definition of a foreign bank's home state under section 5(c) of the IBA. Section 104(d) retains the provision of the IBA stating that the home state of a foreign bank that has any combination of branches, agencies, subsidiary commercial lending companies and subsidiary banks (U.S. banking operations) in more than one state is whichever of these states is selected by the foreign bank, or by the Board if the foreign bank fails to choose. Section 104(d) also provides, for the first time, that if a foreign bank has U.S. banking operations, including agencies or subsidiary commercial lending companies, in one state only, that state is the foreign bank's home state for purposes of interstate branching. The Board proposes the following amendments to 12 CFR 211.22(a) in order to reflect and implement these changes to the definition of a foreign bank's home state.

Abolition of Distinction Between Deposit-Taking Offices and Nondeposit-Taking Offices

Prior to the Interstate Act, the Board interpreted the IBA to require a foreign bank to have a home state only if the foreign bank had deposit-taking offices, *i.e.,* branches or subsidiary banks. 44 FR 62903 (November 1, 1979). This interpretation is set forth in § 211.22(a)(2) of Regulation K. Section 104(d) of the Interstate Act superseded this interpretation by providing for the first time that foreign banks with only agencies or subsidiary commercial lending companies have a home state. Accordingly, the Board proposes that § 211.22(a)(2) be deleted.

The Board also proposes that § 211.22(a)(5) be deleted. This provision follows the Board's interpretation of the IBA in § 211.22(a)(2) by requiring foreign banks to select as their home state the state where their first U.S. deposit-taking office is located. Since the Interstate Act has superseded that interpretation, § 211.22(a)(5) is proposed to be removed.

Initial Home State Selection Under the Interstate Act

As noted, the Interstate Act for the first time requires foreign banks with only subsidiary commercial lending companies or agencies in the United States to have a home state. In order to implement this requirement, the Board proposes that any foreign bank required for the first time to have a home state because it has subsidiary commercial lending companies or agencies in more than one state, and no other U.S. banking operations, be permitted to select its home state. (Foreign banks with domestic agencies and subsidiary commercial lending companies in one state only are assigned that state as their home state by section 5(c)(2) of the IBA, as amended by section 104(d) of the Interstate Act.) Each foreign bank covered by the rule would be required to select its home state from those states in which the foreign bank established U.S. agencies and subsidiary commercial lending companies before September 29, 1994 (the date of enactment of the Interstate Act), and has continuously operated such offices. A foreign bank covered by the rule shall select its home state by filing with the Board a declaration of home state by March 31, 1996.

In the event a foreign bank required to select a home state fails to do so, the Board would exercise its authority, as contemplated by section 104(d) of the Interstate Act, to determine a foreign bank's home state. In such cases, the Board proposes to designate as a foreign bank's home state the state in which the total assets of all its offices, net of claims on affiliates or other offices of the foreign bank, is the largest, as reflected in the foreign bank's most recent report of condition.

The Board also proposes to state in its new rule that, as is provided in section 5(c)(2) of the IBA as amended by section 104(d) of the Interstate Act, a foreign bank with branches, agencies, subsidiary commercial lending companies or subsidiary banks in one state only shall have that state as its home state. A foreign bank that has already chosen a home state would not be affected by the proposed rule.

The Board intends to review other issues raised by the Interstate Act relating to the interstate operations of foreign banks in a future rule-making proceeding. The Board accordingly invites comment concerning all aspects of the application of the Interstate Act to foreign banks.

Deletions of Other Obsolete Sections

The Board proposes that current §§ 211.22(a)(1),(3) and (4) be deleted. These sections governed initial selection of home states for foreign banks under the IBA as enacted in 1978 and the Board's implementing regulations, which were adopted in 1980. The foreign banks affected by these provisions selected a home state, or had one selected for them by the Board or through operation of Regulation K, several years ago. Accordingly, the Board proposes that these provisions be deleted.

Bank Mergers Outside Home State

Section 211.22(c) of Regulation K provides that a foreign bank with one or more domestic banking subsidiaries outside its home state shall notify the Board if it proposes to acquire through a subsidiary bank all or substantially all of the assets of a U.S. bank which is larger than the subsidiary bank and is located outside of the foreign bank's home state under the IBA. The Board may direct the foreign bank to redesignate as its home state the state in which its subsidiary bank is located if the Board finds the proposed acquisition would be inconsistent with the foreign bank's home state selection under the IBA.

The Board adopted this rule in 1980 due to a concern that allowing a foreign bank to expand its deposit-taking capabilities both by branching in its IBA home state and through major acquisitions by merger outside its home state might permit evasion of the interstate restrictions then in place under the IBA and the BHC Act. At that time, a foreign bank with a subsidiary bank in one state (State X) and a branch in another state (State Y) which declared State Y as its home state under the IBA generally could not acquire more than 5 per cent of the shares of an additional bank in State Y, because such acquisitions were subject to the geographic restrictions of section 3(d) of the BHC Act. These restricted purchases of banks outside a foreign bank's home state for purposes of the BHC Act, in this case State X. In addition, such a foreign bank generally could not acquire more than 5 per cent of the shares of an additional bank in State X as a result of section 5(a)(5) of the IBA, which also applied the limits of section 3(d) of the BHC Act to interstate bank acquisitions by foreign banks outside their home state as determined under the IBA (in this case, State Y). The Board concluded that a foreign bank might circumvent these restrictions on interstate banking by engaging, through a subsidiary bank, in a large merger outside its IBA home state (in this case, State X), and framed its interstate bank merger rule to allow the Board to redesignate the foreign bank's home state to prevent this circumvention.

The concerns underlying the rule no longer apply due to the changes made by the Interstate Act. The geographic limits on interstate bank purchases by foreign banks outside their IBA home state under section 5(a)(5) of the IBA have been abolished. In addition, section 3(d) of the BHC Act was amended as of September 29, 1995 to phase out the principal geographic restrictions on interstate banking acquisitions applicable to domestic and foreign acquirors under the BHC Act. As of that date, there is no need to prevent foreign banks from circumventing geographic limits that no longer apply. Accordingly, the Board proposes that the bank merger rule of § 211.22(c) be deleted effective immediately.

Retained Provisions

The Board proposes that §§ 211.22(b) and (d) of Regulation K be retained with no change at this time. Section 211.22(b), which allows foreign banks to change their home states once, will be reviewed in the Board's future rule-making process discussed above. Until such time, foreign banks which have not previously changed their home states may change their home state in accordance with § 211.22(b). Section 211.22(d), which concerns attribution of home states to foreign banking organizations controlled by other foreign banking organizations, also is proposed to be retained pending future review.

Request for Comment

The Board requests comment on all aspects of the proposed changes to Regulation K, and on all other aspects of the application of the Interstate Act to foreign banks which may be dealt with appropriately through rulemaking.

Paperwork Reduction Act

In accordance with section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 35; 5 CFR 1320 Appendix A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget. No collections of information pursuant to the Paperwork Reduction Act are contained in the proposed rule.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 et seq.), the Board certifies that the proposed revisions to

Regulation K would not have a significant economic impact on a substantial number of small entities that are subject to its regulation.

List of Subjects in 12 CFR Part 211

Exports, Federal Reserve System, Foreign banking, Holding companies, Investments, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Board proposes to amend 12 CFR Part 211 as set forth below:

PART 211—INTERNATIONAL BANKING OPERATIONS (REGULATION K)

1. The authority citation for Part 211 continues to read as follows:

Authority: 12 U.S.C. 221 *et seq.*, 1818, 1841 *et seq.*, 3101 *et seq.*, 3901 *et seq.*

2. In § 211.22, paragraph (a) is revised; paragraph (c) is removed; and paragraph (d) is redesignated as paragraph (c) to read as follows:

§ 211.22 Interstate banking operations of foreign banking organizations.

(a) *Determination of home state.* (1) A foreign bank (except a foreign bank to which paragraph (a)(2) of this section applies) that has any combination of domestic agencies or subsidiary commercial lending companies that were established before September 29, 1994, in more than one state and have been continuously operated shall select its home state from those states in which such offices or subsidiaries are located. A foreign bank shall do so by filing with the Board a declaration of home state by March 31, 1996. In the absence of such selection, the Board shall designate the home state for such foreign banks.

(2) A foreign bank that, as of September 29, 1994, had declared a home state or had a home state determined pursuant to the law and regulations in effect prior to that date shall have that state as its home state.

(3) A foreign bank that has any branches, agencies, subsidiary commercial lending companies, or subsidiary banks in one state, and has no such offices or subsidiaries in any other states, shall have as its home state the state in which such offices or subsidiaries are located.

* * * * *

By order of the Board of Governors of the Federal Reserve System, December 21, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–31364 Filed 12–27–95; 8:45 am]

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FEDERAL TRADE COMMISSION

16 CFR Part 423

Trade Regulation Rule on Care Labeling of Textile Wearing Apparel and Certain Piece Goods

AGENCY: Federal Trade Commission.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Federal Trade Commission (the ''Commission'') proposes to commence a rulemaking proceeding to amend its Trade Regulation Rule on Care Labeling of Textile Wearing Apparel and Certain Piece Goods, 16 CFR Part 423 (''the Care Labeling Rule'' or ''the Rule''). The Commission seeks comment on whether the definitions of water temperatures in the Appendix of the Rule should be amended. In addition, the Commission seeks comment on possible alternatives for amending the Rule's current requirement that either a washing instruction or a dry cleaning instruction may be used. Finally, the Commission seeks comment on whether the reasonable basis portion of the Rule should be amended.

DATE: Written comments must be submitted on or before March 13, 1996.

ADDRESSES: Written comments should be identified as ''16 CFR Part 423'' and sent to Secretary, Federal Trade Commission, Room 159, Sixth Street and Pennsylvania Ave., NW., Washington D.C. 20580.

FOR FURTHER INFORMATION CONTACT: Constance M. Vecellio or Laura Koss, Attorneys, Federal Trade Commission, Division of Enforcement, Bureau of Consumer Protection, Sixth Street and Pennsylvania, Ave., NW., S–4302, Washington, DC 20580, (202) 326–2966 or (202) 326–2890.

SUPPLEMENTARY INFORMATION:

Part A—General Background Information

This notice is being published pursuant to Section 18 of the Federal Trade Commission (''FTC'') Act, 15 U.S.C. 57a *et seq.*, the provisions of Part 1, Subpart B of the Commission's Rules of Practice, 16 CFR 1.7, and 5 U.S.C. 551 *et seq.* This authority permits the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

The Care Labeling Rule was promulgated by the Commission on December 16, 1971, 36 FR 23883 (1971). In 1983, the Commission amended the Rule to clarify its requirements by identifying in greater detail the washing or dry cleaning information to be included on care labels.[1] The Care Labeling Rule, as amended, requires manufacturers and importers of textile wearing apparel and certain piece goods to attach care labels to these items stating ''what regular care is needed for the ordinary use of the product.'' (16 CFR 423.6(a) and (b)). The Rule also requires that the manufacturer or importer possess, prior to sale, a reasonable basis for the care instructions. (16 CFR 423.6(c)).

As part of its continuing review of its trade regulation rules to determine their current effectiveness and impact, the Commission published a Federal Register notice (''FRN'') on June 15, 1994. This FRN sought comment on the standard regulatory review questions, such as what changes in the Rule would increase the benefits of the Rule to purchasers and how those changes would affect the costs the Rule imposes on firms subject to its requirements.

The FRN elicited 81 comments.[2] The comments generally expressed continuing support for the Rule, stating that correct care instructions benefit consumers by extending the useful life of the garment, by helping the consumer maximize the appearance of the garment, and/or by allowing the consumer to take the ease and cost of care into consideration when making a purchase. Most comments said that the costs imposed on consumers because of the Rule were minimal when compared to the benefits. Based on this review, the Commission has determined to retain the Rule, but to seek additional

[1] The Rule was amended on May 20, 1983, 48 FR 22733 (1983).

[2] The commenters included cleaners; consumers; public interest-related groups; fiber, textile, or apparel manufacturers or sellers (or conglomerates); federal government entities; fiber, textile, or apparel manufacturers or retailers trade associations; two label manufacturers; one cleaning products manufacturer; one association representing the leather apparel industry; one Committee formed by industry members from the countries signatory to NAFTA; one appliance technician; one appliance manufacturers trade association; two standards-setting organizations; and two representatives from foreign nations. The comments are on the public record and are available for public inspection in accordance with the Freedom of Information Act, 5 U.S.C. 552, and the Commission's Rules of Practice, 16 CFR 4.11, during normal business days from 8:30 a.m. to 5 p.m., at the Public Reference Room, Room 130, Federal Trade Commission, 6th and Pennsylvania Avenue, NW, Washington, D.C. The comments are referred to within this Advance Notice of Proposed Rulemaking (''ANPR'') by their name and the number assigned to each submitted comment.

comment on possible amendments to the Rule as discussed below.

The FRN sought comment on possible amendments, which are addressed below, in this ANPR, including: (1) Whether the Rule should be amended to require labeling instructions for *both* washing and dry cleaning, rather than for just one method of cleaning and (2) whether the reasonable basis standard set forth in the Rule should be clarified or changed. The comments also recommended that the Commission consider other amendments, which also are addressed in detail below.

Several comments suggested expanding the coverage of the Rule. The Leather Apparel Association (''LAA'') suggested that garments made completely of leather be included in the Rule, which now applies only to textile wearing apparel and certain piece goods.[3] J.C. Penney suggested that consumers would benefit by expanding the Rule to cover items such as ''towels, sheets, window coverings and other textile home furnishing products.''[4] However, the Commission considered and rejected including these product categories when it amended the Rule in 1983. The comments do not provide sufficient evidence for reopening these issues.

Part B—Objectives the Commission Seeks To Achieve and Possible Regulatory Alternatives

1. Definitions of Water Temperature in the Appendix

a. Background

Some comments recommended that the Commission revise the definition of cold water temperature in the Appendix to the Rule. The Appendix to the Rule currently states that ''cold'' water means ''cold tap water up to 85 degrees F (29 degrees C).''[5] Commenters noted that tap water temperatures vary across the United States, and that such differences can cause problems in washing clothes because, in the winter in colder parts of the country, granular detergents may not fully dissolve and activate during a cold wash cycle.[6] An appliance technician from Maine noted that consumers may hesitate to use hotter water when the label advises to use ''cold'' water.[7] As a result, clothes may not be thoroughly cleaned and may be left with soap residue.[8]

Other comments suggested that the Rule's definition of hot water (up to 150 degrees F, or 66 C)[9] should be changed. The American Association of Textile Chemists and Colorists (''AATCC'') commented that the temperatures stated in the Appendix to the Rule should be changed to match the AATCC definitions, which the AATCC believes ''more accurately reflect current washing machine settings and consumer practice.''[10] The AATCC defines ''hot'' as 120 F plus or minus 5 (49 C plus or minus 3). Another commenter noted the variances in temperature definitions within the NAFTA countries and suggested they should be harmonized.[11]

b. Objectives and Regulatory Alternatives

The Commission believes that the definition of cold water in the Appendix may need to be revised to ensure that consumers understand that washing clothes in extremely cold water may not be effective. In addition, the Commission believes that the definitions of warm and hot water may need to be changed to ''more accurately reflect current washing machine settings and consumer practice.'' Accordingly, the Commission seeks comment on whether the Commission should amend the Rule to change the definitions of ''warm'' and ''hot'' water, or to include a new term such as ''cool'' or ''lukewarm'' in the Appendix. The Commission further seeks comment on whether the Rule should be amended to state that care labels recommending ''cold'' wash must define the highest acceptable temperature for ''cold'' on the label, and on the benefits and costs to consumers and manufacturers of such an amendment.

2. Environmental Issues

a. Background

In the June 1994 FRN, the Commission stated that, because of evidence that dry cleaning solvents are damaging to the environment, the Environmental Protection Agency (''EPA'') was interested in reducing the use of such solvents. The Commission stated that EPA's Office of Pollution Prevention and Toxics had been working with the dry cleaning industry to reduce the public's exposure to perchloroethylene (''PCE''), the most common dry cleaning solvent.[12] In connection with this effort, EPA has published a summary of a process referred to as ''Multiprocess Wet Cleaning,'' which is an alternative cleaning process that relies on the controlled application of heat, steam and natural soaps to clean clothes that would ordinarily be dry cleaned.[13]

The FRN asked whether the current Rule may pose an impediment to reducing solvent use because it requires either a washing instruction or a dry cleaning instruction; it does not require both. Thus, garments that can legally be labeled with a ''dry clean'' instruction alone also may be washable, a fact not ascertainable from such an instruction. If the Rule were amended to require both washing and dry cleaning instructions for garments cleanable by both methods, consumers and cleaners could make more informed choices and the use of dry cleaning solvents might be lessened. To solicit comment on these issues, the Commission posed a series of questions in the FRN, each of which is separately addressed below:

(i) *Does the current Rule pose an impediment to the EPA's goal of reducing the use of dry cleaning solvents?* Nine commenters addressed this question. Three responded simply that the Rule does not pose an impediment to EPA's goals.[14] Six others, however, contended that the current Rule impedes EPA's goal of reducing the use of dry cleaning solvents by permitting manufacturers to disclose only one cleaning instruction when a

[3] Comment 58, p.1; see also Drycleaners Fund (65) p.4. LAA stated that consumers ''would benefit from having a label that, in so many words, advises consumers that leather requires special care * * *.'' Comment 58, p.1. However, it seems probable that most consumers know that leather requires special care; in the absence of evidence to the contrary, the Commission cannot conclude that it is unfair or deceptive for manufacturers of leather garments to fail to disclose this information. Secondly, LAA stated that leather cleaning ''is more art than science'' and that any care label ''must be non-specific as to the cleaning process.'' LAA suggested a label that simply states ''Do not wash or dry clean by fabric method. Take to a leather expert.'' *Id.* Such a label is unlikely to significantly assist the average dry cleaner, who presumably already knows that conventional dry cleaner, who presumably used on leather garments and knows whether or not he has the ability to clean leather garments.

[4] Comment 70, p.1.

[5] 16 CFR Part 423, Appendix A, 2.c.

[6] Association of Home Appliance Manufacturers (53) p.2.

[7] Bruce W. Fifield (62) p.1.

[8] *Id.*

[9] 16 CFR Part 423, Appendix A, 2.a.

[10] Comment 34, p.1.

[11] Jo Ann Pullen (44) p.3.

[12] PCE has been designated as a hazardous air pollutant under Section 112 of the Clean Air Act and under many state air toxics regulations. On September 15, 1993, EPA set national emission standards for new and existing PCE dry cleaning facilities. According to a study conducted on Staten Island and in New Jersey, PCE is among the toxic air pollutants found at the highest concentrations in urban air.

[13] 59 FR 30733–34. See also EPA (73) p.1.

[14] Baby Togs, Inc. (2) p.2; The Warren Featherbone Co. (33) p.3; VF Corp. (36) p.5.

garment can be either washed or dry cleaned.[15]

(ii) *What is the actual incidence of labeling that fails to include both washing and dry cleaning instructions?* Few comments responded directly to this question. One guessed that the incidence is ''Probably none,'' reasoning that, because washing is less expensive than dry cleaning, it would be unimaginable for a manufacturer to put a ''Dry Clean'' label on a garment that could be washed.[16] Another stated that it is common practice to label conservatively (*e.g.*, ''dry clean only''),[17] and a third alleged that there is a wide variation in adherence to the requirements of the Rule, especially among small firms and importers.[18] Two cleaners using wet cleaning technology contended between them that the incidence ranged from 40% to 100% because a ''Professionally Wet Clean'' instruction is never given on labels for garments that normally would be dry cleaned but also could be professionally wet cleaned.[19]

(iii) *With regard to a garment that can be either washed or dry cleaned, should the Commission amend the Rule to require that care instructions be provided for both washing and dry cleaning?* Several commenters preferred that the Rule not be amended in this regard at all, contending that apparel manufacturers should be free to select the best care method based on their own judgment.[20] Some commenters favored, without extensive analysis, requiring care instructions for both dry cleaning and home laundering if neither process would harm the garment. Most of these expected that such an amendment would enable consumers to save the expense associated with unnecessary dry cleaning for products that could safely be laundered at home.[21] Others maintained that a reduction in dry cleaning would diminish for humans and the environment those risks that are associated with the use of PCE.[22] One commenter pointed out that some consumers may prefer to dry clean washable garments and that care instructions should give these individuals a choice of methods when both laundering and dry cleaning would be appropriate.[23]

Another group of commenters suggested that the Rule be amended to require washing instructions for garments that can be safety laundered as well as dry cleaned, and to require dry cleaning instructions solely for those garments that must only be dry cleaned, rather than to require that both instructions be specified for garments that could withstand both processes.[24] These commenters reasoned that, although many items (cotton underwear and outerwear, children's clothing, wash-and-wear apparel, etc.) could safely be dry cleaned, it would be neither necessary nor desirable to do so. In fact, they contended, a requirement for dual instructions for such products would actually result in an increase in the use of dry cleaning solvents because manufacturers now exclusively producing washable (but also dry cleanable) products would have to install dry cleaning facilities and equipment so they could provide a reasonable basis for the dry cleaning instruction.

Other commenters suggested that the Rule be amended to include a requirement that labels on garments for which dry cleaning is appropriate include a ''professionally wet clean'' instruction in addition to the dry cleaning instruction.[25] These commenters contended that the professional wet cleaning process is a viable alternative to dry cleaning in most cases, and that the process does little damage to the environment. Because wet-cleaning wash formulas are created to cover categories of fabric type, two commenters stated that labels should clearly state the composition of the fabric or fabrics used so the correct machine wet-cleaning formula may be used.[26]

(iv) *What are the costs and benefits, including environmental benefits, of such an amendment?* Several commenters opposing the amendment to require instructions for both washing and dry cleaning contended that a dual labeling requirement would result in increased costs for manufacturers who would have to test for both methods instead of only one.[27] However, those who favored amending the Rule in any of the ways discussed above cited as benefits the reduced cleaning costs to consumers, the benefits to human health and the environment, or, occasionally, both.

Materials describing methods, training, and equipment in many of the comments suggesting a requirement for a ''Professionally Wet Clean'' instruction implied that a significant cost would be incurred by cleaners wishing to use the new technology. One comments also concluded that an amendment to require such an instruction should be accompanied by a consumer education effort.[28]

b. Objectives and Regulatory Alternatives

The record indicates that PCE is dangerous to humans and the environment, and that some consumers are interested in avoiding the use of PCE when possible. Through the proposed amendments to the Rule, discussed below, the Commission seeks to ensure that consumers are provided with information that would allow them the choice of washing garments when possible, or having them professionally wet cleaned. The information about washability may be important to many consumers, either for economic or environmental reasons.

When a garment is labeled ''dry clean,'' many consumers may be misled into believing that the garment cannot be washed in water; if the garment can be washed in water, the consumer may

[15] Business Habits, Inc. (38) p.4 (the current Rule is a disincentive for the dry cleaner to consider washing or professional wet cleaning when the labels state ''Dry Clean Only''); Mothers & Others (22) pp.1–4 (unless consumers are informed of their options, the market will be skewed in favor of dry cleaning and consumers may not use cheaper methods (home laundering) and/or safer methods (professional wet cleaning)); Aqua Clean System (20) p.4; Ecofranchising, Inc. (28) pp.3–4; Jo Ann Pullen (44) p.7; Center for Neighborhood Technology (59) pp.2–3.

[16] Baby Togs, Inc. (2) p.2.

[17] Carter's (24) p.3.

[18] OshKosh B'Gosh, Inc. (27) p.2.

[19] Aqua Clean System (20) p.4; Ecofranchising, Inc. (28) pp.3–4.

[20] The Warren Featherbone Co. (33) p.1–2, 3; Clothing Manufacturers Association (40) p.1; Salant Corp. (52) p.1. See also Braham Norwick (25) p.3.

[21] See, e.g., Benjamin Axleroad (1) p.1; Don Pietsch (3) p.1; Evelyn Borrow (4) p.1; Claudia G. Pasche (5) p.1; Margaret S. Jones (6) p.1; Judith S. Barton (7) p.1; Virginia J. Martin (8) p.1; SuzAnne A. Darlington (14) p.1; Ann Geerhar (29) p.1.

[22] See, e.g., Ardis W. Koester (12) p.1; University of Kentucky College of Agriculture (15) p.1; Center for Neighborhood Technology (59) pp. 2–3.

[23] Drycleaners Environmental Legislative Fund (65) p.2.

[24] See, e.g., OshKosh B'Gosh, Inc. (27) p.2; VF Corp. (36) p. 5; see also Fieldcrest Cannon (11) p. 4 (opposed suggested amendment but advanced the same reasoning as the preceding commenters); American Textile Manufacturers Institute (56) pp.5–6.

[25] Aqua Clean System (20) pp. 4–6; Mothers & Others (22) pp. 2–3; The Massachusetts Toxics Use Reduction Institute (23) pp. 1–2; Ecofranchising, Inc. (28) p. 3; Public Advocate for the City of New York (39) pp. 8, 73; Friends of the Earth (43) p. 1, Jo Ann Pullen (44) p. 7; Greenpeace (45) pp. 1–3; Association of Home Appliance Manufacturers (53) p. 2, Center for Neighborhood Technology (59) pp. 2–4; EPA (73) p. 1. See also American Apparel Manufacturers Association (68) p. 5.

[26] Aqua Clean (20) p. 7; Ecofranchising (28) pp. 2, 4.

[27] Fieldcrest Cannon (11) p. 4; Woolrich, Inc. (21) p. 1; OshKosh B'Gosh, Inc. (27) p. 2; VF Corp. (36) p. 5, Industry Canada (37) p. 3; The GAP, Inc. (78) p. 5.

[28] See, e.g., Mothers & Others (22) pp. 1–2; Public Advocate for the City of New York (39) (transmitting the comprehensive report on ''The Risk to New Yorkers from Drycleaning Emissions and What Can Be Done About It''); Greenpeace (45) pp. 1–3, Attachment: ''Dressed to Kill''; Center for Neighborhood Technology (59) pp. 2–3.

incur the unnecessary expense of dry cleaning the garment.[29] If the garment is labeled ''dry clean'' when it in fact could be wet cleaned by a professional cleaner, the consumer may believe it is necessary to have the garment dry cleaned although the consumer would prefer a cleaning method that is less damaging to the environment.

The lack of this information can result in substantial injury to consumers in the form of unnecessary expense and/or damage to the environment that the consumer wishes to avoid. Moreover, it can be extremely difficult for consumers to avoid this injury by obtaining the information about washability of an item for themselves. While fiber content can be a guide to washability, other factors—such as the type of dye or finish used—can also determine washability, and consumers have no way of learning what dyes and finishes were used and whether they will survive washing. In addition, it may be that some garments that traditionally have been damaged by washing (*e.g.*, wool business suits) can be cleaned without damage by new methods of professional wet cleaning, but consumers have no way of determining for themselves which of the many garments available to them are now washable.

Accordingly, the Commission seeks comment on whether it should amend the Care Labeling Rule to require a laundering instruction for all covered products for which laundering is appropriate. This amendment would permit optional dry cleaning instructions for such washable items, provided dry cleaning would be an appropriate alternative cleaning method.[30] The amendment would, however, require that manufacturers marketing items with a ''Dry Clean'' instruction alone be able to substantiate both that the items could be safely dry cleaned and that home laundering would be inappropriate for them.[31]

The disclosures required by this proposal would inform consumers purchasing washable items that the items could be safely laundered at home. As noted in the comments, this would enable consumers to make a more informed purchasing choice and provide them with the option of saving money by laundering at home instead of incurring the higher expenses of dry cleaning. In addition, consumers who are concerned about reducing the use of PCE will have information about the ''washability'' of all apparel items they are considering purchasing. Moreover, this proposal would not result in the additional substantiation testing (and increased PCE use) that the comments suggested a ''dual disclosure'' requirement could necessitate, because a dry cleaning instruction would be optional, as would the necessary substantiation to support it.

The Commission also seeks comment on the feasibility of requiring, for all covered products bearing a dry cleaning instruction, the addition of a professional wet cleaning instruction for items for which professional wet cleaning would be appropriate. The comments indicate that the comparatively new processes of professional wet cleaning technologies are promising alternatives to PCE-based dry cleaning. However, these comments do not provide enough information about professional wet cleaning for the Commission to assess whether and how the Rule should address wet cleaning. Therefore, the Commission seeks information on the cost of wet cleaning, the availability of wet cleaning facilities, and any other information that would help the Commission determine whether it should consider amending the Rule to require, for all covered products bearing a dry cleaning instruction, the addition of a professional wet cleaning instruction for items for which professional wet cleaning would be appropriate. The Commission also seeks comment on the feasibility of the processes as practical current alternatives to dry cleaning. In addition, the Commission seeks comment on whether fiber identification should be on a permanent label, as is currently required for care information, because this information may be needed for wet-cleaning processes, and comment on the costs to manufacturers of such a requirement.

3. The Reasonable Basis Requirement of the Rule

a. Background

The rule requires that manufacturers and importers of textile wearing apparel possess, prior to sale, a reasonable basis for the care instructions they provide. Under the Rule, a reasonable basis must consist of reliable evidence supporting the instructions on the label. 16 CFR 423.6(c). Specifically, a reasonable basis can consist of (1) reliable evidence that the product was not harmed when cleaned reasonably often according to the instructions; (2) reliable evidence that the product or a fair sample of the product was harmed when cleaned by methods warned against on the label; (3) reliable evidence, like that described in (1) or (2), for each component part; (4) reliable evidence that the product or a fair sample of the product was successfully tested; (5) reliable evidence of current technical literature, past experience, or the industry expertise supporting the care information on the label; or (6) other reliable evidence. 16 CFR 423.6(c).

The FRN solicited comment on whether the Commission should amend the Rule ''to make clear that a variety of types of evidence, alone or in combination, might provide a reasonable basis [for cleaning directions] in specific instances,'' but that as reflected in the Rule's original Statement of Basis and Purpose, the Rule should not be read to suggest that the reasonable basis standard necessarily is met whenever a seller possesses at least one of the types of evidence set forth as examples of how the standard might be satisfied. The FRN also sought comment on whether the Commission should clarify in the Rule that the criteria for determining the proper level of substantiation that were recited in the Commission's Policy Statement Regarding Advertising Substantiation,[32] apply to care labeling claims, whether analyzed directly under Section 5 or under the Rule.

In addition, the Commission expressed interest in whether particular types of garments or garment components might necessitate special treatment. Question 9 in the FRN asked:

> Should the Commission amend the Rule to specify under what conditions a manufacturer or importer must possess a particular type of basis among those listed in

[29] A Perdue University survey found that 89.3% of the 962 respondents indicated that they would not wash a garment labeled ''dryclean.'' Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule (16 CFR Part 423) (May 1978), p. 141. Other surveys showed similar results. *Id.* at 142–143.

[30] The Commission has learned from several commenters, primarily manufacturers, that requiring both washing and dry clean labels (a ''dual disclosure'' amendment) would require a dry cleaning instruction on virtually all washable items. According to these commenters, this would necessitate additional testing expenses for manufacturers and a resulting increase in PCE use, to the detriment of human health and the environment. The Commission has no reason to believe at this time that it is either unfair or deceptive for a manufacturer or importer to fail to reveal that a garment labeled for washing can also be dry cleaned. The comments also indicate that most consumers would not want to spend the additional money necessary to dry clean such items.

[31] The Rule currently requires this level of substantiation for a ''Dry Clean Only'' instruction.

[32] *FTC Policy Statement Regarding Advertising Substantiation,* 104 F.T.C. 839 (1984). The Commission issued this statement to ''reaffirm[]'' its commitment under Section 5 of the FTC Act, 15 U.S.C. § 45, to requiring adequate substantiation for objective advertising claims before they are disseminated.

§ 423.6(c) of the Rule, such as test results? Should the ''reasonable basis'' requirements of the Rule be modified in any other way?

The comments responding to these portions of the FRN suggest that some care labels may lack a reasonable basis. One commenter stated that inaccurate care labels were responsible for 33–45% of the damaged garments sent in to the International Fabricare Institute for testing during a 1988–1993 period.[33] Furthermore, many of the commenters' responses to Question 10 in the FRN (''Are there garments in the marketplace that contain inaccurate or incomplete care instructions?'') indicate that many garments are labeled ''dry clean only'' without a reasonable basis for warning that they cannot be washed.[34] The comments additionally suggest that care instructions may not be appropriate for *all* components of a garment, such as trims.[35] Colorfastness and shrinkage were also identified as problems experienced with inaccurate or incomplete care instructions.[36]

Twelve commenters stated that they were in favor of modifying the reasonable basis portion of the Rule, suggesting that the reasonable basis requirement should be clarified and strengthened to reduce the problem of inaccurate and incomplete care labels.[37] Seven commenters were opposed to modifying the reasonable basis requirements of the Rule.[38] These commenters expressed concern, for example, that requiring tests would be too expensive and would ultimately increase costs for consumers.

Several commenters recommended clarifying the Rule by specifying the circumstances in which a manufacturer or importer must possess test results or another specific type of evidence to establish a reasonable basis.[39] One commenter said that testing might not always be required and suggested that the Rule should specify different types of required evidence for different circumstances.[40] This commenter stressed, however, that the Rule should require a reasonable basis for a garment in its finished state, noting that the current Rule suggests that it is satisfactory to have reliable evidence ''for each component part'' of a garment.[41] Another Commenter suggested that the Rule should set out performance standards for certain properties of garments (*e.g.*, dimensional stability and colorfastness) and should identify both testing methodologies and evaluation criteria for those properties.[42]

b. Objectives and Regulatory Alternatives

The Commission appreciates the comments submitted on the FRN and continues to explore this area. The Commission seeks comment on the incidence of inaccurate and incomplete labels, the extent to which that incidence might be reduced by clarifying the reasonable basis standard, and the costs and benefits of such a clarification. Section 423.6(c)(3) of the Rule provides that a reasonable basis may consist of reliable evidence that ''each component'' of the garment can be cleaned according to the care instructions. As several commenters pointed out, however, a garment component that may be cleaned satisfactorily by itself might not be cleaned satisfactorily when cleaned as part of an assembled garment made of different components, for example, by bleeding noticeably onto the other parts of the garment. The Commission, therefore, seeks comment on whether to amend the Rule to specify that the reasonable basis requirement applies to the garment in its entirety rather than to each of its individual components.

If the Commission decides to amend the reasonable basis standard, one option is to indicate in the Rule that whether one or more of the types of evidence described in Section 423.6(c) constitutes a reasonable basis for care labeling instructions depends on the factors set forth in the FTC Policy Statement Regarding Advertising Substantiation.[43] Another option, as reflected in Question 9 of the FRN, is to require in the Rule that cleaning directions for certain garments, fabrics or materials will comply with the Rule only if they are supported by the results of appropriately designed and conducted scientific tests recognized by experts in the field as probative of whether the item can be cleaned as directed without damage. The Commission also seeks comment on whether, if testing is required under certain circumstances, the Rule should specify particular testing methodologies to be used.

Finally, the Commission solicits comment on whether the Rule should set forth standards for acceptable and unacceptable changes in garments following cleaning as directed. The Commission also seeks comment on whether it would be useful for the Rule to specify properties, such as dimensional stability and colorfastness, to which such standards would apply.

Part C—Request for Comments

Members of the public are invited to comment on any issues or concerns they believe are relevant or appropriate to the Commission's consideration of proposed amendments to the Care Labeling Rule. The Commission requests that factual data upon which the comments are based be submitted with the comments. In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted.

Questions

A. Definitions of Water Temperatures in the Appendix

(1) Is it feasible and desirable to use the words ''lukewarm'' or ''cool'' on a care label rather than ''cold''? Should

[33] Drycleaners Environmental Legislative Fund (65) p.4.

[34] Evelyn Borrow (4) p.1; Claudia G. Pasche (5) p.1; Margaret S. Jones (6) p.1; University of Kentucky College of Agriculture (15) p.1; Aqua Clean System (20) p.3; Carter's (24) p.3; Braham Norwick (25) p.1; Ecofranchising, Inc. (28) pp.3–4; Jo Ann Pullen (44) pp.2–3; J.C. Penney (70) p.3.

[35] VF Corp. (36) p.7; Drycleaners Environmental Legislative Fund (65) p.4.

[36] J.C. Penney (70) p.3.

[37] Clorox Co. (32); Industry Canada (37); Business Habits, Inc. (38); Jo Ann Pullen (44); Salant Corp. (52); Association of Home Appliance Manufacturers (53); Center for Neighborhoods Technology (59); Drycleaners Environmental Legislative Fund (65); Department of the Air Force (67); American Apparel Manufacturers Association (68); EPA (73); The Gap, Inc. (78).

[38] Baby Togs, Inc. (2); Carter's (24); OshKosh B'gosh, Inc. (27); The Warren Featherbone Co. (33); VF Corp. (36); American Textile Manufacturers Institute (56); Fruit of the Loom (64).

[39] *E.g.*, Center for Neighborhood Technology (59) p.1; Salant Corp. (52) p.2; Drycleaners Environmental Legislative Fund (65) p.4; Clorox Co. (32) p.3.

[40] Drycleaners Environmental Legislative Fund (65) p.4. Thus, for example, for garments made entirely of material with a long history of care, such as 100% undyed cotton, historical knowledge may be sufficient to constitute a reasonable basis. In contrast, when the garment is made of a new fiber and is dyed with a new dye or when the garment is a cotton garment with a bright trim, a manufacturer may be required to conduct multiple tests on various samples of the garment in order to establish a reasonable basis.

[41] Drycleaners Environmental Legislative Fund pointed out that a trim might not noticeably bleed when cleaned by itself but might bleed onto the body of a garment when the finished garment is cleaned. Thus, it would not suffice to have one ''reasonable basis'' for the body of a garment and another for the trim. Comment 65, p.4.

[42] Industry Canada (37) p.2.

[43] In the Statement, the Commission set forth criteria to consider in establishing the minimum required basis for objective advertising claims, where no specific basis was stated or implied: ''These factors include: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable.'' *FTC Policy Statement Regarding Advertising Substantiation*, 104 F.T.C. 839, 840 (1984).

these terms be required instead of the word ''cold''? What benefits would consumers derive from such a change?

(2) Is it feasible and desirable to amend the Rule to require that the highest acceptable temperature for ''cold'' water be stated on the care label? What benefits would consumers derive from such an amendment? What costs would such an amendment impose on manufacturers?

(3) Should the Rule's definition of ''warm'' water be amended, and if so, what temperature should be specified instead? What benefits would consumers derive from such an amendment?

(4) Should the Rule's definition of ''hot'' water be amended, and if so, what temperature should be specified instead? What benefits would consumers derive from such an amendment?

B. Environmental Issues

(1) Please describe the process, or the processes, commonly referred to as ''Wet Cleaning,'' ''Multiprocess Wet Cleaning,'' ''Professional Wet Cleaning,'' or other similar terms, and provide as much technical detail as possible.

(2) What equipment and what materials are necessary for a professional cleaning establishment to employ the wet cleaning processes?

(3) What effects do the materials used in the wet cleaning process have on human beings, animals, plants, and the environment? Please be as specific as possible.

(4) How many domestic businesses provide professional wet cleaning to the public on a regular basis? Please specify the type(s) of professional wet cleaning provided. Does the service comprise all, or a part of, each such company's business? If part, what percentage?

(5) What percentage of garments and other items for which professional dry cleaning has historically been the only appropriate cleaning method are safely and satisfactorily cleanable by professional wet cleaning? Please be as specific as possible as to fiber, fabric, and garment type. What difference, if any, would there be in customer satisfaction between the results of the two processes?

(6) What is the average cost, for as many items as respondents can reasonably describe, of professional wet cleaning compared to professional dry cleaning? The Commission requests information both as it pertains to the cost to the cleaner providing the service and the cost to the consumer using it.

(7) With regard to a garment that cannot be home laundered but can be dry cleaned, should the Commission amend the Rule to require a professional wet cleaning instruction too (provided wet cleaning is appropriate for the garment)? What would be the benefits and costs to consumers and manufacturers of such an amendment?

(8) Should fiber identification be on a permanent label? Should fiber identification be on the same label as care information? What costs would such requirements impose on manufacturers?

(9) How many garments currently labeled ''dry clean'' or ''dry clean only'' could be washed at home by consumers? Should the Rule be amended to require a laundering instruction for all covered products for which laundering is appropriate? What would be the benefits and costs to consumers and manufacturers of such an amendment?

C. The Reasonable Basis Requirement of the Rule

(1) Are care label instructions generally accurate? If not, in what ways are they inaccurate, and do these inaccuracies result in damage to the affected garments or other costs to consumers?

(2) Are any types of garments or piece goods particularly prone to damage even when the care label instructions are followed?

(3) Are home laundering directions on care labels incomplete or inaccurate in ways that result in damage to garments when they are laundered as directed? If so, what are the most common problems, and how widespread are they?

(4) Are dry cleaning directions on care labels incomplete or inaccurate in ways that result in damage to garments when they are dry cleaned as directed? If so, what are the most common problems, and how widespread are they?

(5) What actions, if any, do garment or piece goods manufacturers ordinarily take to assure that care labels are accurate? To what extent do garment manufacturers rely solely on care information provided by the suppliers of components of garments?

(6) Do garment manufacturers typically analyze or test garments for appropriate cleaning procedures in their completed form or before the garments' components are assembled?

(7) In what situations, if any, should the testing of garments be the only evidence that would be legally acceptable?

(8) Should the Rule specify testing methodologies to be used in situations in which testing would be required? What should those methodologies be?

(9) Should the Rule refer to performance standards for certain properties of garments? If so, which properties, and what should these performance standards be?

(10) What steps, if any, do garment manufacturers take to provide cleaning instructions for products comprising more than one fabric or material, such as those with metallic trim or trim of a fabric or color different from that of the main part of the product?

(11) What evidence is there concerning the effectiveness of current actions by garment manufacturers to ensure appropriate cleaning of their products?

(12) Do garment labels stating, for example, that particular cleaning instructions apply to the garment ''exclusive of trim'' provide sufficient guidance to consumers or cleaners to enable them to avoid damaging the garments by improper cleaning?

(13) Should the Rule be amended to delete Section 423.6(c)(3), which provides that a reasonable basis can consist of reliable evidence that each component of the garment can be cleaned according to the care instructions and to state, instead, that a manufacturer must possess a reasonable basis for the garment as a whole?

(14) Should the Rule be amended to clarify that whether one or more of the types of evidence described in Section 423.6(c) constitutes a reasonable basis is based on the factors set forth in the FTC Policy Statement Regulating Advertising Substantiation?

(15) Do garment or piece goods manufacturers or retailers offer refunds for products damaged in cleaning despite adherence to care label directions? What is the typical refund policy? How is the existence of such refunds made known to consumers?

(16) What are the costs to consumers of complaining to manufacturers or retailers about garments damaged in cleaning? Are there factors that discourage consumers whose garments have been damaged in cleaning from complaining to manufacturers or retailers?

(17) What would be the benefits and costs to consumers and manufacturers of these amendments clarifying the Rule's reasonable basis requirement?

Authority: Section 18(d)(2)(B) of the Federal Trade Commission Act, 15 U.S.C. 57a(d)(2)(B).

List of Subjects in 16 CFR Part 423

Care labeling of textile wearing apparel and certain piece goods; Trade Practices.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 95–31411 Filed 12–27–95; 8:45 am]

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RAILROAD RETIREMENT BOARD

20 CFR Part 255

RIN 3220–AA44

Recovery of Overpayments

AGENCY: Railroad Retirement Board.

ACTION: Proposed rule.

SUMMARY: The Railroad Retirement Board (Board) revises part 255 of its regulations, currently entitled ''Recovery of Erroneous Payments'', to clarify and update its regulations with respect to recovery of overpayments. The revisions more clearly identify the individuals from whom recovery may be sought and under what circumstances recovery of an overpayment of benefits will be made. The revisions also cover the circumstances under which such recovery may be waived, and the circumstances under which such recovery may be terminated or suspended under the Board's authority concerning administrative relief from recovery.

DATES: Comments must be received by January 29, 1996.

ADDRESSES: Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

FOR FURTHER INFORMATION CONTACT: Thomas W. Sadler, Assistant General Counsel, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611, (312) 751–4513, TDD (312) 751–4701).

SUPPLEMENTARY INFORMATION: Part 255 of the Board's regulations has not been revised since 1967. Although section 10 of the Railroad Retirement Act of 1974 (45 U.S.C. 231i) includes provisions for recovery and waiver of overpayments of benefits which are substantially the same provisions included in the Railroad Retirement Act of 1937 (45 U.S.C. 228i, superseded), internal procedures dealing with overpayments of benefits have been developed which should properly be included in the regulations of the Board. In addition, in the Board's view, waiver should not be available with respect to certain types of overpayments and this proposed rule reflects those proosals. Because the proposed rule would make extensive changes in the existing regulation, a section-by-section analysis is provided below.

The title of part 255 is proposed to be revised to ''Recovery of Overpayments''. The current title, ''Recovery of Erroneous Payments'', mistakenly implied that all such payments were caused by ''fault''. Overpayments can and do occur through no fault of the recipients of such payments. The purpose of part 255 is to set out regulations to govern those instances where more than the correct amount of benefits has been paid, regardless of whether or not ''fault'' exists.

Section 255.1 would replace the present § 255.1, which sets out statutory provisions, with an introductory statement to summarize what is included in part 255.

Section 255.2 defines ''overpayment'' using essentially the same language that is used in the current § 255.2 to define ''erroneous payments''.

Section 255.3 states the general rule that overpayments shall be recovered in all cases except where recovery is waived under § 255.10 or administrative relief from recovery is granted under § 255.17 or where collection is suspended or terminated under these regulations or the Federal Claims Collection Standards.

Section 255.4 would replace the current § 255.4, which simply states in a summary manner the methods by which erroneous payments may be recovered, with a detailed description of those individuals from whom overpayments may be recovered.

Section 255.5–255.8 set out the methods by which an overpayment of benefits may be recovered. These methods include recovery by cash payment (§ 255.5), recovery by setoff from any subsequent payment determined to be payable on the basis of the same record of compensation (§ 255.6), recovery by deduction in the computation of a residual lump-sum death benefit payable under the Railroad Retirement Act (§ 255.7), and recovery by actuarial adjustment of an annuity (§ 255.8). These sections are substantially similar to the current §§ 255.5–255.8. However, § 255.8, unlike the current section, provides that an actuarial adjustment is not effective until the overpaid annuitant negotiates the first check which reflects the actuarially adjusted rate.

Section 255.9 provides that where recovery of an overpayment is by setoff which can be effected within 5 months and the individual from whom recovery is sought is an enrollee under Medicare Part B, the individual's monthly Medicare premium will be paid and the balance of the annuity amount will be applied toward recovery of the overpayment. This section is new and is intended both to save the agency the administrative costs of billing an annuitant for his or her Part B Medicare premium where his or her annuity would be offset in its entirety to recover an overpayment and also to avoid lapse of Medicare coverage.

Section 255.10 sets out the general requirements for waiver of recovery of an overpayment as set forth in the Railroad Retirement Act and replaces the present §§ 255.10 and 255.11.

Section 255.11, as currently in effect, would be removed because it is redundant. The new section 255.11 would define ''fault'' and gives examples of when an individual is or is not at fault based upon past agency decisions. Section 255.12 defines when recovery is contrary to the purpose of the Railroad Retirement Act, based upon past agency decisions. Section 255.13 defines when recovery is against equity or good conscience. Each of these sections is new and together they expand on the present § 255.12.

Sections 255.14, 255.15, and 255.16 are new sections which describe special situations where waiver of recovery of an overpayment is not available. Specifically, § 255.14 provides that waiver is not available under certain circumstances when recovery can be made from an accrual of social security benefits. Section 255.15 provides that waiver is not available to the estate of an individual.

Section 225.16 would provide that recovery of a small overpayment of less than $500 will never be considered contrary to the purpose of the Railroad Retirement Act or against equity or good conscience. Under this rule, waiver of recovery would not be applicable for debts under $500. This proposed rule is similar to the rule contained in § 340.10(e)(2) of the Board's regulations with respect to recovery of overpayments under the Railroad Unemployment Insurance Act (20 CFR 340.10(e)(2)).

Section 255.17 sets out internal Board policy governing those situations where recovery of an overpayment may not be waived under section 10(c) of the Railroad Retirement Act, thus extinguishing the debt, but where recovery will not be sought for equitable reasons. The regulations do not currently contain such a provision.

Section 255.18 is new and explains how an overpayment is recovered when that overpayment was made to a representative payee under part 266 of this chapter.

Sections 255.19 and 255.20, which deal with compromise, suspension, or termination of the collection of overpayments are substantively identical to the current §§ 255.14 and 255.15 with the exception that references to the Federal Claims Collection Standards (4 CFR Chapter 2) have been added.

This rule was previously published as a proposed rule on September 19, 1991 (56 FR 47426). Because the Board has substantially revised the rule as originally published, it has been determined to republish the rule as a proposed rule and to seek further public comment.

The Labor Member of the Board dissented from the action of the majority of the Board in approving this proposed rule. The Labor Member's reasons from dissenting from this action are set out below.

Views of the Labor Member of the Board

The Labor Member finds it to be a document seriously lacking in fairness and in grant need of a balanced approach to sensible debt collection.

- Section 255.12 includes non-liquid assets in the list of resources to be considered when determining whether recovery of an overpayment will be contrary to the purpose of the Railroad Retirement Act. The Labor Member thinks it would be unconscionable to expect anyone to liquidate personal property, for the purpose of repaying an overpayment for which he or she was not at fault, and accordingly feels this has no place in any waiver consideration.
- Example (1) in this same section is meant to illustrate when recovery would not be contrary to the purpose of the Act, but, in fact, the Labor Member considers it to be a one-sided attempt to construct as narrow a definition of financial hardship as possible, with the intention to leave the individual with as little as possible in the recovery process. He takes issue with the majority's failure to consider imminent financial obligations when making financial hardship determinations, as well.
- Section 255.13(b) states that an individual's ability to repay an overpayment is relevant with respect to the credibility of the claim that the individual detrimentally relied on the incorrect payment, but the Labor Member believes that, consistent with the Social Security Administration's regulations, a person's financial circumstances are not material in this regard.
- Section 255.15 does not allow waiver when recovery is sought from the estate of an overpaid individual. However, the Labor Member submits that a literal reading of section 10(c) of the Act directs waiver consideration for estates, as well as individuals, when qualifying criteria is met. He feels that if the Act limited waiver to situations where there was no fault, and recovery would be ''contrary to the purpose of the Act,'' then this restrictive interpretation presented by the majority would possibly have merit. But, since the Act also allows for waiver when recovery would be ''against equity or good conscience,'' it should also be granted to the estate in situations where it would have been granted while the individual was alive. He sees the proposed regulation as being at odds with the statute on this point.
- Proposed Section 255.16 states that where the amount of an overpayment is less than $500 it may not be waived. The majority compares this proposal to the rule contained in section 340.10(e)(2) of the Board's regulations with respect to recovery of overpayments under the Railroad Unemployment Insurance Act (RUIA). The Labor Member does not see this as a valid comparison. He suggests that overpayments under the RUIA often involve working individuals whose income from employment is only temporarily halted, which is in direct contrast to the situations at hand involving elderly or disabled individuals on fixed incomes. Moreover, waiver requests for both RUIA and Railroad Retirement Act overpayments usually include a request to reconsider the amount of the overpayment. Small RUIA overpayments are usually less complex, thus less costly to recompute, providing more of an incentive to complete the recovery process. Conversely, Railroad Retirement Act overpayments can involve various issues and complexities adding to the cost of adjudication. He recommends as a more reasonable and fair approach the allowance of a blanket relief from recovery in these small overpayment situations. From a business standpoint, he believes that the cost to the agency in trying to collect small overpayments will outweigh the benefits. Furthermore, he argues that past experience has shown that overpayments under $500 because of their complexities routinely result from computational errors by the Board where the beneficiary would have no knowledge than an incorrect payment was made. As a government agency with a responsibility to pay benefits accurately, we, not the beneficiary, should be held accountable when we fail to do so.
- The Labor Member also points out that, on the issue of ''fault,'' if an individual received an incorrect annuity rate for a period of more than 5 months after the Board has received information which should have caused it to reduce the benefits, it has been a long-standing agency policy to consider the individual not at fault for any payment after the fifth month. This is provided that the continued issuance of the payments at the incorrect rate led the beneficiary to believe in good faith the he or she was entitled to the amount represented by the payment. The majority has refused to include such a provision in this proposed rule. Rather, it believes that the fault determination should be decided on a case-by-case basis. The Labor Member, on the other hand, believes that given the advanced technology available to the Board, the five-month rule should be incorporated into the proposed rule and, in fact, be reduced even further. He notes that the Social Security Administration has a provision similar to the one that he favors.
- The Labor Member also takes exception to the majority's decision not to include a provision which would allow blanket relief from overpayment recovery clearly resulting from the fault of the agency, contending that the Board must accept full responsibility for its own errors.
- In conclusion, he finds the proposed rule to be insensitive in tone and content and completely slanted against the overpaid individual. He notes that the Social Security Administration takes a far more sensible approach to handling overpayments than is presented in the proposal. He is of the opinion that his colleagues view the Board more as a collection agency than one whose primary mission is the *payment* of benefits,and would like to see as much attention paid to preventing overpayments as there is to collecting them.

The agency has determined that this is not a significant regulatory action for purposes of Executive Order 12866; therefore, no regulatory impact analysis is required. There are no information collections associated with this rule.

List of Subjects in 20 CFR Part 255

Railroad employees, Railroad retirement.

1. For the reasons set out in the preamble, part 255 of title 20, chapter II of the Code of Federal Regulations is proposed to be revised to read as follows:

PART 255—RECOVERY OF OVERPAYMENTS

Sec.

255.1 Introduction.
255.2 Overpayments.
255.3 When overpayments are to be recovered.
255.4 Persons from whom overpayments may be recovered.
255.5 Recovery by cash payment.
255.6 Recovery by setoff.
255.7 Recovery by deduction in computation of death benefit.
255.8 Recovery by adjustment in connection with subsequent payments.
255.9 Individual enrolled under supplementary medical insurance plan.
255.10 Waiver of recovery.
255.11 Fault.
255.12 When recovery is contrary to the purpose of the Railroad Retirement Act.
255.13 When recovery is against equity or good conscience.
255.14 Waiver not available when recovery can be made from accrual of social security benefits.
255.15 Waiver not available to an estate.
255.16 Waiver not available for small overpayments.
255.17 Administrative relief from recovery.
255.18 Recovery of overpayments from a representative payee.
255.19 Compromise of overpayments.
255.20 Suspension or termination of the collection of overpayments.

Authority: 45 U.S.C. 231f(b)(5), 231i.

§ 255.1 Introduction.

Section 10 of the Railroad Retirement Act provides for the recovery of an overpayment of benefits to an individual. This part explains when an overpayment must be recovered, from whom an overpayment may be recovered, and when recovery of the overpayment may be waived for administrative relief from recovery granted, and circumstances under which the overpayment may be compromised, or circumstances under which recovery of the overpayment may be suspended or terminated.

§ 255.2 Overpayments.

An overpayment, within the meaning of this part, is made in any case in which an individual receives a payment under the Railroad Retirement Act, all or part of which payment he or she is not entitled to receive.

§ 255.3 When overpayments are to be recovered.

Overpayments shall be recovered in all cases except those in which recovery is waived under § 255.10 or administrative relief from recovery is granted under § 255.17, or where the overpayment is compromised or recovery is terminated or suspended under §§ 255.19 or 255.20.

§ 255.4 Persons from whom overpayments may be recovered.

(a) *Overpaid individual.* The Board may recover an overpayment from the individual to whom the overpayment has been made by any method permitted by this part, or by the Federal Claims Collection Standards (4 CFR Chapter 2) (Example 1). If the overpaid individual dies before recovery is completed, then recovery may be effected by recovery from the estate or the heirs of such individual.

(b) *Other than overpaid individual.* The Board may recover an overpayment from a person other than the overpaid individual if such person is receiving benefits under a statute administered by the Board based upon the same record of compensation as the overpaid individual. In such a case, the Board will ordinarily recover the overpayment by setoff against such benefits as are provided for in § 255.6 (Example 2). However, the Board may ask for a cash refund of the overpayment.

(c) *Individual not in the same household.* Recovery under paragraph (b) of this section may be made from an individual who was not living in the same household, as defined in part 216 of this chapter, as the overpaid individual at the time of the overpayment, if the individual from whom recovery is to be made either was aware that benefits were paid incorrectly or benefited from the overpayment. (Example 3).

(d) *Examples.* This section may be illustrated by the following examples:

Example (1). An employee receiving a disability annuity returns to work without notifying the Board. The Board discovers that the employee is working and determines that the employee has recovered from his disability and has been overpaid. The Board requests that the employee repay the overpayment by cash refund either in one lump sum or in installment payments. If the employee refuses, the Board may refer the debt to a collection agency or the Department of Justice for civil suit or may collect the debt in any other manner permitted by law.

Example (2). The employee in Example 1 agrees to refund the overpayment by cash installment payments. However, the employee dies before repaying the total amount of the overpayment. At his death the employee's widow, who was living with the employee at the time the overpayment was incurred, becomes entitled to a widow's annuity. The Board may recover the remainder of the overpayment from any benefits due the widow.

Example (3). C, a child of a deceased employee by his first marriage, is receiving a disability annuity on the employee's record of compensation. W, the employee's second wife, is receiving a widow's annuity on the employee's record of compensation. C lives with his mother, the employee's first wife. C marries without notifying the Board. Marriage terminates a child's annuity. W is not aware of C's marriage. Upon discovery of C's marriage, the Board demands that C refund the overpaid annuities; C refuses. Even though W is receiving an annuity based upon the same record of compensation as that of C, the Board will not recover the overpayment from W because she is not in the same household as C, was not aware of the incorrect benefits paid, and did not benefit from them.

§ 255.5 Recovery by cash payment.

The Board shall have the right to require that an overpayment to an individual be immediately and fully repaid in cash by that individual. However, if the Board determines that the individual is financially unable to pay the amount of the indebtedness in a lump sum, payment may be accepted in regular installments in accordance with the Federal Claims Collection Standards, found in 4 CFR chapter 2. These standards provide that whenever possible installment payments should be sufficient in amounts and frequency to liquidate the debt in not more than 3 years.

§ 255.6 Recovery by setoff.

An overpayment may be recovered by setoff from any subsequent payment determined to be payable under any statute administered by the Board to the individual who received the overpayment. An overpayment may be recovered from someone other than the overpaid individual by setoff from a subsequent payment determined to be payable to that other individual on the basis of the same record of compensation as that of the overpaid individual.

§ 255.7 Recovery by deduction in computation of death benefit.

In computing the residual lump sum provided for in part 234, subpart D, of this chapter, the Board shall include in the benefits to be deducted from the applicable percentages of the aggregate compensation provided for in that part all overpayments, whether waived under § 255.10 or otherwise not recovered, that were paid to the employee or to his or her spouse or to his or her survivors with respect to the employee's employment.

§ 255.8 Recovery by adjustment in connection with subsequent payments.

Recovery of an overpayment may be made by permanently reducing the amount of any annuity payable to the individual or individuals from whom recovery is sought. This method of recovery is called an actuarial adjustment of the annuity. The Board cannot require any individual to take an

actuarial adjustment in order to recover an overpayment not is an actuarial adjustment available as a matter of right. An actuarial adjustment does not become effective until the overpaid individual negotiates the first annuity check which reflects the annuity rate after actuarial adjustment

Example. An annuitant agrees to recovery of a $5,000 overpayment by actuarial adjustment. However, the annuitant dies before negotiating the first annuity check reflecting the actuarially-reduced rate. The $5,000 is not considered recovered. If the annuitant had negotiated the check before he died, the $5000 would be considered fully recovered.

§ 255.9 Individual enrolled under supplementary medical insurance plan.

Where recovery of the overpayment is by setoff as provided for in § 255.6, and where recovery of the overpayment by such means will be accomplished within a period of 5 months, and the individual from whom recovery is sought is an enrollee under part B of title XVIII of the Social Security Act (Supplementary Medical Insurance Benefits for the Aged and Disabled), an amount of such individual's monthly benefit which is equal to his or her obligation for supplementary medical insurance premiums will be applied toward payment of such premiums, and the balance of the monthly benefit will be applied toward recovery of the overpayment.

§ 255.10 Waiver of recovery.

There shall be no recovery from any person in any case where more than the correct amount of annuities or other benefits has been paid to an individual or where payment has been made to an individual not entitled thereto if in the judgment of the Board:

(a) The overpaid individual is without fault; and

(b) Recovery would be contrary to the purpose of the Railroad Retirement Act or would be against equity or good conscience.

§ 255.11 Fault.

(a) Before recovery of an overpayment may be waived, it must be determined that the overpaid individual was without fault in causing the overpayment. If recovery is sought from other than the overpaid individual but the overpaid individual was not without fault, then waiver is not available. However, see § 255.17 for provisions as to when administrative relief from recovery may be granted in such circumstances.

(b) Fault means a defect of judgment or conduct arising from inattention or bad faith. Judgment or conduct is defective when it deviates from a standard of reasonable care taken to comply with the entitlement provisions of this chapter. Conduct includes both action and inaction. Unlike fraud, fault does not require a deliberate intent to deceive.

(c) Whether an individual is at fault in causing an overpayment generally depends on all circumstances surrounding the overpayment. Among the factors the Board will consider are: the ability of the overpaid individual to understand the reporting requirements of the Railroad Retirement Act or to realize that he or she is being overpaid (*e.g.*, age, education, comprehension, physical and mental condition); the particular cause of non-entitlement to benefits; and the number of instances in which the individual may have made erroneous statements.

(d)(1) Circumstances in which the Board will find an individual at fault include but are not limited to:

(i) Failure to furnish to the Railroad Retirement Board information which the individual knew or should have known to be material;

(ii) An incorrect statement made by the Individual which he or she knew or should have known was incorrect (including furnishing an opinion or conclusion when asked for facts); and

(iii) Failure to return a payment which the individual knew or should have known was incorrect.

(2) Where any of the circumstances listed in paragraph (d)(1) of this section are found to have occurred, the individual shall be presumed to be not without fault. This presumption may be rebutted, but the burden of presenting evidence to rebut the presumption is on the individual.

(3) For purposes of paragraph (d)(1)(i) of this section, furnishing information to the Social Security Administration or any other agency shall not be considered to constitute furnishing information to the Railroad Retirement Board.

(4) For purposes of this section, an error on the part of the agency shall not extinguish fault on the part of the individual.

(e) Circumstances in which the Board will find an individual not at fault include but are not limited to:

(1) the overpayment is the result of Board error of which the overpaid individual was not aware and could not reasonably have been expected to be aware (Example 1).

(2) The overpayment is the result of an adjustment tot the overpaid individual's annuity because of entitlement of another individual to an annuity on the same record of compensation as that of the overpaid individual (Example 2).

(f) The application of this section may be illustrated by the following examples:

Example (1). The Board makes a mathematical error in the computation of an employee's annuity, thus giving the employee a higher rate than he or she is entitled to but which is sufficiently close to the estimated rate given the employee at the time he or she applied for the annuity that the employee believed, in good faith, that the amount was correct. The employee is not at fault in causing the overpayment in this case. The overpayment may be waived if the requirements of § 255.12 or § 255.13 are met.

Example (2). The widow and four minor children of a railroad employee are receiving benefits from the Board under the family maximum. Another minor child not living in the same household as the above individuals is also determined to be the child of the deceased employee. The widow was not aware of the existence of this child. An award of benefits to this child causes a reduction in benefits to the other individuals under the family maximum benefit provision of the Social Security Act. Because of normal administrative delay this reduction does not take place for a period of 2 months after its effective date. The widow and her children are without fault with respect to this overpayment. The overpayment may be waived if the requirements of § 255.12 or § 255.13 are met.

§ 255.12 When recovery is contrary to the purpose of the Railroad Retirement Act.

(a) The purpose of the Railroad Retirement Act is to pay retirement and survivor annuities and other benefits to eligible beneficiaries. It is contrary to the purpose of the Act for an overpayment to be recovered from income and resources which the individual requires to meet ordinary and necessary living expenses. If either income or resources, or a combination thereof, are sufficient to meet such expenses, recovery of an overpayment is not contrary to the purpose of the Act.

(b) For purposes of this section, income includes any funds which may reasonably be considered available for the individual's use, regardless of source. Income to the individual's spouse or dependents is available to the individual if the spouse or dependent lived with the individual at the time wavier is considered. Types of income include but are not limited to:

(1) Government benefits, such as Black Lung, Social Security, Workers' Compensation, and Unemployment Compensation benefits;

(2) Wages and self-employment income;

(3) Regular incoming payments, such as rent or pensions; and

(4) Investment income.

(c) For purposes of this section, resources may include:

(1) Liquid assets, such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds and the like;

(2) Non-liquid assets at their fair market value; and

(3) Accumulated, unpaid Federal benefits; and

(d) For purposes of paragraphs (c) (1) and (2) of this section, assets disposed of on and after the date of notification of the overpayment, other than cash expended to meet ordinary and necessary living expenses, shall be included.

(e) Whether an individual has sufficient income and resources to meet ordinary and necessary living expenses depends not only on the amount of his or her income and resources, but also on whether the expenses are ordinary and necessary. While the level of expenses which is ordinary and necessary may vary among individuals, it must be held at a level reasonable for an individual who is living on a fixed income. The Board will consider the discretionary nature of an expense in determining whether it is reasonable. Ordinary and necessary living expenses include:

(1) Fixed living expenses such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (*e.g.*, life, accident, and health insurance), taxes, installment payments, etc.;

(2) Medical, hospital, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Miscellaneous expenses (*e.g.*, newspapers, haircuts).

(f) Where recovery of the full amount of an overpayment would be made from income and resources required to meet ordinary and necessary living expenses, but recovery of a lesser amount would leave income or resources sufficient to meet such expenses, recovery of the lesser amount is not contrary to the purpose of the Act.

(g) This section may be illustrated by the following examples:

Example (1). A remarried widow, W, is overpaid $6000 due to receipt of benefits on the wage records of both her late husbands. It has been determined that she is without fault. Her financial disclosure statement reveals monthly income greater than monthly expenses, and asset of $12,000, $10,000 of which is in cash. She claims to be saving these funds for future medical expenses, because she has a progressive disease. It is not contrary to the purposes of the Act to recover the overpayment. The desire, on the part of the beneficiary, to retain her assets to satisfy some potential future obligation, does not change the determination.

Example (2). A disability annuitant, D, is overpaid $33,000 because of simultaneous entitlement to workers' compensation payments. He is determined to be without fault. He claims he has assumed financial responsibility for his adult child and her children. A claimed expense for which the annuitant has no legal obligation to pay does not make recovery contrary to the purposes of the Act.

§ 255.13 When recovery is against equity or good conscience.

(a) Recovery is considered to be against equity or good conscience if a person, in reliance on payments made to him or her or on notice that payment would be made, relinquished a significant and valuable right (Example 1) or changed his or her position to his or her substantial detriment (Example 2).

(b) An individual's ability to repay an overpayment is not material to a finding that recovery would be against equity or good conscience but is relevant with respect to the credibility of a claim of detrimental reliance under paragraph (a) of this section.

(c) This section may be illustrated by the following examples:

Example (1). After being informed by the Board that he had been credited with sufficient years of railroad service to retire at age 60, and employee quit his railroad job and applied for benefits under the Railroad Retirement Act. He receives benefits for six months when it is discovered that he had insufficient railroad service to retire at age 60 and was not entitled to the benefits he received. His annuity was terminated. Because the employee gave up his seniority rights when he quit his railroad job, he cannot get his job back. It is determined that the employee was not at fault in causing the overpayments. In this situation recovery of the overpayments would be against equity or good conscience because the overpaid individual gave up a valuable right.

Example (2). A widow, having been awarded annuities for herself and her daughter, entered her daughter in a private school. The widow did not have substantial assets and her income, apart from the annuities she received in the amounts payable, would not have been sufficient for her to have undertaken the obligation to send her daughter to private school. In order to pay for the schooling she took out a loan and used the monthly annuities to pay interest and principal on the loan. After the widow and her daughter had received payments for almost a year, the deceased employee was found not to have been insured under the Railroad Retirement Act. Therefore, all payments to the widow and child were erroneous and the annuities were terminated. It is determined that the widow was not at fault in causing the overpayment. Having incurred a financial obligation (the school loan) toward which the benefits had been applied, the widow was in a worse position financially than if she and her daughter had never been entitled to benefits. In this situation, the recovery of the overpayment would be against equity or good conscience.

§ 255.14 Waiver not available when recovery can be made from accrual of social security benefits.

Where the overpayment is the result of a reduction of benefits payable under the Railroad Retirement Act due to the overpaid individual's entitlement to social security benefits and recovery of such overpayment may be made by offset against an accrual of social security benefits, it shall not be considered to be against equity or good conscience or contrary to the purpose of the Railroad Retirement Act to recover the overpayment by offset against the accrual. Consequently, in such a case recovery of an overpayment is not subject to waiver consideration.

§ 255.15 Waiver not available to an estate.

There shall be no waiver when recovery is sought from the estate of an overpaid individual.

§ 255.16 Waiver not available for small overpayments.

Where the amount of the overpayment is less than $500, it shall not be considered contrary to the purpose of the Railroad Retirement Act or against equity or good conscience to recover the overpayment. Consequently, recovery may not be waived.

§ 255.17 Administrative relief from recovery.

(a) Where the Board seeks to recover an overpayment from someone other than the overpaid individual, as provided for in § 255.4 of this part, and where waiver of recovery, as provided for in § 255.10 of this part, is not available because the overpaid individual was at fault as defined in § 255.11, the Board may forego recovery of the overpayment where the individual from whom recovery is sought was not at fault in causing the overpayment and where recovery is contrary to the purpose of the Railroad Retirement Act as defined in § 255.12.

(b) Application of administrative relief from recovery with respect to a given person from whom recovery may be made shall have no effect on the authority of the Board to recover the overpayment from anyone else from whom recovery may be sought.

(c) This section may be illustrated by the following examples:

Example (1): An employee, through his own fault, causes an overpayment in his annuity. The employee dies before the overpayment can be recovered from him and he leaves no estate. A widow's annuity is payable on the employee's compensation record. The widow was not at fault in

causing the overpayment. The Board may recover the remainder of the overpayment by setoff against the widow's annuity. However, it may forego recovery under this section if such recovery would be contrary to the purpose of the Railroad Retirement Act as defined in § 255.12. Since this is not a waiver of the overpayment, the Board is free to recover the overpayment from the widow at a later date, for example, if an accrual of benefits should become payable, or if it determines that such recovery would not be against the purpose of the Railroad Retirement Act.

Example (2): A representative payee for a retarded child, through her own fault, causes an overpayment in the child's annuity. The overpaid amounts were used for the benefit of the child. The representative payee dies before the overpayment can be recovered from her and she leaves no estate. The Board may not waive the remainder of the overpayment with respect to the child since for purposes of waiver the representative payee is considered the overpaid individual (see § 255.18) and the overpaid individual was at fault. However, if the child was not at fault in causing the overpayment and recovery would be contrary to the purpose of the Railroad Retirement Act as defined in § 255.12, then the Board may forego recovery of the overpayment from the child's annuity under this section.

§ 255.18 Recovery of overpayments from a representative payee.

(a) *Joint liability.* In general, if an overpayment is made to an individual receiving benefits as a representative payee (see part 266 of this chapter) the Board may recovery the overpayment from either the representative payee or the beneficiary, or both. If the beneficiary is currently receiving benefits, either in his or her own right or through a representative payee, the Board will generally propose to recover the overpayment by setoff against those benefits as provided for in § 255.6 of this part. If the beneficiary is not currently receiving benefits but the representative payee is receiving benefits, then the Board will generally propose to recover the overpayment by setoff against those benefits.

(b) *Waiver of overpayments.* For purposes of § 255.10 (Waiver of recovery), if it is determined that the representative payee was at fault in causing the overpayment there may be no waiver of the overpayment either as to the representative payee or the beneficiary. However, if the beneficiary was not at fault in causing the overpayment he or she may be eligible for administrative relief from recovery under § 255.17.

(c) This section may be illustrated by the following examples:

Example (1). M is receiving a child's annuity as a representative payee for her disabled son, S. With M's knowledge S marries. Although both M and S know that marriage terminates the child's annuity, neither of them informs the Board of this event. Both M and S are liable for any overpayment caused. Wavier is not available since M would be considered at fault in causing the overpayment. Administrative relief from recovery is not available to S since he would also be considered at fault.

Example (2). R is a representative payee for B, who resides in a skilled-care facility. R is found to be at fault in causing an overpayment of benefits to B. The Board may recover the overpayment from either R or B. Waiver is not available because R was at fault in causing the overpayment. However, if B was not at fault in causing the overpayment he or she may be entitled to administrative relief from recovery under § 255.17.

§ 255.19 Compromise of overpayments.

(a) This section sets forth the principal standards which the Board applies in exercising its authority under 31 U.S.C. 3711 to compromise an overpayment. In addition, the Board may compromise an overpayment under the Federal Claims Collection Standards set forth in 4 CFR part 103.

(b) An overpayment may be compromised only if it is in the best interest of the agency. Circumstances and factors to be considered are:

(1) The overpayment cannot be collected because of the overpaid individual's inability to pay the full amount of the overpayment within a reasonable time;

(2) The overpaid individual refuses to pay the overpayment in full and it appears that enforced collection procedures will take an inordinate amount of time or that the cost of collecting does not justify the enforced collection of the full amount; or

(3) There is doubt that the Board could prove its case in court for the full amount claimed because of a bona fide dispute as to the facts or because of the legal issues involved.

§ 255.20 Suspension or termination of the collection of overpayments.

This section sets forth the principal standards which the Board applies in approving the suspension or termination of the collection of an overpayment. In addition the Board may suspend or terminate collection under the Federal Claims Collection Standards set forth in 4 CFR part 104.

(a) Collection action on a Board claim may be suspended temporarily when the debtor cannot be located and there is reason to believe future collection action may be productive or collection may be effected by offset in the near future.

(b) Collection action may be terminated when:

(1) The debtor is unable to make any substantial payment;

(2) The debtor cannot be located and offset is too remote to justify retention of the claim;

(3) The cost of collection action will exceed the amount recoverable; or

(4) The claim is legally without merit or cannot be substantiated by the evidence.

Dated: December 20, 1995.

By Authority of the Board.
For the Board.

Beatrice Ezerski,

Secretary of the Board.

[FR Doc. 95–31311 Filed 12–27–95; 8:45 am]

BILLING CODE 7905–01–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

Federal Acquisition Regulation; Contracting by Negotiations; FAR Part 15 Rewrite

AGENCIES: Department of Defense, General Services Administration, and National Aeronautics and Space Administration.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Comments are solicited from both government and industry personnel on how FAR Part 15 can be rewritten to better support contracting by negotiation. The Director of Defense Procurement, in concert with the Federal Acquisition Regulatory Council, is sponsoring an initiative to rewrite Federal Acquisition Regulation (FAR) Part 15, Contracting by Negotiation. The goal is to make Part 15 easier to understand and to eliminate policies, procedures, or requirements that impose unnecessary burdens on contractors or contracting officers. Regulatory requirements that are not required by statute, required to ensure adequately standardized government business practices, or required to protect the public interest will be considered for elimination. Innovative means of simplifying the procurement process and enhancing its efficiency will be considered for incorporation into the regulation.

Comments may be submitted in two formats: (1) By letter to the address below, or (2) by electronic response on the Acquisition Reform Network's FAR Part 15 Rewrite Forum located on the

Internet at http://www-far.npr.gov. All comments received will be posted in the Acquisition Reform Network's FAR Part 15 Rewrite Forum.

DATES: Comments are due on or before January 16, 1996.

ADDRESSES: Send comments to the Part 15 Rewrite Committee Chair, Ms. Melissa Rider, DAR Council, Attn: IMD 3D139, PDUSD(A&T)DP/DAR, 3062 Defense Pentagon, Washington, D.C. 20301–3062.

FOR FURTHER INFORMATION CONTACT: Ms. Melissa Rider, telephone (703) 602–0131. FAX (703) 602–0350.

SUPPLEMENTARY INFORMATION: An interagency team has been established to rewrite FAR Part 15. The team members are drawn from the Department of Defense, civilian agencies, and the Office of Federal Procurement Policy. The team chair is Ms. Melissa Rider, with the Department of Defense. The team vice chair is Ms. Frances Sullivan, with the National Aeronautics and Space Agency (NASA).

The team is soliciting comments on recommended changes to Part 15. The following topics have already been raised by the Administrator, Office of Federal Procurement Policy, as potential areas of interest. Comments are requested on these topics, and any other ideas interested parties may offer.

1. *Use of Shall:* In what way do you think Part 15 is overly prescriptive or overly permissive? We would appreciate your comments on this issue.

2(a). *Government-Industry Communications; Draft Solicitations:* The team is considering expanding the use of draft RFPs. We would appreciate your input regarding the positive or negative impacts of using draft RFPs and any other comments you may have on the subject.

2(b). *Government-Industry Communications; Discussions:* Within the confines of applicable law, the team is considering expanding the nature, scope, and timing of discussions held during the course of a procurement. We would appreciate your comments regarding the pros and cons of changing what constitutes discussions.

2(c). *Government-Industry Communications; Oral Presentations:* FAR 15.402(f) provides for oral solicitations in certain circumstances, but makes no provisions for oral circumstances, but makes no provisions for oral presentations. The team is considering adding guidance on the use of oral presentations. The team would appreciate your comments regarding the use of oral presentations, including experiences (good and bad) your organization has had with their use.

3. *Commercial Items:* FAR 15.4, Solicitations and Receipt of Proposals and Quotations, and FAR 15.6, Source Selection, do not apply to acquisitions made using simplified acquisition procedures. We would appreciate your comments regarding whether commerical items should also be exempted from any of Part 15?

4. *Source Selection:* The team would appreciate your comments on how the Part 15 coverage of greatest value contracting can be enhanced.

5(a). *Competitive Range; No Cost Proposal:* Current coverage at FAR 15.609(a) requires the contracting officer to determine the competitive range ''on the basis of cost or price and other factors.'' It has been suggested that it would be better for both the Government and the offeror to determine the competitive range without requiring a cost proposal. The Contracting Officer would still be able to get certain cost information (e.g., labor rates, past performance on cost control, etc.) to help determine which offerors are not in the running based on cost, but would not get a complete cost proposal prior to determining the competitive range. The team solicits your comments on benefits or disadvantages of deleting the requirement to consider cost in making the initial competitive range determination.

5(b). *Competitive Range; When there is doubt:* The team directs your attention to FAR Case number 95–008, which was published as a proposed rule in the Federal Register on November 6, 1995 (60 FR 56035). You may provide comments on the proposed rule, which deletes the statement that a proposal should be included in the competitive range for the purpose of conducting discussions, if there is doubt as to whether the proposal is in the competitive range, through the GSA case manager noted in the proposed rule. The public comment period for the proposed rule ends on January 5, 1996.

5(c). *Competitive Range; Reasonable Chance:* The team solicits your comments on the benefits or disadvantages of changing the standard for inclusion in the competitive range.

5(d). *Competitive Range; Two-phase Acquisitions:* In using a two-phase process, the agency would solicit information in the first phase regarding an offeror's capability to perform the contract. The offeror would not prepare a detailed cost or technical proposal in the first phase. Based on an offeror's capabilities, it would be invited to the second phase wherein the agency would ask for detailed technical proposals and cost information. Several agencies are already considering similar methods. If you have had experience using similar methods or would like to share your opinions on the topic, we would appreciate your comments.

6(a). *Contract Pricing; Subcontracts:* The current coverage at FAR 15.806–1(d) states that the prices of negotiated subcontractors should ''in no instance * * * be accepted as the sole evidence that [such] prices are fair and reasonable.'' It has been suggested that this language be removed. We would appreciate any comments you want to share on the subject.

6(b). *Contract Pricing: TINA:* If there are additional revisions you believe would further the efforts of the TINA drafting team, please let us know. The team would also like to solicit your opinions regarding the field pricing support coverage at FAR 15.805–5.

7. *Agency supplementation:* The public's views are sought on the extent to which agency supplementation of FAR Part 15, other than internal agency procedures, should be limited.

8. *Evolving (changes to) solicitations on commercial item acquisitions:* Under traditional procurement thinking, contracting officials are expected to have completed intensive needs and product analyses before they initiate the formal competitive procurement process, which requires substantial acquisition leadtimes. The public's views are sought regarding whether and how the FAR provisions for making changes to evaluation factors and contract requirements in the acquisition of commercial items should be modified to ensure that agencies may more efficiently and effectively match their needs with commercially available technologies and products.

9. *Open negotiation techniques:* In the commercial marketplace, competitions may involve techniques in which the buyer releases or otherwise makes available the bid prices of all vendors without revealing competitive secrets (e.g., cost breakdowns, vendor name, etc.). These sorts of auctioning techniques are currently prohibited in the FAR. The public's view are sought on whether such prohibitions can and should be narrowed or eliminated.

10. *Use of source selection standards:* Currently, agencies develop evaluation standards to establish a uniform baseline to determine how well an offeror's proposal satisfies the source selection evaluation criteria. Evaluation criteria and standards can be difficult to determine, particularly with respect to commercial items and in cases where the Government's requirements are stated in terms of performance objectives rather than detailed

specifications. In such cases, the offeror's lack of knowledge of the standards may hinder its ability to know the basis upon which the offer will be evaluated.

The public's views are sought regarding what types of acquisitions, if any, might warrant the release of evaluation standards as part of the solicitation. The public's views are also sought on whether there are circumstances in which proposals should be evaluated against one another as opposed to a set of standards.

11. *Unsolicited proposals:* The public's views are sought on whether the FAR provisions addressing the handling of unsolicited proposals discourage industry from investing independent research and development funds in unique and innovative ideas and, therefore, should be modified.

Linda W. Neilson,

Deputy Director, Defense Acquisition Regulations Council.

[FR Doc. 95–31335 Filed 12–27–95; 8:45 am]

BILLING CODE 5000–04–M

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48 CFR Parts 225 and 252

Defense Federal Acquisition Regulation Supplement; Foreign Product Restrictions

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comment.

SUMMARY: The Director of Defense Procurement is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to rescind most of the non-statutory foreign product restrictions in subpart 225.71.

DATES: Comment Date: Comments on the proposed rule should be submitted in writing to the address below on or before February 26, 1996, to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams, PDUSD (A&T) DP (DAR), IMD 3D139, 3062 Defense Pentagon, Washington, D.C. 20301–3062. Telefax number (703) 602–0350. Please cite DFARS Case 95–D033 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602–0131.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule amends language in the Defense Federal Acquisition Regulation Supplement (DFARS) to rescind most of the non-statutory foreign product restrictions in Subpart 225.71, except for the restrictions on several forging items, which are still under review.

B. Regulatory Flexibility Act

The proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the proposed rule will affect the preference for domestic manufacturers of miniature and instrument ball bearings, precision components for certain mechanical time devices, high purity silicon, high carbon ferrochrome, and certain foreign items. It is estimated that approximately 135 contractors, some of which are small businesses, will now be subject to foreign competition. An Initial Regulatory Flexibility Analysis has been prepared and may be obtained from the address stated herein. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts will be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DFARS Case 95–D033 in correspondence.

C. Paperwork Reduction Act

Because many items are no longer restricted, the proposed rule will result in a reduction of the paperwork burden associated with DFARS clause 252.225–7025, Foreign Source Restrictions (OMB Control No. 0704–0229), which requires that contractors maintain records showing compliance with the restrictions until three years after final payment and make records available upon request of the Contracting Officer. The rule does not impose any additional information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR Parts 225 and 252 are proposed to be amended as follows:

PART 225—FOREIGN ACQUISITION

1. The authority citation for 48 CFR Parts 225 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

2. Section 225.7102 is revised to read as follows:

225.7102 Forgings policy.

DoD requirements for the following forging items, whether as end items or components, shall be acquired from U.S. or Canadian sources to the maximum extent practicable—

Items	Categories
Ship propulsion shafts	Excludes service and landing craft shafts.
Periscope tubes	All.
Ring forgings for bull gears.	All greater than 120 inches in diameter.

3. Section 225.7103 is revised to read as follows:

225.7103 Forgings exceptions.

The policy in 225.7102 does not apply to acquisitions—

(a) When using simplified acquisition procedures, unless the restricted item is the end item being purchased:

(b) Overseas for overseas use; or

(c) When the quantity acquired exceeds the amount needed to maintain the U.S. defense mobilization base (provided such quantity is an economical purchase quantity). The restriction to domestic sources does not apply to the quantity above that required to maintain the base, in which case, qualifying country sources may compete.

4. Section 225.7104 is revised to read as follows:

225.7104 Forgings waivers.

Upon request from a prime contractor, the contracting officer may waive the requirement for domestic manufacture of the items covered by the policy in 225.7102.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 252.225–7105, is revised to read as follows:

252.225–7025 Foreign Source Restrictions.

As prescribed in 225.7105, use the following clause:

Foreign Source Restrictions (XXX XXXX)

(a) *Definitions.* As used in this clause—

(1) ''Domestic manufacture'' means manufactured in the United States or Canada if the Canadian firm—

(i) Normally produces similar items or is currently producing the item in support of DoD contracts (as prime or subcontractor); and

(ii) Agrees to become (upon receiving a contract/order) a planned producer under

DoD's Industrial Preparedness Program, if it is not already a planned producer for the item.

(2) ''Forging items'' means—

Items	Categories
Ship propulsion shafts	Excludes service and landing craft shafts.
Periscope tubes	All.
Ring forgings for bull gears.	All greater than 120 inches in diameter.

(b) The Contractor agrees that end items and their components delivered under this contract shall contain forging items that are of domestic manufacture only.

(c) The restrictions in paragraph (b) of this clause may be waived upon request from the Contractor in accordance with section 225.7104 of the Defense FAR Supplement.

(d) The Contractor agrees to retain records showing compliance with this restriction until three years after final payment and to make records available upon request of the Contracting Officer.

(e) The Contractor agrees to insert this clause, including this paragraph (e), in subcontracts and purchase orders issued in performance of this contract, when products purchased contain restricted forging items. (End of clause)

[FR Doc. 95–31336 Filed 12–27–95; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 651

[I.D. 121995A]

New England Fishery Management Council; Meeting

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

ACTION: Public meeting.

SUMMARY: The New England Fishery Management Council (Council) will hold a 2-day public meeting to consider actions affecting New England fisheries in the exclusive economic zone.

DATES: The meeting will begin on Wednesday, January 10, 1996, at 10 a.m. and on Thursday, January 11, 1995, at 8:30 a.m.

ADDRESSES: The meeting will be held at the Tara's Ferncroft Conference Resort and Hotel, 50 Ferncroft Road, Danvers, MA; telephone: (508) 277–2500. Requests for special accommodations should be addressed to the New England Fishery Management Council, 5 Broadway, Saugus, MA 01906–1097; telephone: (617) 231–0422.

FOR FURTHER INFORMATION CONTACT: Douglas G. Marshall, Executive Director, (617) 231–0422.

SUPPLEMENTARY INFORMATION: The January 10–11 meeting is being convened specifically to address the remaining groundfish issues that relate to finalizing draft Amendment 7 to the Northeast Multispecies (Groundfish) Fishery Management Plan. The intent of this amendment is to implement measures to rebuild severely overfished stocks, with particular emphasis on cod, haddock, and yellowtail flounder. If time allows, the Council may consider other relevant business.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Douglas G. Marshall (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: December 21, 1995.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 95–31361 Filed 12–27–95; 8:45 am]

BILLING CODE 3510–22–F

Notices

Federal Register
Vol. 60, No. 249
Thursday, December 28, 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 AGRICULTURE

Food, Nutrition, and Consumer Services

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Disease Prevention and Health Promotion

AGENCY FOR INTERNATIONAL DEVELOPMENT

Bureau for Policy and Program Coordination

U.S. Plan of Action for Nutrition; Availability for Comment

AGENCY: Office of the Under Secretary for Food, Nutrition, and Consumer Services, USDA; Office of Disease Prevention and Health Promotion, HHS; Bureau for Policy and Program Coordination, AID.

ACTION: Notice.

SUMMARY: The Department of Agriculture, the Department of Health and Human Service, and the Agency for International Development announce the availability of the draft U.S. Plan of Action for Nutrition, in response to the 1992 International Conference on Nutrition (based on the principles and strategies in the World Declaration and Plan of Action for Nutrition) and invite written comments on the draft plan.

DATES: To be assured of consideration, written comments on the draft U.S. Plan of Action for Nutrition should be postmarked no later than January 29, 1996.

ADDRESSES:

(1) Written comments on the draft U.S. Plan of Action for Nutrition should be sent to Jay Hirschman, Center for Nutrition Policy and Promotion, USDA, 1120 20th Street, N.W., North Lobby, Suite 200, Washington, D.C. 20036, or faxed to 202/208–2321.

(2) Single copies of the draft plan may be obtained by writing Jay Hirschman at the Center for Nutrition Policy and Promotion, USDA, 1120 20th Street, N.W., North Lobby, Suite 200, Washington, D.C. 20036, calling 202/418–2312, or faxing 202/208–2321.

FOR FURTHER INFORMATION CONTACT: For additional information regarding the International Conference on Nutrition and U.S. Plan of Action for Nutrition contact:

Jay Hirschman, Center for Nutrition Policy and Promotion (USDA), 1120 20th Street, N.W., North Lobby, Suite 200, Washington, D.C. 20036 or phone 202/418–2312;

Jill Randell, Food and Consumer Service (USDA), Room 206, 3101 Park Center Drive, Alexandria, VA 22302 or phone 703/305–1112;

Neil Gallagher, Office of International Cooperation and Development, Department of Agriculture, Room 3005 South Building, 14th and Independence Ave., S.W., Washington, D.C. 20250, 202/690–1817;

Linda Meyers, Office of Disease Prevention and Health Promotion, Department of Health and Human Services, 200 Independence Avenue, S.W., Room 738–G, Washington, D.C. 20201, 202/205–8660; or

Eunyong Chung, Office of Health and Nutrition, AID, SA 18, Suite 1200, Washington, D.C. 20523, 703/875–4074

SUPPLEMENTARY INFORMATION:

Background Information

The International Conference on Nutrition (ICN) was held in Rome, Italy, in December 1992. It was jointly sponsored by the Food and Agriculture Organization of the United Nations (FAO) and The World Health Organization (WHO). A World Declaration and Plan of Action for Nutrition were presented at the Conference. Their contents were discussed, revised, and unanimously approved by delegates from 159 countries and the European Economic Community. Nongovernmental organizations and private business groups also participated in the discussions. The nine subject areas identified in the approved Plan of Action were: (1) Incorporating nutritional objectives into development policies and programs; (2) Improving household food security; (3) Protecting consumers through improved food quality and safety; (4) Preventing and managing infectious disease; (5) Promoting breastfeeding; (6) Caring for the socio-economically deprived and nutritionally vulnerable; (7) Preventing and controlling specific micronutrient deficiencies; (8) Promoting appropriate diets and healthy lifestyles; and (9) Assessing, analyzing, and monitoring nutritional situations.

The U.S. Plan of Action for Nutrition

As a follow up activity, all governments were asked to prepare or improve national plans of action based on the principles and strategies in the World Declaration and Plan of Action for Nutrition. To this end, in August 1993, the USDA, HHS, and AID, organized a public meeting to solicit input for the U.S. Plan of Action for Nutrition. The meeting was organized around the nine subject areas in the ICN Plan of Action, and both domestic and international subcategories within the nine areas were addressed. Subsequent to the meeting, drafting of the U.S. Plan of Action ensued.

The draft U.S. Plan of Action for Nutrition incorporates information provided by the Departments and the public. It adapts the theme areas presented in the World Declaration and Plan of Action to the United States context and is organized into the following subjects: (1) Eating for Health; (2) Nutrition Security for All; (3) Safe Food and Water from Source to Table; (4) Promoting Breastfeeding; (5) Nutrition-Sensitive Food Production and Economic Policy; (6) Human Nutrition Research; (7) Nutrition Monitoring. In view of the United States' prominent, leadership role in nutrition programs worldwide, the U.S. Plan of Action includes an International Section. It outlines the priorities for U.S. Government support to developing countries in each of the World Plan of Action's nine theme areas.

Public and Agency comments will be considered in preparing the final U.S. Plan of Action for Nutrition for submission to FAO/WHO.

Dated: December 20, 1995.

Ellen Haas,

Under Secretary for Food, Nutrition, and Consumer Services Department of Agriculture.

Dated: December 7, 1995.

James A. Harrell,

Deputy Director for the Office of Disease Prevention and Health Promotion, Department of Health and Human Services.

Dated: December 14, 1995.

Nils Daulaire,

Deputy Assistant Administrator of the Bureau for Policy and Program Coordination, Agency for International Development.

[FR Doc. 95–31352 Filed 12–27–95; 8:45 am]

BILLING CODE 3410–30–U

DEPARTMENT OF AGRICULTURE

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

December 21, 1995.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, D.C. 20503 and to Department Clearance Officer, USDA, OIRM, Ag Box 7630, Washington, D.C. 20250–7630. Copies of the submission(s) may be obtained by calling (202) 720–6204 or (202) 720–6746.

Farm Services Agency

Title: Loan Deficiency Payments.

Summary: The making of loan deficiency payments (LDP) is authorized by the Agriculture Act of 1949, as amended. To be eligible for a LDP, a producer must meet the same eligibility requirements as if they were applying for a regular price support loan and must agree to forgo obtaining a loan or purchase agreement on the production on which a LDP is requested. Producers wishing to obtain a LDP must furnish information about the class and quantity, and the location of the commodity on which the payment is requested.

Need and Use of the Information: The purpose of the information is to determine eligibility to receive LDP, establish the quantity, quality, and location of the commodity, and to determine payment accounts in accordance with the regulations.

Description of Respondents: Individuals or households; Business or other for-profit; Farms.

Number of Respondents: 114,961.

Frequency of Responses: Annually.

Total Burden Hours: 40,337.

Larry Roberson,

Deputy Departmental Clearance Officer.

[FR Doc. 95–31406 Filed 12–27–95; 8:45 am]

BILLING CODE 3410–01–M

Agricultural Research Service

Notice of Intent to Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of Intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to United Agri Products of Greeley, Colorado, an exclusive license for U.S. Patent Application Serial No. 08/068,872 filed May 28, 1993, U.S. Patent Application Serial No. 08/199,409 filed February 22, 1994, and U.S. Patent Application Serial No. 08/295,583 filed August 25, 1994, all entitled ''Bacterial Control of *Fusarium* Dry Rot of Potatoes.'' Notice of Availability for U.S. Patent Application Serial No. 08/068,872 was published in the Federal Register on September 24, 1993. Serial No. 08/199,409 is a division of Serial No. 08/068,872, and Serial No. 08/295,583 is a continuation-in-part of Serial No. 08/199,409.

DATES: Comments must be received on or before February 26, 1996.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, Room 415, Building 005, BARC-West, Baltimore Boulevard, Beltsville, Maryland 20705–2350.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights to this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as United Agri Products has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within sixty days from the date of this published Notice, the Agricultural Research Service 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.

R.M. Parry, Jr.

Assistant Administrator.

[FR Doc. 95–31353 Filed 12–27–95; 8:45 am]

BILLING CODE 3410–03–M

Food and Consumer Service

Collection Requests Submitted for Public Comment: Correction and Reopening of Comment Period

In accordance with the Paperwork Reduction Act of 1995, the Food and Consumer Service is correcting language regarding submission of comments in three previously published notices which sought public comment in information collection requests. In addition, the comment period on these Federal Register notices is being reopened to allow further public comment based on the corrected language. The affected notices are published at:

1. FR Doc. 95–25232, published on October 12, 1995 at 60 FR 53160, column 1.
2. FR Doc. 95–25292, published on October 12, 1995 at 60 FR 53160, column 3.
3. FR Doc. 95–26096, published on October 23, 1995 at 60 FR 54332, column 1.

Corrections

1. The first paragraph of the Addresses section of notice number 1 listed above is corrected by removing the words ''regarding the accuracy of the burden estimate, ways to minimize the burden, including through the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information''.

2. A new paragraph is added between the first and second paragraphs of the Addresses section of notice number 1 listed above, and as the second paragraph of the Addresses section for notice numbers 2 and 3 listed above, to read as follows:

''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.''

3. In the Supplementary Information section of notice number 2 listed above, the last two sentences under the heading *Use* are corrected to read as follows:

''The State agencies must report the number and value of food stamp benefits issued through the mail, i.e., total mail issuance allotments for the month, total mail allotment replacements, total mail allotments returned that were replaced, and total mail allotments returned that were not replaced. This collection of information on the FCS–259 is used by FCS to assess mail issuance losses, determine the liabilities and bill the State agencies for their portion of the losses.''

4. In the Supplementary Information section of notice number 3 listed above:

a. The words ''On occasion'' under the heading *Frequency* are corrected to read ''Weekly and monthly'';

b. The figure ''63,419'' under the heading *Number of Respondents* is corrected to read ''61,840''.

c. The figure ''64,916'' under the heading *Total Annual Hours* is corrected to read ''63,299''.

Reopening of Comment Period

The comment period of the three previously-listed notices is being reopened for sixty days to allow additional comments based on the corrected language above. Comments on these notices must be received by February 26, 1996.

Commenters should refer to the aforementioned documents for the address to which comments on those documents should be sent. For further information on this correction document, please contact: Sheri Ackerman, Regulatory Officer, Food and Consumer Service, USDA, 3101 Park Center Drive, Room 308, Alexandria, VA 22032.

Dated: December 20, 1995.

William E. Ludwig,

Administrator, Food and Consumer Service.

[FR Doc. 95–31360 Filed 12–27–95; 8:45 am]

BILLING CODE 3410–30–U

Collection Requests Submitted for Public Comment: Correction and Extension of Comment Period

In accordance with the Paperwork Reduction Act of 1995, the Food and Consumer Service is correcting language regarding submission of comments in four previously published notices which sought public comment on information collection requests. In addition, the comment period on these Federal Register notices is being extended to allow further public comment based on the corrected language. The affected notices are published at:

1. FR Doc. 95–27499, published on November 7, 1995 at 60 FR 56138, column 1.

2. FR Doc. 95–28030, published on November 14, 1995 at 60 FR 57208, column 3.

3. FR Doc. 95–28048, published on November 14, 1995 at 60 FR 57208, column 1.

4. FR Doc. 95–28192, published on November 15, 1995 at 60 FR 57397, column 1.

Corrections

1. The first paragraph of the Addresses section of the notices listed above is corrected by removing the words ''regarding the accuracy of the burden estimate, ways to minimize the burden, including through the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information''.

2. A new paragraph is added between the first and second paragraphs of the Addresses section of the notices listed above to read as follows:

''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.''

Extension of Comment Period

The comment period for these four notices is being extended for thirty days to allow additional comments based on the corrected language above. Comments on these four notices must be received by January 29, 1996.

Commenters should refer to the aforementioned documents for the address to which comments on those documents should be sent. For further information on this correction document, please contact: Sheri Ackerman, Regulatory Officer, Food and Consumer Service, USDA, 3101 Park Center Drive, Room 308, Alexandria, VA 22032.

Dated: December 20, 1995.

William E. Ludwig,

Administrator, Food and Consumer Service.

[FR Doc. 95–31359 Filed 12–27–95; 8:45 am]

BILLING CODE 3410–30–U

Collection Requests Submitted for Public Comment: Correction

In accordance with the Paperwork Reduction Act of 1995, the Food and Consumer Service is correcting language regarding submission of comments in three previously published notices which are seeking public comment on information collection requests. The affected notices are published at:

1. FR Doc. 95–27573, published on November 7, 1995 at 60 FR 56137, column 1.

2. FR Doc. 95–28768, published on November 27, 1995 at 60 FR 58324, column 1.

3. FR Doc. 95–29750, published on December 6, 1995 at 60 FR 62382, column 1.

Corrections

1. The first paragraph of the Addresses section of the notices listed above is corrected by removing the words ''regarding the accuracy of the burden estimate, ways to minimize the burden, including through the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information''.

2. A new paragraph is added between the first and second paragraphs of the Addresses section of notices 1 and 2 listed above to read as follows:

''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 this 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.''

2. A sentence is added after ''Alexandria, VA 22032'' in the Addresses section of notice 3 listed above to read as follows:

''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.''

Commenters should refer to the aforementioned documents for the address to which comments on those documents should be sent. For further information on this correction document, please contact: Sheri Ackerman, Regulatory Officer, Food and Consumer Service, USDA, 3101 Park Center Drive, Room 308, Alexandria, VA 22032.

Dated: December 20, 1995.

William E. Ludwig,

Administrator, Food and Consumer Service.

[FR Doc. 95–31358 Filed 12–27–95; 8:45 am]

BILLING CODE 3410–30–U

ASSASSINATION RECORDS REVIEW BOARD

Notice of Sustained Postponements

AGENCY: Assassination Records Review Board.

SUMMARY: The President John F. Kennedy Assassination Records Collection Act of 1992, requires the Assassination Records Review Board to publish a monthly report that ''summarizes the postponements approved by the Review Board or initiated by the President * * *.'' This notice fulfills the reporting requirement for the period of August 8, 1995 through November 15, 1995.

FOR FURTHER INFORMATION CONTACT: T. Jeremy Gunn, General Counsel and Associate Director for Research and Analysis, Assassination Records Review Board, Second Floor, 600 E Street, NW Washington, D.C. 20530, (202) 724–0088, fax (202) 724–0457.

SUPPLEMENTARY INFORMATION: This notice fulfills the reporting requirement of the Assassination Records Review Board as provided by the President John J. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. 2107.9(e). Since its inception, the Assassination Records Review Board has sustained the following limited textual postponements in documentary records for the period of August 8, 1995 through November 15, 1995:

Originating agency	Total sustained postponements	Grounds for sustained postponements
CIA	112	Postponement 1(a) (agents).
CIA	47	Postponement 1(b) (intelligence source or method).
HSCA	3882	Postponement 3 (privacy—social security numbers only).
FBI	119	Postponement 4 (public disclosure of information about an informant would be so harmful as to outweigh the public interest).

A comprehensive listing of all formal determinations made by the Assassination Records Review Board, including sustained postponements, is available at the JFK Collection in the National Archives in College Park, Maryland, and in the Public Reading Room of the Assassination Records Reviews Board.

Dated: December 21, 1995.

David G. Marwell,

Executive Director.

[FR Doc. 95–31409 Filed 12–28–95; 8:45 am]

BILLING CODE 6118–01–M

DEPARTMENT OF DEFENSE

Department of the Army

Announcement of Intent To Grant an Exclusive License of a U.S. Army-Owned Patent

AGENCY: Picatinny Arsenal, New Jersey.

ACTION: Notice.

SUMMARY: The Department of the Army announces that, unless there is objection, in sixty days it will grant an Exclusive license to Rheinmettal Gmbh, Dusseldorf, Germany, on U.S. Army Patent 5,328,130 entitled ''Stabilizer for a Cannon Projectile'' by Stewart Gilman and Anthony Farina based upon Serial No. 08/000,032 filed January 4, 1993, Docket No. DAR–49–91. Notice of availability for licensing this was previously announced in the Federal Register on June 4, 1993. (Vol. 58, No. 106.)

FOR FURTHER INFORMATION CONTACT: Mr. Edward Goldberg, Chief, Intellectual Property Law Division, AMSTA–AR–GCL, U.S. Army ARDEC, Picatinny Arsenal, NJ 07806–5000, telephone number (201) 724–6950.

SUPPLEMENTARY INFORMATION: Written objections must be filed on or before February 26, 1996.

Gregory D. Showalter,

Army Federal Register Liaison Officer.

[FR Doc. 95–31435 Filed 12–27–95; 8:45 am]

BILLING CODE 3710–08–M

Department of the Navy

Government Owned Inventions, Availability for Licensing

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are available for licensing by the Department of the Navy.

Requests for copies of the patent applications cited should be directed to the Office of Naval Research, ONR OOCC, Ballston Tower One, 800 North Quincy Street, Arlington, Virginia 22217–5660 and include the application serial number.

FOR FURTHER INFORMATION CONTACT: Mr. R.J. Erickson, Staff Patent Attorney, Office of Naval Research, ONR OOCC, Ballston Tower One, 800 North Quincy Street, Arlington, Virginia 22217–5660, telephone (703) 696–4001.

Patent Application Serial No. 07/810,548: PROGRAMMABLE ELECTROSET MATERIALS AND PROCESSES; filed December 19, 1991;

Patent Application Serial No. 08/107,047: ELECTROSET COMPOSITE ARTICLES AND PROCESS; filed August 17, 1993; and

Patent Application Serial No. 08/311,632: PROGRAMMABLE ELECTROSET MATERIALS AND PROCESSES; filed September 23, 1994.

FOR FURTHER INFORMATION CONTACT: Mr. R.J. Erickson, Staff Patent Attorney, Office of Naval Research, ONR OOCC, Ballston Tower One, 800 North Quincy Street, Arlington, Virginia 22217–5660, telephone (703) 696–4001.

Dated: December 15, 1995.

M.D. Schetzsle,

LT, JAGC, USNR, Alternate Federal Register Liaison Officer.

[FR Doc. 95–31348 Filed 12–27–95; 8:45 am]

BILLING CODE 3810–FF–P

Notice of Prospective Exclusive or Partially Exclusive Licenses; William D. Sterling/Robert F. Gampper and Santa Fe Laser Company

SUMMARY: Messrs. William D. Sterling and Robert F. Gampper have applied for an exclusive license to practice the

Government owned invention described in U.S. Patent No. 5,249,196 entitled ''Internally Folded Scalable Laser'' issued September 28, 1993; and the Santa Fe Laser Company has also applied for an exclusive license to practice the same invention. The Department of the Navy is considering the granting to either one or both of these entities of revocable, nonassignable, exclusive or partially exclusive license(s) in the United States to practice this invention.

The invention was published in the October 20, 1995 Federal Register as U.S. Patent No. 5,244,196. This was in error. The correct patent number is listed above.

Anyone wishing to object to the granting of license to either or both of these prospective licensees has 60 days from the date of this notice to file written objections along with supporting evidence, if any. Written objections are to be filed with the Office of Naval Research, ONR OOCC, Ballston Tower One, Arlington, Virginia 22217–5660.

Dated: December 15, 1995.

M.D. Schetzsle,

LT, JAGC, USNR, Alternate Federal Register Liaison Officer.

[FR Doc. 95–31434 Filed 12–27–95; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Department of Energy/Los Alamos National Laboratory

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (P.L. 92–463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting: Environmental Management Site-Specific Advisory Board (EM SSAB), Los Alamos National Laboratory

DATES: Tuesday, January 9, 1996: 6:30 pm - 9:30 pm 7:00 pm to 8:00 pm (public comment session)

ADDRESSES: Helping Hands Community Center (505–387–2288) Mora, New Mexico 87732

FOR FURTHER INFORMATION CONTACT: Ms. Lisa Roybal, EM SSAB, Los Alamos National Laboratory, Northern New Mexico Community College, 1002 Onate Street, Espanola, NM 87352, (800)753–8970, or (505)753–8970.

SUPPLEMENTARY INFORMATION: Purpose of the Board: The purpose of the Advisory Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

Tuesday, January 9, 1996
6:30 p.m. Call to Order and Welcome
7:00 p.m. Input from the Public
8:00 p.m. Sub-Committee Reports
9:30 p.m. Adjourn

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Ms. Lisa Roybal, at the telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Official is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. This notice is being published less than 15 days before the date of the meeting due to programmatic issues that had to be resolved prior to publication.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585 between 9:00 a.m. and 4 p.m., Monday-Friday, except Federal holidays. Minutes will also be available by writing to Herman Le-Doux, Department of Energy, Los Alamos Area Office, 528 35th Street, Los Alamos, NM 87185–5400.

Issued at Washington, DC on December 22, 1995

Rachel M. Samuel

Acting Deputy Advisory Committee Management Officer.

[FR Doc. 95–31420 Filed 12–29–95; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket No. ER96–531–000, et al.]

Central Vermont Public Service Corporation, et al.; Electric Rate and Corporate Regulation Filings

December 19, 1995.

Take notice that the following filings have been made with the Commission:

1. Central Vermont Public Service Corporation

[Docket No. ER96–531–000]

Take notice that on November 30, 1995, Central Vermont Public Service Corporation (CVPS), tendered for filing a letter stating that CVPS does not plan to file a Forecast 1996 Cost Report for FERC Electric Tariff, Original Volume No. 4, since there are no customers expected to take such service.

Comment date: January 2, 1996, in accordance with Standard Paragraph E at the end of this notice.

2. Southwestern Public Service Company

[Docket No. ER96–532–000]

Take notice that on December 5, 1995, Southwestern Public Service Company (Southwestern), tendered for filing a proposed amendment to its rate schedule with Golden Spread Electric Cooperative, Inc. for service to Lamb County Electric Cooperative, Inc. (Lamb County).

The proposed amendment reflects changes in the maximum commitment at several delivery points and adds a delivery point for service to Golden Spread for Lamb County.

Comment date: January 2, 1996, in accordance with Standard Paragraph E at the end of this notice.

3. Maine Public Service Company

[Docket No. ER96–533–000]

Take notice that on December 5, 1995, Maine Public Service Company (Maine Public), filed an executed Service Agreement with KCS Power Marketing, Inc.

Comment date: January 2, 1996, in accordance with Standard Paragraph E at the end of this notice.

4. The Dayton Power and Light Company

[Docket No. ER96–534–000]

Take notice that on December 5, 1995, The Dayton Power and Light Company (Dayton), tendered for filing an executed Master Electric Interchange Agreement between Dayton and Louis Dreyfus Electric Power Inc. (LDEP).

Pursuant to the rate schedules attached as Exhibit B to the Agreement, Dayton will provide to LDEP power and/or energy for resale.

Comment date: January 2, 1996, in accordance with Standard Paragraph E at the end of this notice.

5. Pacific Gas and Electric Company

[Docket No. ER96–535–000]

Take notice that on December 5, 1995, Pacific Gas and Electric Company (PG&E), tendered for filing revisions to two agreements between PG&E and the City of Santa Clara, California (City or Santa Clara); (1) a revised Exhibit A–1 (forecast for the years 1996 and 1997) to Appendix A under PG&E Rate Schedule FERC No. 85; and (2) a change in the

energy rate under PG&E Rate Schedule FERC No. 108 for the firm system power sale by PG&E to the City.

Copies of this filing were served upon City and the California Public Utilities Commission.

Comment date: January 2, 1996, in accordance with Standard Paragraph E at the end of this notice.

6. Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company

[Docket No. ER96–536–000]

Take notice that on December 5, 1995, GPU Service Corporation (GPU), on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (jointly referred to as the GPU Operating Companies), filed an executed Service Agreement between GPU and Baltimore Gas and Electric Company, dated November 17, 1995. This Service Agreement specifies that Baltimore Gas and Electric Company has agreed to the rates, terms and conditions of the GPU Operating Companies' Operating Capacity and/or Energy Sales tariff (Sales Tariff) designated as FERC Electric Tariff, Original Volume No. 1. The Sales Tariff was accepted by the Commission by letter order issued on February 10, 1995 in *Jersey Central Power & Light Co., Metropolitan Edison Company and Pennsylvania Electric Company,* Docket No. ER95–276–000 and allows GPU and Baltimore Gas and Electric Company to enter into separately scheduled transactions under which the GPU Operating Companies will make available for sale, surplus operating capacity and/or energy at negotiated rates that are no higher than the GPU Operating Companies' cost of service.

GPU requests a waiver of the Commission's notice requirements for good cause shown and an effective date of November 17, 1995 for the Service Agreement.

GPU has served copies of the filing on regulatory agencies in New Jersey and Pennsylvania.

Comment date: January 2, 1996, in accordance with Standard Paragraph E at the end of this notice.

7. Entergy Services, Inc.

[Docket No. ER96–537–000]

Take notice that on December 6, 1995, Entergy Services, Inc. (Entergy Services), on behalf of Arkansas Power & Light Company, Gulf States Utilities Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service Inc. (Entergy Operating Companies), tendered for filing a Transmission Service Agreement (TSA) between Entergy Services, Inc. and Koch Power Services Inc. Entergy Services states that the TSA sets out the transmission arrangements under which the Entergy Operating Companies provide non-firm transmission service under their Transmission Service Tariff.

Comment date: January 2, 1996, in accordance with Standard Paragraph E at the end of this notice.

8. Public Service Electric and Gas Company

[Docket No. ER96–543–000]

Take notice that on December 6, 1995, Public Service Electric and Gas Company (PSE&G), tendered for filing an initial rate schedule to provide fully interruptible transmission service to Aquila Power Corporation, for delivery of non-firm wholesale electrical power and associated energy output utilizing the PSE&G bulk power transmission system.

Comment date: January 2, 1996, in accordance with Standard Paragraph E at the end of this notice.

9. New England Power Company

[Docket No. ER96–544–000]

Take notice that on December 6, 1995, New England Power Company submitted for filing a letter agreement for non-firm transmission service to Koch Power Services, Inc.

Comment date: January 2, 1996, in accordance with Standard Paragraph E at the end of this notice.

10. Virginia Electric and Power Company

[Docket No. ER96–545–000]

Take notice that on December 6, 1995, Virginia Electric and Power Company (Virginia Power), tendered for filing a Service Agreement between Sonat Power Marketing Inc. and Virginia Power, dated November 29, 1995, under the Power Sales Tariff to Eligible Purchasers dated May 27, 1994. Under the tendered Service Agreement Virginia Power agrees to provide services to Sonat Power Marketing Inc. under the rates, terms, and conditions of the Power Sales Tariff as agreed by the parties pursuant to the terms of the applicable Service Schedules included in the Power Sales Tariff.

Copies of the filing were served upon the Virginia State Corporation Commission, and the North Carolina Utilities Commission.

Comment date: January 2, 1996, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31365 Filed 12–27–95; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. ER96–549–000, et al.]

Southern Company Services, Inc., et al.; Electric Rate and Corporate Regulation Filings

December 20, 1995.

Take notice that the following filings have been made with the Commission:

1. Southern Company Services, Inc.)

[Docket No. ER96–549–000]

Take notice that on December 6, 1995, Southern Company Services, Inc., acting on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (collectively referred to as Operating Companies), tendered for Commission review information concerning the accrual of post-retirement benefits other than pensions as set forth in Statement of Financial Accounting Standard No. 106 by the Financial Accounting Standards Board in agreements and tariffs of the Operating Companies (jointly and individually).

Comment date: January 3, 1996, in accordance with Standard Paragraph E at the end of this notice.

2. Arizona Public Service Company

[Docket No. ER96–550–000]

Take notice that on December 7, 1995, Arizona Public Service Company (the Company), tendered for filing a request for waiver of the Commission's FERC Fuel Adjustment Clause (FAC) regulations as outlined in 18 CFR 35.14, 35.19(a) and to the extent necessary,

Section 35.3. Additionally, the Company has included a report on the refunds of overbilled amounts to wholesale customers through the FAC, and has filed revised rate sheets reflecting these revisions to the FAC.

Copies of this filing have been served upon the affected parties as follows:

Customer Name	APS-FPC/FERC rate schedule
Electrical District No. 3 (ED–3)	12
Tohono O'odham Utility Authority [1] (TOUA)	52
Welton-Mohawk Irrigation and Drainage District (Welton-Mohawk)	58
Arizona Power Authority (APA)	59
Colorado River Indian Irrigation Project (CRIP)	65
Electrical District No. 1 (ED–1)	68
Town of Wickenburg (Wickenburg)	74
Southern California Edison Company (SCE)	120
Electrical District No. 6 (ED–6)	126
Electrical District No. 7 (ED–7)	128
City of Page (Page)	134
Electrical District No. 8 (ED–8)	140
Aqulia Irrigation District (AID)	141
McMullen Valley Water Conservation and Drainage District (MVD)	142
Tonopah Irrigation District (TID)	143
Citizens Utilities Company [2]	149
Harquahala Valley Power District (HED)	153
Buckeye Water Conservation and Drainage District (BID)	155
Roosevelt Irrigation District (RID)	158
Maricopa County Municipal Water Conservation District (MCMWCD)	168
City of Williams (Williams)	192
San Carlos Indiana Irrigation Project [3] (SCIP)	201

[1] Formerly Papago Utility Tribal Authority.
[2] Rate Schedule in effect during refund period, currently Rate Schedule No. 225.
[3] Previously APS-FPC Rate Schedule No. 66.

The California Public Utilities Commission and the Arizona Corporation Commission.

Comment date: January 3, 1996, in accordance with Standard Paragraph E at the end of this notice.

3. New York State Electric & Gas Corporation

[Docket No. ER96–551–000]

Take notice that on December 8, 1995, New York State Electric & Gas Corporation (NYSEG), tendered for filing pursuant to Section 35.12 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 CFR 35.12, as an initial rate schedule, an agreement with Koch Power Services, Inc. (KPSI). The agreement provides a mechanism pursuant to which the parties can enter into separately scheduled transactions under which NYSEG will sell to KPSI and KPSI will purchase from NYSEG either capacity and associated energy or energy only as the parties may mutually agree.

NYSEG requests that the agreement become effective on December 9, 1995, so that the parties may, if mutually agreeable, enter into separately scheduled transactions under the agreement. NYSEG has requested waiver of the notice requirements for good cause shown.

NYSEG served copies of the filing upon the New York State Public Service Commission and KPSI.

Comment date: January 3, 1996, in accordance with Standard Paragraph E at the end of this notice.

4. Vanpower, Inc.

[Docket No. ER96–552–000]

Take notice that on December 8, 1995, Vanpower, Inc. (Vanpower), tendered for filing Electric Service Rate Schedule No. 1, together with a petition for waivers and blanket approvals of various Commission regulations necessary for such Rate Schedule to become effective (60 days after the date of the filing).

Vanpower states that it intends to engage in electric power and energy transactions as a marketer and a broker, and that it proposes to make sales under rates, terms and conditions to be mutually agreed to with the purchasing party. Vanpower further states that it does not own any generation or transmission facilities and is not affiliated with any entity that owns any generation or transmission facilities or any franchised service area.

Comment date: January 3, 1996 in accordance with Standard Paragraph E at the end of this notice.

5. QST Energy Trading Inc.

[Docket No. ER96–553–000]

Take notice that on December 8, 1995, QST Energy Trading Inc. (QST Trading) petitioned the Commission for acceptance of QST Trading FERC Tariff No. 1, the granting of certain blanket approvals, including the authority to sell electricity at market-based rates, and the waiver of certain Commission Regulations. QST Trading is a third tier subsidiary of CILCORP Inc., the parent company of Central Illinois Light Company.

Comment date: January 3, 1996, in accordance with Standard Paragraph E at the end of this notice.

6. Kentucky Utilities Company

[Docket No. ER96–554–000]

Take notice that on December 8, 1995, Kentucky Utilities Company (KU), tendered for filing service agreements between both KU and Sonat Power Marketing, Inc., and KU and Western Gas Resources Power Marketing, Inc. under its TS Tariff. KU requests an effective date of November 10, 1995.

Comment date: January 3, 1996, in accordance with Standard Paragraph E at the end of this notice.

7. Central Maine Power Company

[Docket No. ER96–558–000]

Take notice that on December 8, 1995, Central Maine Power Company (CMP), tendered for filing an executed service agreement entered into with CNG Power Services. Service will be provided pursuant to CMP's previously accepted Power Sales Tariff, designated rate schedule CMP-FERC Electric Tariff, Original Volume No. 2, as supplemented. An effective date for commencement of service of November 18, 1995 is requested for the service agreement.

CMP has served a copy of the filing on the affected customer and on the Maine Public Utilities Commission.

Comment date: January 3, 1996, in accordance with Standard Paragraph E at the end of this notice.

8. Western Gas Resources Power Marketing, Inc.

[Docket No. ER96–555–000]

Take notice that on December 8, 1995, Western Gas Resources Power Marketing, Inc. (WGRPM), tendered for filing confirmation from the Executive Committee of the Western Systems Power Pool (WSPP) acknowledging approval of WGRPM's application for membership in the WSPP. WGRPM requests that the Commission amend the WSPP Agreement to include WGRPM as a participant.

WGRPM requests an effective date of December 8, 1995 for the proposed amendment. Accordingly, WGRPM requests waiver of the Commission's notice requirements for good cause shown.

Copies of the filing were served on the WSPP Executive Committee.

Comment date: January 3, 1996, in accordance with Standard Paragraph E at the end of this notice.

9. Public Service Electric and Gas Company

[Docket No. ER96–556–000]

Take notice that on December 8, 1995, Public Service Electric and Gas Company (PSE&G), tendered for filing

an initial rate schedule to provide fully interruptible transmission service to Rainbow Energy Marketing Corporation, for delivery of non-firm wholesale electrical power and associated energy output utilizing the PSE&G bulk power transmission system.

Comment date: January 3, 1996, in accordance with Standard Paragraph E at the end of this notice.

10. Consolidated Edison Company of New York, Inc.

[Docket No. ER96–557–000]

Take notice that on December 8, 1995, Consolidated Edison Company of New York, Inc. (Con Edison), tendered for filing a Supplement to Con Edison Rate Schedule FERC No. 112 for transmission service for New York State Electric & Gas Corporation (NYSEG). The Supplement provides for a decrease in the charges for transmission service from $.3952/Kw-mo. to $.3805/Kw-mo. Con Edison has requested waiver of notice requirements so that the Supplement can be made effective as of April 1, 1995.

Con Edison states that a copy of this filing has been served by mail upon NYSEG.

Comment date: January 3, 1996, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31366 Filed 12–27–95; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. PR96–4–000]

Consumers Power Company; Notice of Application for Approval of Rates and Charges for Transportation Services

December 21, 1995.

Take notice that on December 1, 1995 consumers Power Company (Consumers) tendered for filing an application for approval of revised rates and charges for interruptible transportation services rendered pursuant to Section 284.224 of the Federal Energy Regulatory Commission's Regulations.

Consumers states that the application was made pursuant to § 284.123(b)(2)(1) of the Commission's Regulations and proposes a maximum interruptible transportation rate of $.1265 per Dth.

Consumers states that a copy of the filing was served upon Consumers' state regulatory commission.

Any person desiring to be heard or protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 first Street, N.E., Washington D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 384.214). All such petitions or protests should be filed on or before January 8, 1996. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of the Consumers Power Company filing in this matter are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31445 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. MG96–5–000]

Crossroads Pipeline Company; Notice of Filing

December 21, 1995.

Take notice that on December 15, 1995, Crossroads Pipeline Company (Crossroads) submitted standards of conduct under Order Nos. 497 *et seq.*[1] and Order Nos. 566 *et seq.*[2]

Crossroads states that copies of this filing were served upon all customers of Crossroads and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, in accordance with Rules 211 or 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions to intervene or protest should be filed on or before January 5, 1996. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31446 Filed 12–27–95; 8:45 am]

BILLING CODE 6717–01–M

[1] Order No. 497, 53 FR 22139 (June 14, 1988), III FERC Stats. & Regs. ¶ 30,820 (1988), Order No. 497–A, *order on rehearing,* 54 FR 52781 (December 22, 1989), III FERC Stats. & Regs. 30,868 (1989); Order No. 497–B, *order extending sunset date,* 55 FR 53291 (December 28, 1990), III FERC Stats. & Regs. ¶ 30,908 (1990); Order No. 497–C, *order extending sunset date,* 57 FR 9 (January 2, 1992), III FERC Stats. & Regs. ¶ 30,934 (1991), rehearing denied, 57 FR 5815 (February 18, 1992), 58 FERC ¶ 61,139 (1992); *Tenneco Gas* v. *FERC* (affirmed in part and remanded in part), 969 F. 2d 1187 (D.C. Cir. 1992); Order No. 497–D, *order on remand and extending sunset date,* III FERC Stats. & Regs. ¶ 30,958 (December 4, 1992), 57 FR 58978 (December 14, 1992); Order No. 497–E, *order on rehearing and extending sunset date,* 59 FR 243 (January 4, 1994), 65 FERC ¶ 61,381 (December 23, 1993); Order No. 497–F, *order denying rehearing and granting clarification,* 59 FR 15336 (April 1, 1994), 66 FERC ¶ 61,347 (March 24, 1994); and Order No. 497–G, *order extending sunset date,* 59 FR 32884 (June 27, 1994), III FERC Stats. & Regs. ¶ 30,996 (June 17, 1994).

[2] Standards of Conduct and Reporting Requirements for Transportation and Affiliate Transactions, Order No. 566, 59 FR 32885 (June 27, 1994), III FERC Stats. & Regs. ¶ 30,997 (June 17, 1994); Order No. 566–A, *order on rehearing,* 59 FR 52896 (October 20, 1994), 69 FERC ¶ 61,044 (October 14, 1994); Order No. 566–B, *order on rehearing,* 59 FR 65707, (December 21, 1994); 69 FERC ¶ 61,334 (December 14, 1994); *appeal docketed sub nom. Conoco, Inc.* v. *FERC,* D.C. Cir. No. 94–1745 (December 13, 1994).

[Docket No. RP96–22–001]

Iroquois Gas Transmission System L.P.; Notice of Proposed Changes in FERC Gas Tariff

December 21, 1995.

Take notice that on December 15, 1995, Iroquois Gas Transmission System, L.P. (Iroquois) tendered for filing to be part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets with a proposed effective date of December 1, 1995:

Substitute Second Revised Sheet No. 11.

Iroquois states that the purpose of the instant filing is to comply with the Commission's November 30, 1995 letter order conditionally accepting certain tariff sheets filed on October 31, 1995. Substitute Second Revised Sheet No. 11 complies with the Commission's directives by: (1) Providing that Iroquois will determine the best bid for short-term capacity within one days of the closing of the open season and (2) eliminating any reference to a minimum term for service in the best bid process. The two-week evaluation period is maintained where some or all of the bidders seek long-term capacity. According to Iroquois, no changes to Original Sheet No. 11A are necessary. Iroquois requests that the tariff sheets thus be accepted effective December 1, 1995.

Iroquois states that copies of its filing were served on all jurisdictional customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. Pursuant to § 154.210 of the Commission's Regulations, all such protests must be filed not later than 12 days after the date of the filing noted above. Protests will be considered by the Commission in determining the appropriate action to be taken in this proceeding, but will not serve to make protestant a party to the proceedings. Copies of this filing are on file with the Commission and are available for inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31443 Filed 12–27–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP96–108–000]

K N Interstate Gas Transmission Co.; Notice of Request Under Blanket Authorization

December 22, 1995.

Take notice that on December 14, 1995, K N Interstate Gas Transmission Co. (K N Interstate), P.O. Box 281304, Lakewood, Colorado 80228–8304, filed in Docket No. CP96–108–000 a request pursuant to Sections 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212) for authorization to install and operate thirteen new delivery taps and appurtenant facilities to be located in Finney and Rooks Counties, Kansas; Chase, Cheyenne, Gosper, Howard, Keith and Stanton Counties, Nebraska; and Platte County, Wyoming under K N Interstate's blanket certificate issued in Docket No. CP83–140–000, *et al.*, pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

K N Interstate states that the new taps will be added as delivery points under an existing transportation agreement between K N Interstate and K N Energy, Inc. (K N) and will be used by K N to facilitate the delivery of natural gas to new direct retail customers.

Specifically, K N Interstate proposes to install the following delivery points to K N:

County, State	Peak day delivery (Mcf)	Annual delivery (Mcf)	Cost ($)
Finney, KS	6	360	400
Finney, KS	6	360	400
Finney, KS	6	360	400
Rooks, KS	5	288	400
Chase, NE	6	360	400
Chase, NE	4	216	400
Cheyenne, NE	4	230	400
Gosper, NE	67	2,218	2,500
Howard, NE	2	144	400
Keith, NE	5	288	400
Stanton, NE	3	202	400
Platte, WY	35	2,088	1,150
Platte, WY	216	7,128	2,500

K N Interstate states that the volumes of gas which will be delivered at these proposed delivery points will be within the current maximum transportation quantities set forth in K N Interstate's transportation service agreement with K N. In addition, K N Interstate states that the addition of the proposed delivery points is not prohibited by K N Interstate's existing FERC Gas Tariff, and will not have any adverse impact, on a daily or annual basis, upon K N Interstate's existing customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31439 Filed 12–27–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP96–68–001]

Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

December 21, 1995.

Take notice that on December 15, 1995, Northern Natural Gas Company (Northern), tendered for filing changes in its FERC Gas Tariff, Fifth Revised Volume No. 1.

Northern states that the filing corrects the Stranded Account No. 858 surcharge, which was filed on December 1, 1995. Therefore, Northern has filed Substitute 7th Rev Seventeenth Revised Sheet Nos. 50 and 51 and Substitute Twenty Fifth Rev Sheet No. 53 to revise the surcharge to be effective January 1, 1996.

Northern states that copies of this filing were served upon the Company's customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. Pursuant to § 154.210 of the Commission's Regulations, all such protests must be filed not later than 12 days after the date of the filing noted above. Protests will be considered by the Commission in determining the appropriate action to be taken in this proceeding, but will not serve to make protestant a party to the proceedings. Copies of this filing are on file with the Commission and are available for inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31441 Filed 12–27–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP96–33–001]

Northern Natural Gas Company; Notice of Compliance Filing

December 21, 1995.

Take notice that on December 15, 1995, Northern Natural Gas Company (Northern), tendered for filing to become part of Northern's FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets, proposed to be effective December 1, 1995:

Fifth Revised Volume No. 1

Substitute First Revised Original Sheet No. 400
Substitute First revised Sheet No. 412
First Revised Sheet No. 424
First Revised Sheet No. 425
First Revised Sheet No. 426
Second Revised sheet No. 431

Northern asserts that the purpose of this filing is to comply with the Commission's Order issued November 30, 1995, in Docket No. RP96–33–000, in which Northern proposed to condense and simplify its form of Service Agreement.

Northern states that copies of the filing were served upon the company's customers and interested State Commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. Pursuant to § 154.210 of the Commission's Regulations, all such protests must be filed not later than 12 days after the date of the filing noted above. Protests will be considered by the Commission in determining the appropriate action to be taken in this proceeding, but will not serve to make protestant a party to the proceeding. Copies of this filing are on file with the Commission and are available for inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31442 Filed 12–27–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP96–110–000]

Northern Natural Gas Company; Notice of Request Under Blanket Authorization

December 21, 1995.

Take notice that on December 18, 1995, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124–1000, filed in Docket No. CP96–110–000 a request pursuant to §§ 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212) for authorization to construct and operate delivery point facilities in Lancaster County, Nebraska, to accommodate deliveries of natural gas to UtiliCorp United, Inc. (UCU), under Northern's blanket certificate issued in Docket No. CP82–401–000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Northern proposes to construct and operate the delivery point and 400 feet of 2-inch branchline for UCU to make deliveries to the Wanek Town Border Station #1 to accommodate the growth of residential gas requirements in the area. It is stated that the facilities would be used for the delivery of up to 63 MMBtu equivalent of natural gas on a peak day and 13,000 MMBtu equivalent on an annual basis. It is explained that these volumes will be the result of a realignment of existing firm entitlement contracted under Northern's throughput service agreements with UCU. Northern estimates the construction cost for the facilities at $47,500. It is asserted that the deliveries through the proposed facilities would not increase UCU's existing firm entitlement from Northern. It is further asserted that Northern's tariff does not prohibit additional delivery points and that Northern has sufficient capacity to accomplish the deliveries without detriment or disadvantage to Northern's other customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31447 Filed 12–27–95; 8:45 am]

BILLING CODE 6717–01–M

[RP95–409–000]

Northwest Pipeline Corp.; Notice of Informal Settlement Conference

December 22, 1995.

Take notice that an informal settlement conference will be convened in these proceedings on January 24, 1996 at 10:00 a.m. at the offices of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, for the purpose of exploring the possible settlement of the issues in this proceeding.

Any party, as defined by 18 CFR 385.102(c), or any participant as defined by 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

For additional information, contact Marc G. Denkinger (202) 208–2215 or Kathleen M. Dias (202) 208–0524.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31438 Filed 12–27–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP96-85-000]

Tennessee Gas Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

December 21, 1995.

Take notice that on December 15, 1996, Tennessee Gas Pipeline Company tendered for filing as part of its Fifth Revised FERC Gas Tariff the following tariff sheets to become effective February 1, 1996.

Fifth Revised Sheet No. 20
Ninth Revised Sheet No. 21A
Fourteenth Revised Sheet No. 22
Ninth Revised Sheet No. 22A
Fifth Revised Sheet No. 23
Second Revised Sheet No. 23A
Original Sheet No. 23B
Original Sheet No. 23C
Thirteenth Revised Sheet No. 24
Seventh Revised Sheet No. 25
Fifth Revised Sheet No. 26B
Second Revised Sheet No. 660
First Revised Sheet No. 660A
First Revised Sheet No. 660B
Third Revised Sheet No. 661
Second Revised Sheet No. 663
Second Revised Sheet No. 666A
First Revised Sheet No. 669A
Second Revised Sheet No. 670
Third Revised Sheet No. 671
First Revised Sheet No. 671A
Third Revised Sheet No. 673
Third Revised Sheet No. 674
Second Revised Sheet No. 674A

Tennessee states that the purpose of the filing is to recover gas supply realignment costs (GSR cost) paid or known and measurable at the time of the filing, consistent with the GSR cost recovery provisions reflected in Section XXVI of the General Terms and Conditions of Tennessee's Fifth Revised FERC Gas Tariff. The charges include a GSR demand surcharge applicable to firm customers, a separately stated Canadian demand charge component, and a unit GSR component applicable to Tennessee's interruptible services.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C 20426, in accordance with §§ 385.314 and 385.211 of the Commission's Rules and Regulations. Pursuant to Section 154.210 of the Commission's Regulations, all such motions or protests must be filed not later than 12 days after the date of filing noted above. 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 with the Commission a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 95-31440 Filed 12-27-95; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP95–303–003]

Williams Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

December 21, 1995.

Take notice that on December 15, 1995, Williams Natural Gas Company (WNG) tendered for filing to become part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, with a proposed effective date of July 1, 1995:

Second Substitute First Revised Sheet Nos. 202 and 234

WNG states that this filing is being made in compliance with Commission order issued December 7, 1995 in Docket No. RP95–303–202. Ordering paragraph (A) directed WNG to file tariff sheets containing the revised provisions within 15 days of the date of the order.

WNG states that a copy of its filing was served on all participants listed on the service lists maintained by the Commission in the dockets referenced above and on all jurisdictional customers and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with § 385.211 of the Commission's Rules and Regulations. Pursuant to § 154.210 of the Commission's Regulations, all such protests must be filed not later than 12 days after the date of the filing noted above. 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 proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31444 Filed 12–27–95; 8:45 am]

BILLING CODE 6717–01–M

Office of Energy Efficiency and Renewable Energy

Energy Conservation Program for Consumer Products: Granting of the Application for Interim Waiver and Publishing of the Petition for Waiver of CFM International Inc. From the DOE Vented Home Heating Equipment Test Procedure (Case No. DH–004)

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice.

SUMMARY: Today's notice grants an Interim Waiver to CFM International Inc. (CFM) from the existing Department of Energy (DOE or Department) test procedure regarding pilot light energy consumption and weighted average steady-state efficiency for its manually controlled vented heaters, models DV32, DV34, DV36, DV40, DVS2, DVS3, HEDV30, HEDV30–1, FSDV30, FS30, FA20, HE30, HEB30, FADV20, and HE40.

Today's notice also publishes a ''Petition for Waiver'' from CFM. CFM's Petition for Waiver requests DOE to grant relief from the DOE vented home heating equipment test procedure relating to the use of pilot light energy consumption in calculating the Annual Fuel Utilization Efficiency (AFUE) and the calculation of weighted average steady state efficiency of its models DV32, DV34, DV36, DV40, DVS2, DVS3, HEDV30, HEDV30–1, FSDV30, FS30, FA20, HE30, HEB30, FADV20, and HE40 vented heaters. CFM seeks to delete the required pilot light measurement (Q_p) in the calculation of AFUE when the pilot is off, and to test at a minimum fuel input rate of two-thirds instead of the specified ±5 percent of 50 percent of the maximum fuel input in the calculation of AFUE. The Department is soliciting comments, data, and information respecting the Petition for Waiver.

DATES: DOE will accept comments, data, and information not later than January 29, 1996.

ADDRESSES: Written comments and statements shall be sent to: Department of Energy, Office of Energy Efficiency and Renewable Energy, Case No. DH–004, Mail Stop EE–43, Room 1J–018, Forrestal Building, 1000 Independence

Avenue, SW., Washington, DC 20585–0121, (202) 586–7140.

FOR FURTHER INFORMATION CONTACT:

William W. Hui, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station EE–431, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9145

Eugene Margolis, Esq., U.S. Department of Energy, Office of General Counsel, Mail Station GC–72, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585–0103, (202) 586–9507.

SUPPLEMENTARY INFORMATION: The Energy Conservation Program for Consumer Products (other than automobiles) was established pursuant to the Energy Policy and Conservation Act, as amended (EPCA), which requires DOE to prescribe standardized test procedures to measure the energy consumption of certain consumer products, including vented home heating equipment. The intent of the test procedures is to provide a comparable measure of energy consumption that will assist consumers in making informed purchasing decisions. These test procedures appear at Title 10 CFR Part 430, Subpart B.

The Department amended the test procedure rules to provide for a waiver process by adding § 430.27 to Title 10 CFR Part 430. 45 FR 64108, September 26, 1980. Subsequently, DOE amended the waiver process to allow the Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) to grant an Interim Waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. Title 10 CFR Part 430, § 430.27(a)(2).

The waiver process allows the Assistant Secretary to waive temporarily test procedures for a particular basic model when a petitioner shows that the basic model contains one or more design characteristics which prevent testing according to the prescribed test procedures, or when the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. Waivers generally remain in effect until final test procedure amendments become effective, resolving the problem that is the subject of the waiver.

An Interim Waiver will be granted if it is determined that the applicant will experience economic hardship if the Application for Interim Waiver is denied, if it appears likely that the Petition for Waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the Petition for Waiver. Title 10 CFR Part 430, § 430.27(g). An Interim Waiver remains in effect for a period of 180 days, or until DOE issues a determination on the Petition for Waiver, whichever is sooner, and may be extended for an additional 180 days, if necessary.

On October 2, 1995, CFM filed an Application for Interim Waiver and a Petition for Waiver regarding (a) pilot light energy consumption and (b) weighted average steady state efficiency. On October 30, 1995, CFM submitted a letter to DOE providing additional product information and amending the list of models submitted for consideration in the October 2, 1995 Waiver requests.

CFM seeks an Interim Waiver from the DOE test provisions in section 3.5 of Title 10 CFR Part 430, Subpart B, Appendix O, that require measurement of energy input rate of the pilot light (Q_p), and the use of this data in section 4.2.6 for the calculation of AFUE, where:

$$AFUE=(4400\eta_{SS}\eta_u Q_{in\text{-}max})/(4400\eta_{SS}Q_{in\text{-}max}+2.5(4600)\eta_u Q_p)$$

Instead, CFM requests that it be allowed to delete Q_p and accordingly, the $(2.5(4600)\eta_u Q_p)$ term in the calculation of AFUE. CFM states that instructions to turn off the transient pilot by the user when the heater is not in use are in the User Instruction Manual and on a label adjacent to the gas control valve. Therefore, the additional energy savings that result when the pilot is turned off (Q_p=0) should be credited. Since the current DOE test procedure does not address pilot light energy savings, CFM asks that the Interim Waiver be granted.

CFM also seeks an Interim Waiver from the DOE test provisions in section 3.1.1 of Title 10 CFR Part 430, Subpart B, Appendix O, which require steady state efficiency of manually controlled vented heaters with various input rates to be determined at a fuel input rate that is within ± 5 percent of 50 percent of the maximum fuel input rate, and the use of this data in section 4.2.4 to determine the weighted average steady state efficiency needed in the calculation of AFUE. Instead, CFM requests that it be allowed to determine steady state efficiency, weighted average steady state efficiency, and AFUE at a minimum fuel input rate of two-thirds of the maximum fuel input rate for its manually controlled vented heaters which do not adjust to an input rate as low as 50 percent. Since the current DOE test procedure does not address steady state testing for manually controlled vented heaters with various input rates at fuel input rates other than within ±5 percent of 50 percent of the maximum fuel input rate, CFM asks that the waiver be granted.

Previous Petitions for Waiver to exclude the pilot light energy input term in the calculation of AFUE for home heating equipment with a manual transient pilot control and allowance to determine weighted average steady state efficiency used in the calculation of AFUE at a minimum fuel input rate of 65.3 percent of the maximum fuel input rate instead of the specified ±5 percent of 50 percent of the maximum fuel input rate have been granted by DOE to Appalachian Stove and Fabricators, Inc., 56 FR 51711, October 15, 1991, and Valor Incorporated, 56 FR 51714, October 15, 1991.

The Department published a Notice of Proposed Rulemaking on August 23, 1993, to amend the vented home heating equipment test procedure, which would allow the above requests. 58 FR 44583.

Thus, it appears likely that CFM's Petition for Waiver for pilot light and weighted average steady state efficiency for home heating equipment will be granted. In those instances where the likely success of the Petition for Waiver has been demonstrated based upon DOE having granted a waiver for a similar product design, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

Therefore, based on the above, DOE is granting CFM an Interim Waiver for its models DV32, DV34, DV36, DV40, DVS2, DVS3, HEDV30, HEDV30–1, FSDV30, FS30, FA20, HE30, HEB30, FADV20, and HE40 vented heaters. CFM shall be permitted to test its models DV32, DV34, DV36, DV40, DVS2, DVS3, HEDV30, HEDV30–1, FSDV30, FS30, FA20, HE30, HEB30, FADV20, and HE40 vented heaters on the basis of the test procedures specified in Title 10 CFR Part 430, Subpart B, Appendix O, with the modifications set forth below:

(i) Delete paragraph 3.5 of Appendix O.

(ii) Delete paragraph 4.2.4 of Appendix O and replace with the following paragraph:

4.2.4 Weighted Average Steady-State Efficiency. (a) For manually controlled heaters with various input rates, the weighted average steady-state efficiency ($\eta_{SS\text{-}WT}$) is:

(1) At ±5 percent of 50 percent of the maximum fuel input rate as measured in either section 3.1.1 to this appendix for

manually controlled gas vented heaters or section 3.1.2 to this appendix for manually controlled oil vented heaters, or

(2) At the minimum fuel input rate as measured in either section 3.1.1 to this appendix for manually controlled gas vented heaters or section 3.1.2 to this appendix for manually controlled oil vented heaters if the design of the heater is such that ±5 percent of 50 percent of the maximum fuel input rate can not be set, provided the tested input rate is no greater than two-thirds of maximum input rate of the heater.

(b) For manually controlled heater with one single firing rate, the weighted average steady-state efficiency is the steady-state efficiency measured at the single firing rate.

(iii) Delete paragraph 4.2.6 of Appendix O and replace with the following paragraph:

4.2.6 Annual Fuel Utilization Efficiency. For manually controlled vented heaters, calculate the Annual Fuel Utilization Efficiency (AFUE) as a percent and defined as:

$AFUE=\eta_u$

Where:

η_u= as defined in section 4.2.5 of this appendix.

(iv) With the exception of the modification set forth above, CFM shall comply in all respects with the procedures specified in Appendix O of Title 10 CFR Part 430, Subpart B.

This Interim Waiver is based upon the presumed validity of statements and all allegations submitted by the company. This Interim Waiver may be removed or modified at any time upon a determination that the factual basis underlying the Application is incorrect.

The Interim Waiver shall remain in effect for a period of 180 days or until DOE acts on the Petition for Waiver, whichever is sooner, and may be extended for an additional 180-day period, if necessary.

CFM's Petition for Waiver requests DOE to grant relief from the DOE vented home heating equipment relating to the pilot light and weighted average steady state efficiency. CFM seeks (a) to exclude the pilot light energy consumption in the calculation of AFUE, and (b) to determine the weighted average steady state efficiency used in the calculation of AFUE at a minimum fuel input rate of two-thirds of the maximum fuel input rate instead of the specified ±5 percent of 50 percent of the maximum fuel input rate. Pursuant to paragraph (b) of Title 10 CFR Part 430.27, the Department is hereby publishing the ''Petition for Waiver.'' CFM's submission of October 2, 1995 published, *infra*, (a) references a letter, dated July 7, 1995, from Vermont Castings, Inc. that constitutes a Petition for Waiver and Application for Interim Waiver and (b) attaches three brochures describing the company's products. Said letter and brochures are not published herein but may be requested from Mr. William W. Hui at the address indicated, *supra*. Further, CFM's letter of October 30, 1995 published, *infra*, references a three page excerpt from a SIT brochure. The excerpt is not published but may be requested from Mr. Hui.

The Petition contains confidential company information; thus, the confidential attachments submitted by CFM are not being published. The Department solicits comments, data, and information respecting the Petition.

Issued in Washington, D.C. December 21, 1995.

Christine A. Ervin,

Assistant Secretary, Energy Efficiency and Renewable Energy.

CFM International Inc.

475 Admiral Blvd., Mississauga, Ont. L5T 2N1, Canada, Tel: (905) 670–7777 Ext. 213, Fax: (905) 670–7840

October 2, 1995.

The Honorable Christine Ervin,
Assistant Secretary for Energy Efficiency and Renewable Energy, U.S. Dept. of Energy, Forrestal Bldg., 1000 Independence Avenue, S.W., Washington, D.C. 20585

Attn: Secretary Christine Ervin

Dear Madam: Attached with this letter is a copy of a petition for a waiver and Application for Interim Waiver submitted by Vermont Castings on July 7, 1995.

Since CFM Inc. has similar applications and arguments as mentioned in the attached Vermont Casting petition—therefore we are also requesting the acceptance of those two waivers from the test procedures which appear on 10 CFR, part 430, subpart B, Appendix O; Uniform Test Method for Measuring the Energy Consumption of Vented Home Heating Equipment. The aforementioned waivers are requested for our direct vent and vented units.

Also, the revisions to the test procedures which we requested above have been published by DOE as proposed changes on August 23, 1993—58 FR 44538.

Furthermore, since similar waivers were granted in the past to other manufacturers; i.e. Appalachian Stove and Fabricators Inc. and Valor Incorporated—therefore we are convinced that the same waivers will be granted to CFM Inc.

Copies of confidential test data confirming the energy savings will be forwarded to you upon request.

Any questions regarding this subject, please contact me at the above address. Your help is highly appreciated. Thank you.

Yours Truly,

Ferdinand M. Francisco,

Lab. Manager.

CFM International Inc.

475 Admiral Blvd., Mississauga, Ont. L5T2N1, Tel: (905) 670–7777 Ext. 213, Fax: (905) 670–7840

October 30, 1995.

U.S. Dept. of Energy,
Office of Energy Efficiency and Renewable Energy, Mail Station EE–431, Forrestal Bldg., 1000 Independence Avenue, SW., Washington, DC 20585

Attn: Bill Hui

Dear Sir. Further to our conversation last Friday. I tested one of our manually controlled appliance with various input rates to established a linear correlation between its rate and AFUE.

Based on the AFUE I calculated using Draft Factor Method, DF=1, which appear at 10CFR, part 430, subpart B, Appendix O—Uniform Test Method for Measuring the Energy Consumption Of Vented Home Heating Equipment. I can therefore conclude that increase in rate is directly proportional to the increase in AFUE.

Also, attached are 3 page excerpts from SIT brochure that will answer your question regarding the necessary steps needed to reduced the input from 70% to ⅔ of maximum input—for testing purposes only.

Page I illustrates a working diagram of the valve, Page 2 show the valve description and finally page 3 explains how to adjust the outlet pressure. Furthermore, outlet pressure of valves equipped with manual Hi/Lo control (SIT mv 0.820.633 and 0.820.634) can be adjusted by removing the Hi/Lo knob, see page 2 under valve description—item #2, then turn the pressure regulator clockwise to increase pressure and counterclockwise to decrease pressure.

To reduce the input from 70% to ⅔ of maximum input just turn the regulator counterclockwise thus decreasing the outlet pressure.

Moreover, the petition I submitted for the acceptance of two waivers from the test procedures which appear at 10CFR, part 430, subpart B, Appendix O—Uniform Test Method for Measuring the Energy Consumption Of Vented Home Heating Equipment are requested for CFM International Inc.

CFM International Inc. is a parent company of CFM Inc. (Insta Flame & Northern Flame), Majestic and TrueHeat. Therefore, the waivers mentioned above is intended to all CFM International Inc. subsidiaries' existing as well as future submitted and certified products.

Below is a list of CFM Inc's existing as well as future submitted and certified products both Insta Flame & Northern Flame.

MODEL

Certified units	Under certification
DV32	FADV20
DV34	HE40

MODEL—Continued

Certified units	Under certification
DV36	
DV40	
DVS2	
DVS3	
HEDV30 and HEDV30–1	
FSDV30	
FS30	
FA20	
HE30	
HEB30	

Any questions regarding this subject, please contact me at the above address. Your help is highly appreciated. Thank you.

Yours Truly,

Ferdinand M. Francisco,

Lab. Manager.

[FR Doc. 95–31423 Filed 12–27–95; 8:45 am]

BILLING CODE 6450–01–P

Energy Conservation Program for Consumer Products: Granting of the Application for Interim Waiver and Publishing of the Petition for Waiver of Vermont Castings, Inc. From the DOE Vented Home Heating Equipment Test Procedure (Case No. DH–003)

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice.

SUMMARY: Today's notice grants an Interim Waiver to Vermont Castings, Inc. (Vermont Castings) from the existing Department of Energy (DOE or Department) test procedure regarding pilot light energy consumption and weighted average steady-state efficiency for its manually controlled vented heaters, models DV25 (Gas Fired Freestanding Direct Vent Firebox) and DH20 (Gas Fired Wallmount/Zero Clearance Direct Vent Firebox).

Today's notice also publishes a ''Petition for Waiver'' from Vermont Castings. Vermont Castings' Petition for Waiver requests DOE to grant relief from the DOE vented home heating equipment test procedure relating to the use of pilot light energy consumption in calculating the Annual Fuel Utilization Efficiency (AFUE) and the calculation of weighted average steady state efficiency of its models DV25 and DH20 vented heaters. Vermont Castings seeks to delete the required pilot light measurement (Q_p) in the calculation of AFUE when the pilot is off, and to test at a minimum fuel input rate of two-thirds instead of the specified 5 percent of 50 percent of the maximum fuel input rate in the calculation of AFUE. The Department is soliciting comments, data, and information respecting the Petition for Waiver.

DATES: DOE will accept comments, data, and information not later than January 29, 1996.

ADDRESSES: Written comments and statements shall be sent to: Department of Energy, Office of Energy Efficiency and Renewable Energy, Case No. DH–003, Mail Stop EE–43, Room 1J–018, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585–0121, (202) 586–7140.

FOR FURTHER INFORMATION CONTACT:

William W. Hui, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station EE–431, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585–0121, (202) 586–9145,

Eugene Margolis, Esq., U.S. Department of Energy, Office of General Counsel, Mail Station GC–72, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585–0103, (202) 586–9507

SUPPLEMENTARY INFORMATION: The Energy Conservation Program for Consumer Products (other than automobiles) was established pursuant to the Energy Policy and Conservation Act, as amended (EPCA), which requires DOE to prescribe standardized test procedures to measure the energy consumption of certain consumer products, including vented home heating equipment. The intent of the test procedures is to provide a comparable measure of energy consumption that will assist consumers in making informed purchasing decisions. These test procedures appear at Title 10 CFR Part 430, Subpart B.

The Department amended the test procedure rules to provide for a waiver process by adding § 430.27 to Title 10 CFR Part 430. 45 FR 64108, September 26, 1980. Subsequently, DOE amended the waiver process to allow the Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) to grant an Interim Waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. Title 10 CFR Part 430, § 430.27(a)(2).

The waiver process allows the Assistant Secretary to waive temporarily test procedures for a particular basic model when a petitioner shows that the basic model contains one or more design characteristics which prevent testing according to the prescribed test procedures, or when the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. Waivers generally remain in effect until final test procedure amendments become effective, resolving the problem that is the subject of the waiver.

An Interim Waiver will be granted if it is determined that the applicant will experience economic hardship if the Application for Interim Waiver is denied, if it appears likely that the Petition for Waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the Petition for Waiver. Title 10 CFR Part 430, § 430.27(g). An Interim Waiver remains in effect for a period of 180 days, or until DOE issues a determination on the Petition for Waiver, whichever is sooner, and may be extended for an additional 180 days, if necessary.

On July 7, 1995, Vermont Castings filed an Application for Interim Waiver and a Petition for Waiver regarding (a) pilot light energy consumption and (b) weighted average steady state efficiency. On October 30, 1995, Vermont Castings submitted a letter to DOE requesting modifications to the model nomenclature and minimum fuel input rate of the vented heaters submitted for consideration in the July 7, 1995 Waiver requests.

Vermont Castings seeks an Interim Waiver from the DOE test provisions in section 3.5 of Title 10 CFR Part 430, Subpart B, Appendix O, that require measurement of energy input rate of the pilot light (Q_p), and the use of this data in section 4.2.6 for the calculation of AFUE, where:

$$AFUE=(4400\eta_{SS}\eta_u Q_{in\text{-}max}) / (4400\eta_{SS}\eta_u Q_{in\text{-}max}+2.5(4600)\eta_u Q_P)$$

Instead, Vermont Castings requests that it be allowed to delete Q_p and accordingly, the ($2.5(4600)\ \eta_u\ Q_p$) term in the calculation of AFUE. Vermont Castings states that instructions to turn off the transient pilot by the user when the heater is not in use are in the User Instruction Manual and on a label adjacent to the gas control valve. Therefore, the additional energy savings that result when the pilot is turned off (Q_P=0) should be credited. Since the current DOE test procedure does not address pilot light energy savings, Vermont Castings asks that the Interim Waiver be granted.

Vermont Castings also seeks an Interim Waiver from the DOE test provisions in section 3.1.1 of Title 10 CFR Part 430, Subpart B, Appendix O,

which require steady state efficiency of manually controlled vented heaters with various input rates to be determined at a fuel input rate that is within ±5 percent of 50 percent of the maximum fuel input rate, and the use of this data in section 4.2.4 to determine the weighted average steady state efficiency needed in the calculation of AFUE. Instead, Vermont Castings requests that it be allowed to determine steady state efficiency, weighted average steady state efficiency, and AFUE at a minimum fuel input rate of two-thirds of the maximum fuel input rate for its manually controlled vented heaters which do not adjust to an input rate as low as 50 percent. Since the current DOE test procedure does not address steady state testing for manually controlled vented heaters with various input rates at fuel input rates other than within ±5 percent of 50 percent of the maximum fuel input rate, Vermont Castings asks that the waiver be granted.

Previous Petitions for Waiver to exclude the pilot light energy input term in the calculation of AFUE for home heating equipment with a manual transient pilot control and allowance to determine weighted average steady state efficiency used in the calculation of AFUE at a minimum fuel input rate of 65.3 percent of the maximum fuel input rate instead of the specified ±5 percent of 50 percent of the maximum fuel input rate have been granted by DOE to Appalachian Stove and Fabricators, Inc., 56 FR 51711, October 15, 1991, and Valor Incorporated, 56 FR 51714, October 15, 1991.

The Department published a Notice of Proposed Rulemaking on August 23, 1993, to amend the vented home heating equipment test procedure, which would allow the above requests. 58 FR 44583.

Thus, it appears likely that Vermont Castings' Petition for Waiver for pilot light and weighted average steady state efficiency for home heating equipment will be granted. In those instances where the likely success of the Petition for Waiver has been demonstrated based upon DOE having granted a waiver for a similar product design, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

Therefore, based on the above, DOE is granting Vermont Castings an Interim Waiver for its models DV25 and DH20 vented heaters. Vermont Castings shall be permitted to test its models DV25 and DH20 vented heaters on the basis of the test procedures specified in Title 10 CFR Part 430, Subpart B, Appendix O, with the modifications set forth below:

(i) Delete paragraph 3.5 of Appendix O.

(ii) Delete paragraph 4.2.4 of Appendix O and replace with the following paragraph:

4.2.4 Weighted Average Steady-State Efficiency. (a) For manually controlled heaters with various input rates, the weighted average steady-state efficiency ($\eta_{SS\text{-}WT}$) is:

(1) At ± 5 percent of 50 percent of the maximum fuel input rate as measured in either section 3.1.1 to this appendix for manually controlled gas vented heaters or section 3.1.2 to this appendix for manually controlled oil vented heaters, or

(2) At the minimum fuel input rate as measured in either section 3.1.1 to this appendix for manually controlled gas vented heaters or section 3.1.2 to this appendix for manually controlled oil vented heaters if the design of the heater is such that ±5 percent of 50 percent of the maximum fuel input rate can not be set, provided the tested input rate is no greater than two-thirds of maximum input rate of the heater.

(b) For manually controlled heater with one single firing rate, the weighted average steady-state efficiency is the steady-state efficiency measured at the single firing rate.

(iii) Delete paragraph 4.2.6 of Appendix O and replace with the following paragraph:

4.2.6 Annual Fuel Utilization Efficiency. For manually controlled vented heaters, calculate the Annual Fuel Utilization Efficiency (AFUE) as a percent and defined as:

$AFUE=\eta_u$

Where:

η_u=as defined in section 4.2.5 of this appendix.

(iv) With the exception of the modification set forth above, Vermont Castings shall comply in all respects with the procedures specified in Appendix O of Title 10 CFR Part 430, Subpart B.

This Interim Waiver is based upon the presumed validity of statements and all allegations submitted by the company. This Interim Waiver may be removed or modified at any time upon a determination that the factual basis underlying the Application is incorrect.

The Interim Waiver shall remain in effect for a period of 180 days or until DOE acts on the Petition for Waiver, whichever is sooner, and may be extended for an additional 180-day period, if necessary.

Vermont Castings' Petition for Waiver requests DOE to grant relief from the DOE vented home heating equipment relating to the pilot light and weighted average steady state efficiency. Vermont Castings seeks (a) to exclude the pilot light energy consumption in the calculation of AFUE, and (b) to determine the weighted average steady state efficiency used in the calculation of AFUE at a minimum fuel input rate of two-thirds of the maximum fuel input rate instead of the specified ±5 percent of 50 percent of the maximum fuel input rate. Pursuant to paragraph (b) of Title 10 CFR Part 430.27, the Department is hereby publishing the ''Petition for Waiver.''

The Petition contains confidential company information; thus, the confidential attachments submitted by Vermont Castings are not being published. The Department solicits comments, data, and information respecting the Petition.

Issued in Washington, D.C. on December 21, 1995.

Christine A. Ervin,

Assistant Secretary, Energy Efficiency and Renewable Energy.

Vermont Castings

July 7, 1995.

The Honorable Christine Ervin,

Assistant Secretary for Energy Efficiency and Renewable Energy, United States Department of Energy, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585

Re: Petition for Waiver and Application for Interim Waiver

Dear Secretary Ervin: This is a Petition for Waiver and Application for Interim Waiver submitted pursuant to Title 10 Code of Federal Regulations 430.27. as amended 14 November 1986. Vermont Castings is requesting acceptance of two waivers from the test procedures which appear at 10 CFR, part 430, subpart B. Appendix O—Uniform Test Method for Measuring the Energy Consumption of Vented Home Heating Equipment. The particular sections for which the waivers are required are detailed in each of the following Waiver Requests.

These waivers are requested for:

MODEL DV25

Gas Fired Freestanding Direct Vent Firebox

MODEL DV20

Gas Fired Wallmount/Zero Clearance Direct Vent Firebox

Waiver Request No. 1—

This request refers to section 3.1.1—Gas fueled vented home heating equipment and section 4.2.4—Weighted-average steady-state efficiency. These sections state that for manually controlled heaters with various input rates the weighted-average steady-state efficiency is measured at a fuel input rate of ±5 percent of 50 percent of the maximum fuel input rate. Both of the heater models included in this request utilize a combination gas control with has a variable pressure regulator set point which allows the user to easily vary the manifold pressure of the appliance within a fixed range of pressures. Specifically the range of manifold adjustment

for Natural gas is 3.5″ W.C. to 1.7″ W.C. and for Propane gas from 10.0″ W.C. to 4.9″ W.C. These pressure ranges allow the user to vary the fuel input rates on the model DV25 from 25,000 BTUH to 17,500 BTUH and on the model DV20 from 20,000 BTUH to 14,000 BTUH. For both models the minimum fuel input rate is limited to 70% of the maximum fuel input rate and it is therefore not possible to operate these heaters in accordance with the Manufacturer's Users Instructions and obtain a rate of 50% of the maximum fuel input rate. Since the 50% rate specified in the Regulations can not be normally achieved on these products we request that this requirement be waived for these appliances.

Vermont Castings requests to utilize the test procedure proposed by DOE on 23 August, 1993, 58 FR 44538. Accordingly, we request to calculate the weighted average steady-state efficiency using the minimum obtainable fuel input rate provided this rate is no greater than ⅔ maximum input rate of the heater. Specifically, the models included in this request will be tested at ⅔ of the maximum fuel input rate.

The current test procedure does not credit Vermont Castings for the additional energy savings that occur when the minimum fuel input rate is limited to 70% of the maximum input rate. Test data shows a significant increase in the actual overall AFUE when compared to results obtained at a rate of 50% of the maximum fuel input rate. Copies of confidential test data confirming the energy savings will be forwarded to you upon request.

Waiver Request No. 2—

This request refers to section 3.5—Pilot Light Measurement and section 4.2.6—Annual Fuel Utilization Efficiency (AFUE). These sections require the measurement of energy input to the pilot light (Q_p) and the use of this data in the calculation of AFUE for the energy consumed by the pilot light when the heater is not in operation.

Both of the heater models included in this request are designed with a transient pilot which is to be turned off by the user when the heater is not in use. The control knob on the combination gas control in these heaters has three positions—''OFF'', ''PILOT'' and ''ON''. Gas flow to the pilot is obtained by rotating the control knob from ''OFF'' to ''PILOT'', depressing the knob, holding in, and pressing the piezo ignitor. When the pilot heats a thermocouple element, sufficient voltage is supplied to the combination gas control for the pilot to remain lit when the knob is released and turned to the ''ON'' position. The main burner can then be ignited by moving an ON/OFF switch to the ''ON'' position. Instructions in both the Users Instruction Manual and on a label adjacent to the gas control require the user to move the gas control knob to the ''OFF'' position when the heater is not in use. Since the current test procedure does not credit Vermont Castings for the additional energy savings that occur when the pilot is turned off, we request the requirement to include energy input to the pilot light in the AFUE calculation be waived for these appliances.

Vermont Castings requests to utilize the test procedure purposed by DOE on 23 August, 1993. 58 FR 44538. Specifically, we request the term involving the pilot light energy consumption be deleted from the calculation of AFUE for the models included in this request. This results in an AFUE which is equal to the heating seasonal efficiency.

Test data shows a significant increase in the actual overall AFUE when compared to results obtained when energy input to the pilot is included in the overall AFUE. Copies of confidential test data confirming the energy savings will be forwarded to you upon request.

Vermont Castings is confident that both of these waivers will be granted, as similar waivers have been granted in the past to Appalachian Stove and Fabricators, Inc. and Valor Incorporated. Also, the revisions to the test procedure which we request have been published by DOE as proposed changes on 23 August, 1993. 58 FR 44538.

Manufacturers that domestically market similar products are being sent a copy of this Petition for Waiver and Application for Interim Waiver.

Sincerely,

Steve Ballou,

Director of Engineering.

DOE Waiver Request Vendors Being Notified

Aladdin Steel Products, Inc., 401 North Wynne Street, Colville, WA 99114, Attn: Alan J. Trusler

Canadian Heating Products Inc., 12091 88th Avenue, Surrey, B.C. V3W 3J5, Canada, Attn: Dan Binzer, President

CFM Inc., 475 Admiral Boulevard, Mississauga, Ontario L5T 2N1, Canada, Attn: Heinz Rieger, President

Fireplace Manufacturers Incorporated, 2701 South Harbor Boulevard, Santa Ana, CA 92704–5803. Attn: Steve Cropp, Vice President of Engineering

Hearthstone Stoves/NHC Inc., P.O. Box 1069, Morrisville, VT 05661, Attn: Manuel L. Perez, President

Heatilator, Inc., 1915 West Saunders Street, Mt. Pleasant, IA 52641, Attn: Bob Burns, President

Heat-N-Glo Fireplace Products, Inc., 6665 West Highway 13, Savage, MN 55378, Attn: Ron Shimek, President

Hunter Enterprises Orillia Ltd., 100 Hunter Valley Road, P.O. Box 400, Orillia, Ontario L3V 6K1, Canada, Attn: Bryan Spencer, Engineering Manager

The Majestic Company, 1000 East Market Street, Huntington, IN 46750–2576, Attn: J. Michael Whiteman, Director, Product Development

Martin Industries, Inc., P.O. Box 128, Florence, AL 35630, Attn: James D. Wilson, President and CEO

Mendota Hearth Corporation, 1890 Wooddale Drive, Woodbury, MN 55125, Attn: Gregory Iverson, National Marketing Manager

Regency Fireplace Products, 7830 Vantage Way, Delta, B.C. V4G 1A7, Canada, Attn: Robert Little, President

Superior Fireplace Company, 4325 Artesia Avenue, Fullerton, CA 92633–2522, Attn: Samir Barudi, Vice President, Engineering

Temco Fireplace Products, 301 So. Perimeter Park Drive, Suite 227, Nashville, TN 37211–4128, Attn: Jack Fahey, Vice President, Sales and Mktg.

Vermont Castings

October 30, 1995—Revised

Mr. Bill Hui,

Office of Energy Efficiency and Renewable Energy, United States Department of Energy, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585

Re: Vermont Castings Petition for Waiver and Application for Interim Waiver

Dear Mr. Hui: I am writing in response to your request for more information regarding our Petition for Waiver and Application for Interim Waiver dated July 7, 1995. Some of the information in our original request has been changed.

The gas control for the new model DV25 has been changed to allow the user to adjust the fuel input rate from a maximum of 25,000 BTUH to a minimum of 20,000 BTUH. The minimum fuel input rate will be limited to 80 percent of the maximum fuel input rate rather than 70 percent of the maximum fuel input rate as stated in our original request.

The model nomenclature for model DV20 has been changed to DH20 and the minimum fuel input rate will also been limited to 80 percent of the maximum fuel input rate. This model will have a maximum fuel input rate of 20,000 BTUH and a minimum fuel input rate of 16,000 BTUH rather than 14,000 BTUH as stated in our original request.

Both of these models will be shipped from our factory with a gas control which limits the range of adjustment by the homeowner to the ranges specified above. When these units are tested in our laboratory at lower firerates, the gas control must be modified in one of two ways:

- The regulator assembly located on the gas control is replaced with a regulator assembly which allows adjustment to a lower manifold pressure (lower firerate).
- The regulator assembly located on the gas control is modified by breaking a seal and readjusting internal stops to allow adjustment to a lower manifold pressure.

Even though these Vermont Castings units can only be turned down to 80 percent of their maximum fire rate when shipped from our factory we have requested to calculate AFUE ratings for our initial production units by testing at ⅔'s of the maximum fire rate. Attached to this letter is data from one pre-production model which compares AFUE ratings based on fire rates of 100 percent, 80 percent, ⅔ and 50 percent of the maximum fire rate. This data shows that an AFUE rating based on ⅔ maximum firerate is lower than an AFUE rating based on 80 percent maximum firerate.

Vermont Castings will support a DOE proposal to rate appliances at the lower value obtained form tests at the maximum firerate and the minimum firerate as shipped from the factory. Until this test procedure can be finalized, we request that our interim waiver utilizing a more conservative method of rating at ⅔ maximum firerate be granted as soon as possible.

Sincerely,

Dave Christensen,

Project Engineer.

[FR Doc. 95–31424 Filed 12–27–95; 8:45 am]

BILLING CODE 6450–01–M

Office of Fossil Energy

[Docket No. FE C&E 95–01—Certification Notice—147]

Panda Brandywine, Limited Partnership, Notice of Filing of Coal Capability Powerplant and Industrial Fuel Use Act

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of filing.

SUMMARY: On December 11, 1995, Panda Brandywine, Limited Partnership, submitted a coal capability self-certification pursuant to section 201 of the Powerplant and Industrial Fuel Use Act of 1978, as amended.

ADDRESSES: Copies of self-certification filings are available for public inspection, upon request, in the Office of Fuels Programs, Fossil Energy, Room 3F–056, FE–52, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Ellen Russell at (202) 586–9624.

SUPPLEMENTARY INFORMATION: Title II of the Powerplant and Industrial Fuel Use Act of 1978 (FUA), as amended (42 U.S.C. 8301 et seq.), provides that no new baseload electric powerplant may be constructed or operated without the capability to use coal or another alternate fuel as a primary energy source. In order to meet the requirement of coal capability, the owner or operator of such facilities proposing to use natural gas or petroleum as its primary energy source shall certify, pursuant to FUA section 201(d), to the Secretary of Energy prior to construction, or prior to operation as a base load powerplant, that such powerplant has the capability to use coal or another alternate fuel. Such certification establishes compliance with section 201(a) as of the date filed with the Department of Energy. The Secretary is required to publish a notice in the Federal Register that a certification has been filed. The following owner/operator of a proposed new baseload powerplant has filed a self-certification in accordance with section 201(d).

Owner: Panda Brandywine, Limited Partnership.

Operator: Panda Brandywine, Limited Partnership.

Location: Brandywine, Maryland.

Plant Configuration: Combined cycle, cogeneration facility.

Capacity: 230 megawatts.

Fuel: Natural gas.

Purchasing Entities: Potomac Electric Power Company.

In-Service Date: October 31, 1996.

Issued in Washington, D.C., December 19, 1995.

Anthony J. Como,

Director, Office of Coal & Electricity, Office of Fuels Programs, Office of Fossil Energy.

[FR Doc. 95–31421 Filed 12–27–95; 8:45 am]

BILLING CODE 6450–01–M

[Docket No. FE–R–79–43B]

Electric and Gas Utilities Covered in 1996 by Titles I and III of the Public Utility Regulatory Policies Act of 1978 and Requirements for State Regulatory Authorities To Notify the Department of Energy

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice.

SUMMARY: Sections 102(c) and 301(d) of the Public Utility Regulatory Policies Act of 1978 (PURPA) require the Secretary of Energy to publish a list, before the beginning of each calendar year, identifying each electric utility and gas utility to which Titles I and III of PURPA apply during such calendar year. In addition, sections 102(c) and 301(d) of PURPA require each State regulatory authority to notify the Secretary of Energy of each electric utility and gas utility on the list for which such State regulatory authority has ratemaking authority. Written comments are requested on the accuracy of the list of electric utilities and gas utilities. This Notice is to announce the availability of the 1996 list.

The list is available both in hard copy and electronically. The hard copy version of the 1996 list is being provided by mail to all State regulatory authorities. Other parties interested in receiving the hard copy list may contact the **FOR FURTHER INFORMATION CONTACT** identified below. In addition, the Office of Fuels Programs operates an electronic bulletin board as a service to commercial and government users, as well as the general public. The 1996 list is also available by accessing the bulletin board.

DATES: Notifications by State regulatory authorities and written comments must be received by no later than 4:30 p.m. on February 15, 1996.

ADDRESSES: Notifications and written comments should be forwarded to: Department of Energy, Office of Coal and Electricity, FE–52, 1000 Independence Avenue, SW., Room 3F–070, Docket No. FE–R–79–43B, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Steven Mintz, Office of Coal and Electricity, Fossil Energy, Department of Energy, 1000 Independence Avenue, SW., Room 3F–070, FE–52, Washington, DC 20585, Telephone 202/586–9506.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to sections 102(c) and 301(d) of PURPA, Pub. L. 95–617, 92 Stat. 3117 *et seq.* (16 U.S.C. 260l *et seq.*, hereinafter referred to as the Act) the Department of Energy (DOE) is required to publish a list of utilities to which Titles I and III of PURPA apply in 1996.

State regulatory authorities are required by the Act to notify the Secretary of Energy as to their ratemaking authority over the listed utilities. The inclusion or exclusion of any utility on or from the list does not affect the legal obligations of such utility or the responsible authority under the Act.

The term ''State regulatory authority'' means any State, including the District of Columbia and Puerto Rico, or a political subdivision thereof, and any agency or instrumentality, which has authority to fix, modify, approve, or disapprove rates with respect to the sale of electric energy or natural gas by any utility (other than such State agency). In the case of a utility for which the Tennessee Valley Authority (TVA) has ratemaking authority, the term ''State regulatory authority'' means the TVA.

Title I of PURPA sets forth ratemaking and regulatory policy standards with respect to electric utilities. Section 102(c) of Title I requires the Secretary of Energy to publish a list, before the beginning of each calendar year, identifying each electric utility to which Title I applies during such calendar year. An electric utility is defined as any person, State agency, or Federal agency that sells electric energy. An electric utility is covered by Title I for any calendar year if it had total sales of electric energy, for purposes other than resale, in excess of 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year. An electric utility is covered in 1996 if it exceeded the threshold in any year from 1976 through 1994.

Title III of PURPA addresses ratemaking and other regulatory policy standards with respect to natural gas utilities. Section 301(d) of Title III

requires the Secretary of Energy to publish a list, before the beginning of each calendar year, identifying each gas utility to which Title III applies during such calendar year. A gas utility is defined as any person, State agency, or Federal agency engaged in the local distribution of natural gas and the sale of natural gas to any ultimate consumer of natural gas. A gas utility is covered by Title III if it had total sales of natural gas, for purposes other than resale, in excess of 10 billion cubic feet during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year. A gas utility is covered in 1996 if it exceeded the threshold in any year from 1976 through 1994.

In compiling the list published today, the DOE revised the 1995 list (60 FR 2586, January 10, 1995) upon the assumption that all entities included on the 1995 list are properly included on the 1996 list unless the DOE has information to the contrary. In doing this, the DOE took into account information included in public documents regarding entities which exceeded the PURPA thresholds for the first time in 1994. The DOE believes that it will become aware of any errors or omissions in the list published today by means of the comment process called for by this Notice. The DOE will, after consideration of any comment and other information available to the DOE, provide written notice of any further additions or deletions to the list.

II. Notification and Comment Procedures

No later than 4:30 p.m. on February 15, 1996, each State regulatory authority must notify the DOE in writing of each utility on the list over which it has ratemaking authority. Two copies of such notification should be submitted to the address indicated in the **ADDRESS** section of this Notice and should be identified on the outside of the envelope and on the document with the designation ''Docket No. FE-R–79–43B.'' Such notification should include:

1. A complete list of electric utilities and gas utilities over which the State regulatory authority has ratemaking authority;
2. Legal citations pertaining to the ratemaking authority of the State regulatory authority; and
3. For any listed utility known to be subject to other ratemaking authorities within the State for portions of its service area, a precise description of the portion to which such notification applies.

All interested persons, including State regulatory authorities, are invited to comment in writing, no later than 4:30 p.m. on February 15, 1996, on any errors or omissions with respect to the list. Two copies of such comments should be sent to the address indicated in the **ADDRESS** section of this Notice and should be identified on the outside of the envelope and on the document with the designation ''Docket No. FE-R–79–43B.'' Written comments should include the commenter's name, address, and telephone number.

All notifications and comments received by the DOE will be made available, upon request, for public inspection and copying in the Freedom of Information Reading Room, Room 1E–190, 1000 Independence Avenue, S.W., Washington, D.C. 20585, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

III. List of Electric Utilities and Gas Utilities

The 1996 list consists of two parts (appendices A and B). Each displays a different tabulation of the utilities that meet PURPA coverage requirements. As stated above, the inclusion or exclusion of any utility on or from the lists does not affect its legal obligations or those of the responsible State regulatory authority under PURPA.

Appendix A contains a list of utilities which are covered by PURPA. These utilities are grouped by State and by the regulatory authority within each State. Also included in this list are utilities which are covered by PURPA but which are not regulated by the State regulatory authority. This tabulation, including explanatory notes, is based on information provided to the DOE by State regulatory authorities in response to the January 10, 1995, Federal Register notice (60 FR 2586) requiring each State regulatory authority to notify the DOE of each utility on the list over which it has ratemaking authority, public comments received with respect to that notice, and information subsequently made available to the DOE.

The utilities classified in Appendix A as not regulated by the State regulatory authority in fact may be regulated by local municipal authorities. These municipal authorities would be State agencies as defined by PURPA and thus have responsibilities under PURPA identical to those of the State regulatory authority. Therefore, each such municipality is to notify the DOE of each utility on the list over which it has ratemaking authority.

In Appendix B, the utilities are listed alphabetically, subdivided into electric utilities and gas utilities, and further subdivided by type of ownership: investor-owned utilities, publicly-owned utilities, and rural cooperatives.

Those parties interested in accessing the list electronically require the following equipment: a personal computer; communications software such as PROCOMM, RELAY, or CROSSTALK; and, a modem.

Before dialing the Fuels Programs Bulletin Board you should set your communications software to the following parameters: 1200 or 2400 baud; no parity; 8 data bits; 1 stop bit; and, full duplex.

The Bulletin Board telephone number is (202) 586–7853. Calls are limited to 40 minutes of on-line time per day.

The changes to the 1995 list of electric and gas utilities are as follows:

Additions:

Athens Utilities Board (TN)
Bristol Virginia Utilities Board (VA)
City of Fort Collins (CO)
Columbia Power System (TN)
Florida Keys Electric Cooperative (FL)
Key West Utility Board (FL)
La Plata Electric Association, Inc. (CO)
Maryville Utilities (TN)
Northcentral Mississippi EPA (MS)
Peoples Natural Gas Company (SD)
Roanoke Gas Company (VA)
Tallahatchie Valley EPA (MS)
Tri-State Generation and Transmission, Inc. (CO)
Vero Beach, City of (FL)

(Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, 92 Stat. 3117 *et seq.* (16 U.S.C. 2601 *et seq.*)).

Issued in Washington, D.C. on December 22, 1995.

Anthony J. Como,

Director, Office of Coal and Electricity, Office of Fuels Programs, Office of Fossil Energy.

[FR Doc. 95–31422 Filed 12–27–95; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL RESERVE SYSTEM

CoreStates Financial Corp., et al.; Notice of Applications to Engage de novo in Permissible Nonbanking Activities

The companies listed in this notice have 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.

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 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.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 11, 1996.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105, and Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. CoreStates Financial Corp., Philadelphia, Pennsylvania, Banc One Corporation, Columbus, Ohio, KeyCorp, Cleveland, Ohio, National City Corporation, Cleveland, Ohio, PNC Bank Corp., Pittsburgh, Pennsylvania; to engage *de novo* through their joint venture subsidiary, Electronic Payment Services, Inc., Wilmington, Delaware, in providing data processing services in connection with an enhanced automated teller machine function, enabling financial institutions to dispense money orders, travelers checks, and postage stamps, pursuant to Board Order, *The Bank of New York Company*, 80 Fed. Res. Bull. 1107 (1994).

Board of Governors of the Federal Reserve System, December 21, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–31425 Filed 12–27–95; 8:45 am]

BILLING CODE 6210–01–F

CoreStates Financial Corp.; Formation of, Acquisition by, or Merger of Bank Holding Companies; and Acquisition of Nonbanking Company

The company listed in this notice has applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed company also has given notice under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) for the 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, or to engage in such an activity. Unless otherwise noted, these 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 to acquire the non-banking subsidiaries 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 January 22, 1996.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105:

1. CoreStates Financial Corp., Philadelphia, Pennsylvania; to merge with Meridian Bancorp, Inc., Reading, Pennsylvania, and thereby indirectly acquire Meridian Bank, Reading, Pennsylvania; Delaware Trust Company, Wilmington, Delaware; and Meridian Bank, New Jersey, Cherry Hill, New Jersey. Applicant also has applied to acquire 24.9 percent of the voting shares of First Commercial Bank of Philadelphia, Philadelphia, Pennsylvania, and 6.7 percent of the voting shares of United Bank of Philadelphia, Philadelphia, Pennsylvania.

In connection with this application, Applicant, also has applied to acquire McGlinn Capital Management, Inc., Wyomissing, Pennsylvania, and thereby engage in providing investment advise, pursuant to § 225.25(b)(4) of the Board's Regulation Y; Meridian Acceptance Corporation, Trenton, New Jersey, and thereby engage in lending activities, pursuant to § 225.25(b)(1) of the Board's Regulation Y; Meridian Asset Management, Inc., Malvern, Pennsylvania, Meridian Trust Company, Malvern, Pennsylvania, and Meridian Trust Company of California, San Francisco, California (in dissolution), and thereby engage in trust company activities, pursuant to § 225.25(b)(3) of the Board's Regulation Y; Meridian Investment Company, Malvern, Pennsylvania, and thereby engage in providing investment advice, pursuant to § 225.25(b)(4) of the Board's Regulation Y; Meridian Commercial Financial Corporation, Philadelphia, Pennsylvania, and thereby engage in lending activities, pursuant to § 225.25(b)(1) of the Board's Regulation Y; Meridian Life Insurance Company, Phoenix, Arizona, and thereby engage in the sale of credit-related insurance, pursuant to § 225.25(b)(8)(i) of the Board's Regulation Y; and Meridian Securities, Inc., Reading, Pennsylvania, and thereby engage in providing securities brokerage services and advice, pursuant to § 225.25(b)(15)(i) and (ii), and underwriting and dealing in government obligations and money market instruments, pursuant to § 225.25(b)(16) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 21, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–31426 Filed 12–27–95; 8:45 am]

BILLING CODE 6210–01–F

Harris Financial, MHC, et al.; Acquisitions of Companies Engaged in Permissible Nonbanking Activities

The organizations listed in this notice have 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.

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 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.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated for the application or the offices of the Board of Governors not later than January 11, 1996.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105:

1. Harris Financial, MHC, Harrisburg, Pennsylvania; to acquire First Harrisburg Bancor, Inc., Harrisburg, Pennsylvania, and its wholly owned subsidiaries, First Federal Savings and Loan Association of Harrisburg, Harrisburg, Pennsylvania, and thereby engage in the ownership and operation of a savings association, pursuant to § 225.25(b)(9) of the Board's Regulation Y; AVSTAR Mortgage Corporation, Blue Bell, Pennsylvania, and thereby engage in mortgage banking, pursuant to § 225.25(b)(1) of the Board's Regulation Y; First Harrisburg Service Corporation, Harrisburg, Pennsylvania, and its subsidiaries, First Financial Insurance Agency, Harrisburg, Pennsylvania, and thereby engage in certain insurance agency activities, pursuant to § 225.25(b)(8)(iv). These activities will be conducted in Pennsylvania, New Jersey and Delaware.

B. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. S.B.C.P. Bancorp, Inc., Cross Plains, Wisconsin; to acquire T&S Insurance Agency, Cross Plains, Wisconsin, and thereby engage in insurance agency activities in a town of less than 5,000 in population, pursuant to § 225.25(b)(8)(iii) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 21, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–31427 Filed 12–27–95; 8:45 am]

BILLING CODE 6210–01–F

Keycorp; Notice of Proposal to Engage de novo in Permissible Nonbanking Activities

The company listed in this notice has given notice 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 notice is available for immediate inspection at the Federal Reserve Bank indicated. Once the notice has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether commencement of the activity 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 January 11, 1996.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. KeyCorp, Cleveland, Ohio; to engage *de novo* through its subsidiary, Key Capital Markets, Inc., Cleveland, Ohio, in providing certain investment and financial advisory services, pursuant to § 225.25(b)(4) of the Board's Regulation Y; in providing brokerage services and investment advisory services, both separately and on a combined basis in connection with the purchase and sale of securities, pursuant to § 225.25(b)(15) of the Board's Regulation Y; in underwriting and dealing in bank eligible securities, pursuant to § 225.25(b)(16) of the Board's Regulation Y; in underwriting and dealing in Tier 1 securities on a limited basis and within the framework previously imposed by the Board of Governors; in buying and selling all types of securities on a riskless principal basis; in acting as agent in the private placement of all types of securities *Citicorp* 73 Fed. Res. Bull. 473 (1987); and *Bankers Trust New York Corporation*, 75 Fed. Res. Bull. 829 (1989); in providing certain foreign exchange and transactional advisory services, pursuant to § 225.25(b)(17) of the Board's Regulation Y; and in trading for its own account, for purposes other than hedging, in futures, options and options on certificates of deposit or other money market instruments that are permissible for national banks, *Swiss Bank Corporation*, 77 Fed. Res. Bull. 759 (1991).

Board of Governors of the Federal Reserve System, December 21, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–31429 Filed 12–27–95; 8:45 am]

BILLING CODE 6210–01–F

Paul Franciscus Janssens-Lens; Change in Bank Control Notice

Acquisition of Shares of Banks or Bank Holding Companies

The notificant listed below has 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 notice is available for immediate inspection at the Federal Reserve Bank indicated. Once the notice has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for the notice or to the offices of the Board of Governors. Comments must be received not later than January 11, 1996.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. Paul Franciscus Janssens-Lens, Marco Island, Florida; to acquire a total of 14 percent of the voting shares of Citizens Community Bancorp, Inc., Marco Island, Florida, and thereby indirectly acquire Citizens Community Bank of Florida, Marco Island, Florida (in organization).

Board of Governors of the Federal Reserve System, December 21, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–31428 Filed 12–27–95; 8:45 am]

BILLING CODE 6210–01–F

Sooner Southwest Bankshares, 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 January 22, 1996.

A. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. Sooner Southwest Bankshares, Inc., Bristow, Oklahoma; to acquire 100 percent of the voting shares of Farmers Exchange Bank, Antlers, Oklahoma.

B. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105:

1. Shinhan Bank, Seoul, Korea; to become a bank holding company by acquiring 100 percent of the voting shares of Marine National Bank, Irvine, California.

Board of Governors of the Federal Reserve System, December 21, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–31430 Filed 12–27–95; 8:45 am]

BILLING CODE 6210–01–F

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–050–1020–00: GP–0050]

Notice of Meeting of John Day-Snake Resource Advisory Council

AGENCY: Bureau of Land Management, Prineville District.

ACTION: Meeting of John Day-Snake Resource Advisory Council: Walla Walla, Washington; February 1–2, 1996.

SUMMARY: A meeting of John Day-Snake Resource Advisory Council will be held on February 1, 1996, from 8:00 a.m. to 4:30 p.m., and February 2, 1996, from 8:00 a.m. to 3:00 p.m. at the Interior Columbia Basin Ecosystem Management Project Office, 112 East Poplar Street, Walla Walla, Washington 99362. At an appropriate time each day, the Council meeting will recess for approximately one hour for lunch. Public comments will be received from 3:00 p.m. to 4:00 p.m. on Thursday, February 1, 1996. Topics to be discussed are the Interior Columbia Basin Ecosystem Management Project and standards for rangeland health and guidelines for livestock grazing on the public lands.

FOR FURTHER INFORMATION CONTACT: James L. Hancock, Bureau of Land Management, Prineville District Office, 3050 NE Third Street Prineville, Oregon 97754, or call 541–447–4115.

Dated: December 8, 1995.

James L. Hancock,

District Manager.

[FR Doc. 95–31349 Filed 12–27–95; 8:45 am]

BILLING CODE 4310–33–M

[OR–094–06–1430–01: GP6–0046; OR 48830]

Realty Action: Modified Competitive Sale of Public Lands; Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action; modified competitive sale of public lands in Lane County, Oregon.

SUMMARY: The following land has been found suitable for sale by modified competitive sale procedures under Sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2750, 43 U.S.C. 1713 and 1719), at not less than the appraised fair market value (FMV) of $17,300.00. The land will not be offered for sale for at least 60 days after publication of this notice:

Willamette Meridian, Oregon

T.18 S., R. 1 W.

Section 26: Lots 7, 8, 9, and 10

Containing 2.89 acres

The above described land is hereby segregated from appropriation under the public land laws, including the mining laws, but not from sale under the above cited statute, for 270 days from the date of publication of this notice in the Federal Register or until title transfer is completed or the segregation is terminated by publication in the Federal Register, whichever occurs first.

This land is difficult and uneconomic to manage as part of the public lands and is not suitable for management by other Federal agencies. No significant resource values will be affected by this disposal. The sale is consistent with BLM's planning for the land involved and the public interest will be served by the sale.

Purchasers must be U.S. citizens, 18 years of age or older, a state or state instrumentality authorized to hold property, or a corporation authorized to own real estate in the state in which the land is located.

The land will be offered for sale at public auction using modified bidding procedures authorized under 43 CFR 2711.3–2. Bidding for this parcel is open to all qualified bidders; however, the following adjacent land owners (designated bidders) will be given the opportunity to meet the highest bid received at the sale: Nancy L. Beplat, William F. Cooper, Gerald and Shirley Dilley, Thomas J. Donnelly, Katherine and Rodger Fair, Angela Gomes, Gavin McComas, Weyerhaeuser Company, Nadine Wilkins.

The land will be offered for sale at public auction beginning at 10:00 am, PST on March 15, 1996, at 2890 Chad Drive, Eugene, Oregon 97401–9336. Sale will be by sealed bid only. All sealed bids must be received by the BLM's Eugene District Office at 2890 Chad Drive, Eugene, Oregon 97401–9336, prior to 10:00 a.m. on the date of the sale, March 15, 1996. Bid envelopes must be marked on the lower left front corner, ''Sale OR 48830''. Bids must be for not less than the appraised FMV specified in this notice. Each sealed bid shall be accompanied by a certified check, postal money order, bank draft, or cashier's check made payable to the Department of Interior, BLM for not less than 10 percent of the amount bid. If the parcel is not sold on the March 15, 1996 sale date, then the land offered will be re-offered to the general public through continuing modified competitive sales. Offers for the unsold parcel will be accepted in a manner consistent with the process described herein; bids will be opened on the 15th day of each month thereafter until the apparent high bid is declared.

Under modified competitive sale procedures the written sealed bids will be opened and an apparent high bid will be declared at the sale. The apparent high bidder and the designated bidders will be notified. The designated bidders will be given 30 days from the date of the sale to exercise the preference consideration given to meet the high bid. Should the designated bidders fail to submit a written bid that matches the apparent high bid within the specified time period, the apparent high bidder shall be declared high bidder. In case of a tie of bids submitted by the designated bidders, the interested bidders would be given an opportunity to submit a written agreement as to the division of the lands, or an additional sealed bid, meeting the above stated requirements, within 30 days of notification of eligibility. At that time the high bidder would be awarded the property. The total purchase price for the land shall be paid within 180 days of the date of this sale.

The terms and conditions applicable to the sale are as follows:

1. A right-of-way for ditches and canals will be reserved to the United States under the authority of the Act of August 30, 1890 (26 Stat. 291; 43 U.S.C. 945).

2. The mineral interest being offered for conveyance have no known mineral value. A bid submitted will constitute an application for conveyance of the mineral estate in accordance with Section 209 of the Federal Land Policy and Management Act. All qualified bidders must include with their bid deposit a non refundable $50.00 filing fee for the conveyance of the mineral estate.

3. The patent will be issued subject to all valid existing rights and reservations of record.

DATES: For a period of 45 days from the date of publication of this notice in the Federal Register, interested parties may submit comments to the District Manager, Bureau of Land Management, 2890 Chad Drive, Eugene, Oregon 97401–9336. Objections would be reviewed by the State Director who may sustain, vacate, or modify this realty action. In absence of any objections, this realty action will become the final determination of the Department of the Interior.

ADDRESSES: Detailed information concerning the sale, including the reservations, procedures for and conditions of sale, and planning and environmental documents, is available at the Eugene District Office, Bureau of Land Management, 2890 Chad Drive, Eugene, Oregon 97401–9336.

FOR FURTHER INFORMATION CONTACT: Steve Madsen, Realty Specialist, Eugene District Office, at (541) 683–6948.

Date of Issue: December 15, 1995.

Lee Lauritzen,

Eugene Dist. Manager, Acting.

[FR Doc. 95–31431 Filed 12–27–95; 8:45 am]

BILLING CODE 4310–33–P

[OR–125–06–6332–00: GP–0041]

Closures and Restrictions

AGENCY: Bureau of Land Management (BLM), Interior.

ACTION: Notice of restrictions, Spruce Reach adjacent to Dean Creek Elk Viewing Area.

SUMMARY: Pursuant to 43 CFR part 8364, the BLM will prohibit hunting, shooting firearms, igniting fireworks and other explosive devices within the area known as Spruce Reach, adjacent to Dean Creek Elk Viewing Area. Spruce Reach is approximately 56 acres. This restriction will apply year round. BLM and Oregon Department of Fish and Wildlife employees, agents, contractors, and cooperators are exempt from this restriction while in the performance of official duties. The BLM acquired Spruce Reach to further enhance, complement and protect the watchable wildlife and other qualities found at the 1,033-acre Dean Creek Elk Viewing Area. Spruce Reach is considered part of the Elk Viewing Area. Dean Creek Elk Viewing Area supports a large herd of resident Roosevelt elk that are readily visible from a public highway. The area also supports other watchable wildlife. The previously acquired acreage already have the above restrictions. The purpose for the restrictions at Spruce Reach is to provide a means by which the Secretary of the Interior through the BLM, may control and manage public use of the area to effectively implement management objectives and provide the watchable wildlife with habitat that is free from public disturbance or harassment. The restrictions will also provide for public safety by designating safe viewing areas with greater opportunities to view wildlife.

The restricted area is depicted on a Dean Creek Elk Viewing Area map. The map and copies of this restriction notice are available from the Coos Bay District Office, Bureau of Land Management, 1300 Airport Lane, North Bend, Oregon 97459.

This restriction order is effective immediately and shall remain in effect until revised, revoked, or amended by the authorized officer pursuant to 43 CFR 8360. Any person who violates this restriction notice may be subject to a maximum fine of $1,000 or imprisonment not to exceed 12 months or both under authority of 43 CFR 8360.0–7.

Restricted Areas

Spruce Reach is located approximately three miles east of Reedsport, Oregon, adjacent to Oregon State Highway 38 and Dean Creek Elk Viewing Area and is further described as follows:

Township 21 South, Range 11 West, Willamette Meridian
Sec. 32 M&B within lot 8
Sec. 33 M&B of lots 5, 6, and 7 and S½SW¼ and SW¼SE¼
All north of Oregon State Highway 38.

FOR FURTHER INFORMATION CONTACT: Larry Johnston, Park Ranger, Umpqua Resource Area, Coos Bay District, Bureau of Land Management, 1300 Airport Lane, North Bend, Oregon 97459, Telephone: (541) 756–0100.

Daryl L. Albiston,

Umpqua Area Manager.

[FR Doc. 95–31350 Filed 12–27–95; 8:45 am]

BILLING CODE 4310–33–M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32818]

Coast Enterprises, Inc.—Acquisition Exemption—Sierra Pacific Coast Railway, Inc.; Sierra Railroad, a Division of Coast Enterprises, Inc.—Operation Exemption—Coast Enterprises, Inc.

Coast Enterprises, Inc. (Coast) and Sierra Railroad, a Division of Coast Enterprises, Inc. (SSR), have filed a verified notice under 49 CFR Part 1150, Subpart D—Exempt Transactions for Coast to acquire from Sierra Pacific Coast Railway, Inc. (SPCR) and for SSR to operate, approximately 49 miles of rail line, between milepost 0.0 at Oakdale, in Stanislaus County, CA, and the end of the line at milepost 49.0 at Fassler, in Tuolumne County, CA.[1]

The transaction was consummated on or about September 29, 1995. The notice of exemption was filed on November 27, 1995, and became effective, pursuant to 49 CFR 1150 Subpart D, on December 4, 1995. On or about July 1, 1995, SRR filed a small carrier transfer application with the Commission seeking approval for SRR's acquisition of the line from SPCR. That application was rejected.[2] In addition, Coast's and SRR's representative informed the Commission staff that their original representative that handled this case left the firm, and the case had to be handled by another representative with guidance from our Office of Public Assistance. It would appear that Coast and SSR were unaware that consummation should not have occurred before the effective date of the exemption.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the exemption's effectiveness. An original and 10 copies of all pleadings, referring to Finance Docket No. 32818, must be filed with he Office of the Secretary, Case Control Branch, Interstate Commerce Commission,[3] Washington, DC 20423. In addition, a copy of each pleading must be served on Michael G. Hart, President, Coast Enterprises, Inc. 17516 Old Summit Road, Los Gatos, CA 95030.

Decided: December 20, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31401 Filed 12–27–95; 8:45 am]

BILLING CODE 7035–01–P

[1] Although the verified notice was filed by SRR, it is signed by Michael G. Hart in his capacity as President of Coast. This is sufficient to treat the verified notice as having been filed by both SRR and Coast.

[2] A small carrier transfer application is for motor carriers. This procedure is not available for rail transactions.

[3] Legislation to sunset the Commission on December 31, 1995, and transfer remaining functions is now under consideration in Congress. Until further notice, parties submitting pleadings should continue to use the current name and address.

[Finance Docket No. 32807]

Minnesota River Bridge Company—Acquisition and Operation Exemption—Soo Line Railroad Company d/b/a CP Rail System

Minnesota River Bridge Company (MRBC), a noncarrier, has filed a notice of exemption to acquire and operate approximately 1.11 miles of track, including a railroad bridge over the Minnesota River, owned by the Soo Line Railroad Company d/b/a CP Rail System (CPRS), between milepost 26.0, near the city of Bloomington, in Hennepin County, MN, to milepost 27.11, near the city of Savage, in Scott County, MN. As part of the agreement between MRBC and CPRS, CPRS will retain trackage rights over the line. The parties expected to consummate the acquisition on or after December 13, 1995.

This proceeding is related to Twin Cities & Western Railroad Company—Operation Exemption—Minnesota River Bridge Company, Finance Docket No. 32808, wherein Twin Cities & Western Railroad Company (TCW) filed a notice of exemption to operate the line.[1] MRBC will retain a residual obligation to provide common carrier service on the line. TCW and MRBC expected to enter into an operation agreement on or after December 13, 1995, and expected to consummate that transaction on or after December 14, 1995. Also related to this proceeding is Douglas M. Head, Kent P. Shoemaker, and Charles H. Clay—Continuance in Control Exemption—Minnesota River Bridge Company, Finance Docket No. 32810, in which the owners of MRBC have concurrently filed a petition of exemption to continue in control of MRBC when it becomes a rail carrier upon consummation of the transactions described in this notice.[2]

Any comments must be filed with the Commission[3] and served on: Jo A. Deroche, Esq., Weiner, Brodsky, Sidman & Kider, P.C., Suite 800, 1350 New York Avenue, N.W. Washington, DC 20005–4797.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: December 20, 1995.

[1] Concurrently with Finance Docket No. 32808, TCW filed a verified notice of exemption in Twin Cities & Western Railroad Company—Trackage Rights Exemption—Soo Line Railroad Company d/b/a/ CP Rail System, Finance Docket No. 32809, to obtain overhead trackage rights on track which connects with the subject line. The connecting track is owned by CPRS, extends from milepost 17.23 at St. Louis Park, MN, and connects at milepost 26.00, near Bloomington, MN. It also connects with the subject line at milepost 27.11, and extends to milepost 28.04, near Savage, MN. The trackage rights were scheduled to become effective on or after December 14, 1995.

[2] Douglas M. Head, Kent P. Shoemaker, and Charles H. Clay, the stockholders of MRBC, do not qualify for a class exemption under 49 CFR 1180.2(d)(2) because: (1) they hold controlling ownership of MRBC, TCW, and Red River Valley & Western Railroad Company; and (2) the 1.11 mile line to be acquired here from CPRS connects with a rail line owned by CPRS, on which TCW, controlled by the above-named stockholders, anticipates acquiring trackage rights in Finance Docket No. 32809. Thus, the stockholders have established a voting trust to insulate themselves from authorized acquisition of control of MRBC until the petition for exemption for control is acted upon.

[3] Legislation to sunset the Commission on December 31, 1995, and transfer the remaining functions is now under consideration in Congress. Until further notice, parties submitting pleadings should continue to use the current name and address: Interstate Commerce Commission, 1201 Constitution Avenue, N.W., Washington, DC 20423.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31398 Filed 12–27–95; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32808]

Twin Cities & Western Railroad Company—Operation Exemption—Minnesota River Bridge Company

Twin Cities & Western Railroad Company (TCW) has filed a notice of exemption to operate approximately 1.11 miles of track owned by Minnesota River Bridge Company (MRBC),[1] between milepost 26.0 near the city of Bloomington, in Hennepin County, MN, to milepost 27.11 near the city of Savage, in Scott County, MN. The parties expected to enter into an operation agreement on or after December 13, 1995, and to consummate the transaction on or after December 14, 1995.

Concurrently with this notice, TCW filed a notice of exemption in *Twin Cities & Western Railroad Company—Trackage Rights Exemption—Soo Line Railroad Company d/b/a/ CP Rail System,* Finance Docket No. 32809, to obtain overhead trackage rights on 9.7 miles of track connected to the subject line. This track extends from milepost 17.23 at St. Louis Park, MN, to its connection with the subject line at milepost 26.00, near Bloomington, MN. It also connects with the line at milepost 27.11, and extends to milepost 28.04, near Savage, MN. The trackage rights were scheduled to become effective on or after December 14, 1995.

Any comments must be filed with the Commission[2] and served on: Jo A. Deroche, Esq., Weiner, Brodsky, Sidman & Kider, P.C., Suite 800, 1350 New York Avenue, N.W., Washington, DC 20005–4797.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: December 20, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31399 Filed 12–27–95; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32809]

Twin Cities & Western Railroad Company—Trackage Rights Exemption—Soo Line Railroad Company d/b/a CP Rail System

Soo Line Railroad Company d/b/a CP Rail System (CPRS) has agreed to grant overhead trackage rights to Twin Cities & Western Railroad Company (TCW) over approximately 9.7 miles of its rail line from milepost 17.23, at St. Louis Park, to milepost 26.0, near the city of Bloomington, in Hennepin County, MN, and from milepost 27.11 to milepost 28.04, near the city of Savage, in Scott County, MN. CPRS previously granted trackage rights to TCW within the Twin Cities Terminal.[1] CPRS will amend that trackage rights agreement to enable TCW to provide switching service to industries located in Savage. The trackage rights were scheduled to become effective on or after December 14, 1995.

Concurrently with this notice, TCW filed a notice of exemption in *Twin Cities & Western Railroad Company—Operation Exemption—Minnesota River Bridge Company,* Finance Docket No. 32808, to operate 1.11 miles of track owned by Minnesota River Bridge Company (MRBC).[2] MRBC's track connects to the subject line at milepost 26.00, near Bloomington, MN, and at milepost 27.11, near Savage, MN. TCW and MRBC expected to enter into an operation agreement on or after December 13, 1995, and expected to consummate that transaction on or after December 14, 1995.

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Pleadings must be filed with the Commission[3] and served on: Jo A. Deroche, Esq., Weiner, Brodsky, Sidman & Kider, P.C., Suite 800, 1350 New York Avenue, N.W. Washington, DC 20005–4797.

As a condition to the use of this exemption, any employees adversely affected by the trackage rights will be protected under *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653 (1980).

Decided: December 20, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31400 Filed 12–27–95; 8:45 am]

BILLING CODE 7035–01–P

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[1] MRBC filed a verified notice of exemption in *Minnesota River Bridge Company—Acquisition and Operation Exemption—Soo Line Railroad Company d/b/a CP Rail System,* Finance Docket No. 32807, to acquire and operate the line. MRBC will retain a residual obligation to provide common carrier service on the line. The parties expected to consummate the acquisition on or after December 13, 1995. The owners of MRBC concurrently filed a petition for exemption in *Douglas M. Head, Kent P. Shoemaker, and Charles H. Clay—Continuance in Control Exemption—Minnesota River Bridge Company,* Finance Docket No. 32810, to continue in control of MRBC when it becomes a rail carrier. Douglas M. Head, Kent P. Shoemaker, and Charles H. Clay, MRBC's stockholders, do not qualify for a class exemption under 49 CFR 1180.2(d)(2) because: (1) they hold controlling ownership of MRBC, TCW, and Red River Valley & Western Railroad Company; and (2) the subject line connects with a rail line owned by Soo Line Railroad Company d/b/a CP Rail System (CPRS) on which TCW, controlled by the above-named stockholders, anticipates acquiring trackage rights in Finance Docket No. 32809, as described above. Thus, the stockholders have established a voting trust to insulate themselves from authorized acquisition of control of MRBC until the petition for exemption for control is acted upon.

[2] Legislation to sunset the Commission on December 31, 1995, and transfer the remaining functions is now under consideration in Congress. Until further notice, parties submitting pleadings should continue to use the current name and address: Interstate Commerce Commission, 1201 Constitution Avenue, N.W., Washington, D.C. 20423.

[1] *See Twin Cities & Western Railroad Company—Trackage Rights Exemption—Soo Line Railroad Company,* Finance Docket No. 31914 (ICC served Aug. 14, 1991).

[2] MRBC filed a verified notice of exemption in *Minnesota River Bridge Company—Acquisition and Operation Exemption—Soo Line Railroad Company d/b/a CP Rail System,* Finance Docket No. 32807, to acquire and operate the line. MRBC will retain a residual obligation to provide common carrier service on the line. The parties expected to consummate the acquisition on or after December 13, 1995. MRBC's owners concurrently filed a petition for exemption in *Douglas M. Head, Kent P. Shoemaker, and Charles H. Clay—Continuance in Control Exemption—Minnesota River Bridge Company,* Finance Docket No. 32810, to continue in control of MRBC when it becomes a rail carrier upon consummation of the transactions described in this notice. Douglas M. Head, Kent P. Shoemaker, and Charles H. Clay, MRBC's stockholders, do not qualify for a class exemption under 49 CFR 1180.2(d)(2) because: (1) they hold controlling ownership of MRBC, TCW, and Red River Valley & Western Railroad Company; and (2) the subject line connects with a rail line owned by Soo Line Railroad Company d/b/a CP Rail System (CPRS) on which TCW, controlled by the stockholders, anticipates acquiring trackage rights. Thus, the stockholders have established a voting trust to insulate themselves from authorized acquisition of control of MRBC until the petition for exemption for control is acted upon.

[3] Legislation to sunset the Commission on December 31, 1995, and transfer the remaining functions is now under consideration in Congress. Until further notice, parties submitting pleadings should continue to use the current name and address: Interstate Commerce Commission, 1201 Constitution Avenue N.W., Washington, D.C. 20423.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importation of Controlled Substances; Notice of Application

Pursuant to Section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(i)), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under Section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Section 1311.42 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on October 11, 1995, The Binding Site, Inc., 5889 Oberlin Drive, Suite 101, San Diego, California 92121, made application to the Drug Enforcement Administration to be registered as an importer of the basic classes of controlled substances listed below:

Drug	Schedule
Methaqualone (2565)	I
Lysergic acid diethylamide (7315)	I
Tetrahydrocannabinols (7370)	I
Normorphine (9313)	I
Methamphetamine (1105)	II
Amobarbital (2125)	II
Secobarbital (2315)	II
Ecgonine (9130)	II
Ethylmorphine (9190)	II
Meperidine intermediate-C (9234)	II

The firm plans to import the above listed substances in milligrams quantities for labelling with enzymes, fluorophores and radioisotopes for immunoassays.

Any manufacturer holding, or applying for, registration as a bulk manufacturer of this basic class of controlled substance may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.54 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections, or requests for a hearing may be addressed to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, D.C. 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than January 29, 1996.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1311.42(b), (c), (d), (e), and (f). As noted in a previous notice at 40 FR 43745–46 (September 23, 1975), all applicants for registration to import a basic class of any controlled substance in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1311.42(a), (b), (c), (d), (e), and (f) are satisfied.

Dated: December 15, 1995.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 95–31389 Filed 12–27–95; 8:45 am]

BILLING CODE 4410–09–M

Importer of Controlled Substances; Notice of Registration

By Notice dated August 10, 1995, and published in the Federal Register on August 17, 1995 (60 FR 42905), Noramco of Delaware, Inc., Division of McNeilab, Inc., 500 Old Swedes Landing Road, Wilmington, Delaware 19801, made application to the Drug Enforcement Administration (DEA) to be registered as an importer of basic classes of controlled substances listed below:

Drug	Schedule
Opium, raw (9600)	II
Poppy Straw Concentrate (9670)	II

No comments or objections have been received. DEA has determined that the registration of Noramco of Delaware, Inc. to import the listed controlled substances is consistent with the public interest at this time. Therefore, pursuant to Section 1008(a) of the Controlled Substances Import and Export Act and in accordance with Title 21, Code of Federal Regulations, Section 1311.42, the above firm is granted registration as an importer of the basic classes of controlled substances listed above.

Dated: December 15, 1995.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 95–31387 Filed 12–27–95; 8:45 am]

BILLING CODE 4410–09–M

Importation of Controlled Substances; Notice of Application

Pursuant to Section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(i)), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under Section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with § 1311.42 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on October 23, 1995, North Pacific Trading Company, 1505 SE Gideon Street, Portland, Oregon 97202, made application to the Drug Enforcement Administration to be registered as an importer of marihuana (7360) a basic class of controlled substance in Schedule I.

This application is exclusively for the importation of marihuana seed which will be rendered non-viable and used as bird seed.

Any manufacturer holding, or applying for, registration as a bulk manufacturer of these basic classes of controlled substances may file written comments on or objections to the application described above and may, at the same time, file a written request for a hearing on such application in accordance with 21 CFR 1301.54 in such form as prescribed by 21 CFR 1316.47.

Any such comments, objections, or requests for a hearing may be addressed to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, D.C. 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than (30 days from publication).

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1311.42 (b), (c), (d), (e), and (f). As noted in a previous notice at 40 FR 43745–46 (September 23, 1975), all applicants for registration to import basic classes of any controlled substances in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1311.42 (a), (b), (c), (d), (e), and (f) are satisfied.

Dated: December 15, 1995.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 95–31388 Flied 12–27–95; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 95–47]

Roxane Laboratories, Inc., Columbus, OH; Notice of Administrative Hearing, Summary of Comments and Objections; Notice of Hearing

This Notice of Administrative Hearing, Summary of Comments and Objections, regarding the application of Roxane Laboratories, Inc. (Roxane) for registration as an importer of cocaine, a Schedule II controlled substance, is published pursuant to 21 C.F.R. § 1301.42(a). On June 8, 1995, notice was published in the Federal Register [1] stating that Roxane has applied to be registered as an importer of cocaine.

On July 7, 1995, Mailinckrodt Chemical, Inc. (Mallinckrodt) filed comments and objections on the application and requested a hearing in the event that the application is not denied. Stepan Company (Stephan) also filed objections to the application. Notice is hereby given that a hearing with respect to Roxane's application to be registered as an importer of cocaine will be conducted pursaunt to the provisions of 5 U.S.C. 952(a) and 958 and 21 C.F.R. § 1311.42.

Hearing Date

The hearing will begin at 9:30 a.m. on February 5, 1996, and will be held at the Drug Enforcement Administration Headquarters, 600 Army Navy Drive, Hearing Room, Room E–2103, Arlington, Virginia. The hearing will be closed to the public except to the parties and those persons who have a right to participate under 21 C.F.R. § 1311.42(a) and request a hearing or enter a notice of appearance.

Notice of Appearance

Any person entitled to participate in this hearing pursuant to 21 C.F.R. § 1311.42(a), and desiring to do so, may participate by filing a notice of intention to participate in accordance with 21 C.F.R. § 1311.54, in duplicate, with the Hearing Clerk, Office of the Administrative Law Judges, Drug Enforcement Administration, Washington, DC 20537, within 30 days of the date of publication of this notice in the Federal Register. Each notice of appearance must be in the form prescribed in 21 C.F.R. § 1316.48. Mallinckrodt, Roxane, and DEA Office of Chief Counsel need not file a notice of intention to participate.

FOR FURTHER INFORMATION CONTACT: Helen Farmer, Hearing Clerk, Drug Enforcement Administration, Washington, DC 20537; Telephone (202) 307–8188.

Summary of Comments and Objections

Mallinckrodt's Comments

Mallinckrodt, a manufacturer of bulk cocaine, intends to show that registration of Roxane as an importer of cocaine would be contrary to 21 U.S.C. § 952(a) because there is no emergency in which domestic supplies of cocaine are inadequate and because competition among domestic manufacturers of cocaine either is adequate or could be rendered adequate by registration of additional domestic manufacturers. Mallinckrodt argues that supply and competition are adequate. In support of its argument that supply is adequate, Mallinckrodt asserts that it is able to supply the entire licit United States cocaine market and that the quality, reliability, and quantity of foreign sources of raw materials varies considerably. In support of its argument that competition is sufficient, Mallinckrodt asserts that the domestic market for cocaine is very small and is flat or declining, and that even if competition were inadequate, it could be rendered adequate by the registration of additional domestic manufacturers. Mallinckrodt also argues that because it could meet the market needs for cocaine, allowing the importation of cocaine would needlessly increase the risk of diversion, foster international commerce in cocaine, and result in an increased demand on DEA's regulatory resources.

Stepan's Comments

Stepan, an importer of coca leaf and manufacturer of cocaine, states that it is concerned that the importation of finished cocaine raises a question whether adequate controls will exist to prevent its diversion. Stepan further asserts that importation would raise issues of quality and sponsorship that do not exist in the current arrangement, whereby Stepan manufacturers cocaine in accordance with long-standing, approved, and controlled processes. Finally, Stepan asserts that there is no shortage of domestic manufacturing capability or facilities.

Dated: December 21, 1995.

Stephen H. Greene,

Deputy Administrator, Drug Enforcement Administration.

[FR Doc. 95–31384 Filed 12–27–95; 8:45 am]

BILLING CODE 4410–09–M

[1] 60 Fed. Reg. 30320.

LEGAL SERVICES CORPORATION

Grant Awards to Applicants for Funds to Provide Civil Legal Services to Eligible Low-Income Clients

AGENCY: Legal Services Corporation.

ACTION: Announcement of Grant Awards.

SUMMARY: The Legal Services Corporation (LSC/Corporation) hereby announces its intention to award grants and contracts to provide economical and effective delivery of high quality civil legal services to eligible low-income clients effective as early as January 1, 1996, or as soon thereafter as feasible consistent with pending Congressional appropriations.

DATES: All comments and recommendations must be received on or before the close of business on January 29, 1996.

ADDRESSES: Office of Program Services, Legal Services Corporation, 750 First Street, N.E., 11th Floor, Washington, D.C. 20002–4250.

FOR FURTHER INFORMATION CONTACT: Patricia M. Hanrahan, Office of Program Services, 202/336–8846.

SUPPLEMENTARY INFORMATION: Pursuant to the Corporation's announcement of funding availability on September 21, 1995 (60 FR 48951), the LSC will award funds to one or more of the following organizations to provide civil legal services in the indicated service areas.

NAME OF ORGANIZATION—SERVICE AREAS IDENTIFIED IN LSC RFP (Oct. 1995)

GUAM LGL SVCS CORP—GU–1

These grants and contracts will be awarded under the authority conferred on LSC by the Legal Services Corporation Act, as amended (42 U.S.C. 2996e(a)(1)). Awards will be made so that each service area indicated is served by one of the organizations listed above, although each of the listed organizations is not necessarily guaranteed an award or contract. This public notice is issued pursuant to the LSC Act (42 U.S.C. 2996f(f)), with a request for comments and recommendations concerning the potential grantees within a period of thirty (30) days from the date of publication of this notice. Grants will become effective as early as January 1,

1996, and funds will be distributed as soon thereafter as possible, consistent with pending Congressional appropriations.

Merceria L. Ludgood,

Director, Office of Program Services.

[FR Doc. 95–31408 Filed 12–27–95; 8:45 am]

BILLING CODE 7050–01–M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration, Office of Records Administration.

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Records schedules identify records of sufficient value to warrant preservation in the National Achives of the United States. Schedules also authorize agencies after a specified period to dispose of records lacking administrative, legal, research, or other value. Notice is published for records schedules that (1) propose the destruction of records not previously authorized for disposal, or (2) reduce the retention period for records already authorized for disposal. NARA invites public comments on such schedules, as require d by 44 U.S.C. 3303a(a).

DATES: Request for copies must be received in writing on or before February 12, 1996. Once the appraisal of the records is completed, NARA will send a copy of the schedule. The requester will be given 30 days to submit comments.

ADDRESSES: Address requests for single copies of schedules identified in this notice to the Records Appraisal and Disposition Division (NIR), National Archives and Records Administration, College Park, MD 20740. Requesters must cite the control number assigned to each schedule when requesting a copy. The control number appears in the parentheses immediately after the name of the requesting agency.

SUPPLEMENTARY INFORMATION: Each year U.S. Government agencies create billions of records on paper, film, magnetic tape, and other media. In order to control this accumulation, agency records managers prepare records schedules specifying when the agency no longer needs the records and what happens to the records after this period. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. These comprehensive schedules provide for the eventual transfer to the National Archives of historically valuable records and authorize the disposal of all other records. Most schedules, however, cover records of only one office or program or a few series of records, and many are updates of previously approved schedules. Such schedules also may include records that are designated for permanent retention.

Destruction of records requires the approval of the Archivist of the United States. This approval is granted after a thorough study of the records that takes into account their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and historical or other value.

This public notice identifies the Federal agencies and their subdivisions requesting disposition authority, includes the control number assigned to each schedule, and briefly describes the records proposed for disposal. The records schedule contains additional information about the records and their disposition. Further information about the disposition process will be furnished to each requester.

Schedules Pending:

1. Tennessee Valley Authority (N1–142–95–13). Facilities Services Organizations general correspondence files.

2. Tennessee Valley Authority (N1–142–95–17). Divisional correspondence files for the Purchasing function.

3. Tennessee Valley Authority (N1–142–96–1). Employee Transition Program employee history files.

4. Tennessee Valley Authority (N1–142–96–2). Succession planning program files.

5. Tennessee Valley Authority (N1–142–96–3). Energy and engineering project and procurement records.

Dated: December 18, 1995.

James W. Moore,

Assistant Archivist for Records Administration.

[FR Doc. 95–31367 Filed 12–27–95; 8:45 am]

BILLING CODE 7515–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–440]

Cleveland Electric Illuminating Co., et al.; Order Approving Transfer of License for Perry Nuclear Power Plant

I

Cleveland Electric Illuminating Company (CEI), Centerior Service Company (CSC), Duquesne Light Company, Ohio Edison Company (Ohio Edison), Pennsylvania Power Company, and Toledo Edison Company are the licensees of Perry Nuclear Power Plant, Unit No. 1 (PNPP Unit 1). CEI and CSC act as agents for themselves, and the other licensees and have exclusive responsibility for and control over the physical construction, operation, and maintenance of PNPP Unit 1 as reflected in Operating License No. NPF–58. The Nuclear Regulatory Commission (NRC) issued License No. NPF–58 on March 18, 1986, pursuant to Part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR Part 50). Ohio Edison holds title to 17.42 percent of PNPP Unit 1 and leases another 12.58 percent of PNPP Unit 1 pursuant to the sale and leaseback transactions previously authorized by Amendment 2 to License No. NPF–58. The facility is located on the shore of Lake Erie in Lake County, Ohio, approximately 35 miles northeast of Cleveland, Ohio.

II

Under cover of a letter dated November 17, 1995, from Shaw, Pittman, Potts and Trowbridge, Ohio Edison submitted its request for approval of its intended transfer of its 17.42-percent ownership interest (less the ownership interest in the accompanying transmission facilities) to a newly formed wholly owned subsidiary, OES Nuclear Inc. (OES). The sale effecting the transfer would include a provision that would allow Ohio Edison to convert a steam purchase agreement to a lease to itself at some time in the future. The other licensees would remain the same and would not be affected by the proposed transfer. By letter dated November 22, 1995, CEI submitted a license amendment request to reflect the proposed change in Ohio Edison ownership. On December 11, 1995, a notice of proposed ownership transfer was published in the Federal Register (60 FR 63548).

The transfer of Facility Operating License No. NPF–58 is subject to the consent of the NRC as described by 10 CFR 50.80(a). Ohio Edison will remain as a licensee of PNPP Unit 1 and

proposes to add OES as an additional licensee. Ohio Edison would make payments to OES in an amount sufficient for OES to pay its expenses and would retain full responsibility for the costs of operating, maintaining, and decommissioning the interest in PNPP Unit 1 transferred to OES. OES will be an ''electric utility'' as defined in 10 CFR 50.2, and thus is exempt from further financial qualifications review as specified in 10 CFR 50.33(f). Ohio Edison will continue to be an ''electric utility'' as defined in 10 CFR 50.2, and thus is also exempt from any further financial qualifications review. Given the financial arrangement between Ohio Edison and OES, and that both will be licensees, the transfer will result in no adverse impact with respect to financial qualifications.

Since CEI and CSC are the only authorized operators and the transfer would not affect their staff, plant operations would not be affected by the transfer. OES will be bound by the existing antitrust license conditions now obligating Ohio Edison, and Ohio Edison will remain obligated to these same antitrust license conditions after the proposed transfer. Ohio Edison has also asserted that it and OES are not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.

On the basis of a review of the information in the letters of November 17 and 22, 1995, and other information before the Commission, the NRC staff finds that adding OES as an additional licensee will not adversely affect protection of public health and safety or the common defense and security. Therefore, the NRC staff concludes that OES is qualified to hold the license to the extent and for the purposes that Ohio Edison is now authorized to hold the license with respect to its 17.42-percent ownership interest and that the transfer, subject to the conditions set forth herein, is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission.

III

By January 29, 1996, any person adversely affected by this order may file a request for a hearing with respect to issuance of the order. Any person requesting a hearing shall set forth with particularity how such person's interest is adversely affected by this order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is to be held, the Commission will issue an order designating the time and place of such hearing.

If a hearing is held concerning this order, the issue to be considered at any such hearing will be whether this order should be sustained.

Any request for a hearing must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. Copies should also be sent to the Office of the General Counsel and to the Director, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Gerald Charnoff, Shaw, Pittman, Potts and Trowbridge, 2300 N Street NW., Washington, DC 20037.

IV

Accordingly, pursuant to Sections 161b, 161i, and 184 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2201(b), 2201(i), and 2234, and 10 CFR 50.80, it is hereby ordered that the Commission consents to the proposed transfer of the license described herein between Ohio Edison and OES subject to the following: (1) an approved amendment consistent with the contents of and reflecting this order must be issued after the transfer adding OES as an owner of PNPP Unit 1 for Facility Operating License No. NPF–58, which when issued by the NRC would become effective as of the date of issuance; (2) should the transfer not be completed by January 31, 1996, this order will become null and void, unless upon application and for good cause shown this date is extended.

This order is effective upon issuance. For further details with respect to this action, see the application for transfer dated November 17, 1995, and the application for amendment dated November 22, 1995, which are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Perry Public Library, 3753 Main Street, Perry, Ohio.

Dated at Rockville, Maryland, this 20th day of December 1995.

For the Nuclear Regulatory Commission.

William T. Russell,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 95–31386 Filed 12–27–95; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–36613; International Series No. 907; File No. SR–OPRA–95–5]

Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Amendment to OPRA Fee Schedule Establishing a Fee Payable by Subscribers to Last Sale and Quotation Information Pertaining to Foreign Currency Options

December 20, 1995.

Pursuant to Rule 11Aa3–2 under the Securities Exchange Act of 1934 (''Exchange Act''), notice is hereby given that on December 11, 1995, the Options Price Reporting Authority (''OPRA'') [1] submitted to the Securities and Exchange Commission (''SEC'' or ''Commission'') an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''Plan''). The amendment establishes a fee payable by subscribers to last sale and quotation information pertaining to foreign currency options (''FCOs'').[2] OPRA has designated this proposal as establishing or changing a fee or other charge collected on behalf of the OPRA participants in connection with access to or use of OPRA facilities, permitting the proposal to become effective upon filing pursuant to Rule 11Aa3–2(c)(3)(i) under the Exchange Act. The Commission is publishing this notice to solicit comments from interested persons on the amendment.

I. Description and Purpose of the Amendment

The purpose of the amendment is to establish a subscriber fee payable to

[1] OPRA is a National Market System Plan approved by the Commission pursuant to Section 11A of the Exchange Act and Rule 11Aa3–2 thereunder. Securities Exchange Act Release No. 17638 (Mar. 18, 1981).

The Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the five member exchanges. The five exchanges which agreed to the OPRA Plan are the American Stock Exchange (''AMEX''); the Chicago Board Options Exchange (''CBOE''); the New York Stock Exchange (''NYSE''); the Pacific Stock Exchange (''PSE''); and the Philadelphia Stock Exchange (''PHLX'').

[2] OPRA filed a substantially similar amendment to the OPRA plan (SR–OPRA–95–2) on September 15, 1995. OPRA subsequently withdrew the proposed amendment on November 22, 1995. *See* Letter from Janet Angstadt, Schiff Hardin & Waite, Attorney for OPRA, to David Oestreicher, Attorney, Division of Market Regulation, SEC (November 22, 1995). In addition to withdrawing SR–OPRA–95–2, OPRA withdrew SR–OPRA–95–1, the proposed amendment to revise the fees payable to OPRA by professional subscribers for access to options market data (except foreign currency options data) and related information. *See id.* To date, OPRA has not refiled an amendment regarding this latter fee revision.

OPRA for access to last sale and quotation information and related information pertaining to FCOs. OPRA's existing subscriber fee currently covers access to all securities options market information emanating from OPRA's participant exchanges, including information pertaining to FCOs. In accordance with the OPRA Plan as amended,[3] OPRA is authorized to impose separate fees for access to or for the use of information pertaining solely to FCOs, if the participants exchanges that provide a market in FCOs determine to impose separate FCO fees.

A subscriber to OPRA's FCO service will be subject to a monthly fee based upon the number of electronic display or interrogation devices maintained by the subscriber that are capable of displaying or reporting FCO information. The proposed FCO subscriber fee offers volume discounts to larger subscribers by reducing the fee per device as the total number of devices maintained by a subscriber increases. There are four pricing tiers covering the range from one device to 750 or more devices per subscriber.[4]

The proposed FCO subscriber fee is scheduled to take effect on January 1, 1996. Prior to that time, existing OPRA subscribers will be given notice of the new FCO fee, and an opportunity to indicate whether they wish to continue to receive FCO information and thereby subject themselves to the FCO fee.

The PHLX, as the only exchange currently providing a market in FCOs, has duly authorized the proposed subscriber fee in accordance with the OPRA Plan. In addition, the PHLX has notified all other OPRA participant exchanges of the proposed fee change.

II. Solicitation of Comments

Pursuant to Rule 11Aa3–2(c)(3), the amendment is effective upon filing with the Commission. The Commission may summarily abrogate the amendment within 60 days of its filing and require refiling and approval of the amendment by Commission order pursuant to Rule 11Aa3–2(c)(2), if it appears to the Commission that such action is necessary or appropriate in the public interest; for the protection of investors and the maintenance of fair and orderly markets; to remove impediments to, and perfect the mechanisms of, a National Market System; or otherwise in furtherance of the purposes of the Exchange Act.

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, and 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 withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available at the principal offices of OPRA. All submissions should refer to file number SR–OPRA–95–5 and should be submitted by January 22, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31355 Filed 12–27–95; 8:45 am]

BILLING CODE 8010–01–M

[3] *See* Securities Exchange Act Release No. 35487, International Series Release No. 792 (March 14, 1995), 60 FR 14984 (March 21, 1995)(Order approving unbundling services for FCOs and Index options).

[4] The tiers are as follows:

(1) For 1 device, the fee per device is $3.00;

(2) For 2–9 devices, the fee per device is $2.50;

(3) For 10–749 devices, the fee per device is $2.00; and

(4) For 750 or more devices, the fee per device is $1.50.

[5] 17 CFR 200.30–3(a)(29).

[Release No. 34–36610; File No. SR–MSRB–95–19]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to an Extension of the Continuing Disclosure Information (''CDI'') System From December 31, 1995 Through September 30, 1996

December 20, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), and Rule 19b–4 thereunder, notice is hereby given that on November 28, 1995, the Municipal Securities Rulemaking Board (''Board'' or ''MSRB'') filed with the Securities and Exchange Commission (''Commission''' or ''SEC'') a proposed rule change (File No. SR–MSRB–95–19). The proposed rule change is described in Items I, II, and III below, which Items have been prepared by the Board. The MSRB has designated this proposal as concerned solely with the administration of the Board under Section 19(b)(3)(A) of the Act, which renders the rule effective upon the Commission's receipt of this filing. 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 MSRB is filing a proposed rule change to request an extension, from December 31, 1995, through September 30, 1996, of its interim Continuing Disclosure Information (''CDI'') system of the Municipal Securities Information Library® (MSIL™) system. The Board requests that the Commission set the effective date for 30 days after filing.

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 Board included statements concerning the purpose of and basis for the proposed rule change and discussed any comments is received on the proposed rule change. The texts of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in Section A., B., and C. below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

On April 6, 1992, the Commission approved the CDI system for an 18-month period.[1] The CDI system began operating on January 23, 1993, and functions as part of the Board's MSIL™ system. The CDI system accepts and disseminates voluntary submissions of official disclosure notices relating to outstanding issues of municipal securities, *i.e.*, continuing disclosure information. During its first phase of operation, the system accepted disclosure notices only from trustees. On May 17, 1993, the system also began accepting disclosure notices from issuers.[2]

On November 10, 1994, the Commission approved an amendment to its Rule 15c2–12 which prohibits dealers from underwriting issues of

[1] Securities Exchange Act Release No. 30556 (April 6, 1992), 57 FR 12534.

[2] On May 17, 1993, the Board reported to the Commission on the initial phase of operation of the CDI system regarding technical, policy and cost issues and proposed enhancements to the system.

municipal securities unless the issuer commits, among other things, to provide material events notices to the Board's CDI system or to all Nationally Recognized Municipal Securities Information Repositories (''NRMSIRs'') and to the applicable state information depository.[3] In addition, the Rule prohibits dealers from recommending municipal securities without having a system in place to receive material events notices.[4] To conform to the new Commission requirements, the Board revised the CDI system and implemented an interim system designed to accept material event notices while a larger permanent system is being designed.[5] The Commission approved operation of the interim system through December 31, 1995.[6]

The Board is requesting an extension for the interim system through September 30, 1996, to gain additional experience with the new disclosure scheme of SEC Rule 15c2–12 while the permanent system is being designed. The amendments to SEC Rule 15c2–12 regarding material event notices were effective in July 1995, and will not be fully effective until January 1, 1996. Issuers and their agents are still in the process of adjusting to the amendments. The current volume of material event notices has been within the capacity of the interim system. Additional experience will allow the Board to design the permanent system to more efficiently accommodate the expected volume of material event notices. In addition, the permanent system is being designed to accommodate longer documents.

The Board believes that an extension of the operation of the interim CDI system through September 30, 1996, will give it sufficient time to determine the system changes needed, in consultation with the Commission as well as potential users of the system, including NRMSIRs. Prior to that time, the Board plans to ask the Commission for approval of the permanent CDI system, which will be described in a filing with the Commission.

The Board believes the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, which provides that the Board's rules:

> Be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

The MSIL™ system is designed to increase the integrity and efficiency of the municipal securities market by, among other things, helping to ensure that the price charged for an issue in the secondary market reflects all available official information about that issue. The Board will continue to operate the output side of the CDI system to ensure that the information is available to any party who wishes to subscribe to the service. As with all MSIL™ system services, this service is available, on equal terms, to any party requesting the service.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Board does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement of Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; (iii) was provided to the Commission for its review at least five days prior to the filing date; and (iv) does not become operative for thirty days from the date of its filing on November 28, 1995, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(e)(6) thereunder. In particular, the Commission believes the proposed rule change qualifies as a ''non-controversial filing'' in that the proposed standards do not significantly affect the protection of investors or the public interest and do not impose any significant burden on competition. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR–MSRB–95–19 and should be submitted by January 18, 1996.

For the Commission by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31354 Filed 12–27–95; 8:45 am]

BILLING CODE 8010–01–M

[3] Securities Exchange Act Release No. 34961 (November 10, 1994), 59 FR 59590. This provision of the Rule became effective on July 3, 1995. *See* Securities Exchange Act Release No. 35911.

[4] The effective date of this provision of the Rule is January 1, 1996.

[5] The Board also terminated the pilot phase of the CDI System and filed its Report on the Conclusion of the CDI Pilot of the Municipal Securities Information Library™ System with the Commission on August 25, 1995.

[6] Securities Exchange Act Release No. 35911 (June 28, 1995), 60 FR 35248.

[Release No. 34–36611; File No. SR–NASD–95–53]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Requiring Members Who Participate in the Transfer of Limited Partnership Securities To Use Standard Transfer Forms

December 20, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 15, 1994,[1] the National Association of

[1] The proposed rule change was initially filed on November 8, 1995, but was subsequently amended on December 11, 1995, and again on December 15, 1995, in order to clarify that the proposed rule change does not apply to limited partnership securities that are traded on the Nasdaq Stock Market or a registered national securities exchange.

Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is herewith filing a proposed rule change to amend Section 1 and add new Section 73 and Exhibit A to the NASD's Uniform Practice Code. Below is the text of the proposed rule change to Sections 1 and 73 of the Code. Proposed new language is italicized.

Uniform Practice Code

Scope of Uniform Practice Code

Sec. 1.

(a) All over-the-counter secondary market transactions in securities between members shall be subject to the provisions of this Code except:

(i)–(iv) (No change).

(v) transactions in Direct Participation Program securities as defined in Article III, Section 34 of the Association's Rules of Fair Practice, *except as otherwise provided in this Code.*

* * * * *

Limited Partnership Securities

Sec. 73.

Each member who participates in the transfer of limited partnership securities, as defined in Article III, Section 34 of the Association's Rules of Fair Practice, shall use standard transfer forms in the same form as set forth in Exhibit A of this section. This section shall not apply to limited partnership securities which are traded on The Nasdaq Stock Market or a registered national securities exchange.

* * * * *

Proposed Exhibit A to Section 73 of the Uniform Practice Code contains the standard transfer forms, including a ''Transferor's (Seller's) Application For Transfer,'' a ''Transferee's (Buyer's) Application For Transfer,'' a ''Registration Confirmation Form,'' and a ''Distribution Allocation Agreement.'' Briefly, the Transferor and Transferee forms are each two pages in length and contain all of the essential information necessary to perform a valid transfer; the Registration Confirmation Form confirms to the buyer/transferee that the transfer has been completed; the Distribution Allocation Agreement contains certain affirmations on which the transferor/seller and transferee/buyer agree, and would act as a contract between them setting forth their agreement regarding all upaid distributions.[2]

II. Self-Regulatory Organization's Statement of the Purpose of and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The Uniform Practice Code (''Code'') governs the delivery and settlement of all over-the-counter secondary market transactions in securities between members, with certain exceptions. The Code provides and exception, among others, for transactions in Direct Participation Program securities (''DPP securities'') as defined in Article III, Section 34 of the NASD's Rules of Fair Practice, including limited partnership securities also defined in Article III, Section 34. The NASD is proposing to modify and add a new section to the Code to require members to use standardized limited partnership transfer forms when transferring a limited partnership security.

Historically, limited partnership securities were not structured to be freely transferable in secondary market transactions. Trading markets now exist, however, for many limited partnership securities in addition to the large publicly-traded partnerships which are traded on The Nasdaq Stock Market and the national securities exchanges. Quick and accurate processing of the transfer of limited partnership securities has, therefore, become more critical.

The terms and requirements relating to the assignment and transfer of limited partnership interests are contained in and controlled by the partnership agreement,[3] almost all of which state that assignment or transfer of limited partnership interests requires the consent and approval of the general partner(s). As a result, when transferring limited partnership interests, NASD members are currently confronted with transfer requirements unique to each partnership which may vary widely on the type and amount of documents necessary for the valid transfer of a partnership interest. Some parternship agreements require information so extensive that the transfer documents sometimes reach 30 to 40 pages in length. Thus, the transfer of the partnership interest may take up to six months, in some cases, to become finalized.

Partnership terms for record dates and distribution or dividend payment dates are equally varied. Transfer delays and non-standardized payment provisions have caused or contributed to delays or mistakes in the allocation of cash distributions between buyers and sellers. A seller of a limited partnership interest, as a recordholder of the securities, often receives distributions that rightly should have accrued to the buyer and subsequently disposes of such distributions without knowledge of the claims of purchasers. Particularly problematic are special distributions other than cash distributions (such as proceeds from capital transactions, capital distributions, sale or refinancing proceeds, liquidating distributions, distributions with respect to terminating transactions) which, under many partnership agreements, are paid to the owner of record of the partnership unit in the prior quarter. Thus, under current transfer standards and practices, buyers and sellers of limited partnership securities in the secondary market are unable to protect their rights to such distributions. This leads to disputes over distributions that often must be settled by broker/dealers at their own expense or through arbitration or litigation.[4]

The NASD recognizes that the transfer of limited partnership interests is controlled by the terms of the partnership agreement under various state limited partnership statutes. However, the NASD also recognizes that, in most cases, prior to the recognition by the general partner of the actual transfer of the partnership property interest from one holder (transferor/seller) to another (transferee/purchaser), a security interest in the property is created whenever the

[2] The contents of the proposed forms are not reproduced here. Copies of proposed Exhibit A are available from the NASD by calling (202) 728–6960, and are available for inspection and copying in the Commission's Public Reference Room.

[3] The Revised Uniform Limited Partnership Act and the Delaware Revised Uniform Limited Partnership Act expressly provide for the ability to recognize transfers and admit new partners under whatever rules the general partners design.

[4] The NASD believes these problems are exacerbated by the fact that general partners relying on no-action letters issued by the Division of Market Regulation do not believe they are required under SEC Rule 10b–17 to publicly disclose the payment of regular or special distributions.

purchaser gives, and seller accepts, economic consideration to secure the purchaser's right to have the partnership interests transferred. The security interest creates the right for the purchaser to have the partnership interest transferred in advance of the date specified in the partnership agreement and entitles the purchaser to legal certainty that his/her ownership rights can be recognized and protected until the transfer of the partnership interest is completed.

In order to provide a uniform way for member firms engaged in the transfer of limited partnership interests to receive and recognize information on the valid transfer of the security interest separate and apart from the partnership interest, and to record such information of valid transfer on their books and records, the NASD is proposing to amend Section 1(a)(v) to allow the Code to apply to over-the-counter secondary market transfers of direct participation programs to the extent provided in individual provisions of the Code and to add new Section 73 of the Code to require members to use standardized transfer forms, as set forth in proposed Exhibit A to Section 73, when transferring limited partnership securities. The proposed forms will standardize the format for gathering transfer information by registered representatives, reduce the amount of information necessary to perform a valid transfer, and eliminate delays and inefficiencies in the transfer and settlement process. Proposed new Section 73 will not apply to limited partnership securities which are traded on The Nasdaq Stock Market or a registered national securities exchange.

The proposed standardized transfer forms include ''Transferor's (Seller's) Application For Transfer,'' ''Transferee's (Buyer's) Application For Transfer,'' ''Registration Confirmation Form,'' and ''Distribution Allocation Agreement,'' as set forth in proposed Exhibit A to Section 73. The Transferor and Transferee forms are each two pages in length and contain all of the essential information necessary to perform a valid transfer, including customer identification, partnership identification, tax identification, quantity transferred, broker/dealer and registered representative involved and signature execution. The Registration Confirmation Form confirms to the buyer/transferee that the transfer has been completed and contains information regarding, among other things, the partnership's NASD symbol, CUSIP number, tax identification number, number of units transferred and the effective/admission date.

The Distribution Allocation Agreement would be completed at the time the transfer documents are completed and sent to the general partner of the limited partnership security being transferred. The agreement contains certain affirmations on which the transferor and transferee agree and would act as a contract between the buyer and seller setting forth their agreement regarding all unpaid distributions. The agreement specifies when the unitholder of record is entitled to cash distributions and capital distributions, and who is responsible for correcting a distribution made to the wrong party. The agreement requires, among other things, the party who incorrectly receives a distribution to promptly endorse and deliver to the correct party the distribution checks or otherwise pay to the other party the amount of such distribution.

Although only NASD members would be required to use the standardized forms under the proposed amendments, the NASD is confident that general partners and transfer agents engaged in the transfer of limited partnership securities will use and honor the proposed forms so that uniform transfer practices and procedures could be established on an industry-wide basis.[5]

The NASD believes that standardized forms will significantly reduce the time and effort required by member firms to process limited partnership transfers from approximately 180 days to less than 30 days. In particular, the use of the Distribution Allocation Agreement will provide certainty as to the buyer/transferee and seller/transferor regarding distributions not yet announced or received by memorializing the agreement among the buyer and seller as to the method for handling distributions. The Distribution Allocation Agreement will also prevent member broker-dealers representing such buyers and sellers from effecting and settling trades without knowledge of the buyers' and sellers' rights to any distribution.

The NASD is requesting an effective date for NASD members of 60 days after the date on which SEC approval of the proposed rule is announced in an NASD Notice to Members, which announcement shall be made no later than 45 days after Commission approval.

[5] In fact, the NASD has worked closely with transfer agents who specialize in the transfer of partnership securities, and the Investment Program Association, a trade organization for the partnership industry, to reach an informal consensus on the general applicability of forms throughout the industry.

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[6] which require that the Association adopt and amend its rules to promote just and equitable principles of trade, and generally provide for the protection of customers and the public interest in that the proposed rule change standardizes the process and the means by which limited partnership securities are transferred on the secondary markets, thereby significantly eliminating the delays and inefficiencies in the transfer process, substantially improving the accuracy of dividend and capital distributions and minimizing litigation in that regard, and facilitating the transfer of limited partnership securities.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The proposed rule change was published for comment in Notice to Members 94–75 (September 1994) (''NTM 94–75''). Fourteen comment letters from thirteen commenters were received in response thereto.[7] Nine commenters supported the proposed rule change, two commenters were opposed and two commenters neither supported nor opposed the proposed rule change.

General Comments

One commenter suggested that the forms be typeset. Two commenters stated that the forms are too technical, complicated and cumbersome for the average investor and that the forms should be streamlined. One of the commenters stated that investors would not have the necessary information to complete the forms without help from their registered representative.

The NASD understands the concerns expressed by these commenters but emphasizes that the forms were never intended to be completed by investors. The forms are intended to be used by general partners, transfer agents and financial intermediaries.

[6] 15 U.S.C. § 78 *o*–3.

[7] Copies of the Comment letters received by the NASD in response to NTM 94–75 are available for inspection and copying at the NASD or at the Commission's Public Reference Room.

Two commenters stated that the proposed forms have no ability to include certain transferor and transferee representations required by the issuer's prospectus or partnership agreement in conjunction with transfer documents. One of these commenters suggested that general partners and sponsors might be more willing to adopt the proposed forms if they incorporate certain additional provisions, acknowledgements and representations commonly found in existing transfer documents (e.g., illiquidity, lack of a public market, availability of public information, distribution and tax allocations, etc.). Another commenter suggested that general partners should be allowed to use their own forms. Similarly, one commenter recommended that the forms serve as model guides subject to reasonable modifications by a general partner or sponsor.

Three commenters objected to the requirement that use of the proposed forms be mandatory for members. One commenter requested that the proposed modification to the Uniform Practice Code requiring members to use the forms not be made. Another commenter recommended that the proposal be clarified to require members only to accept the proposed documentation and not that they be required to use it. One commenter stated that the NASD must have a strategy for compelling issuers to adopt the new forms and procedures or else use by members is meaningless. The same commenter also stated that only issuers know the exact number of units a seller owns and the exact registration information, and that these same issuers are often unresponsive, slow and inaccurate in verifying this information. The commenter added that any policy set with regard to dividend distributions can only be accomplished if issuers agree to adopt and accept the proposed new procedures and that the proposed Registration Conformation Form would not help members if issuers and transfer agents do not promptly notify all parties of the receipt and approval of a transfer. The commenter concludes that unless the proposed forms are adopted by issuers, use of the forms should not be mandatory for members.

One commenter, while supporting the initiative, stated that the standardization should not be limited to transfer forms, but also should include signature verification, authorization and supporting documentation to insure uniformity and efficiency in the DPP transfer process. The commenter stated that attempting to establish uniformity without developing procedural guidelines in these areas would do little to reduce inefficiencies and delays.

Despite the concerns expressed, the NASD believes the proposed forms will become the standard forms used by the industry. Since 1990, the NASD's Direct Participation Program Committee and the special Ad Hoc Committee on Uniform Settlement and Transfer Procedures for Direct Participation Program Securities have gathered and assessed information from the major market participants that act as principal or agent for customers in the fragmented limited partnership secondary market and consulted with the major limited partnership issuers in order to develop limited partnership transfer forms that have universal applicability. Both the staff and the members of the NASD's Direct Participation Program Committee, some of whom represent major limited partnership sponsors, are committed, through supporting a number of initiatives undertaken by the NASD in addition to the standardized transfer forms, to developing a broad, accessible framework through which the transfer and distribution process for limited partnership securities becomes streamlined and efficient for issuers, transfer agents and NASD members.[8]

While it is true that the NASD cannot compel non-member limited partnership issuers to use the proposed forms, many of these issuers have had significant input into the development of the proposed forms and generally agree that the forms are workable. Limited partnership issuers also understand that, once the proposed forms are approved by the SEC, member firms, transfer agents and other limited partnership secondary market intermediaries will begin using the forms as part of their standard transfer process. Therefore, the NASD is confident that issuers will generally not be adverse to using the proposed forms and that, in fact, it will be in their best interest to do so.

The NASD believes that the proposed forms contain all the essential information to effect a valid transfer of the security interest in a timely fashion. To allow the forms to be used as mere models or guides would defeat the fundamental aim of standardizing the limited partnership transfer process. Nonetheless, nothing precludes a particular general partner, member or transfer agent from requesting additional information in order to complete certain books, records or documentation requirements of the partnership agreement. However, the failure to obtain such additional information should not prevent a valid transfer of the security interest from taking effect where the transfer forms are complete and contain all of the required information for a valid transfer.

Specific Comments

Transferor/Transferee Forms

One commenter suggested that the terms ''Buyers'' and ''Seller'' be deleted from the proposed applications for transfer forms since transfers are not limited to buy/sell transactions.

The ''Reasons For Transfer'' section in the transferor's form contains fields for ''reregistration,'' ''sale,'' ''death,'' ''gift'' and ''other.'' Thus, the forms do recognize that a transfer can be effected in ways other than a purchase and sale.

Partnership ID Information

Three commenters suggested modifications to the Partnership ID Information section of the proposed forms. Once commenter stated that the tax Shelter Identification Number is a unique number to each partnership and, therefore, problematic in its application, that not all partnerships have a tax number and that it is not clear whether transfer agents track such a number for identification purposes. The other commenter suggested that the additional partnership identifiers, such as the CUSIP #, the NASD Symbol, the Partnership Tax ID and the Tax Shelter ID, are not particularly helpful to the average investor and should be replaced with information to be completed by the secondary market intermediary completing the form. Finally, one commenter stated that the symbols in the NASD symbol directory were confusing and should be changed suggesting a different format for the symbols.

The proposed forms were designed to accommodate not any particular DPP secondary market participant but the transfer processing in general. Thus, some information required by the forms may be unnecessary for certain transfers. Regarding confusion to the average investor, the NASD wishes to emphasize again that the proposed forms were never intended to be completed by investors; the forms are

[8] These initiatives include: (1) the development of a Direct Participation Program Symbol Directory; (2) the submission of a petition to the SEC to subject limited partnerships to the dividend and distribution reporting requirements of SEC Rule 10b–17; and, (3) the submission of a petition to the SEC requesting modification of SEC Rule 17Ad–4(a) to require the application of Rules 17Ad–2 (Turnaround, Processing, and Forwarding of Items), 17Ad–3 (Limitations on Expansion), and 17Ad–6(a)(1) through (7) and (11) (Recordkeeping) to the transfer of interests in publicly traded limited partnerships by transfer agents and to modify Rule 17Ad–10 to establish a limited buy-in provision for publicly traded partnership interests.

intended to be used by general partners, transfer agents and financial intermediaries. The NASD does not view the symbols in the proposed symbol directory as confusing or difficult to use.

Quantity

One commenter suggested that the quantity section of the proposed forms include either the original investment amount or the original cost per unit. The commenter claims that some general partners use a ''dollar for dollar'' investment amount rather than a unit amount, which creates confusion when different secondary markets randomly assigned unit values to these partnerships. The commenter also stated that investors are more likely to know how much money they initially invested rather than how many units they purchased. The commenter concluded that this additional information would eliminate confusion and would ensure that all involved parties are ''speaking the same language.''

The NASD believes that since most partnership documents offer an initial unit value of measurement to the investor and continue to use such a measurement for books and records and tax allocation purposes, a unit value is the best measure of quantity transferred.

Required Representations and Acknowledgments

One commenter suggested that both the proposed transferor and transferee forms contain certain representations and acknowledgments that (1) specify an ''effective date'' for the right to receive distributions of cash and allocations or profits and losses, (2) recognize certain restrictions in the partnership agreement and state-imposed suitability requirements, and (3) recognize the general partner as the designated person to maintain the list required under Section 6112 of the Internal Revenue Code. The same commenter stated that in order to clarify the enforcement and interpretation of the parties' agreement for the transfer of the interests, both the transferor's and transferee's forms should state that the application for transfer is irrevocable and specify the governing law.

In response to the comments above, the NASD has added a field to the Registration Confirmation Form for ''Effective/Admission Date.'' The NASD does not believe that the inclusion in the proposed forms of the additional suggested representations and acknowledgements is necessary in order to effect a valid transfer.

Sale Price

Two commenters suggested including in the proposed applications for transfer a space to insert the sale price or other consideration paid for the interests being transferred (Comments 7,10). One Commenter explained that, with this information, general partners or sponsors could maintain data on current sales transactions for prospective buyers or sellers to obtain current market prices of interests or for others to use in valuing interests held by estates.

NASD research indicates that knowledge or recordation of the sales price is not necessary for a general partner to effect the transfer of a limited partnership interest. In any case, the NASD is actively working to permit certain public limited partnerships to be listed or quoted on the NASD's OTC Bulletin Board. Transactional data, including price, would be available for a nominal fee for general partners who would be interested in such information.

Fees

Three commenters commented on the instructions in the proposed transfer forms requiring the transferor and transferee form to be submitted together with the required fees. One commenter requested authority for the issuer to implement its own fee structure. Another commenter stated that advance notice of fee changes to members by issuers should be mandatory. Another commenter stated that transfer fees ought to be standardized.

The NASD believes that, notwithstanding the proposed standardization of transfer forms, the amount of resources expended in the transfer process by secondary market intermediaries in what is still a fragmented and somewhat disorganized marketplace may vary significantly from one entity to another. It is therefore inappropriate to impose a standard fee structure as part of the proposed forms.

Signature Execution

Two commenters suggested changes regarding signature execution. One commenter also recommend that the application for transfer forms should include a signature block and date line for the general partner or sponsor to execute or acknowledge, either by manual signature of an officer or partner or by a generic signature stamp to alleviate confusion and possible disagreements as to whether applications for transfer have been accepted. The other commenter suggested, when applicable, adding an explanation that the custodian's signature is required, noting that most partnerships require the custodian's and the client's signatures. The commenter stated that there are numerous limited partnership units held in custodial accounts (e.g., IRA, pension plans etc.) and investors are often confused as to whose signature is required on these forms. The commenter also suggested that Instruction #7 on the proposed forms state that satisfactory evidence of the custodian's authority be represented.

In response to the comments above, the NASD has changed the forms to incorporate the use of the medallion stamp, and believes that this proposed change will help to alleviate concerns about signature verification.

Transferor Form

Application to Transfer: New Language

One commenter suggested that the first full paragraph of the transferor form be modified as shown (new language is underlined).

''The transferor hereby makes application to transfer and assign, subject to the general partner's rights, to the transferee all rights, *title and interest in and to the profits, losses, and distributions of the partnership,* as set forth in the partnership below and for the transferee to succeed to such interest as a Substitute Limited partner, successor in interest or assignee.''

Under the assumption that the intent of the above commenter's suggested changes was to make the forms more consistent, the NASD has, in response, changed the first full paragraph of the proposed transferee's form by deleting the words ''and assign'' and ''title'' to correct the form and to make the language more consistent with the proposed transferor's form.

Quantity

Two of the fourteen commenters suggested modifications to the quantity section of the proposed form. One commenter suggested that the number of units to be held after transfer be labeled on the transferor's form as ''must be completed'' rather than ''optional.'' Another commenter believes that requesting information on the number of units to be held after transfer may result in delays when attempting to verify this information.

The NASD has included the field for number of units to be held after transfer as an optional field for informational purposes only. Verification of the information should not result in delays, since the information is optional.

Transferee Form

Required Representations and Acknowledgements

One commenter suggested adding certain acknowledgements and representations regarding liquidity and tax status to the proposed transferee form. The commenter suggested adding to the proposed transferee form: (1) the acknowledgement that there may not be a public market in the future through which the transferee can liquidate his/her investment in the partnership, (2) the representation that the taxpayer identification number is correct and that the transferee is not subject to backup withholding, and (3) if a resident is a non-alien, the representation that IRS form 4224 is correct.

The NASD does not believe that the inclusion in the proposed forms of the additional suggested representations and acknowledgements is necessary in order to effect a valid transfer.

Partnership Information

One commenter suggested modification to the Partnership Tax I.D. number on the Transferee's Form. The commenter indicated that for those Direct Participation Programs that have obtained from the Internal Revenue Service tax shelter registration numbers, the transferee's application should also contain the tax shelter registration notification required by the Internal Revenue Service regulations. However, the commenter stated that in order to limit the length of the form, such notification could be included as part of the Registration Confirmation Form.

The IRS tax notification requirements was intended, in part, to provide some federal oversight, through tax law, for partnerships that were intentionally constructed to have little or no economic value and generate excessive tax losses. The NASD believes that the universe of public partnerships traded in the secondary markets with which it is concerned contains, for the most part, partnerships which were designed to return some real economic value to the investor and which do not generally make use of the IRS notification requirement.

Registration Type

One commenter suggested adding the categories ''Money Purchase Pension Plan'' and ''Profit Sharing Plan'' to the ''Tax Deferred'' section under ''Registration Type.'' In response to the comments above, the NASD has added the categories ''Money Purchase Pension Plan'' and ''Profit Sharing Plan'' to the ''Tax Deferred'' section under ''Registration Type.''

Secondary Address Information

Two commenters suggested modifications to the Secondary Address Information Section on the Transferee's Form. One commenter stated that distribution payment instructions are very important to partnership processing and sending distributions to the wrong address is costly both in processing time and bank fees. The same commenter stated that the form does not make it clear where distribution payment is to be made, and suggested that a statement could be added such as: ''If the secondary address field is not filled in, then payment will be made to the legal address,'' as well as an additional field to solicit the custodian account number so that distribution payments can be accurately audited. The second commenter suggested adding a space for the buyer to include distribution instructions, with a note to the effect that if no instructions are given, all distributions will be paid to the registered transferee. The commenter stated that adding such space and instructions will enable the buyer to direct distributions to a brokerage account or mutual fund account.

The NASD agrees that the correct payment of distributions is an important part of the transfer process. In response to the comments above, the NASD has added space to the proposed Registration Conformation Form entitled ''Distribution Address (if different than address of record),'' and, in addition, has developed a Distribution Allocation Agreement to allow transferor and transferee to agree to specify how and to whom distributions will be paid.

Suitability

One commenter, a registered transfer agent, suggested revising the Transferee's (Buyer's) Form to include suitability standards. The commenter stated that many partnerships are required to limit transfers to buyers who satisfy the suitability standards established at the time of each partnership's initial offering. The commenter suggested the following suitability information be added to the form:

Please indicate your annual net income, and your current net worth (exclusive of home, automobiles, and home furnishings).

Income	Net worth
$35,000–$44,999	$35,000–$44,999
$45,000–$59,999	$45,000–$59,999
$60,000 or above	$60,000–$74,999
	$75,000–$149,999
	$150,000–$174,999
	$175,000–$249,999
	$250,000 or above.

In researching this issue, the NASD found that only California required a suitability determination when a partnership security was sold or transferred in a secondary market transaction. The forms contain the necessary disclosure requiring the prior written consent of the Commissioner of Corporations of the State of California.

Registration Confirmation Form

Four commenters suggested modifications to the Registration Confirmation Form. One commenter stated that an apparent unintentional consequence of the proposed confirmation form is to notify the client that he/she has actually been admitted into the partnership when in fact completion of the closing documents can take a considerable amount of time. The commenter favors a two-step process that first confirms receipt of the documents in a timely fashion and then later confirms the actual acceptance of the client into the partnership.

Another commenter stated that the language in the first paragraph, ''You have been, or will be admitted as a Limited Partner in the Partnership indicated below'' was confusing and suggested more simple wording that would state, ''Your transfer request has been processed. The effective date or admission date as a limited partner in the partnership is indicated below.'' The same commenter also believes that a field should be added to the form requesting a date processed.

Another commenter stated that the confirmation form was similar to forms already in use and it was not likely that a standardized confirmation form would replace certificates. The commenter suggested that, since investors are not satisfied with a confirmation and want a certificate, issuers should be required to issue only non-negotiable certificates so that investors would not be required to pay for lost certificates.

Another commenter recommended four modifications to the form. First, the seller's name should be added to the form to eliminate any confusion regarding the parties involved in the transaction. Second, the form should contain space to add the name of the individual at the general partner processing the paperwork, so that an NASD member would have a contact person should any questions come up concerning the transaction. Third, information should be provided on the form indicating when the first

distribution would take place, including any information available with regard to the amount of that distribution and the date it would be paid. Finally, a specified time period in which a general partner or transfer agent must respond to a transfer request should be indicated on the form.

In response to the comments above, the NASD added changes to the Registration Confirmation Form. The first sentence of the first full paragraph on the form was changed to state, ''Your transfer request has been processed. The effective date or admission date as a limited partner in the partnership is indicated below.'' In addition, the portion of the form which asks for the date of admission to the partnership has been changed to state ''Effective/Admission Date.'' Finally, space was provided at the bottom of the form to indicate an address for distributions if different than the address of record.

Distribution Affirmation Form

Four commenters responded to the request for comment in NTM 94–75 on whether a dividend distribution affirmation/agreement should be used in conjunction with the proposed transfer forms or should be optional. One commenter requested that the affirmation requirement be optional. Another commenter believes that the affirmation that a seller gives up all distributions not yet declared or paid can only work if issuers will uniformly adopt such practices. The same commenter added that the agreement by a member with a seller to such a contractual term, followed by the issuer not honoring such term, creates a legal conflict and a contractual term which becomes pragmatically unenforceable. The commenter concluded that the affirmation should only be included if the issuer will uniformly agree to it.

One commenter stated that while it is important to include distribution allocation language to the proposed documentation, it would also be important to include language with respect to tax allocations to facilitate investors understanding as to whether they will or will not be allocated gains or losses for tax purposes.

Another commenter stated that distribution procedures were so important that they should be standardized in the industry and a statement should be included on the form for the seller to affirm that it agrees to give up any undeclared or unpaid distributions.

In response to the comments above, the NASD has developed a proposed distribution allocation agreement that would be executed by the parties at the time the transfer documents are completed and sent to the general partner of the limited partnership security being transferred. The agreement contains certain affirmations on which the transferor and transferee agree and would act as a contract between the buyer and seller setting forth their agreement regarding all unpaid distributions. The agreement specifies when the transferee becomes the unitholder of record, when a unitholder of a record is entitled to cash distributions and capital distributions, and who is responsible for correcting a distribution made to the wrong party. The agreement requires, among other things, the party who incorrectly receives a distribution to promptly endorse and deliver to the correct party the distribution checks or otherwise pay to the other party the amount of such distribution. Thus, the distribution allocation agreement, which incorporates this information, would evidence the parties' agreement as to the treatment of distributions and make it clear that they have agreed to all material terms of the transaction.

As mentioned above, while it is true that the NASD cannot compel non-member DPP issuers to use the proposed forms, major DPP issuers, working in conjunction with the NASD's Direct Participation Program Committee and the special Ad Hoc Committee on Uniform settlement and Transfer Procedures for Direct Participation Program Securities, have had an opportunity for input into the development of the agreement. The NASD believes that issuers will uniformly use the proposed agreement in conjunction with the proposed transfer forms.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR–NASD–95–53 and should be submitted by January 18, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31356 Filed 12–27–95; 8:45 am]

BILLING CODE 8010–01–M

[9] 17 CFR 200.30–3(a)(12).

Issuer Delisting; Notice of Application To Withdraw From Listing and Registration; (Excel Industries, Inc., Common Stock, No Par Value) File No. 1–8684

December 20, 1995.

Excel Industries, Inc. (''Company'') has filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'') and Rule 12d2–2(d) promulgated thereunder, to withdraw the above specified security (''Security'') from listing and registration on the American Stock Exchange, Inc. (''Amex'').

The reasons alleged for striking the Security from listing and registration include the following:

According to the Company, trading in the Security on the New York Stock Exchange, Inc. commenced at the opening of business on December 12, 1995 and, concurrently therewith, trading on the Amex was suspended. At its October 19, 1995 meeting, the Company's Board of Directors considered the direct and indirect costs and expenses attendant with maintaining a dual listing of the Security. The Board determined that there was no particular advantage in the

dual trading of the Security and that a dual listing would fragment the market for the Security.

Any interested person may, on or before January 10, 1996, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, facts bearing upon whether the application has been made in accordance with the rules of the Amex and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 95–31357 Filed 12–27–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 35–26436]

Filings Under the Public Utility Holding Company Act of 1935, As Amended (''Act'')

December 22, 1995.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by January 11, 1996, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

General Public Utilities Corporation, et al. (70–8593)

General Public Utilities Corporation (''GPU''), 100 Interpace Parkway, Parsippany, New Jersey 07054, a registered holding company (''GPU''), GPU Service Corporation (''GPUSC''), 100 Interpace Parkway, Parsippany, New Jersey 07054, Energy Initiatives, Inc. (''EII''), One Upper Pond Road, Parsippany, New Jersey 07054, Energy Services, Inc. (''ESI''), One Upper Pond Road, Parsippany, New Jersey 07054, each a wholly owned nonutility subsidiary of GPU, and GPU's utility subsidiaries, Jersey Central Power & Light Company, 300 Madison Avenue, Morristown, New Jersey 07960, Metropolitan Edison Company, P.O. Box 16001, Reading, Pennsylvania 19640, and Pennsylvania Electric Company, 1001 Broad Street, Johnstown, Pennsylvania 15907 (''Operating Companies''), have filed a post-effective amendment under sections 6(a), 7, 9(a), 10, 12(b), 32 and 33 of the Act and rules 45, 52, 53 and 54 thereunder.

By order dated July 6, 1995 (HCAR No. 26326) (the ''Order''), the Commission authorized GPU to acquire indirectly the securities of one or more foreign utility companies (''FUCOs'') and exempt wholesale generators (''EWGs'') (each, an ''Exempt entity'') through subsidiary companies which are not themselves Exempt Entities (each, a ''Subsidiary Company''). Each Subsidiary Company would be engaged directly or indirectly, and exclusively, in the business of owning and holding the interests and securities of one or more Exempt Entities and in project development activities relating to the acquisition of such securities and the underlying projects.

The Order stated that equity investments in the Subsidiary Companies could take the form of capital stock or shares, trust certificates, partnership interests or other equity or participation interests.

The Order also authorized GPU to make investments in one or more Subsidiary Companies from time to time through December 31, 1997 in an aggregate amount of up to $200 million. Such investments could take the form of cash capital contributions or open account advances; loans evidenced by promissory notes; guarantees by GPU or the principal of, or interest on, any promissory notes or other evidences of indebtedness or obligations of any Subsidiary Company, or of GPU's undertaking to contribute equity to a Subsidiary Company; assumption of liabilities of a Subsidiary Company; and reimbursement agreements with banks entered into to support letters of credit delivered as security for GPU's equity contribution obligation to a Subsidiary Company or otherwise in connection with a Subsidiary Company's project development activities.

In addition to the above-described investments in Subsidiary Companies, the Order authorized GPU to make investments in Exempt Entities from time to time through December 31, 1997. Such investments could take the form of (i) guarantees of the indebtedness or other obligations of one or more Exempt Entities; (ii) assumption of liabilities of one or more Exempt Entities; and (iii) guarantees and letter of credit reimbursement agreements in support of equity contribution obligations or otherwise in connection with project development activities for one or more Exempt Entities.

The aggregate amount of such guarantees, assumptions and reimbursement agreements entered into with respect to Exempt Entities, together with the amount invested in Subsidiary Companies, would not exceed $200 million in the aggregate outstanding at any one time (''Investment Cap'').

GPU now proposes to increase the Investment Cap, which would include all forms of equity or participation interests, to 50% of GPU's consolidated retained earnings at the time any investment in a Subsidiary Company or Exempt Entity is made. GPU states that, under new rules 45(b)(4) and 52, open account advances without interest are not subject to the limit of the Investment Cap, nor are cash capital contributions to Subsidiary Companies to the extent they are not made in connection with the acquisition of a new subsidiary.

The Subsidiary Companies propose to provide services and goods to associate Subsidiary Companies and associate Exempt Entities at fair market prices. GPU requests an exemption pursuant to section 13(b) of the Act from the requirements of rules 90 and 91 applicable to such transactions in any case in which one or more of the following circumstances are present:

a. Such associate is a FUCO or an EWG which derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale within the United States;

b. Such associate is an EWG which sells electricity at market-based rates which have been approved by the FERC or the appropriate State Public Utility Commission, provided the purchaser of such electricity is not an associate of GPU;

c. Such associate is an EWG that sells electricity at rates based upon its cost of service, as approved by the FERC or any State Public Utility Commission, provided that the purchaser of such electricity is not an associate of GPU; or

d. Such associate is a Subsidiary Company, the sole business of which is developing, owning and/or operating FUCOs or EWGs described in clause 1, 2 or 3 above.

In an order dated June 14, 1995 (HCAR No. 26307), the Commission has previously authorized EII and ESI to provide goods and services to associate EWGs and FUCOs who satisfy one of the requirements in clause a, b, or c above under an exemption from the cost standard. EII and ESI now requests an exemption under section 13(b) of the Act from the requirements of rules 90 and 91 with respect to the rendering of services or sale of goods to Subsidiary Companies that satisfy the requirements of clause d above. GPUSC and the Operating Companies also propose to provide certain services at cost to any Subsidiary Company or Exempt Entity in which GPU owns an interest.

The Order set forth different limits on the interest rates for U.S. dollar-denominated debt of Subsidiary Companies than for non-U.S. dollar-denominated debt. GPU now proposes that the interest rate on indebtedness of a Subsidiary Company or Exempt Entity, with respect to which there is recourse to GPU, whether or not the indebtedness is denominated in U.S. dollars or foreign currency, not exceed that rate of interest which is generally obtainable for indebtedness bearing similar terms, conditions, and features and which is issued by companies of the same or reasonably comparable credit quality.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31379 Filed 12–22–95; 11:12 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 21617; 812–9750]

Spectra Fund, Inc., et al.; Notice of Application

December 21, 1995.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the ''Act'').

APPLICANTS: Spectra Fund, Inc. (''Fund''), Spectra Fund (''Trust''), Fred Alger Management, Inc. (''Adviser''), and Alger Associates, Inc. (''Associates'').

RELEVANT ACT SECTIONS: Order requested under section 17(b) for an exemption from sections 17(a)(1) and 17(a)(2).

SUMMARY OF APPLICATION: Applicants seek an order permitting the Fund to convert from a closed-end management investment company organized as a Massachusetts corporation to an open-end management investment company organized as a Massachusetts business trust by transferring all of its assets and liabilities to the Trust in exchange for shares of the Trust.

FILING DATES: The application was filed on September 7, 1995, and amended on December 1, 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 January 16, 1996, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification or a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street NW., Washington, DC 20549. Applicants, 75 Maiden Lane, New York, New York 10038.

FOR FURTHER INFORMATION CONTACT: Courtney S. Thornton, Senior Counsel, at (202) 942–0583, 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. The Fund was organized in 1968 as a Massachusetts corporation, and operated as an open-end management investment company until 1978, when it converted to a closed-end management investment company. The Trust, which has been organized as a Massachusetts business trust, will register as an open-end management investment company and will have substantially the same investment objectives and policies as the Fund. The Adviser serves as investment adviser to the Fund, and will serve as the investment adviser to the Trust.

2. Associates, the indirect parent of the Adviser, owns 34.4% of the outstanding shares of the Fund. Fred M. Alger, III, chairman of the board of the Fund and the Trust, owns 53.1% of the outstanding voting securities of Associates. His brother, David D. Alger, president and a director of the Fund and president and a trustee of the Trust, owns 17.2% of the outstanding voting securities of Associates.[1]

3. Since the Fund's conversion to a closed-end management investment company, its shares generally have traded at a discount of greater than 10% to their net asset value. On May 24, 1995, after considering various means of reducing the discount to net asset value at which Fund shares typically trade, the board of directors of the Fund (the ''Board'') decided to recommend conversion from closed-end to open-end status, which would give shareholders the right to dispose of Fund shares at such time as they choose at prices based on the net asset value of their shares. The Board also recommended that the Fund convert from a Massachusetts corporation to a Massachusetts business trust in order to reduce its operating expenses by eliminating the need for annual shareholder meetings, with their associated costs.

4. To effect the conversion of the Fund from a closed-end management investment company organized as a Massachusetts corporation to an open-end management investment company organized as a Massachusetts business trust (the ''Reorganization''), a majority of the Board (including a majority of directors who are not interested persons of the Fund) approved an agreement and plan of reorganization and liquidation (the ''Agreement''). In accordance with the Agreement, the Fund will transfer all of its assets and liabilities to the Trust in a tax-free exchange for shares of beneficial interest of the Trust equal in number and value to the shares of common stock of the Fund then outstanding. Immediately thereafter, the Fund will distribute these shares of the Trust *pro rata* to its shareholders in

[1] Fred Alger is also chairman of the board of Associates and the Adviser. David Alger is president and a director of Associates and the Adviser, and, in addition to his indirect ownership of Fund shares through Alger Associates, directly owns .5% of the shares of the Fund.

complete liquidation of the Fund.[2] Upon completion of the Reorganization, each former shareholder of the fund will be the owner of full and fractional shares of the Trust equal in number and aggregate net asset value to the shares he or she held in the Fund.

5. In assessing the proposed Reorganization, the Board considered the following factors: (a) The terms and conditions of the Agreement, including the fact that shareholders of the Fund, in effect, will receive shares of a substantially identical Trust in an exchange based on the relative net asset values of such shares; (b) no transaction costs or other charges will be incurred by shareholders of the Fund in connection with their acquisition of Trust shares; and (c) the tax-free nature of the Reorganization.

6. In connection with the proposed Reorganization, shareholders of the Fund were provided with a proxy statement dated August 4, 1995. At a special meeting held on September 28, 1995, shareholders of the Fund voted to amend the Fund's investment management agreement and certain of its fundamental investment policies, and approved the Reorganization.

7. All expenses relating to the Reorganization will be borne by the Fund and, if the Reorganization is consummated, will be assumed by the Trust.

Applicants' Legal Analysis

1. Sections 17(a)(1) and 17(a)(2) of the Act, in relevant part, prohibit an affiliated person of a registered investment company, or any affiliated person of such a person, acting as principal, from selling to or purchasing from such registered company, any security or other property. Section 17(b) provides that the SEC may exempt a transaction from section 17(a) if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, that the proposed transaction is consistent with the policies of the investment company concerned and with the general purposes of the Act.

2. Rule 17a–8 generally exempts from the prohibitions of section 17(a) mergers, consolidations, or purchases or sales of substantially all of the assets of registered investment companies that are affiliated persons, or affiliated persons of an affiliated person, solely by reasons of having a common investment adviser, common directors, and/or common officers, provided that certain conditions are satisfied. Applicants may not rely on rule 17a–8 because, under section 2(a)(3)(D), Fred Alger and David Alger are affiliated persons of the Trust by virtue of their offices. Under section 2(a)(3)(B), the Fund may be an affiliated person of each of Fred Alger and David Alger by virtue of the fact that each may be said indirectly (through Associates) to own at least 5% of the Fund's outstanding shares. In addition, Fred Alger also owns or controls, directly and through trusts of which he is the trustee, 6.7% of the shares of the Fund, so that the Fund may be said to be an affiliated person of him on this basis as well. Accordingly, the Fund may be considered an affiliate person of an affiliated person of the Trust. The Board nonetheless reached the determinations required by rule 17a–8. Specifically, the Board determined that changing from a corporation to a business trust was in the best interest of the Fund, and that the interests of existing shareholders of the Fund would not be diluted as a result of the transaction.

3. Applicants believe that the proposed Reorganization is properly viewed as a mere change in the form of organization rather than as a disposition of property giving rise to section 17(a) concerns. Applicants also submit that the Reorganization satisfies the requirements of section 17(b). The Trust was created specifically for the purpose of effecting the Reorganization, and, prior to the Reorganization, will be simply a shell with nominal assets, no liabilities, and no business operations. The transfer of Fund shares for Trust shares of identical value will leave Fund shareholders with identical ownership positions, and no additional consideration will be paid by the Fund or its shareholders for the Trust shares. Because Fund shareholders will receive interests in the Trust identical to their previous interests in the Fund pursuant to a tax-free transaction, with no transaction costs or other charges imposed on shareholders, no party to the transaction will have the opportunity to influence the actions of the Fund or the Trust to the detriment of shareholders. Accordingly, applicants believe that the terms of the Reorganization, including the consideration to be paid and received, are reasonable and fair and do not involve overreaching on the part of any persons concerned.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31380 Filed 12–27–95; 8:45 am]

BILLING CODE 8010–01–M

[2] The Fund is currently the sole shareholder of the Trust, but will redeem its Trust shares prior to the Reorganization.

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Applications of Capital Cargo International Airlines, Inc. for Issuance of New Certificate Authority

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 95–12–29) Dockets OST–95–589 and OST–95–590.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue orders (1) finding Capital Cargo International Airlines, Inc., fit, willing, and able, and (2) awarding it certificates to engage in foreign charter air transportation of property and mail and interstate all-cargo air transportation.

DATES: Persons wishing to file objections should do so no later than January 2, 1996.

ADDRESSES: Objections and answers to objections should be filed in Dockets OST–95–589 and OST–95–590 and addressed to the Documentary Services Division (C–55, Room PL–401), U.S. Department of Transportation, 400 Seventh Street, SW, Washington, D.C. 20590 and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Ms. Janet A. Davis, Air Carrier Fitness Division (X–56, Room 6401), U.S. Department of Transportation, 400 Seventh Street, SW, Washington, D.C. 20590, (202) 366–9721.

Dated: December 20, 1995

Mark L. Gerchick,

Acting Assistant Secretary for Aviation and International Affairs.

[FR Doc. 95–31377 Filed 12–27–95; 8:45 am]

BILLING CODE 4910–62–P

Coast Guard

[CGD 95–087]

National Boating Safety Activities: Funding for National Nonprofit Public Service Organizations

AGENCY: Coast Guard, DOT.

ACTION: Notice of availability.

SUMMARY: The Coast Guard is seeking to enter into financial assistance agreements with national nonprofit public service organizations to promote boating safety on the national level. This announcement seeks proposals for projects that might be eligible for this assistance.

DATES: Application packages may be obtained on or after December 15, 1995. Proposals must be received before 4:30 p.m. eastern time March 18, 1996.

ADDRESSES: Application packages may be obtained from Coast Guard Customer Infoline (800) 368–5647 or (202) 267–0780 and proposals submitted to Commandant (G–NAB–5), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001.

FOR FURTHER INFORMATION CONTACT: Ms. Betty Alley, Office of Navigation Safety and Waterway Services, U.S. Coast Guard (G–NAB–5/room 1202), 2100 Second Street SW., Washington, DC 20593–0001; (202) 267–0954.

SUPPLEMENTARY INFORMATION: Title 26, United States Code, section 9504, establishes the Boat Safety Account of the Aquatic Resources Trust Fund. The Coast Guard may award up to 5 percent of the available funds to national, nonprofit, public service organizations to promote national boating safety. It is anticipated that $1,500,000 will be available for fiscal year 1996. Seventeen awards totalling $1,625,000 were made in fiscal year 1995 ranging from $15,000 to $304,000. Nothing in this announcement should be construed as committing the Coast Guard to dividing available funds among qualified applicants or awarding any specified amount.

It is anticipated that several awards will be made by the Chief, Office of Navigation Safety and Waterway Services, U.S. Coast Guard. Applicants must be nongovernmental, nonprofit, public service organizations and must establish that their activities are, in fact, national in scope. An application package may be obtained by writing or calling the point of contact listed in **ADDRESSES** on or after December 15, 1995. The application package contains all necessary forms, an explanation of how the grant program is administered, and a checklist for submitting a grant application. Specific information on organization eligibility, proposal requirements, award procedures, and financial administration procedures may be obtained by contacting the person listed in **FOR FURTHER INFORMATION CONTACT**.

Some general areas of continuing and particular interest for grant funding include the following:

1. *Develop and Conduct a National Annual Safe Boating Campaign.* Coast Guard seeks a grantee to develop and conduct the 1997 year-round National Annual Safe Boating Campaign that targets boater market segments and specific recreational boating safety topics. This year-round campaign must support the organizational objectives of the Recreational Boating Safety program to save lives, reduce the number of boating accidents and associated health care costs and support the nationwide grassroots activity of the many volunteer groups that coordinate local media events, education programs, and public awareness activities. Products must include, but are not limited to, situation analysis, evaluation processes, measures of effectiveness, marketing strategy, distribution plan, and final report. All print, audio and video material must be designed to emphasize multiple year-round boating safety and accident prevention messages. Highlights of the Calendar Year 1997 national campaign must be special select materials and activities to support National Safe Boating Week and other selected boating events. The major focus of the campaign must be to encourage the use of Personal Flotation Devices (PFDs), with special emphasis on use by children. An established portion of allocated grant funds must support a National Boating Accident Reporting Awareness Program that is designed to reach all boaters and has a message on the importance of reporting all boating accidents. Efforts must also be coordinated with other national transportation safety activities, in particular, those which focus on the prevention of operating under the influence of alcohol or drugs. Point of Contact: Ms. Jo Calkin, (202) 267–0994.

2. *Develop and Conduct a National Recreational Boating Safety Outreach and Awareness Conference.* Coast Guard seeks a grantee to plan, implement, and conduct a National Recreational Boating Safety Outreach and Awareness Conference. This conference must support the organizational objectives of the Recreational Boating Safety Program to save lives, reduce the number of boating accidents, and lower associated health care costs. The conference must be scheduled for the spring of 1997 and be held concurrent or consecutively with a major recreational boating safety aquatic symposium. The design of the conference should enhance the awareness and development of paid and volunteer professionals; national, State, and local boating safety program organization leaders; and industry specialists. It should provide a unifying link between their programs to those on the national level. The conference should be a collaborative effort of national organizations interested in the betterment of boating and aquatic safety and should include, but not be limited to, plenary sessions, hands-on workshops, and the distribution of a report publication describing the activities of the conference. Products should include, but are not limited to, evaluation processes, measures of effectiveness, marketing strategy, and final report. Point of Contact: Ms. Jo Calkin, (202) 267–0994.

3. *Market Multi-Use Waterway Guide.* In September 1993, the National Water Safety Congress (NWSC) was awarded a grant from the U.S. Coast Guard for the development of a Comprehensive Guide for Multiple Use Waterway Management. This guide is designed to assist government and private waterway managers in the development of comprehensive boating management plans to resolve multiple-use conflicts. It is to provide the framework for balanced and defensible decisions in developing and implementing plans, policies, and regulatory actions that result in improved boating safety, quality of boating experience, and sustained environmental quality. The guide is to be completed in 1996.

A grant application is solicited to disseminate the guide developed by NWSC in the most efficient and effective formats (paper, electronic, or other) and to have it marketed and made available in a manner that would result in the most widespread and effective use of the guide. Point of Contact: Mr. Jeff Hoedt, (202) 267–0978.

4. *Information Resources Management: Recreational Boating Safety Measures of Effectiveness Data Capture Project Phase II.* The Coast Guard seeks a grantee to conduct the second phase of a Recreational Boating Safety Measures of Effectiveness (MOE) project. The first phase (FY 1995) identified the data needed to develop the project. The second phase (FY 1996) would be contingent on the findings of the FY 1995 phase. If the FY95 grant determines that the second phase of the project is necessary, the grantee would collect the data elements identified under the FY95 project. The overall goal of the 1996 project would be to determine boat occupant exposure hours for developing risk-based measures of effectiveness for the Recreational Boating Safety Program. Point of Contact: Dr. Jerry Boden, (202) 267–0956.

5. *Recreational Boating Accident Health Care Cost Model.* The Coast Guard seeks grantee to develop and design an injury cost model that will be

used to determine the societal costs of recreational boating accidents. The grant recipient would design a model that will enable the U.S. Coast Guard to perform analyses of boating injuries using a sufficient and statistically valid sample of injury data. The injury cost model would be used to categorize different types of injuries, their severity, and their associated health care costs, medical costs, legal costs, and administrative costs for comparison across various modes of transportation. Point of Contact: Dr. Jerry Boden, (202) 267–0956.

6. *Manufacturer's Compliance Improvement Project.* The Coast Guard seeks a grantee to plan and hold several public workshops throughout the United States to identify existing and potential problems and to propose solutions/approaches for the following areas: (1) Development of boat construction and safety standards; and (2) the reporting of defects by manufacturers, independent sources, and customer outreach education programs. Point of Contact: Mr. Gary Larimer, (202) 267–0986.

7. *Develop and Conduct Boating Accident Seminars.* The Coast Guard seeks a grantee to develop and provide instructional materials and conduct training courses nationwide for boating accident investigators, including three courses at the Coast Guard Reserve Training Center in Yorktown, Virginia. Point of Contact: Mr. Gary Larimer, (202) 267–0986.

8. *Technology Comparison of Propellers, Propeller Guards, and Pump Jets.* The Coast Guard seeks a grantee to compile and analyze current available research comparing the operating efficiency, maneuverability characteristics, and protection factors of propeller/propeller guard combinations, pump jets, after-market pump jet installations, and conventional propellers. Point of Contact: Mr. Gary Larimer, (202) 267–0986.

9. *Voluntary Standards Development Support.* The Coast Guard seeks a grantee to carry out a program to encourage active participation by members of the public and other qualified persons, in the development of technically sound voluntary boating safety standards. Point of Contact: Mr. Gary Larimer, (202) 267–0986.

10. *State/Federal/Boating Organizations Cooperative Partnering Efforts.* The Coast Guard seeks grantees to provide programs to encourage greater participation and uniformity in boating safety efforts. Applicants would provide a forum to encourage greater uniformity of boating laws and regulations, reciprocity among jurisdictions, and closer cooperation and assistance in developing, administering, and enforcing Federal and State laws and regulations pertaining to boating safety. Point of Contact: Ms. Jeanne Timmons, (202) 267–0857.

Proposals addressing other boating safety concerns are welcome. A more detailed discussion of specific projects of interest to the Coast Guard is included in the application package obtained under **ADDRESSES.** The Boating Safety Financial Assistance Program is listed in section 20.005 of the Federal Domestic Assistance Catalog.

Dated: December 21, 1995.

Rudy K. Peschel,

Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.

[FR Doc. 95–31373 Filed 12–27–95; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA, Inc., Technical Management Committee; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for the RTCA Technical Management Committee meeting to be held January 16, 1996, starting at 9:00 a.m. The meeting will be held at RTCA, Inc., 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC, 20036.

The agenda will include: (1) Chairman's Remarks; (2) Review and Approval of Summary of the Previous Meeting; (3) Systems Management Working Group Report to the Technical Management Committee; (4) Consider and Approve: a. Proposed Final Draft, Minimum Operational Performance Standards for Global Positioning System/Wide Area Augmentation System Airborne Equipment; b. Proposed Final Draft, Minimum Operational Performance Standards for Aeronautical Mobile Satellite Services (AMSS); c. Report from SC165/WG6 Concerning Feasibility of High Frequency Data Link (HFDL) MASPS; (5) Take Action on Open Items from Previous Meeting: Consider White Paper on RNP Issues and Recommendations; (6) Other Business; (7) Date and Place of Next Meeting.

Attendance is open to the interested public but limited to space availability, With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036; (202) 833–9339 (phone) or (202) 833–9434 (fax). Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 22, 1995.

Janice L. Peters,

Designated Official.

[FR Doc. 95–31416 Filed 12–27–95; 8:45 am]

BILLING CODE 4810–13–M

RTCA, Inc. Special Committee 184; Minimum Performance and Installation Standards for Runway Guard Lights

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), Notice is hereby given for a Special Committee 184 meeting to be held January 17, 1996, starting at 9:30 a.m. The meeting will be held at RTCA, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC, 20036.

The agenda will be as follows: (1) Administrative Announcements; (2) Chairman's Introductory Remarks; (3) Review and Approval of Meeting Agenda; (4) Review and Approval of Minutes of the Previous Meeting; (5) Review Work Assignments from the Previous Meeting; (6) Compile Material into Full Working Draft Document; (7) Other Business; (9) Date and Place of Next Meeting.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, N.W., Suite 1020, Washington, D.C. 20036; (202) 833–9339 (phone) or (202) 833–9434 (fax). Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 22, 1995.

Janice L. Peters,

Designated Official.

[FR Doc. 95–31417 Filed 12–28–95; 8:45 am]

BILLING CODE 4810–13–M

Notice of Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Bismarck Municipal Airport, Bismarck, ND

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Bismarck Municipal Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before January 29, 1995.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address:

Federal Aviation Administration, Bismarck Airports District Office, 2000 University Drive, Bismarck, ND 58504.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Gregory B. Haug, Airport Manager, of the Bismarck Municipal Airport at the following address: Bismarck Municipal Airport, PO Box 991, Bismarck, ND 58502.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the City of Bismarck, ND under § 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Ms. Irene R. Porter, Manager, Bismarck Airports District Office, 2000 University Drive, Bismarck, ND 58504, (701) 250–4358. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Bismarck Municipal Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On December 1995, the FAA determined that the application to impose and use the revenue from a PFC submitted by the City of Bismarck, ND was substantially complete within the requirements of § 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than March 6, 1996.

The following is a brief overview of the application.

PFC application number: 96–01–C–00–BIS

Level of the proposed PFC: $3.00

Proposed charge effective date: July 1, 1996

Proposed charge expiration date: June 13, 1997

Total estimated PFC revenue: $336,388.00

Brief description of proposed project(s): Reconstruct GA and Regional Airline Ramps; Airfield Signage Installation; Replace Rotating Beacon; Part 107 Access Control; Construct Service Roads; Runway Rejuvenation and Construct Blast Pads; Airfield Lighting and Electrical Improvements; SRE Building Addition; Update ALP; EA for Runway 3/21; SRE Acquisition; Apron Reconstruction and Expansion; Drainage Improvements; Installation of Security Fencing; Acquisition of Electronic Declerometer; Master Plan Update; Plans and Specs for the Extension and Widening of Runway 3/21; and return of PFC Application Preparation Costs.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs. Air taxis, filing Form 1800–31, except commuter air carriers.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Bismarck Municipal Airport or City of Bismarck offices.

Issued in Des Plaines, Illinois on December 20, 1995.

Benito De Leon,

Manager, Planning and Programming Branch, Airports Division, Great Lakes Region.

[FR Doc. 95–31418 Filed 12–28–95; 8:45 am]

BILLING CODE 4910–13–M

Notice of Intent To Rule on Application To Impose and Use a Passenger Facility Charge (PFC) at Orlando International Airport, Orlando, Florida

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use a PFC at Orlando International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before January 29, 1996.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Orlando Airports District Office, 9677 Tradeport Drive, Suite 130, Orlando, Florida 32827.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Robert B. Bullock, Executive Director of the Greater Orlando Aviation Authority at the following address: One Airport Boulevard, Orlando, Florida 32827–4399.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Greater Orlando Aviation Authority under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Pablo G. Auffant, P.E., Programs Manager, 9677 Tradeport Drive, Suite 130, Orlando, Florida, 32827, 407–648–6586. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use a PFC at Orlando International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On December 20, 1995, the FAA determined that the application to impose and use a PFC submitted by Greater Orlando Aviation Authority was substantially complete within the requirements of § 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than March 21, 1996.

The following is a brief overview of PFC Application No. 96–04–C–00–MCO.

Level of the proposed PFC: $3.00.

Proposed charge effective date: February 1, 1993.

Proposed charge expiration date: June 1, 1999.

Total estimated PFC revenue: $98,992,000.

Brief description of proposed project(s): A. Rehabilitation of Automated Guideway Transit Vehicles (Impose and Use).

B. Terminal and Roadway Signage (Impose and Use).

C. Modifications for Americans with Disabilities Act Compliance (Impose and Use).

D. West Ramp High Mast Lighting (Impose and Use).

E. Rehabilitation of Northwest Terminal Support Area Ramp (Impose and Use).

F. Design of Airport Road Interchange and Expansion—East and West (Impose Only).

G. Construction of Airport Road Interchange and Expansion—East and West (Impose Only).

H. Design and Mid-Crossfield Taxiway Bridge Expansion (Impose and Use).

I. Deleted.

J. Expansion of Existing International Facilities (Impose and Use).

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: None.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Greater Orlando Aviation Authority.

Issued in Orlando, Florida on December 20, 1995.

Charles E. Blair,

Manager, Orlando Airports District Office, Southern Region.

[FR Doc. 95–31419 Filed 12–28–95; 8:45 am]

BILLING CODE 4910–13–M

Federal Highway Administration

Federal Railroad Administration

Federal Transit Administration

Participation in the State Infrastructure Bank Pilot Program

AGENCY: Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), and Federal Transit Administration (FTA), Department of Transportation.

ACTION: Notice of Request for Participation.

SUMMARY: This notice invites States to make applications for participation in the State Infrastructure Bank (SIB) Pilot Program established by the National Highway System Designation Act of 1995 (the Act). Pursuant to Section 350 of the Act, USDOT is authorized to enter into agreements with up to ten States to establish State Infrastructure Banks or multistate infrastructure banks. The purpose of this notice is to invite interested parties to participate in the SIB Pilot Program and to outline the procedures that will be established for designation of States to be included in the Pilot Program.

DATES: Applications for participation will be accepted until Pilot SIBs are designated for ten (10) States. USDOT will begin processing applications as received but will not designate any SIBs until January 29, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. Cynthia Burbank, FHWA Office of Policy Development, (202) 366–9208; Mr. John Paolella, FRA Office of Policy and Program Development, (202) 366–0380; or Mr. Richard Steinmann, FTA Office of Budget and Policy, (202) 366–4060. Application requests and specific questions regarding the SIB Pilot Program may also be directed to the contact person(s) named in this notice or the Divisional or Regional Offices of FHWA, FRA, or FTA in your State.

SUPPLEMENTARY INFORMATION:

Purpose

President Clinton's vision for sustained economic growth and prosperity and for improving international competitiveness for the Nation means investing in America and its infrastructure. Executive Order 12893 signed by the President in January 1994 reinforced the Administration's position that investment in transportation infrastructure lays the foundation for economic growth in the next century.

The challenge facing USDOT, its modal administrations, States and local governments is finding ways to more effectively employ Federal funds by leveraging existing resources to encourage new investment in transportation infrastructure. USDOT and its modal administrations have accepted this challenge, and through their innovative finance initiatives have encouraged States, local governments and other affected groups to identify and develop innovative financing mechanisms which seek to better manage available resources and create new financing opportunities. States responded with an extensive list of projects and financing ideas. USDOT's Partnership for Investment has used these to develop a wide array of innovative financing mechanisms, including the State Infrastructure Bank proposal, which address the need to leverage scarce Federal and State resources. USDOT approved over 90 projects under the Partnership for Investment.

In response to State requests for greater flexibility, Congress has made a number of changes in Federal surface transportation financing legislation, including the establishment of a Pilot Program for State Infrastructure Banks through Section 350 of the Act (Pub. L. 104–59, § 350). That section authorizes USDOT to enter into cooperative agreements with up to ten States for the establishment of SIBs or multistate infrastructure banks for making loans and providing other assistance to public and private entities carrying out or proposing to carry out projects eligible for assistance under the section. The Act requires that the Secretary review the financial condition of each SIB established pursuant to the Act and report to Congress on the results of the review not later than March 1, 1997.

This notice serves to announce the Pilot Program and provide information regarding the Pilot Program, participation qualifications, and application procedures. The Pilot Program and subsequent implementation by designated SIBs will help USDOT determine how to proceed with the SIB concept while simultaneously advancing projects. In addition, it will help USDOT inform Congress about the status of the program, as required under the Act, and how to expand program flexibility for State and local governments.

Definitions

State Infrastructure Bank (SIB)

An infrastructure investment fund established to facilitate and encourage investment in eligible transportation infrastructure projects sponsored by public and/or private entities. Through a SIB, a State can use its initial capital, provided by its Federal-aid highway apportionment, Federal transit allocations, and non-Federal monies, to make loans, provide credit enhancement, serve as a capital reserve for bond or debt financing, subsidize interest rates, issue letters of credit, finance purchase and lease agreements, provide debt financing security, or provide other forms of financial assistance for construction of projects qualified under the Federal-aid highway program and transit capital projects. As the funds are repaid or compensation is provided, the SIB can make new financial assistance available to other projects, continually recycling the initial monies, thus leveraging the initial funds available.

Infrastructure Bank Application Instructions

A series of questions provided by USDOT to be answered by States interested in participating in the SIB Pilot Program. The responses will be

used by USDOT to evaluate which States will be included in the Pilot Program.

Multistate Infrastructure Bank

Interstate compact among two (2) or more States to enter into a cooperative agreement with USDOT to establish a SIB.

Notice of Request for Participation

This Notice of Request for Participation is the initial step in the process that will lead to cooperative agreements for up to ten States for the SIB Pilot Program. Interested applicants will be asked to respond to a series of questions posed in the Infrastructure Bank application instructions to be made available by USDOT as part of this designation process. The application responses submitted by the State will provide the basis for determining a State's interest in the Pilot Program, its ability and qualifications to implement a SIB, and the initial projects it expects to facilitate through financial support for the SIB. The application instructions are also designed to assist States as they seek to develop a framework for establishing a SIB.

In the interest of providing a timely response to Congress as required under the Act, USDOT will begin processing applications as they are received but will not designate any SIBs until thirty (30) days following publication of this notice. USDOT anticipates designations to be made on an individual, rolling basis to permit interested States to accelerate implementation, and to facilitate a qualitative response to Congress regarding the program. The application will be available from the USDOT contact persons referenced in this notice, or any of USDOT's modal administrations, FHWA, FRA or FTA, and their Divisional or Regional offices.

USDOT recognizes that this is a Pilot Program, and is receptive to nontraditional as well as traditional approaches to establishing a SIB and defining the types of assistance that might be offered. Subject to the limitations of the Act, USDOT has no preconceived concept of how SIBs should be implemented and seeks to work in cooperation with the States to define the implementation program. USDOT will not promulgate any regulations for the Pilot Program prior to the designation process. USDOT will not require that all Pilot SIBs be configured in the same way or that they provide the same forms of assistance. This Pilot Program, therefore, gives States an opportunity to determine how they might best structure SIBs. USDOT will be interested in information detailing how States propose to establish and implement SIBs, and is looking for evidence of well thought out proposals. In addition, applications can be enhanced by providing information in the following areas:

- The types of assistance to be provided by the SIB (e.g., loans, credit enhancements, capital reserves for debt financing, interest rates subsidies, letters of credit);
- Identification of projects to be advanced as a result of Pilot designation;
- Status of any enabling legislation, if required by a State prior to establishing a SIB;
- How the SIB relates to other innovative financing efforts underway or planned by States and how their experience under the innovative financing programs to date can reflect this;
- The relationship of the projects proposed for the SIB to the Statewide Transportation Plan, the approved State Transportation Improvement Program (STIP) and any other Federally required plans;
- How the SIB will more effectively use Federal monies;
- The sources of funds that will be used to capitalize the SIB (CMAQ and ISTEA demonstration funds cannot be utilized), including the availability of non-Federal matching funds required by Section 350(e);
- The proposed institutional framework for the SIB;
- Proposed mechanisms and internal procedures to monitor and/or track the flow of Federal funds to accounts in the SIB and the State's preferred reporting procedures to USDOT, given that Section 350 requires maintenance of separate accounts for highway and transit; and
- The use of a SIB to facilitate development of intermodal or multistate projects.

USDOT has established a fast track schedule for this new Pilot Program and the opportunities that it will create for States. Responses provided by States in the application and subsequent implementation of selected SIBs will help USDOT determine how to move forward with the Pilot Program, while simultaneously advancing projects. States should indicate in their applications the type and extent of any technical assistance they might need to expedite implementation if designated as a pilot.

Interested States should request Infrastructure Bank application instructions. Copies of the enabling legislation (Section 350) will be provided with the application instructions, which will be available from the USDOT contact persons referenced in this notice, or any Divisional or Regional Office of FHWA, FRA or FTA. Completed applications should be submitted to the Divisional or Regional Offices of FHWA, FRA or FTA. USDOT and its modal administrations may seek further clarification of SIB applications in writing or through an informal interview process with States.

Authority: Pub. L. 104–59, § 350, 109 Stat. 568, 618–622 (1995).

Issued on: December 21, 1995.

Rodney E. Slater,

Federal Highway Administration.

Issued on: December 21, 1995.

Gordon J. Linton,

Federal Transit Administration.

Issued on: December 21, 1995.

Jolene M. Molitoris,

Federal Railroad Administration.

[FR Doc. 95–31407 Filed 12–27–95; 8:45 am]

BILLING CODE 4910–22–P

Federal Railroad Administration

[BS–AP–No. 3360]

Norfolk Southern Railway Co.; Public Hearing

The Norfolk Southern Railway Company, Central of Georgia Railroad has petitioned the Federal Railroad Administration (FRA), seeking approval of the proposed discontinuance and removal of the automatic block signal and traffic control signal systems, on the single main track ''P'' Line and sidings between Columbus, Georgia, milepost P–291.8 and Leeds, Alabama, milepost P–423.8, Alabama Division, Columbus and Norris Yard District, a distance of approximately 132 miles.

This proceeding is identified as FRA Block Signal Application Number 3360.

FRA has issued a public notice seeking comments of interested parties and has conducted a field investigation in this matter. After examining the proposal, field report, and letters of protest, the FRA has determined that a public hearing is necessary before a final decision is made on this proposal.

Accordingly, a public hearing is hereby set for 10 a.m. on Thursday, January 25, 1996, in the G. W. Andrews Federal Court House Building, located at 701 Avenue A, in Opelika, Alabama. Interested parties are invited to present oral statements at the hearing.

The hearing will be an informal one and will be conducted in accordance with Rule 25 of the FRA Rules of Practice (Title 49 CFR 211.25), by a representative designated by the FRA.

The hearing will be a nonadversary proceeding and, therefore, there will be no cross-examination of persons presenting statements. The FRA representative will make an opening statement outlining the scope of the hearing. After all initial statements have been completed, those persons wishing to make brief rebuttal statements will be given the opportunity to do so in the same order in which they made their initial statements. Additional procedures, if necessary for the conduct of the hearing, will be announced at the hearing.

Issued in Washington, D.C. on December 21, 1995.

Phil Olekszyk,

Deputy Associate Administrator for Safety Compliance and Program Implementation.

[FR Doc. 95–31396 Filed 12–27–95; 8:45 am]

BILLING CODE 4910–06–P

Sunshine Act Meetings

Federal Register
Vol. 60, No. 249
Thursday, December 28, 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).

NOTIFICATION OF ITEMS ADDED TO AGENDA

RAILROAD RETIREMENT BOARD

At the Board's meeting on December 20, 1995, the Board voted unanimously to add three items to the agenda:

1. Furlough;
2. Congressional Correspondence; and
3. Truth in Budgeting.

In so voting, the Board determined that agency business required these changes and that advance notice was not possible.

Date: December 21, 1995.

Beatrice Ezerski,

Secretary of the Board.

[FR Doc. 95–31467 Filed 12–26–95; 9:56 am]

BILLING CODE 7905–01–M

federal register

Thursday
December 28, 1995

Part II

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 101

Food Labeling; Final Rule and Proposed Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 90N–0134]

RIN 0910–AA19

Food Labeling: Reference Daily Intakes

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending its regulations to establish Reference Daily Intakes (RDI's) for vitamin K, selenium, manganese, chromium, molybdenum, and chloride, but not for fluoride. The agency is also amending its regulations to modify the units of measure that are used to declare the amount of biotin, folate, calcium, and phosphorus in food. In addition, the agency is amending its regulations to make consideration of selenium, chromium, molybdenum, and chloride optional in making a determination as to whether a food is nutritionally inferior to a food for which it substitutes and that it resembles. These actions are intended to assist consumers in understanding the nutritional significance of foods in the context of a total daily diet and are in recognition of the fact that the National Academy of Sciences (NAS) established Recommended Dietary Allowances (RDA's) and Estimated Safe and Adequate Daily Dietary Intakes (ESADDI's) for vitamin K, selenium, manganese, chromium, molybdenum, and chloride either in 1980 or 1989.

EFFECTIVE DATE: January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Camille E. Brewer, Center for Food Safety and Applied Nutrition (HFS–165), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–5483.

SUPPLEMENTARY INFORMATION

I. Background

In the Federal Register of January 4, 1994 (59 FR 427), FDA published a proposed rule in a document entitled ''Food Labeling: Reference Daily Intakes'' (hereinafter referred to as ''the January 1994 proposal''). This document grew out of earlier proposals that, among other things, sought to amend FDA's label reference value regulations to replace the United States Recommended Daily Allowances (U.S. RDA's) with Reference Daily Intakes (RDI's) for protein and 26 vitamins and minerals.

In the Federal Register of July 19, 1990 (55 FR 29476), FDA published its initial proposal on RDI's in a document entitled ''Food Labeling Reference Daily Intakes and Daily Reference Values'' (hereinafter referred to as ''the July 1990 proposal''). Following the passage of the Nutrition Labeling and Education Act of 1990 (Pub. L. 101–535) (hereinafter referred to as ''the 1990 amendments''), FDA republished this proposal in modified form on November 27, 1991 (56 FR 60366) (hereinafter referred to as ''the supplementary proposal''). FDA summarized and reviewed the comments to these proposals in a final rule entitled ''Food Labeling; Reference Daily Intakes and Daily Reference Values'' (58 FR 2206, January 6, 1993, and corrected at 58 FR 17104, April 1, 1993) (hereinafter referred to as ''the RDI/DRV final rule'').

However, on October 6, 1992, before FDA issued the final rule, Congress passed the Dietary Supplement Act of 1992 (Title II of Pub. L. 102–571) (hereinafter referred to as the ''DS act''). Section 202(a)(1) of the DS act imposed a moratorium on the implementation of the 1990 amendments as they applied to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances until December 15, 1993. Section 203 of the DS act prohibited FDA from promulgating regulations before November 8, 1993, that required the use of, or that were based on, recommended daily allowances of vitamins or minerals, other than regulations establishing the U.S. RDA's specified in § 101.9(c)(7)(iv)(21 CFR 101.9(c)(7)(iv)) (1992), as in effect on October 6, 1992.

The label reference values in § 101.9(c)(7)(iv) (1992) were based to a large extent on the 1968 RDA's (Ref. 1), and thus they are more than 25 years old. These label values do not reflect the significant advances in scientific knowledge about essential nutrient requirements that have occurred over the last 20 years. Based on these advances, in 1980, the NAS established, for the first time, ESADDI values for vitamin K, biotin, pantothenic acid, copper, manganese, fluoride, chromium, selenium, molybdenum, sodium, potassium, and chloride (Ref. 2). In 1989, the NAS updated the values for vitamin K and selenium, making them RDA's rather than ESADDI's (Ref. 3). At the same time, the NAS continued to provide ESADDI values for manganese, fluoride, chromium, and molybdenum, but NAS dropped the suggested values for sodium, potassium, and chloride, giving instead estimated minimum requirements for healthy persons at various ages (Ref. 3).

With its discretion constrained by section 203 of the DS act, and yet faced with a need to establish a labeling scheme that manufacturers could implement as quickly as possible, FDA simply adopted in its new regulations the values in § 101.9(c)(7)(iv) as in effect in 1992 (see RDI/DRV final rule). This solution created a new problem. Section 101.9(c)(7)(iv) (1992) did not contain label reference values for vitamin K, selenium, manganese, chromium, molybdenum, chloride, and fluoride, which were addressed in the 1989 RDA's (Ref. 3).

In its January 1994 proposal, FDA proposed to establish RDI's for vitamin K, selenium, manganese, chromium, molybdenum, chloride, and fluoride for the following reasons: Such values are necessary to permit the declaration of these nutrients in the nutrition labeling of all foods; they will assist consumers in understanding the significance of the amount of these nutrients present in foods in the context of a total daily diet; and these values will permit nutrient content claims to be made for these nutrients.

FDA received approximately 65 letters in response to the January 1994 proposal. Each letter contained one or more comments. Many comments supported the proposal generally or supported aspects of the proposal. Other comments addressed issues outside the scope of the proposal (e.g., nutrition education, freedom of choice, premarket clearance, and fortification policies) and will not be discussed here. Several comments suggested modifications or revisions of various aspects of the proposal. A summary of the comments, the agency's responses to the comments, and a discussion of the agency's conclusions with respect to the RDI's for the seven nutrients follows:

II. Authority for Additional Label Reference Values

Section 2(b)(1)(A) of the 1990 amendments provides that the Secretary of Health and Human Services (and, by delegation, FDA) shall issue regulations that require that the required nutrition label information be conveyed in a manner that enables the public to readily observe and comprehend such information and to understand its relative significance in the context of a total daily diet. FDA, in its food labeling initiative, has tried generally to assist consumers in understanding the nutrition label information relative to a total daily diet (see 55 FR 29476) and to do so based on the most current scientific and public health knowledge.

1. The majority of comments agreed with establishing RDI's for the

additional nutrients. These comments applauded FDA's intention to broaden the list of nutrients for which RDI's are established and stated that this action is in keeping with the intent of the 1990 amendments to provide additional useful information to consumers. On the other hand, one comment questioned the wisdom of establishing new RDI's before conducting surveys to gauge the extent to which the RDI's can be comprehended and expressed concern the new RDI's would only add to public confusion.

The agency does not agree with the latter comment. Before issuing final food labeling rules on January 6, 1993, FDA and the food industry conducted numerous focus groups and informal preference studies that analyzed consumer understanding of different formats for presenting nutrition information, including the question of whether consumers could understand RDI's, which are incorporated into the ''Nutrition Facts'' panel by means of the percent Daily Value (DV) declaration. This research demonstrated that the percent DV format improved consumers' abilities to make correct dietary judgments about a food in the context of the total daily diet (58 FR 2070 at 2127). Therefore, FDA finds that percent DV's, and the underlying RDI's can be, and are, understood by consumers and used by them successfully. Therefore, FDA finds that this comment provides no basis for not establishing RDI's for the seven nutrients. Consistent with the vast majority of comments, FDA is adopting these values except the value for fluoride, as explained below.

III. Nutrient Selection and Determination of Values for RDI's

A. Basis for RDI's

2. Most comments strongly supported the use of the NAS' RDA's as the basis for the establishment of RDI values. However, a couple of comments objected to providing RDI's only for nutrients with RDA's. One comment urged FDA to permit the inclusion of boron, nickel, silicon, tin, and vanadium as nutrients to be declared within the nutrition label. The comment stated that these nutrients have been recognized as essential by leading experts on trace minerals.

Since the inception of the nutrition labeling program, FDA has relied on the judgment of the NAS' Food and Nutrition Board concerning the essentiality of particular nutrients in human nutrition and the required levels of those nutrients (37 FR 6493, March 30, 1972). The procedures followed by the NAS ensure that scientific consensus exists for the essentiality in human nutrition of nutrients for which RDA's and ESADDI's are established. In brief, these procedures include a review of the available scientific literature by experts in the field of human nutrition, requests for public input, consultation with other knowledgeable experts, a review by the Food and Nutrition Board, and a review by the National Research Council's Report Review Committee. The types of evidence on which the RDA's are based include: (1) Studies of subjects maintained on diets containing low or deficient levels of a nutrient, followed by correction of the deficit with measured amounts of the nutrient; (2) nutrient balance studies that measure nutrient status in relation to intake; (3) biochemical measurements of tissue saturation or adequacy of molecular function in relation to nutrient intake; (4) nutrient intakes of fully breast-fed infants and of apparently healthy people from their food supply; (5) epidemiological observations of nutrient status in populations in relation to intake; and (6) in some cases, extrapolation of data from animal experiments (Ref. 3, p. 1).

Strong and uniform support was provided for the use of NAS RDA's as the basis for nutrition label information during the initial development of nutrition labeling regulations in 1972 as well as in response to the July 1990 proposal and the supplementary proposal. FDA noted in the RDI/DRV final rule that ''The majority of comments on this topic * * * supported the continued use of the NAS RDA's as the basis for developing label reference values for vitamins and minerals'' (58 FR 2206 at 2208). Based on the continuing support shown in the comments submitted in the present rulemaking, the agency continues to believe that the NAS' ''Recommended Dietary Allowances'' (Ref. 3) remains the most widely accepted and respected source of information on human nutrient requirements.

The lack of an RDA or ESADDI does not mean that other substances should not be included in the diet. It does mean, however, that the level of scientific agreement does not exist that would justify highlighting these substances for special attention to ensure that they are included in the diet at appropriate levels.

There are two criteria for determining which nutrients should be considered for RDI's. The first and foremost is scientific consensus as to the essentiality of the nutrient. Nutrients that are essential in human nutrition warrant special consideration on the label to guarantee that consumers have the means, through nutrition labeling, to account for the nutrient in the total daily diet.

The second criterion is scientific agreement concerning the level at which the nutrient should be consumed. The RDA's are defined as ''the levels of intake of essential nutrients that, on the basis of scientific knowledge, are judged by the Food and Nutrition Board to be adequate to meet the known nutrient needs of practically all healthy persons'' (Ref. 3, p. 1). The ESADDI's are defined as ''a category of safe and adequate intakes for essential nutrients when data were sufficient to estimate a range of requirements, but insufficient for developing an RDA'' (Ref. 3, pp. 6 and 7).

The criteria of essentiality and of recommended intakes provides assurance that there is scientific agreement regarding the need for certain nutrients and guidance regarding appropriate levels.

While the comment supporting the inclusion of boron, nickel, silicon, tin, and vanadium submitted published reports of the requirements for these nutrients in animal nutrition, it submitted no data or other information that there is scientific consensus that these minerals are essential in human nutrition, or that there is agreement concerning recommended daily intake levels for these minerals. Because of the lack of such data and the NAS' position that deficiencies of these trace elements have not been established in humans, and, hence, that there are no data from which human requirements can be established (Ref. 3, p. 267), the agency is not establishing RDI's for boron, nickel, silicon, tin, or vanadium. Therefore, in accordance with § 101.9(c), these nutrients cannot be declared within the nutrition label on conventional foods. However, in a companion document in this issue of the Federal Register entitled ''Food Labeling; Statement of Identity, Nutrition Labeling and Ingredient Labeling of Dietary Supplements,'' FDA is proposing regulations to implement the Dietary Supplement Health and Education Act of 1994 (the DSHEA) that will, in part, allow dietary ingredients for which RDI's have not been established (e.g., boron) to be listed in the nutrition label of dietary supplements.

3. One comment urged FDA to consider the promotion of optimal health, instead of nutrient adequacy, in the determination of label reference values.

As discussed in the response to the previous comment, the RDI's are based on the NAS RDA's, and the agency is

not persuaded that a change in that basis is warranted. NAS is in the process, however, of evaluating the basis on which it determines the RDA's. In 1994, the Food and Nutrition Board (FNB) of the Institute of Medicine of the NAS published a document entitled ''How Should the Recommended Dietary Allowances Be Revised'' (Ref. 4). In this document, NAS summarized its multi-step plan for reconceptualizing the RDA's and announced its intention to examine alternate bases for determining the RDA's. NAS stated:

> Nutrition science, similar to all scientific endeavors, is rapidly changing and evolving. Nutrition scientists and practitioners continue to learn more with each passing day about nutrition and its effect on health. The role of the RDAs at any time is to provide the best consensus of nutrition science interpreted to recommended values at that time. The FNB believes that the science of nutrition has advanced significantly, and the next edition of the RDAs will need to reflect this progress. One consideration is expanding the RDA concept to include reducing the risk of chronic disease. (Ref. 4, p. 14.)

To accomplish this task the FNB proposed to develop four reference points: Deficient, average requirement, recommended dietary allowances, and upper safe levels (Ref. 4, pp. 18–20). They also proposed to develop a publication describing how the new RDA's could be used for the variety of purposes to which they are put (e.g., for food labeling) (Ref. 4, pp. 20–21).

FDA is committed to working with the NAS in its development of new approaches for providing standards to serve as goals for good nutrition and in the implementation of those approaches. The agency believes that any action to change the basis for the RDI's should await completion of the NAS process to ensure that such an action reflects scientific consensus and to avoid the possible need for consecutive relabeling of foods that might occur if FDA were to proceed to revise the RDI's before NAS published new values.

B. Method for the Determination of RDI Values

4. Many comments supported the method that FDA used for determining the proposed RDI's for the seven nutrients. One comment, however, supported the proposal to establish RDI's for nutrients with RDA's (i.e., vitamin K, selenium) but not for nutrients with ESADDI's (i.e., chloride, manganese, chromium, molybdenum, and fluoride). The comment contended that FDA's proposed use of ESADDI's for establishing RDI's is not scientifically sound. The comment argued that because ESADDI's are merely estimates, established when scientific data are insufficient to develop an RDA, RDI's should not be based on them. The comment also stated that, because recommended levels are presented as a range of values, using the midpoint of such a range is of questionable scientific validity.

Another comment stated that using the midpoint of the ESADDI range results in RDI's that are too high for manganese, chromium, and molybdenum. The comment stated that the upper value of the ESADDI range is the upper limit of safety for the specified age group. This comment recommended that the lowest value of the ESADDI range be used for determining the RDI for these nutrients because this level is more than adequate to meet the needs of most individuals and is higher than usual intakes. The comment stated that the proposed values would be difficult to obtain by diet and would likely result in many people believing that they are ''deficient'' when they are not.

Based on its consideration of the comments on the 1990 proposal and on the supplementary proposal, FDA determined in the RDI/DRV final rule that it is appropriate to establish label reference values for vitamins and minerals by selecting the highest NAS RDA value from among those for adults and persons 4 or more years of age (excluding pregnant and lactating females) (58 FR 2206 at 2211). The agency concluded that use of these values would ensure that the value set as the RDI would take into account the intakes of vulnerable and at-risk groups. At the same time, where several ESADDI ranges were established by the NAS for specific age groups, FDA said that it would select the highest range, and then use the midpoint of that range as the RDI (58 FR 2206 at 2212). In its July 1990 proposal, FDA based the proposed RDI's for nutrients with ESADDI's presented as a series of ranges of values on the midpoint of the highest ESADDI range (55 FR 29476 at 29481), and most of the comments supported that approach. Accordingly, in the current rulemaking, FDA used this method to derive the proposed values for chloride, manganese, fluoride, chromium, and molybdenum (59 FR 429).

As stated previously, the vast majority of comments to the January 1994 proposal supported this approach. FDA disagrees with the comment that it is not scientifically sound to base RDI's on ESADDI's. In the July 1990 proposal, FDA acknowledged that available data regarding nutrients with ESADDI's are not sufficient to allow NAS to set specific RDA values. However, in ''Recommended Dietary Allowances,'' the NAS does state that ESADDI's are established ''for essential nutrients when data were sufficient to estimate a range of requirements'' (Ref. 3, p. 7). From this statement, the agency concludes that, for those nutrients for which it has established ESADDI's, the NAS reviewed similar types of evidence as that used in arriving at RDA's and applied the same rigorous scientific approach, satisfying itself that the nutrients were essential for human nutrition, and that, while the data were not sufficient to set precise recommended levels, they were sufficient to arrive at a scientifically supported range.

Accordingly, these nutrients meet the two criteria (discussed in comment 2 of section III.B. of this document) used by FDA in determining which nutrients should be considered for RDI's, namely, that there is scientific consensus as to the essentiality of the nutrient and scientific agreement concerning the level at which the nutrient should be consumed. While for these nutrients that level is a range rather than an exact amount, it nonetheless reflects the amount of the nutrient known to be necessary to meet the nutrient needs of individuals according to age group. Based on these facts, FDA concludes that it is proper to establish RDI's for nutrients for which the NAS has established ESADDI's.

This action is consistent with the agency's action in 1973 when it established U.S. RDA values for biotin, pantothenic acid, copper, and zinc based on discussions of nutrient requirements in the text of the seventh edition of ''Recommended Dietary Allowances'' (Ref. 1) (38 FR 2125 and 2146, January 19, 1973). At that time, RDA's did not exist for these four nutrients, and ESADDI's had not been introduced. Both then and now, by providing a reference value, the agency allowed for the nutrients to be listed in nutrition labeling so that manufacturers could voluntarily provide consumers with information on the amount (in terms of percent of a reference value) of these essential nutrients that is present in a serving of food.

The agency is not persuaded that using the lowest value of the ESADDI range is a preferable method for determining RDI's for nutrients with ESADDI's. The vast majority of comments received on this subject in this rulemaking, as well as on the July 1990 proposal and on the supplementary proposal, argued strongly for label reference values that

targeted vulnerable or at-risk groups by selecting the highest recommended values. In the RDI/DRV final rule, FDA was persuaded by the comments to use a ''population coverage approach'' that did, in fact, rely on the highest NAS RDA values from among those persons 4 or more years of age (excluding pregnant or lactating women). For those nutrients with ESADDI values presented as ranges, the agency attempted to be consistent with this approach by selecting the highest range and then using the midpoint of that range.

Use of the lowest point in the ESADDI range would be inconsistent with the population coverage approach because it would set the RDI at a value considered by the NAS as the minimum adequate dietary intake level, not at a value that is targeted at vulnerable or at risk groups. The agency recognizes the need for some caution, however, because NAS has stated that the upper limits of the ESADDI ranges of intake should not be habitually exceeded because the toxic level for many trace elements may be only several times usual intake (Ref. 3, p. 7).

Therefore, in recognition of NAS' expressed concern and based on the comments, FDA is persuaded to modify its method for determining RDI's for nutrients with ESADDI's. While FDA will look first to the midpoint of the highest range, if that value exceeds the upper limit of the range for any ESADDI age group within the age range for which the RDI will apply (i.e., adults and children 4 or more years), FDA will select as the RDI the lowest upper level of the ESADDI ranges that are less than the midpoint of the highest ESADDI range. For example, a review of the 1989 ESADDI values for manganese shows a range from 1.5 to 2 milligrams (mg) for children 4 to 6 years of age, from 2 to 3 mg for children 7 to 10 years of age, and from 2 to 5 mg for children 11 years of age through adults (Ref. 3). The agency proposed an RDI for use on labels of foods intended for adults and children 4 or more years of age of 3.5 mg for manganese. This value was the midpoint in the highest ESADDI range (2 to 5 mg). Under this new method for determining RDI's for nutrients with ESADDI's, FDA is setting the RDI value at 2 mg since the midpoint of the highest ESADDI range (3.5 mg) exceeds the upper limit for 4 to 6 year old children (2 mg).

Other nutrients affected by this modified method are chromium and molybdenum. FDA proposed an RDI for chromium of 130 micrograms (µg). The upper limit of the ESADDI range for children 4 to 6 years of age is 120 µg. Therefore, the agency is adopting an RDI for chromium of 120 µg, rather than 130 µg. Likewise, FDA proposed an RDI for molybdenum of 160 mg. The upper limit of the ESADDI range for children 4 to 6 years of age is 75 mg. Therefore, the agency is adopting an RDI for molybdenum of 75 mg, rather than 160 mg. FDA has revised § 101.9(c)(8)(iv) to reflect these new values for manganese, chromium, and molybdenum.

FDA reiterates that the RDI's do not represent dietary goals for individuals. Their purpose is to provide an overall population reference value for use on the food label (55 FR 29476 at 29481). As such, they may underrepresent or exceed the needs of particular individuals, particularly for manganese and molybdenum. Nonetheless, on a population basis FDA concludes that these values are appropriate.

IV. Issues Concerning Specific Nutrients

A. Fluoride

5. A number of form letters opposed establishing an RDI for fluoride. Most of these comments did not provide any justification for their position. Some comments stated that fluoride has been shown to be a poison when ingested in very small quantities. These comments associated the ingestion of minute quantities of fluoride with several adverse health effects (e.g., dental fluorosis, gastrointestinal disorders, allergies) but provided no data or information to support this position. Another comment said that FDA should not establish an RDI for fluoride because fluoride has never been identified as an essential nutrient. This comment also expressed concern about difficulties that would be encountered with an RDI for fluoride, given the variability in dietary intake levels of this substance resulting from the use or nonuse of fluoridated water as well as the unintentional consumption of fluoride from mechanically deboned meat and fluoridated toothpastes, and about the harm that might occur if foods (including supplements) began fortifying with fluoride.

Another comment recommended that either fluoride be deleted from the list of nutrients for which RDI's are established, or that the agency establish an upper limit at 1.3 parts per million for added fluoride in foods and dietary supplements because this level would be consistent with the agency's proposal for the addition of fluoride to bottled water.

A couple of comments suggested that an RDI of 3 mg for fluoride will become a formulation target level for manufacturers. One comment stated that manufacturers of vitamin-mineral supplements may incorporate an amount of fluoride corresponding to 100 percent of the RDI and reflect this fact on the nutrition label. The comment argued that if such formulations are produced, the intake of 3 mg fluoride from the vitamin-mineral supplement in addition to the intake of fluoride from the diet, drinking water, and fluoridated dentifrices would pose a risk of dental fluorosis for young children and might lead to excess skeletal fluoride accumulation.

A professional association of pediatric dentists supported establishing an RDI for fluoride for nutrition labeling purposes. However, the comment stated that establishing the RDI at 3 mg would place millions of children from infancy through 16 years at risk for dental fluorosis. The comment urged FDA to establish the RDI for fluoride at 1 mg because this level is scientifically proven to provide significant anti-caries protection without increasing the risk of dental fluorosis. The comment stated that levels above 1 mg have shown no greater anti-caries protection, while greatly increasing the risk of dental fluorosis in children. Another comment suggested that the lowest fluoride ESADDI of 1.5 mg be adopted as the RDI because this level would be compatible with the available food supply, and because fluoride has about 70 percent availability for absorption resulting in an absorbed level of 1 mg.

The agency rejects the argument that an RDI should not be established because low levels of ingested fluoride (i.e., levels at or below the proposed RDI) represent significant health risks and are associated with a variety of toxicities. The U.S. Department of Health and Human Services, in a report titled ''Review of Fluoride, Benefits and Risks'' (Ref. 5), examined the literature on the adverse effects of ingested fluoride. The report could not substantiate that there are adverse health effects or toxicities associated with low level fluoride exposure in normal individuals. In 1993, the Subcommittee on the Health Effects of Ingested Fluoride of the NAS Committee on Toxicology (the Subcommittee) examined possible adverse health effects associated with fluoride intake including dental fluorosis; bone fracture; reproductive, renal, gastrointestinal, and immunological toxicities; genotoxicity; and carcinogenicity. The Subcommittee found that it could not conclude that adverse health effects were associated with current levels of fluoride intake resulting from ingestion of drinking water with a maximum contaminant

level for fluoride at 4 mg/liter (as set by the U.S. Environmental Protection Agency) and of other sources of fluoride, such as toothpaste, mouth rinses, dietary fluoride supplements, and foods prepared with fluoridated water (Ref. 6). Therefore, FDA rejects the argument that the ingestion of low levels of fluoride is associated with adverse health effects and toxicities.

FDA wishes to clarify that the proposed RDI for fluoride was not intended to be a target level for supplementation. The agency stated in the July 1990 proposal that the proposed RDI for fluoride was to be used only in conjunction with a declaration of the level of fluoride that is naturally present in a food or that results from the use of a fluoridated water supply in the processing operation (55 FR 29476 at 29482). This issue was addressed again in the RDI/DRV final rule (58 FR 2206 at 2215).

FDA is persuaded, however, that an RDI should not be established for fluoride because fluoride does not meet the first criterion discussed previously for determining which nutrients should be considered for RDI's, namely, that there is scientific consensus as to the essentiality of the nutrient. Fluoride is a unique nutrient in that an ESADDI for it was included in the 10th edition of ''Recommended Dietary Allowances,'' yet in the text of that publication, the NAS states that the contradictory results of published studies ''do not justify a classification of fluorine as an essential element, according to accepted standards'' despite the fact that it is considered a beneficial element for humans because of its valuable effects on dental health (Ref. 3, p. 235). In proposing an RDI for fluoride, the agency mistakenly proposed an RDI for each nutrient listed in the NAS' RDA and ESADDI tables. The agency failed to focus on the fact that, unlike the other nutrients listed, the supporting text did not conclude that fluoride is an essential nutrient.

In addition, FDA is persuaded by the comments that establishing an RDI for fluoride would have limited usefulness in assisting consumers to understand the nutritional significance of the amount of fluoride in a serving of food in comparison to the total amount consumed per day because the primary sources of fluoride (i.e., community fluoridated water supplies, toothpastes, mouth rinses, and fluoride supplements) will not bear nutrition labeling. Approximately 132 million Americans receive drinking water that contains either naturally occurring or added fluoride (Refs. 5 and 6). This water supply contributes significantly to the total daily dietary intake of fluoride. Additionally, fluoride supplements that may contribute significantly to the total daily dietary intake of fluoride of persons consuming them are regulated as drugs because of their intended use (to prevent disease) and, therefore are not subject to the food labeling regulations. Consequently, because the primary sources of dietary fluoride are beyond the purview of nutrition labeling regulations, the agency concludes that the declaration of percent DV of fluoride within nutrition labeling on a limited number of foods that are relatively minor sources of the nutrient will be of little use in assisting consumers in maintaining healthy dietary practices.

Accordingly, because there is no consensus on the essentiality of fluoride, and because declaration of a percent DV for this nutrient would be of little value to consumers, the agency is removing fluoride from the RDI list in § 101.9(c)(8)(iv). Consistent with this action, FDA is not including a reference to fluoride in § 101.3(e)(4)(ii) (21 CFR 101.3(e)(4)(ii)) and is removing a reference to it in § 101.36 (b)(3), (b)(3)(i), (b)(3)(ii), (b)(4), and (b)(4)(vi) (21 CFR 101.36(b)(3),(b)(3)(i), (b)(3)(ii), (b)(4), and (b)(4)(vi)).

B. Selenium and Chromium

6. Several form letters from consumers encouraged FDA to establish RDI's for selenium and chromium that are higher than the proposed levels because the proposed levels did not take prevention into account. A few comments cited therapeutic benefits of high doses of selenium and chromium.

The agency is not persuaded to establish higher RDI's for selenium and chromium. As discussed in comment 3 of section III.B. of this document, the NAS is considering expanding the RDA concept to include reducing the risk of disease. If that occurs, the recommended levels of some nutrients can be expected to rise. As stated previously, FDA intends to work cooperatively with the NAS in its deliberations and to propose to implement recommendations resulting from that process.

7. One comment recommended that consumers be cautioned against ingesting levels of selenium in excess of the RDI to prevent potential toxicity because the toxic level may only be a few times greater than the average daily intake.

FDA does not agree with this comment. The 10th edition of the RDA states that national food composition data in the United States indicate that the adult mean dietary intake of selenium was 108 μg per day between 1974 and 1982 (Ref. 3). Toxicities have not been seen in persons who ingested less than 1 mg per day and generally much more (Ref. 3). Such levels are many times the RDI being established for selenium at 70 μg. However, even if the agency were persuaded of the need to consider a label warning statement about selenium, it would be outside the scope of this rulemaking.

C. Chloride

8. One comment noted that the RDI for every nutrient should be based on the most current scientific information available and should rely on the 10th edition of ''Recommended Dietary Allowances.'' The comment stated that the ESADDI for chloride (as well as for sodium and potassium) was eliminated from the 10th edition because it was difficult to justify. The comment contended that if FDA were to use the ESADDI for chloride as the basis for an RDI, it would be disregarding the best judgment of the scientific experts who establish the RDA's. Furthermore, the comment stated that it would be unscientific to establish an RDI for chloride in the absence of either an RDA or an ESADDI. All other comments addressing this issue supported the proposed RDI for chloride.

The agency is not persuaded that it is unscientific to establish an RDI for chloride. There is a clear consensus that chloride meets the first criterion discussed previously for determining which nutrients should be considered for RDI's, that is, that it be essential. As stated by the NAS, ''the principal electrolytes (sodium, potassium, and chloride) * * * are essential dietary components, in that they must be acquired from the diet * * *'' (Ref. 3, p. 247).

In regard to the second criterion (i.e., that there is scientific agreement concerning the level at which the nutrient should be consumed), in the case of chloride and the other electrolytes, there is scientific agreement concerning the estimated minimum required level for consumption (Ref. 3, table 11–1). While these levels are given in a separate table from the RDA and ESADDI levels in the 10th edition of the ''Recommended Dietary Allowances,'' there is nonetheless scientific consensus in support of them.

Since the estimated minimum required levels for these nutrients were based on estimates of only what is needed for growth and replacement of obligatory losses (Ref. 3), and other RDI values represent higher levels that are ''adequate to meet known nutrient

needs of practically all healthy persons,'' FDA looked to the 9th edition of ''Recommended Dietary Allowances'' (Ref. 2), which provided ESADDI values for chloride, in arriving at the value that the agency first proposed as the RDI for chloride for adults and children 4 or more years of age (i.e., 3,150 mg) (55 FR 29476 at 29482). In the RDI/DRV final rule, FDA stated that, using the ''population coverage approach,'' this value would raise to 3,400 mg. This value, which the agency is adopting as the RDI for chloride, is 4.5 times the highest estimated minimum required level of 750 mg specified in the 10th edition of ''Recommended Dietary Allowances'' (Ref. 3, table 11–1). This value is proportional to the DRV for sodium, 2,400 mg, which is 4.8 times its highest estimated minimum required level of 500 mg (Ref. 3, table 11–1). Because dietary chloride comes almost entirely from sodium chloride, and because chloride loss tends to parallel losses of sodium (Ref. 3, p. 258), it is logical that the RDI's for both of these nutrients be in roughly the same proportion to their respective estimated minimum required levels.

Potassium has a Daily Reference Value (DRV) of 3,500 mg which is 1.75 times its highest estimated minimum value. The agency points out that it is not necessary that the label reference value for potassium be in the same proportion to the estimated minimum required levels for sodium or chloride because neither the intake nor obligatory losses for potassium are in direct proportion to those of sodium and chloride (Ref. 3, p. 256).

V. Determination of Nutritional Inferiority of Substitute Foods

The RDI/DRV final rule discussed the effect of the label reference values on alternative products (e.g., reduced fat foods, reduced sodium foods) formulated to achieve nutritional equivalency with their traditional counterparts in accordance with § 101.3(e)(4). The agency acknowledged that an increase in the number of nutrients for which RDI's are established would mean that efforts to obtain nutritional equivalency may require the addition of additional nutrients to some substitute foods (58 FR 2206 at 2225).

In recognition of this fact and because there are no listed sources for selenium, fluoride, chromium, and molybdenum that can be used to add these nutrients to foods (i.e., FDA has not authorized the use of any food additives or listed any substances as generally recognized as safe (GRAS) that are sources of supplementation of these four nutrients), the agency proposed in § 101.3(e)(4)(ii) in the January 1994 proposal that these nutrients need not be considered in determining nutritional inferiority (59 FR 427).

9. One comment agreed with the agency's position on determinations of nutritional inferiority. A few comments from the food industry supported the proposal that selenium, fluoride, chromium, and molybdenum not be considered in determining nutritional inferiority of an substitute product. These comments expressed concern, however, that the proposed inclusion of vitamin K in determinations of nutritional inferiority will lead to the unnecessary fortification of existing substitute foods and be a serious disincentive for manufacturers to continue to develop and market ''healthier'' products. The comments suggested that FDA include vitamin K among the nutrients that need not be considered in determining nutritional inferiority.

The comments cited several factors in support of their suggestion, including the lack of practical analytical methodology for determining levels of vitamin K in food, the need to analyze current substitute food products for vitamin K, the lack of a data base on vitamin K content of foods, and the fact that there are a variety of technical issues (e.g., compatibility with the product, ability to achieve uniform distribution, stability during processing and storage, and flavor maintenance) that would need to be resolved with respect to this nutrient. The comments also stated that food manufacturers would be required to seek appropriate ingredient sources for vitamin K, determine product formulations and performance characteristics with the new ingredients, and change product labels if the nutrient is added to the modified products. A couple of comments requested guidance regarding analytical methods for vitamin K. One comment stated that current intakes of vitamin K appear to be adequate based on estimated intakes and that vitamin K is synthesized by intestinal microflora.

FDA has carefully reviewed the comments but has concluded that vitamin K should be considered in determining whether substitute foods are nutritionally inferior to the foods for which they substitute. The authority for the provisions of § 101.3 on substitute foods is section 403(c) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 343(c)). When this section of the act was adopted in 1938, Congress was seeking to protect the consumer from the uninformed purchase of an inferior substitute product that could be mistaken for a traditional food product (38 FR 2138, January 19, 1973). In 1973, in proposed regulations pertaining to ''imitation foods,'' the agency noted that vast strides in food technology had taken place since section 403(c) of the act was enacted, and that since 1938 many new wholesome and nutritious food products had entered the marketplace, some of which resembled and substituted for traditional foods (38 FR 2138). The agency stated that it was no longer the case that such products were necessarily substandard compared to the traditional foods for which they were substituted. However, FDA still believed that the consumer must be protected from unwittingly purchasing a product that is different from what he or she may reasonably expect (38 FR 2138). FDA continues to believe that, as substitute products proliferate, it is important to ensure that these products contain essential nutrients in amounts consistent with the reference food, so that consumers can continue to have confidence that a varied diet will supply adequate nutrition. For this reason the agency disagrees that the consideration of vitamin K in determining the status of substitute foods is unnecessary.

Moreover, the agency disagrees that adequacy of intake is a sufficient reason to make the addition of vitamin K optional in substitute foods. Contrary to the comments, a recent analysis of data from FDA's Total Diet Study indicates that 25 to 30 year old women and men are consuming less than the current RDA for vitamin K (Ref. 10). Although it is widely assumed that the daily vitamin K requirement is met by bacterial synthesis of vitamin K in the form of menaquinones, the relative contribution of this form of vitamin K remains uncertain (Ref. 9), and recent studies underscore the importance of the dietary intake of vitamin K (Refs. 7, 8, and 9). However, adequacy of intake of a nutrient is not the issue in deciding whether the nutrient should be considered in determining nutritional inferiority. The agency's consistent view has been that, as stated previously, if a nutrient is essential, it should be considered in such determinations unless there are factors that demonstrate that it is inappropriate to do so.

No evidence was submitted in the comments to support the argument that the addition of this nutrient to alternative products will be a disincentive for the development and marketing of substitute foods, nor were any examples presented that demonstrated that the fortification of an appropriate food with vitamin K would be impossible. FDA appreciates that manufacturers may need to reformulate

and relabel some products. However, the number of such products will likely be very small because available databases reveal that many foods do not contain measurable amounts of vitamin K (Refs. 11, 12, and 13).

A ''measurable amount'' of an essential nutrient is defined as 2 percent or more of the RDI for that nutrient per reference amount customarily consumed (see § 101.3(e)(4)(ii) as revised in this final rule). FDA has stated that analysis is not needed for nutrients where reliable databases or scientific knowledge establish that a nutrient is not present in the product (58 FR 2079 at 2109). For example, current databases (Refs. 11, 12, and 13) show that foods that consist primarily of sugar and water (e.g., soft drinks, hard candies, honey), as well as many oils, beverages, fruits, and fish, do not contain measurable amounts of vitamin K, so there is no need to analyze such foods for it. Conversely, green leafy vegetables, legumes, and certain oil products (e.g., soybean oil), which are important sources of vitamin K, are not generally reformulated as substitute foods. The primary categories of substitute foods that may need to be reformulated or relabeled appear to be those that substitute for foods containing eggs, milk, grains, or those oils that contain vitamin K.

The agency is not persuaded by the comments that there is a lack of analytical methods for vitamin K, or that technological barriers to analyzing foods for vitamin K, or to adding vitamin K to foods, are insurmountable. The Association of Official Analytical Chemists (AOAC) International has authorized methods for analyzing vitamin K for infant formula (Refs. 14 and 15). In addition, there are High Performance Liquid Chromatographic methods available that are being used in university and government laboratories in the United States for the analysis of vitamin K in a wide, diverse portion of the food supply (Refs. 16, 17, and 18). These methods could be utilized by commercial laboratories if there was a demand for information on the vitamin K content of food products other than infant formula. The agency believes that such methods can be readily adapted for use by industry. However, the agency considers it inadvisable to explicitly recommend a specific analytical method for vitamin K. The applicability of a specific method to products of different matrices varies. If FDA were to require the use of a specific method, it could give the erroneous impression that other methods that are more appropriate to a matrix, or that utilize newer techniques, could not, or would not, be acceptable. In accordance with § 101.9(g)(2), FDA advises that manufacturers should select the most appropriate method for the matrix involved.

The agency also is not persuaded by the comments that there is a scarcity of ingredient sources of vitamin K. Vitamin K is required for addition to infant formula as specified in part 107 (21 CFR part 107) and is found in many dietary supplement products. These facts evidence that ingredient sources are available to supply this nutrient.

In summary, the consideration of vitamin K in determinations of nutritional inferiority is consistent with the original intention of the imitation food provisions (i.e., § 101.3(e)(4)) that consumers be protected from the uninformed purchase of nutritionally inferior substitute products. Because the lack of vitamin K would make a food inferior to the one for which it substitutes, the agency concludes that its addition should be required according to the criteria established in § 101.3(e)(4).

FDA appreciates that there are presently some gaps in knowledge about the vitamin K content of foods and technological issues related to its addition to foods. However, as noted previously, considerable recent scientific activity has occurred and knowledge is evolving rapidly (Refs. 10 through 17). Therefore, based on its review of current data, FDA concludes that there are adequate analytical methods, food composition data, and technological expertise available to support consideration of vitamin K when determining nutritional inferiority of substitute foods. FDA will continue to monitor the evolving scientific knowledge regarding vitamin K content of food and will work with industry on specific foods or issues, should problems arise.

10. Several comments noted that chloride and manganese are not of public health concern and encouraged FDA to modify § 101.3(e)(4)(ii) to state that these minerals need not be considered when determining nutritional inferiority. A few comments specifically noted that no chloride deficiencies have been found except among infants fed chloride deficient formulas as the sole source of the diet. These comments also argued that requiring the inclusion of chloride in nutritional inferiority determinations would jeopardize the development and continued availability of certain reduced sodium foods. The comments said that if this provision was not changed, manufacturers would be required to add chloride to the modified products to compensate for the amount originally contributed by salt, and that the addition of chloride-containing salts would seriously affect the flavor and acceptability of many such products.

As explained in the preceding comment, the requirement for a determination of nutritional inferiority that is set forth in § 101.3(e)(4) is intended to ensure that alternative products are nutritionally comparable to the foods for which they substitute. In promulgating these regulations, FDA tentatively concluded that the term ''imitation'' should only be applied to substitute foods that are nutritionally inferior to the foods for which they substitute (38 FR 2138). In response to comments received, FDA confirmed this view and defined nutritional inferiority as any reduction in the content of an essential vitamin or mineral or of protein that is present in a ''measurable amount,'' with ''measurable amount'' defined as 2 percent or more of the U.S. RDA of that nutrient per serving (38 FR 20703, August 2, 1973). Adequacy of intake of a particular nutrient or concern over whether the nutrient was of public health concern (e.g., due to widespread deficiencies) was not considered to be an issue in determining whether a substitute food was nutritionally inferior to the food for which it is a substitute.

Consistent with the agency's longstanding definition of nutritional inferiority in § 101.3(e)(4), FDA finds that the adequacy of current dietary intakes of a nutrient is not determinative of the issue. Therefore, the agency is not persuaded by this argument to drop chloride and manganese from consideration in determining nutritional inferiority. The agency concludes that the lack of manganese would make a food inferior to the one which it replaces.

However, FDA is persuaded that a change in its position on inclusion of chloride in determinations of nutritional inferiority is warranted given its commitment to lower sodium intake, consistent with the ''Dietary Guidelines for Americans'' (Refs. 19 and 20) and ''The Surgeon General's Report on Nutrition and Health'' (Ref. 21). The Surgeon General's report pointed to the need for moderation in sodium consumption, not only because there is a benefit to persons whose blood pressure rises with increased sodium intake, but also because there is no biological marker for individual sodium sensitivity. The report notes that there is no apparent harm to the general population from moderate sodium restriction (Ref. 21, p. 13). Because salt (i.e., sodium chloride) is the major source of dietary chloride, the agency is

persuaded that it is contradictory to encourage a reduction in sodium intake and yet to require that chloride be considered in determining nutritional inferiority. When salt is removed from a product, chloride follows.

Therefore, FDA concludes that it is reasonable to delete the requirement for inclusion of chloride in the determination of nutritional inferiority. The agency points out, however, that chloride must be included in total replacement formulas, medical foods, and infant formula, as needed, to ensure that there are adequate levels of this essential nutrient in the diet of persons consuming a limited variety of foods.

Accordingly, the agency is retaining the requirement in § 101.3(e)(4)(ii) that manganese, but not chloride, be included in determinations of nutritional inferiority in substitute foods.

VI. Age/Sex Groupings

In the January 1994 proposal, FDA pointed out that in following the provisions of the DS act and retaining the label reference values in § 101.9(c)(7)(iv)(1992), the agency did not adopt label reference values for use on foods that are represented or purported to be for use by infants, children under 4 years of age, or pregnant or lactating women (59 FR 427 at 429). Given the continuing questions about how to arrive at such values, FDA deferred action on this issue. The agency stated that it intended to address the issue of RDI's for the various age groups in a future rulemaking (59 FR 427 at 430). It also stated that, until such rulemaking is completed, labels of dietary supplements of vitamins or minerals that are intended for these specific groups and that are regulated under § 101.36 may continue to specify the mg or µg amounts of vitamin K, selenium, manganese, chromium, molybdenum, and chloride with an asterisk in the percent DV column (59 FR 427 at 430). The asterisk would refer to a footnote stating ''Daily Value not established.'' However, because quantitative amounts are not listed for vitamins and minerals on labels of conventional foods, only the percent DV, FDA noted that the subject nutrients may not be declared on labels of foods in conventional food form that are represented or purported to be for use by infants, children less than 4 years of age, or pregnant or lactating women until such time as RDI's are established for such groups. The agency requested comment on how to list the subject nutrients on the labels of conventional foods that are represented or purport to be for use by infants, children under 4, and pregnant and lactating women (59 FR 427 at 430).

11. A couple of comments that supported establishing RDI's for the seven subject nutrients suggested that the agency establish RDI's for infants, children under 4 years of age, and pregnant or lactating women by using the same quantitative reasoning that it used to determine RDI's for children age 4 and above.

FDA advises that it intends to propose to establish RDI's for infants, children less than 4 years, and pregnant and lactating women in the near future. In that proposal, the agency intends to address all nutrients for which RDI's have been established for adults and children 4 or more years of age.

12. One manufacturer of dietary supplement products suggested that consumers of conventional foods represented for or purported to be for use by infants, children less than 4 years of age, or pregnant or lactating women would be best served by allowing quantitative information (i.e., mg or µg amounts) of vitamin K, selenium, manganese, chromium, molybdenum, and chloride to be listed in nutrition labeling of such products, with an accompanying asterisk and footnote that a DV has not been established, until such time as RDI's are established for those groups. The comment stated that while this information might not be all that meaningful to the average consumer, there are a significant number of sophisticated people who could put this information to good use in making intelligent food choices.

FDA has considered the suggested change and finds that while there may be merit to it, it would necessitate major changes in the nutrition label of such products that were not foreshadowed in the proposed rule. The agency had discussed simply the use of asterisks with the footnote stating that a DV had not been established (59 FR 427 at 430), but the agency received no support in the comments for that modification. In accordance with the Administrative Procedures Act, it would be necessary to propose a change in § 101.9 to allow quantitative amounts by weight of vitamin K, selenium, manganese, chromium, molybdenum, and chloride to be declared in nutrition labeling of conventional foods represented or purported for use by infants, children under 4, and pregnant or lactating women in advance of the establishment of RDI's for those groups. Given that the agency intends to propose to establish RDI's for the additional groups, that action can be accomplished as expeditiously as the one suggested by this comment, thereby negating the need for such additional rulemaking.

VII. Conforming Amendments

A. Section 101.3(e)(4)

As a result of questions that FDA received since the publication of the January 6, 1993 final rules, the agency has come to recognize that it inadvertently deleted the term ''per average or usual serving'' from § 101.3(e)(4)(ii) when it amended that paragraph as a part of the RDI/DRV final rule (58 FR 2206). Section 101.3(e)(4)(ii) defines a measurable amount of an essential nutrient in a food for the purposes of determining nutritional inferiority. FDA is correcting that error in this final rule.

However, to make this paragraph consistent with other regulations that FDA issued in implementing the 1990 amendments (e.g., serving size and nutrient content claim regulations in 21 CFR 101.12 and 101.13, respectively), the term ''per reference amount customarily consumed'' should be used instead of ''per average or usual serving'' to ensure that the comparison of products reflects the true characteristics of the product, not the container size. This concept underlies FDA's consideration of claims characterizing the levels of nutrients in foods (58 FR 2302 at 2314). FDA is not replacing the accompanying term ''per average or usual portion'' because FDA concluded in the final rule on serving size that the term ''portion'' is considered to be interchangeable with ''serving'' size and, therefore, deleted that term from the regulations (58 FR 2229 at 2232).

Accordingly, § 101.3(e)(4)(ii) is corrected to read as follows:

> For the purpose of this section, a measurable amount of an essential nutrient in a food shall be considered to be 2 percent or more of the Daily Reference Value (DRV) of protein listed under § 101.9(c)(7)(iii) per reference amount customarily consumed and of potassium listed under § 101.9(c)(9) per reference amount customarily consumed and 2 percent or more of the Reference Daily Intake (RDI) of any vitamin or mineral listed under § 101.9(c)(8)(iv) per reference amount customarily consumed except that selenium, molybdenum, chromium, and chloride need not be considered.

B. Section 101.36

As noted in the proposed rule (59 FR 427 at 430), the amendments to the nutrition labeling regulations that FDA is making in this final rule necessitate that FDA revise §§ 101.36 (b)(3), (b)(4), and (b)(4)(vi).

Current § 101.36(b)(3) states that all nutrients in § 101.9(c) that are present in

a dietary supplement in quantitative amounts by weight that exceed the amount that can be declared as zero in § 101.9(c) must be declared in nutrition labeling. This section goes on to state that those nutrients that are not present, or that are present in amounts that would be declared as zero, shall not be declared. The section states, in addition, that potassium, vitamin K, chloride, chromium, fluoride, manganese, molybdenum, and selenium shall be declared, except when present in quantitative amounts by weight that allow a declaration of zero.

FDA is modifying § 101.36(b)(3) by removing all reference to vitamin K, chloride, chromium, manganese, molybdenum, and selenium. Because these nutrients are now included in § 101.9(c)(8)(iv), they can be listed in nutrition labeling without the need for a specific provision that authorizes such listing. As discussed under comment 5 of section IV.A of this document, the agency is also modifying this section to remove all references to fluoride to reflect the agency's decision not to establish an RDI for this nutrient.

Current § 101.36(b)(4) states that the nutrition label shall contain a listing of the percent of the DV (i.e., the percent of the RDI as established in § 101.9(c)(8)(iv) or DRV as established in § 101.9(c)(9)), where appropriate, of all nutrients listed in the nutrition label, except that the percent DV for protein may be omitted as provided in § 101.9(c)(7), and that no percent shall be given for sugars, vitamin K, chloride, chromium, fluoride, manganese, molybdenum, selenium.

FDA is modifying § 101.36(b)(4) by limiting the exception that no percent DV shall be given for vitamin K, selenium, manganese, chromium, molybdenum, and chloride to only products represented or purported for use by infants, children less than 4 years of age, and pregnant or lactating women. Because RDI's are now established for these nutrients for adults and children 4 or more years of age, the percent DV of these nutrients can be calculated on products represented or purported for use by that group. Because FDA is not adopting an RDI for fluoride, revised § 101.36(b)(4) does not reference this nutrient.

Current § 101.36(b)(4)(vi) states that when no percent DV is given for sugars, vitamin K, chloride, chromium, fluoride, manganese, molybdenum, or selenium, an asterisk shall be placed in the ''% Daily Value'' column that shall refer to another asterisk that is placed at the bottom of the nutrition label that is followed by the statement ''Daily Value not established.'' FDA is modifying this regulation to state that when no percent is given for sugars, or, for labels of dietary supplements of vitamins and minerals that are represented or purported to be for use by infants, children less than 4 years of age, or pregnant or lactating women, when no percent is given for vitamin K, selenium, manganese, chromium, molybdenum, or chloride, an asterisk shall be placed in the ''Percent Daily Value'' column that shall refer to another asterisk that is placed at the bottom of the nutrition label and followed by the statement ''Daily Value not established.'' This action is needed until the rulemaking (discussed in comment 11 of section VI of this document) to establish RDI's for infants, children less than 4 years of age, and pregnant or lactating women is complete. While there are no RDI's codified for these groups for any nutrients, in its June 18, 1993, proposal pertaining to nutrition labeling of dietary supplements (58 FR 33715 at 33721), FDA encouraged manufacturers of products represented or purported to be for use by infants, children less than 4 years of age, or pregnant or lactating women to use label reference values for these groups given in the preamble of the RDI/DRV final rule on January 6, 1993 (58 FR 2206 at 2213). Since the table of label reference values at the bottom of page 2213 in that document addresses only the vitamins and minerals in current § 101.9(c)(8)(iv), there are no values for vitamin K, selenium, manganese, chromium, molybdenum, or chloride that can be used to calculate the percent DV of these nutrients on labels of products represented or purported to be for use by infants, children less than 4 years of age, or pregnant or lactating women at this time.

Again, because FDA is not adopting an RDI for fluoride, revised § 101.36(b)(4)(vi) does not reference that nutrient.

It should be noted that, while these conforming amendments to § 101.36 modify that current regulation, they will be superseded by any final regulations resulting from the proposed rule published in a companion document in this issue of the Federal Register entitled ''Food Labeling: Statement of Identity, Nutrition Labeling and Ingredient Labeling of Dietary Supplements.''

VIII. Other Provisions

FDA did not receive any comments that dealt with, or objected to, the other provisions of the proposal (e.g., units of measure for calcium, phosphorus, biotin, and folate and the conforming amendments). In the absence of any basis for doing otherwise, FDA is adopting those provisions as proposed.

IX. Effective Date

13. Several comments suggested that FDA reevaluate the effective date discussed in the proposed rule. These comments suggested a longer effective date because the proposed inclusion of vitamin K, chloride, and manganese in nutritional equivalency determinations would require that the composition of virtually all existing substitute foods be reevaluated. One comment suggested a 3-year extension of the effective date because food manufacturers are just completing a massive relabeling effort of all packaged foods in the marketplace. One comment from a printing company stated that it would have to change 2,600 labels very shortly if the effective date was adopted as proposed. The comment noted that new labels for dietary supplements will use an asterisk referring to the statement ''No Daily Value established'' for the subject nutrients. The comment stated that if the final rule did not issue by June 1994, the company would not be able to implement the new RDI values with the label changes it was making in response to the 1990 amendments. The comment requested that the final rule issue by June 1994 or establish an effective date after July 1996. Another comment suggested that establishing the effective date after July 1996 would reduce the impact of making two label changes to the same label. The comment noted that it is impossible for producers to undertake analysis, reformulation and relabeling of all the alternative products affected by this proposal within the 30 days allowed between publication of the final rule and the effective date.

One comment requested that the final rule on RDI's become effective 30 days after its publication with the clarification that the values may be used at that time but are not mandatory on the labels of food or dietary supplements until at least July 1, 1996, 1 year from the implementation deadline for the food labeling regulations for dietary supplements.

FDA points out that it published a notice on February 9, 1995 (60 FR 7711), indicating it will not enforce its regulations on nutrition labeling and nutrient content claims for dietary supplements until after December 31, 1996. Therefore, the July 1, 1995, date is not longer determinative. This delay allows FDA time to modify its regulations to respond to the DSHEA.

The agency is persuaded by the comments that it is necessary to reconsider the amount of time that it

may take the food industry to implement these new rules. The proposed 30-day effective date was intended to permit the inclusion of the subject nutrients in nutrition labeling as quickly as possible. The agency believes that many companies want, and will be able, to implement these rules quickly, while others will need more time to make the necessary changes.

Accordingly, while companies who wish to add vitamin K, selenium, manganese, chromium, molybdenum, and chloride to the nutrition labeling on their products may do so immediately, FDA is changing the effective date to January 1, 1997, in recognition of the analytical work and formulation changes that may be needed with some food products to come into compliance with revised §§ 101.3(e)(4)(ii) and 101.9(c)(8)(iv). This effective date provides approximately 12 months for industry to implement the subject changes, sufficient time to accomplish an orderly and economical adjustment to the subject rules. It is also consistent with the effective date established in the DSHEA and proposed in the document addressing nutrition labeling of dietary supplements published elsewhere in this issue of the Federal Register. The agency encourages industry to comply with these new rules earlier than the effective date wherever it is feasible to do so.

X. Economic Impact

FDA has examined the economic implications of the final rule as required by Executive Order 12866 and the Regulatory Flexibility Act (Pub. L. 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). The Regulatory Flexibility Act requires that agencies analyze options for regulatory relief for small businesses. FDA finds that this final rule is not a significant rule as defined by Executive Order 12866. In accordance with the Regulatory Flexibility Act, the agency certifies that the final rule will not have a significant impact on a substantial number of small businesses.

A. Costs

14. FDA received several comments rejecting the agency's analysis of the costs of this regulation as proposed. One comment stated that the cost of evaluating the manganese, vitamin K, and chloride content of substitute foods and relabeling affected products would exceed the agency's estimates. Another comment explained that a lack of a practical analytical method for vitamin K in food systems and other technical issues would lead to major costs.

FDA agrees that including manganese and vitamin K in the consideration of nutritional equivalency will lead to increased costs of analyzing and relabeling substitute products. Because FDA has reevaluated its decision regarding chloride, there will be no increased costs attributable to that substance.

As stated previously in this document, analysis is not needed for nutrients where reliable data bases establish, or scientific knowledge establishes, that a nutrient is not present in the product. Current data bases show that foods that consist primarily of sugar and water, as well as many oils, beverages, fruits, and fish, do not contain measurable amounts of vitamin K, so there is no need to analyze for it in products substituting for such foods. Conversely, green leafy vegetables, legumes, and certain oil products, which are major sources of vitamin K, are not generally reformulated as substitute foods. Therefore, FDA expects that only a limited number of products will require analysis for vitamin K. Likewise, manganese is prevalent in cereal grains, green leafy vegetables, and tea. Therefore, FDA predicts that only a limited number of products will require analysis for manganese. However, when there is a reasonable expectation that either nutrient occurs in the food, an analysis for the nutrient will be necessary, and the manufacturers of those products will bear the cost of testing for the nutrient.

FDA does not have an estimate of the cost of testing for vitamin K in foods other than infant formulas or dietary supplements, although such testing has been performed in university settings. The cost of testing for vitamin K in infant formulas or dietary supplements is approximately $187 per product (Ref. 22). The cost of testing for manganese is approximately $34 per product (Ref. 23). While FDA cannot determine the exact cost of testing for these nutrients because the total number of products that must be tested is unknown, the cost per test and the fact that vitamin K and manganese levels will be significant in only a small number of foods lead the agency to conclude that the costs that will be engendered by this final rule will not approach the levels that represent a significant rule.

15. Several comments objected to the economic analysis on the basis that the short lead time of the proposed effective date would lead to increased costs. One comment objected to the proposed effective date given due to the impossibility of evaluating foods for nutritional equivalency and relabeling of affected products within the 30-day effective date proposed. Another comment stated that extending the effective date would reduce the impact of making two label changes.

FDA agrees that the proposed effective date would lead to increased costs. However, because FDA is extending the effective date to give firms approximately 12 months, the analysis need not be changed in response to these comments.

B. Benefits

This regulation allows manufacturers to declare certain nutrients within the nutrition panel and to make content claims about those nutrients. This regulation will create benefits to the extent that the additional information allowed on labels will help consumers make healthy dietary choices.

This regulation also establishes requirements for determining nutritional inferiority such that substitute products must contain equivalent amounts of vitamin K and manganese as the products for which they substitute.

There are currently no widespread deficiencies of either vitamin K or manganese in the United States. Although it is theoretically possible that additional deficiencies could occur if enough consumers switch to substitute products containing inferior amounts of the nutrient, the likelihood of widespread deficiencies is small because the number of foods containing significant amounts of the nutrients that could be substituted is small. Also, it is unlikely that the deficiencies that might occur would result in anything other than minor effects. Therefore, the health benefits of including vitamin K and manganese in tests for nutritional equivalency are small and unmeasurable.

C. Summary

The agency has examined the economic impact of this final rule and has determined that it is not significant as defined by Executive Order 12866.

XI. Environmental Impact

The agency has previously considered the environmental effects of this rule as announced in the proposed rule (59 FR 427). At that time, the agency determined under 21 CFR 25.24(a)(11) that this action is of a type that does not individually or cumulatively have a significant effect on the human

environment. No new information or comments have been received that would affect the agency's previous determination that there is no significant impact on the human environment and that an environmental impact statement is not required.

XII. Paperwork Reduction Act

This final rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

XIII. References

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

1. Food and Nutrition Board, Division of Biology and Agriculture, National Research Council, ''Recommended Dietary Allowances,'' 7th ed., publication 1694, Printing and Publishing Office, NAS, Washington, DC, 1968.
2. Committee on Dietary Allowances, Food and Nutrition Board, Commission on Life Sciences, National Research Council, ''Recommended Dietary Allowances,'' 9th revised ed., Washington, DC, National Academy Press, 1980.
3. Subcommittee on the 10th Edition of the RDA's, Food and Nutrition Board, Commission on Life Sciences, National Research Council, ''Recommended Dietary Allowances,'' 10th revised ed., Washington, DC, National Academy Press, 1989.
4. Food and Nutrition Board, Institute of Medicine, National Academy of Sciences, ''How Should the Recommended Dietary Allowances Be Revised,'' Washington, DC, National Academy Press, 1994.
5. Ad Hoc Subcommittee on Fluoride of the Committee to Coordinate Environmental Health and Related Programs, Public Health Service, Department of Health and Human Services, ''Review of Fluoride Benefits and Risks,'' 1991.
6. Subcommittee on Health Effects of Ingested Fluoride, Committee on Toxicology, Board on Environmental Studies and Toxicology, Commission on Life Sciences, National Research Council, National Academy Press, ''Health Effects of Ingested Fluoride,'' Washington, DC, 1993.
7. Suttie, J. W., ''Vitamin K and Human Nutrition,'' *Journal of the American Dietetic Association,* 92585–92590, 1992.
8. Suttie, J. W., L. L. Mummah- Schendel, D. V. Shah, B. J. Lyle, J. L. Greger, ''Vitamin K Deficiency from Dietary Vitamin K Restriction in Humans,'' American *Journal of Clinical Nutrition,* 47475–47480, 1988.
9. Ferland, G., J. A. Sadowski, M. O'Brien, ''Dietary Induced Subclinical Vitamin K Deficiency in Normal Human Subjects,'' *Journal of Agricultural and Food Chemistry,* 911761–911768, 1993.
10. Booth, S. L., J. A. T. Pennington, J. A. Sadowski, ''Food Sources and Dietary Intakes of Phylloquinone,'' unpublished manuscript.
11. United States Department of Agriculture, Human Nutrition Information Service, Nutrient Data Research Branch, Nutrition Monitoring Division, ''Provisional Table on the Vitamin K Content of Foods,'' revised June 1990.
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14. Tanner, J. T., S. A. Barnett, and M. K. Mountford, ''Analysis of Milk-Based Infant Formula. Phase IV. Iodide, Linoleic Acid, and Vitamins D and K: U.S. Food and Drug Administration-Infant Formula Council Collaborative Study,'' *Journal of the Association of Official Analytical Chemists International,* 76:1042–1056, 1993.
15. Bueno, P. M., and M. C. Villabobos, Reverse Phase High Pressure Liquid Chromatographic Determination of Vitamin K_1 in Infant Formulas, *Journal of the Association of Official Analytical Chemists,* 66:1063–1066, 1983.
16. Booth S. L., K. W. Davidson, J. A. Sadowski, ''Evaluation of an HPLC Method for the Determination of Phylloquinone (Vitamin K_1) in Various Food Matrices,'' *Journal of Agricultural and Food Chemistry,* 42:295–300, 1994.
17. Haroon, Y., M. J. Shearer, S. Rahim, W. G. Gunn, G. McEnergy, P. Barkhan, ''The Content of Phylloquinone (Vitamin K_1) in Human Milk, Cow's Milk and Infant Formula Foods Determined by High-Performance Liquid Chromatography'', *Journal of Nutrition* 112:1105–1117, 1982.
18. Ferland, G., J. A. Sadowski, ''Vitamin K_1 (Phylloquinone) Content of Green Vegetables Effects of Plant Maturation and Geographical Growth Location,'' *Journal of Agricultural and Food Chemistry,* 40:1874–1877, 1992.
19. U.S. Department of Agriculture and U.S. Department of Health and Human Services, ''Nutrition and Your Health, Dietary Guidelines for Americans,'' Washington, DC, *Home and Garden Bulletin,* No. 232, U.S. Government Printing Office, 1990.
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21. U.S. Department of Health and Human Services, Public Health Service, ''The Surgeon General's Report on Nutrition and Health,'' Washington, DC, DHHS (PHS) Publication No. 88–50210, U.S. Government Printing Office, p. 13, 1988.
22. Bush, Laina M., memorandum of telephone conversation with Wayne Ellefson, Hazelton Laboratories, April 23, 1995.
23. Bush, Laina M., memorandum of telephone conversation with John McKay, Lancaster Laboratories, January 11, 1995.

List of Subjects in 21 CFR Part 101

Food labeling, Nutrition, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 101 is amended as follows:

PART 101—FOOD LABELING

1. The authority citation for 21 CFR part 101 is revised to read as follows:

Authority: Secs. 4, 5, 6 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 301, 402, 403, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 371).

2. Section 101.3 is amended by revising paragraph (e)(4)(ii) to read as follows:

§ 101.3 Identity labeling of food in packaged form.

* * * * *

(e) * * *

(4) * * *

(ii) For the purpose of this section, a measurable amount of an essential nutrient in a food shall be considered to be 2 percent or more of the Daily Reference Value (DRV) of protein listed under § 101.9(c)(7)(iii) and of potassium listed under § 101.9(c)(9) per reference amount customarily consumed and 2 percent or more of the Reference Daily Intake (RDI) of any vitamin or mineral listed under § 101.9(c)(8)(iv) per reference amount customarily consumed, except that selenium, molybdenum, chromium, and chloride need not be considered.

* * * * *

3. Section 101.9 is amended by revising paragraph (c)(8)(iv) to read as follows:

§ 101.9 Nutrition labeling of food.

* * * * *

(c) * * *

(8) * * *

(iv) The following RDI's and nomenclature are established for the following vitamins and minerals which are essential in human nutrition:

Vitamin A, 5,000 International Units
Vitamin C, 60 milligrams
Calcium, 1,000 milligrams
Iron, 18 milligrams
Vitamin D, 400 International Units
Vitamin E, 30 International Units
Vitamin K, 80 micrograms
Thiamin, 1.5 milligrams
Riboflavin, 1.7 milligrams
Niacin, 20 milligrams
Vitamin B_6, 2.0 milligrams
Folate, 400 micrograms
Vitamin B_{12}, 6 micrograms
Biotin, 300 micrograms
Pantothenic acid, 10 milligrams
Phosphorus, 1,000 milligrams
Iodine, 150 micrograms
Magnesium, 400 milligrams
Zinc, 15 milligrams

Selenium, 70 micrograms
Copper, 2.0 milligrams
Manganese, 2.0 milligrams
Chromium, 120 micrograms
Molybdenum, 75 micrograms
Chloride, 3,400 milligrams

* * * * *

4. Section 101.36 is amended by revising the introductory text of paragraph (b)(3), paragraphs (b)(3)(i), (b)(3)(ii), the introductory text of paragraph (b)(4), and paragraphs (b)(4)(vi) to read as follows:

§ 101.36 Nutrition labeling of dietary supplements of vitamins or minerals.

* * * * *

(b) * * *

(3) A listing of all nutrients required in § 101.9(c) that are present in the dietary supplement in quantitative amounts by weight that exceed the amount that can be declared as zero in § 101.9(c). Those nutrients that are not present, or present in amounts that would be declared as zero, shall not be declared. In addition, potassium shall be declared except when present in quantitative amounts by weight that allow a declaration of zero. The name of each nutrient listed shall be immediately followed by the quantitative amount by weight of the nutrient. Nutrient names and quantitative amounts shall be presented in a column under the heading ''Amount Per Serving'' and aligned on the left side of the nutrition label. The heading ''Amount Per Serving'' shall be separated from other information on the label by a bar above and beneath it, except that when calories are listed, the bar shall be placed beneath the calorie declaration. When the serving size of the product is one unit (e.g., 1 tablet), a heading consistent with the declaration of serving size, such as ''Amount per Tablet'' or ''Each Tablet Contains,'' may be used in place of the heading ''Amount per Serving.'' Other appropriate terms, such as capsule, packet, or teaspoonful, may be used in place of the term ''Serving.''

(i) These amounts shall be expressed in the increments specified in § 101.9(c), except that the amounts of vitamins and minerals, excluding sodium and potassium, declared on the nutrition label shall be the actual amount of the vitamin or mineral included in the dietary supplement, using the units of measure and the levels of significance given in § 101.9(c). In declaring the amounts of vitamins and minerals, zeros following decimal points may be dropped, and additional levels of significance may be used when the number of decimal places indicated is not sufficient to express lower amounts (e.g., the RDI for copper is given in whole milligrams, but the quantitative amount may be declared in tenths of a milligram). Amounts for chloride and manganese shall be expressed in mg, and, amounts for chromium, molybdenum, selenium, and vitamin K shall be expressed in micrograms. These values shall be expressed in whole numbers.

(ii) Nutrients that are present shall be listed in the order specified in § 101.9(c); except that, when present, vitamin K shall follow vitamin E; calcium and iron shall follow pantothenic acid; selenium shall follow zinc; and manganese, chromium, molybdenum, chloride, sodium, and potassium shall follow copper. This results in the following order for vitamins and minerals: Vitamin A, vitamin C, vitamin D, vitamin E, vitamin K, thiamin, riboflavin, niacin, vitamin B6, folate, vitamin B12, biotin, pantothenic acid, calcium, iron, phosphorus, iodine, magnesium, zinc, selenium, copper, manganese, chromium, molybdenum, chloride, sodium, and potassium. A bar shall separate the last nutrient to be listed from the bottom of the nutrition label, as shown in the sample labels in paragraph (c)(9) of this section.

* * * * *

(4) A listing of the percent of the Daily Value (i.e., the percent of the RDI as established in § 101.9(c)(8)(iv) or DRV as established in § 101.9(c)(9)), where appropriate, of all nutrients listed in the nutrition label, except that the percent for protein may be omitted as provided in § 101.9(c)(7), no percent shall be given for sugars, and for labels of dietary supplements of vitamins and minerals that are represented or purported to be for use by infants, children less than 4 years of age, or pregnant or lactating women, no percent shall be given for vitamin K, selenium, manganese, chromium, molybdenum, or chloride. This information shall be presented in one column aligned under the heading of ''% Daily Value'' and to the right of the column of nutrient names and amounts. The headings ''% Daily Value (DV),'' ''% DV,'' ''Percent Daily Value,'' or ''Percent DV'' may be substituted for ''% Daily Value.'' The heading ''% Daily Value'' shall be placed on the same line as the heading ''Amount per Serving'' or placed beneath this heading and the bar underneath it, except that ''% Daily Value'' shall be placed beneath this bar when calorie information is required to be declared. Calorie information shall be placed beneath ''Amount Per Serving'' and above the bar.

* * * * *

(vi) When no percent is given for sugars, or for labels of dietary supplements of vitamins and minerals that are represented or purported to be for use by infants, children less than 4 years of age, or pregnant or lactating women, when no percent is given for vitamin K, selenium, manganese, chromium, molybdenum, or chloride, an asterisk shall be placed in the ''Percent Daily Value'' column that shall refer to another asterisk that is placed at the bottom of the nutrition label and followed by the statement ''Daily Value not established.''

* * * * *

Dated: September 26, 1995.

William B. Schultz

Deputy Commissioner for Policy.

[FR Doc. 95–31197 Filed 12–27–95; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 95N–0282]

Food Labeling; Requirements for Nutrient Content Claims, Health Claims, and Statements of Nutritional Support for Dietary Supplements

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its nutrient content claims regulations to change the terminology used to describe dietary supplements; provide for the use of statements that characterize the percentage level of dietary ingredients that do not have Reference Daily Intakes (RDI's) or Daily Reference Values (DRV's); and withdraw the provision that dietary supplements of vitamins and minerals may not give prominence to any ingredient that is not a vitamin or a mineral on its label or in labeling. The agency is also proposing to specify how (i.e., text, placement, and type size) the disclaimer required by the Federal Food, Drug, and Cosmetic Act (the act) is to be presented with statements of nutritional support. Additionally, FDA is proposing to remove the definition of ''dietary supplements'' and to change the terminology used to describe dietary supplements in regulations governing health claims for food products. This action is being taken to implement in part the Dietary Supplement Health and Education Act of 1994 (the DSHEA).

DATES: Written comments by March 13, 1996. The agency is proposing that any final rule that may issue based upon this proposal become effective January 1, 1997.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, 301–245–1064.

FOR FURTHER INFORMATION CONTACT: Camille E. Brewer, Center for Food Safety and Applied Nutrition (HFS–165), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–5483.

SUPPLEMENTARY INFORMATION:

I. Background

On November 8, 1990, the President signed into law the Nutrition Labeling and Education Act of 1990 (the 1990 amendments) (Pub. L. 101–535). The 1990 amendments amended the act in a number of important ways. One of the most notable aspects of the 1990 amendments is that they established FDA's authority to regulate nutrient content and health claims on food labels and in food labeling. Section 403(r)(1)(A) of the act (21 U.S.C. 343(r)(1)(A)), which was added by the 1990 amendments, provides that a product is misbranded if it bears a claim in its label or labeling that either expressly or implicitly characterizes the level of any nutrient of the type required to be declared as part of nutrition labeling, unless such claim has been specifically defined (or otherwise exempted) by regulation. Section 403(r)(1)(B) of the act, also added by the 1990 amendments, provides that a product is misbranded if it bears a claim that characterizes the relationship of a nutrient to a disease or health-related condition, unless the claim is made in accordance with sections 403(r)(3) of the act (which pertains to foods in conventional food form) or 403(r)(5)(D) (which pertains to dietary supplements).

In the Federal Register of November 27, 1991 (56 FR 60421 and 56 FR 60478), FDA published two documents, one general and the other on fat, fatty acid, and cholesterol claims, in which the agency proposed, among other things, to define nutrient content claims, to provide for their use on foods labels, and to establish procedures for the submission and review of petitions regarding the use of specific nutrient content claims. These proposals applied to dietary supplements as well as to foods in conventional food form. In the same issue of the Federal Register, FDA proposed general requirements on the use of health claims and on petitions to the agency to authorize health claims (56 FR 60537).

On October 6, 1992, the President signed into law the Dietary Supplement Act of 1992 (the DS Act) (Pub. L. 102–571). Section 202(a)(1) of the DS Act established a moratorium on the implementation of the 1990 amendments with respect to dietary supplements until December 15, 1993. Section 202(a)(2) of the DS Act required that the Secretary of Health and Human Services (the Secretary), and by delegation FDA, issue new proposed regulations applicable to dietary supplements no later than June 15, 1993, and final regulations by December 31, 1993.

In the Federal Register of January 6, 1993, FDA published final regulations that implemented the 1990 amendments with respect to nutrient content claims (hereinafter referred to as the ''1993 nutrient content claims final rule'') (58 FR 2302) and health claims (hereinafter referred to as the ''1993 health claims final rule'') (58 FR 2478) on foods in conventional food form. In the Federal Register of August 18, 1993 (58 FR 44020 and 44036), FDA made technical amendments to these final regulations.

In response to the requirements of the DS Act, FDA published in the Federal Register of June 18, 1993 (58 FR 33731), a proposal to: (1) Include dietary supplements of vitamins, minerals, herbs, and other similar nutritional substances under the coverage of the general principles for nutrient content claims; (2) provide for the use of express and implied nutrient content claims on labels or in labeling of dietary supplements; and (3) provide for petitions for nutrient content claims for dietary supplements (hereinafter referred to as the ''1993 nutrient content claims for dietary supplements proposal''). In the same issue of the Federal Register, FDA also proposed to make dietary supplements of vitamins, minerals, herbs, and other similar nutritional substances subject to the general requirements that apply to all other types of food with respect to the use of health claims (hereinafter referred to as the ''1993 dietary supplement health claims proposal'') (58 FR 33700).

FDA received approximately 500 letters in response to its 1993 nutrient content claims for dietary supplements proposal. A summary of the comments, the agency's responses to the comments, and a complete discussion of the agency's conclusions with respect to nutrient content claims for dietary supplements were published in the Federal Register of January 4, 1994 (59 FR 378), in the final rule on nutrient content claims for dietary supplements (hereinafter referred to as the ''1994 nutrient content claims for dietary supplements final rule''). FDA received over 1,200 letters in response to the 1993 dietary supplement health claims proposal. FDA summarized and responded to these comments in the final rule on health claims for dietary supplements in the same issue of the Federal Register (59 FR 395).

On October 25, 1994, the President signed into law the DSHEA (Pub. L. 103–417). The DSHEA, among other things, defined ''dietary supplement'' (adding section 201(ff) to the act (21 U.S.C. 321(ff))), made provision for statements that characterize the percentage level of dietary ingredients that do not have RDI's or DRV's (adding section 403(r)(2)(F) to the act), and amended section 411 (b)(2) and (c)(1) of the act (21 U.S.C. 350 (b)(2) and (c)(1))

on the labeling of products that contain vitamins and minerals. In addition, the DSHEA added section 403(r)(6) to the act, which states that statements may be made for dietary supplements if:

> the statement claims a benefit related to a classical nutrient deficiency disease and discloses the prevalence of such disease in the United States, describes the role of a nutrient or dietary ingredient intended to affect the structure or function in humans, characterizes the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function, or describes general well-being from consumption of a nutrient or dietary ingredient * * *.

(section 403(r)(6)(A) of the act), and if certain other conditions are met. The manufacturer of the dietary supplement must have substantiation that the statement is truthful and not misleading (section 403(r)(6)(B)), and the nutritional support statement must prominently contain the following disclaimer:

> This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

(section 403(r)(6)(C)).

This proposal addresses how this disclaimer is to be presented on the label or in labeling of a dietary supplement. The agency is issuing this proposal in response to requests from the dietary supplement industry that FDA define how this statement is to be presented. In addition, this proposal seeks to bring the agency's nutrient content claim and health claim regulations into conformance with the DSHEA and provides for the use of statements that characterize the percentage level of dietary ingredients that do not have RDI's or DRV's on labels and in labeling of dietary supplements.

II. Proposed Regulations

A. Coverage

As discussed in the preamble to the 1994 nutrient content claims for dietary supplements final rule (59 FR 378 at 379), section 403(r)(1)(A) of the act states that a food intended for human consumption is misbranded if it bears a claim that expressly or by implication ''characterizes the level of any nutrient which is of the type required by paragraph (q)(1) or (q)(2) to be in the label or labeling of the food * * *.'' The statute uses the same language in section 403(r)(1)(B) to describe the substances that could be the subject of a health claim, i.e., a health claim is a claim that ''characterizes the relationship of any nutrient which is of the type required by paragraph (q)(1) or (q)(2) to be in the label or labeling of the food to a disease or a health-related condition * * *.'' Under section 403(r)(1)(B), a health claim must be made in accordance with section 403(r)(3) or section 403(r)(5)(D). The latter section, which addresses health claims for dietary supplements of vitamins, minerals, herbs, and other similar nutritional substances, is relevant to this proceeding. The legislative history of the phrase ''other similar nutritional substances'' reveals that its coverage is broad (136 Congressional Record S16609 (October 24, 1990)).

Section 3(a) of the DSHEA amends section 201 of the act by adding section 201(ff), which defines a ''dietary supplement'' as a product, other than tobacco, intended to supplement the diet that bears or contains one or more of the following dietary ingredients: A vitamin; a mineral; an herb or other botanical; an amino acid; a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or a concentrate, metabolite, constituent, extract, or combination of any of the aforementioned dietary ingredients. In effect, the list of dietary ingredients in section 201(ff)(1) is an explication of the term ''other similar nutritional substances'' in section 403(r)(5)(D). Thus, based on the foregoing analysis, all dietary ingredients may qualify, in appropriate circumstances, as ''nutrients of the type required by paragraph (q)(1) and (q)(2)'' for purposes of section 403(r) the act.[1] To clarify this point in its regulations, FDA is proposing to amend § 101.13(b) (21 CFR 101.13(b)) by adding a reference to § 101.36 *Nutrition labeling of dietary supplements of vitamins and minerals* (21 CFR 101.36), so that § 101.13(b) will read, in part, if this amendment is adopted: ''A claim that expressly or implicitly characterizes the level of a nutrient of the type required to be in nutrition labeling under § 101.9 or under § 101.36 (that is, a nutrient content claim) * * *.''

The broad range of substances that can be dietary ingredients under section 201(ff) has the potential to create ambiguities as to the coverage of the nutrient content claim regime. With respect to some substances that can be dietary ingredients, the context in which statements about them are made will determine whether they are nutrient content claims or not. For example, garlic can be the dietary ingredient. A claim on the label or in the labeling of a dietary supplement that it is ''high in garlic,'' or that it ''now contains more garlic,'' is a nutrient content claim within the meaning of the act, and the food is misbranded unless such a claim has been authorized by FDA through regulation. The claim characterizes the level of garlic in a food in which the garlic is a ''nutrient which is of the type'' required to be listed in the nutrition label because the food is intended to supplement the dietary intake of garlic. On the other hand, a label statement on garlic bread, for example, that the product now contains more garlic would not be a nutrient content claim if the bread is not labeled as a dietary supplement, and if it is clear from the context in which the claim is made that the claim refers to the taste of the product. As FDA has provided in § 101.65(b)(3) (21 CFR 101.65(b)(3)), a claim about the presence of an ingredient that is perceived to add value to the product, which would clearly be the case when one adds more garlic to garlic bread, is not an implied nutrient content claim.

B. Terminology

1. Nutrient Content Claims

Current § 101.13(a), on nutrient content claims, states:

> This section and the regulations in subpart D of this part apply to foods that are intended for human consumption and that are offered for sale, including foods in conventional food form and dietary supplements of vitamins, minerals, herbs, and other similar nutritional substances (dietary supplements).

As discussed above, new section 201(ff) of the act creates a new definition for the term ''dietary supplement.'' To reflect this definition and to simplify its regulations in the manner that the new definition permits, FDA is proposing to amend § 101.13(a) to read as follows: ''This section and the regulations in subpart D of this part apply to foods that are intended for human consumption

[1] While all dietary ingredients can be ''nutrients of the type required by paragraph (q)(1) and (q)(2) to be in the label or labeling of the food'' in appropriate circumstances, all dietary ingredients are not nutrients as that term is generally understood, in that they do not all have nutritive value. The DSHEA recognizes this fact by using the phrase ''nutrient or dietary ingredient'' (e.g., see section 403(r)(6) of the act), indicating that the two terms are not mutually inclusive. Furthermore, all dietary ingredients are not necessarily ''ingredients'' within the traditional meaning of that term under section 403(i) of the act. For example, in a ''calcium dietary supplement,'' calcium would be the ''dietary ingredient,'' whereas calcium carbonate or some other calcium salt would be the ''ingredient,'' i.e., the ''source'' of the dietary ingredient, calcium. In a dietary supplement of garlic, garlic could be the dietary ingredient, while the common or usual name of the ingredient might be ''dried, powdered garlic.'' However, if the manufacturer promoted the same supplement for its allicin content, allicin could be the dietary ingredient and the source of allicin, i.e., the ingredient, would be ''dried, powdered garlic.''

and that are offered for sale, including conventional foods and dietary supplements.''

2. Health Claims

Under the general principles governing health claims, § 101.14(a)(4) (21 CFR 101.14(a)(4)) currently states that ''dietary supplement'' means a food, not in conventional food form, that supplies a component to supplement the diet by increasing the total dietary intake of that component. This definition has been superseded by the definition of ''dietary supplement'' found in new section 201(ff) of the act. Further, because section 201(ff)(2)(A) makes it clear that dietary supplements can be in a variety of forms, including conventional food form, FDA is proposing to remove § 101.14(a)(4) and redesignate current § 101.14 (a)(5) and (a)(6) as § 101.14 (a)(4) and (a)(5), respectively.

A similar conforming change is necessary in § 101.14(b)(3)(i) in the preliminary requirements for a substance to be eligible to be the subject of a health claim. This regulation refers to the fact that the food in which a substance is found may be ''in conventional food form or dietary supplement form.''

To bring this section into conformance with section 201(ff) of the act, FDA is proposing to revise § 101.14(b)(3)(i) to read as follows:

> The substance must, regardless of whether the food is a conventional food or a dietary supplement, contribute taste, aroma, or nutritive value, or any other technical effect listed in § 170.3(o) of this chapter, to the food and must retain that attribute when consumed at levels that are necessary to justify a claim; and * * *.

Section § 101.14(d)(3) currently states:

> Nutrition labeling shall be provided in the label or labeling of any food for which a health claim is made in accordance with § 101.9; for restaurant foods, in accordance with § 101.10; or for dietary supplements of vitamins or minerals, in accordance with § 101.36. The requirements of the introductory text of paragraph (d)(3) of this section are effective as of May 8, 1993, except:
>
> (i)–(ii) [Reserved]
>
> (iii) For dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances for which the requirements of paragraph (d)(3) of this section will be effective July 5, 1994.

In the Federal Register of March 31, 1994 (59 FR 15050), the effective date was corrected for the nutrient content claims provision to July 1, 1994. Because of the passage of the DSHEA, the agency published a notice in the Federal Register of February 9, 1995 (60 FR 7711), stating that it does not intend to enforce the Nutrient Content Claim regulations for dietary supplements until after December 31, 1996.

As above, the terminology for dietary supplements (i.e., ''dietary supplements of vitamins and minerals'') used in § 101.14(d)(3) is too narrowly drawn in light of new section 201(ff) of the act. In addition, since the effective date is past, there is no longer a need to include it in the regulations. Therefore, FDA is proposing to revise § 101.14(d)(3) to remove ''of vitamins and minerals'' as a qualifier of the types of dietary supplements and to remove the language setting out the effective date in the second sentence of § 101.14(d)(3). These changes also mean that there is no need for paragraphs (d)(3)(i) through (d)(3)(iii). Accordingly, proposed § 101.14(d)(3) reads as follows:

> Nutrition labeling shall be provided in the label or labeling of any food for which a health claim is made in accordance with § 101.9; for restaurant foods, in accordance with § 101.10; or for dietary supplements, in accordance with § 101.36.

C. Percentage Claims

Section 7(c) of the DSHEA amends section 403(r)(2) of the act by adding clause (F) which reads:

> Subclause (i) clause (A) does not apply to a statement in the labeling of a dietary supplement that characterizes the percentage level of a dietary ingredient for which the Secretary has not established a reference daily intake, daily recommended value, or other recommendation for daily consumption.

This new provision refers to section 403(r)(2)(A)(i) of the act, which states that nutrient content claims may be made only if the characterization of the level made in the claim uses terms which are defined in regulations of the Secretary. Thus, section 403(r)(2)(A)(i) of the act limits the type of nutrient content claims that can be made to those terms that are defined and authorized by regulation. The effect of section 403(r)(2)(F) of the act is to permit the use on the labels or in the labeling of dietary supplements of statements that have not been defined by FDA that characterize the percentage level of a dietary ingredient for which an RDI or DRV has not been established.

In the absence of any substantive legislative history on this provision, the agency interprets section 403(r)(2)(F) of the act as authorizing claims on the label or in labeling of a dietary supplement that disclose the percentage level in the dietary supplement of a dietary ingredient for which an RDI and DRV has not been established in a product (e.g., ''40 percent omega-3 fatty acids'') as well as statements that characterize the percentage of such dietary ingredients in relation to an equivalent or increased/decreased amount found in another food product (e.g., ''100 percent of the allicin in a bulb of garlic,'' ''twice the allicin as (product alternative)'' [where ''twice'' is another way of saying 200 percent]).

Section 3(b)(1)(A)(iv) of the 1990 amendments directed the agency to promulgate regulations that permit statements describing the amount and percentage of nutrients in food that are not misleading and that are consistent with the terms defined under section 403(r)(2)(A)(i) of the act. Consequently, FDA provided in § 101.13(i) for statements about the amount or percentage of nutrients when specified criteria are met. While this regulation did not specifically include a provision for the use of such statements with respect to dietary ingredients for which no RDI or DRV had been established, § 101.13(i)(3) allowed for the use of amount or percentage statements that do not implicitly characterize the level of the nutrient in the food (e.g., claims that do not imply whether the amount is high or low based on an established RDI or DRV value), and that are not misleading in any way. In ''Food Labeling, Questions and Answers'' (Ref. 1, p. 36, C23), FDA stated that statements about a nutrient for which there is no established daily value (i.e., no RDI or DRV) could be made under § 101.13(i)(3) as long as the claim specifies only the amount of the nutrient per serving and does not imply that there is a lot or a little of that nutrient in the product. The example ''x grams of omega-3 fatty acids'' was given.

Accordingly, percentage claims such as ''40 percent omega-3 fatty acids'' that do not in any way characterize the level of a nutrient in terms of defined claims such as ''high,'' ''low,'' or ''reduced'' were permitted on dietary supplements as well as conventional foods before the enactment of the DSHEA. To memorialize this fact and to implement the DSHEA by reflecting that labels or labeling of dietary supplements may bear statements that characterize the percentage level of a dietary ingredient for which an RDI or DRV has not been established even though those statements have not been defined by FDA, the agency is proposing to amend § 101.13 by adding new paragraph (q)(3)(ii) to read as follows:

> Under section 403(r)(2)(F) of the act, a statement that characterizes the percentage level of a dietary ingredient for which an RDI or daily reference value (DRV) has not been established (e.g., ''40 percent omega-3 fatty acids,'' ''100 percent of the allicin in a bulb of garlic,'' or ''twice the allicin as (name of

product alternative)'' * * *) may be made on the label or in labeling of dietary supplements without a regulation that specifically defines such a statement. * * *

Because this provision allows for an exemption to the nutrient content claims rules and is somewhat similar to the exemption in § 101.13(q)(3) for percentage statements for vitamins and minerals, the agency is placing the new paragraph in § 101.13(q)(3) by redesignating current § 101.13(q)(3) as § 101.13(q)(3)(i) and adding new § 101.13(q)(3)(ii).

The agency believes that percentage statements on the label or in labeling of a dietary supplement that characterize the percentage level of a dietary ingredient for which there is no established RDI or DRV in relation to an equivalent or increased/decreased amount of the dietary ingredient in another food, such as ''100 percent of the allicin in a bulb of garlic'' and ''twice the allicin as (name of product alternative),'' would be misleading under sections 403(a) and 201(n) of the act if there is not a meaningful amount of the dietary ingredient in both foods being compared and a meaningful difference between the two foods being contrasted. However, because many dietary ingredients, which are the subject of clause (F), do not have established reference amounts for daily consumption, there is not a single, consistent way to describe the amount or difference that would be considered meaningful for the broad spectrum of these dietary ingredients. Therefore, firms will need to determine on a case-by-case basis whether the stated amount of a dietary ingredient for which an RDI or DRV has not been established, and the difference between the amount of such a dietary ingredient in two products, is meaningful. In making such a determination, published literature on the dietary ingredient, knowledge of the functional properties of the dietary ingredient, and any additional information available to the manufacturer, packer, or distributor should be taken into account.

It should be noted that while FDA is proposing in § 101.13(q)(3)(ii) to provide for statements that characterize the percentage level of dietary ingredients for which no RDI or DRV has been established, the proposed regulations do not provide for use of the defined terms, such as ''more,'' ''good source,'' ''high,'' and ''as much as.'' For example, the statement ''300 percent of the bioflavonoids in a large grapefruit'' is permissible, but a claim such as ''high in bioflavonoids'' is not. As discussed in the nutrient content claims for dietary supplements proposal and final rule, FDA has concluded that if the defined term (i.e., the nutrient content claim) is to have any meaning, there must be a level that can be used as a reference in determining whether the claim is valid and appropriate. The RDI's and DRV's provide such levels. Thus, FDA has limited the use of ''good source,'' ''high,'' and other defined terms to use with nutrients for which RDI's or DRV's have been established.

By way of exception, ''contains'' and ''provides'' are listed in § 101.54(c)(1) (21 CFR 101.54(c)(1)) as synonyms for ''good source'' (e.g., ''Contains vitamin C'' is considered synonymous with ''good source of vitamin C'') and are therefore dependent on the establishment of an RDI or DRV for the nutrient to qualify for the claim. However, the agency has stated that these words may be used with nutrients that do not have RDI's or DRV's when specific amounts are given for the nutrient (Ref. 1, p. 37, C24). Accordingly, the agency has no objection to statements such as ''Contains 4 grams of omega-3 fatty acids per serving'' being made for dietary ingredients for which RDI's and DRV's have not been established provided the specific amount of the nutrient is stated.

It should be noted that section 403(r)(2)(F) of the act applies only to dietary supplements. Congress did not provide this exemption for conventional foods. Therefore, except for the statements discussed in the preceding paragraph that come under § 101.13(i)(3), statements that characterize the level of a dietary ingredient without an established RDI or DRV will continue to be prohibited on conventional foods.

While section 403(r)(2)(F) of the act states that section 403(r)(2)(A)(i) does not apply to statements on the labels of dietary supplements that characterize the percent level of dietary ingredients, there is nothing in the DSHEA that exempts such statements from the requirement in section 403(r)(2)(B) for referral statements (i.e., ''See *[location]* for nutrition information'') or from other requirements for nutrient content claims. Accordingly, FDA is proposing to require in § 101.13(q)(3)(ii) that a referral statement (or disclosure statement when fat, saturated fat, cholesterol, or sodium exceed specified limits) accompany the claim in accordance with § 101.13 (g) or (h).

In addition, the agency tentatively concludes that when percentage statements are made comparing or contrasting the amount of a dietary ingredient for which an RDI or DRV has not been established in a dietary supplement to that in a reference food, information on the identity of the reference food and on the quantitative amount of the dietary ingredient in both foods are material facts. Consumers need this information to evaluate and understand the claim being made, and the claim would be misleading under sections 403(a) and 201(n) of the act without it (see 56 FR 60421 at 60446, and 58 FR 2302 at 2365). This situation is analogous to that encountered with relative claims for nutrients, where there is a requirement in § 101.13(j)(2)(iv) for quantitative information comparing the amount of the subject nutrient in the product with that in the reference food. Inclusion of this information is particularly important because, while the nutrition label on dietary supplements will include information about the amount of dietary ingredients for which RDI's and DRV's have not been established that are present in the food (see proposed § 101.36(b)(3) in the companion document entitled ''Food Labeling; Statement of Identity, Nutrition Labeling and Ingredient Labeling of Dietary Supplements'' published elsewhere in this issue of the Federal Register), the nutrition label on conventional foods will not (except for nutrients provided for in § 101.9(c) such as sugars and polyunsaturated fat that do not have RDI's and DRV's established). Accordingly, when conventional foods are used as the reference food, information about the amount of a dietary ingredient for which there is no RDI or DRV that is present in the food is likely to only be available when it is provided as accompanying information, in accordance with § 101.13(j)(2)(iv).

For these reasons, FDA is proposing in § 101.13(q)(3)(ii) to require that whenever statements characterizing the percentage level of a dietary ingredient for which there is no RDI or DRV are made in comparison to the amount in a reference food, the reference food be clearly identified, and information on the actual amount of the dietary ingredient in both foods be provided in accordance with § 101.13(j)(2)(iv). Section 101.13(j)(2)(iv)(B) requires that this quantitative information be placed adjacent to the most prominent claim or to the nutrition label, except that when the nutrition label is on the information panel, the quantitative information may be placed elsewhere on that panel in accordance with § 101.2 (21 CFR 101.2) (see 60 FR 17202, April 5, 1995).

D. Disclaimer for Statements of Nutritional Support

1. Exclusion From Drug Definition

As mentioned previously, the DSHEA added section 403(r)(6) to the act, which provides for certain statements of nutritional support for dietary supplements, including a statement that ''describes the role of a nutrient or dietary ingredient intended to affect the structure or function in humans.'' Section 201(g)(1)(C) of the act states that a ''drug'' is an article (other than food) intended to affect the structure or any function of the body of man or other animals. Section 10(a) of the DSHEA adds the following statement to section 201(g)(1) of the act:

> A food, dietary ingredient, or dietary supplement for which a truthful and not misleading statement is made in accordance with section 403(r)(6) is not a drug under clause (C) solely because the label or the labeling contains such a statement.

Under section 10(a) of the DSHEA and section 403(r)(6) of the act, for a firm to take advantage of the exclusion from the ''drug'' definition for a statement of nutritional support on the label or in labeling of a dietary supplement, it must meet each of the conditions established under section 403(r)(6), including having substantiation that the claim is truthful and not misleading and having the disclaimer required in section 403(r)(6) displayed in conjunction with the statement. To implement the latter requirement, FDA is proposing in § 101.94, as stated in proposed § 101.94(a), to set forth the requirements for the text, placement, and typesize of the disclaimer that must accompany the statement of nutritional support for it to be subject to the exemption in section 201(g)(1)(C) of the act.

2. Text

Section 403(r)(6)(C) requires the following disclaimer to be prominently displayed in boldface type:

> This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

Based on inquiries that FDA has received from the dietary supplement industry, FDA tentatively finds that aspects of the statutory requirements for the disclaimer (e.g. ''prominent display'') need to be defined and implemented through regulations. Prominence is a relative term, and without regulations, the agency would be forced to evaluate prominence on a case-by-case basis. Such an approach would not provide firms with sufficient guidance to be assured that product labels would not trigger regulatory action.

A literal reading of section 403(r)(6)(C) of the act suggests that *each* nutritional support statement must contain the disclaimer in its entirety, without any deviation from the statutory language. FDA tentatively concludes that, where a label contains only one nutritional support statement, there is no reason not to adopt such a reading of the act. Accordingly, the agency is proposing in § 101.94(b)(1) that where the label contains one statement of nutritional support provided for in section 403(r)(6) of the act, the label or labeling must prominently contain the disclaimer as required by the act without modification to the text.

However, where there are multiple nutritional support statements, or where the same statement appears several times, the agency recognizes that repeated use of the statutory text with each nutritional support statement could be confusing to consumers and burdensome to manufacturers. For example, if a dietary supplement includes three nutritional support statements on the same label panel, or in a piece of labeling such as a brochure, the literal reading of the act would require that each statement include the complete disclaimer. Because the statutory text is of some length, only very large label panels could conform to this requirement if they contained multiple statements.

FDA wishes to implement the statute in a practical way that still fully effectuates the purposes of the statute. In light of this fact, the agency tentatively concludes that it is appropriate to provide that the disclaimer required in section 403(r)(6)(C) of the act can be slightly modified to reflect the use of multiple statements of nutritional support. FDA is proposing in § 101.94(b)(2) to require that, where there is more than one statement of nutritional support, each statement contain the disclaimer as required by the act, or that the first sentence of the disclaimer be modified to the plural form to read as follows: ''These statements have not been evaluated by the Food and Drug Administration.'' Under this proposal, the second sentence will remain as required by the act. For convenience, FDA will refer to this modified form of the disclaimer as ''the plural disclaimer.''

3. Placement

The juxtaposition of the disclaimer to the statement of nutritional support as required by the act is one way to ensure prominence. Because the act states that the statement of nutritional support must ''contain'' the disclaimer, the agency tentatively concludes that the disclaimer must be part of the statement of nutritional support. When there is only one such statement, this inclusion can be readily accomplished by presenting the disclaimer as part of the claim. Accordingly, FDA is proposing in § 101.94(c)(1) that the disclaimer be contained in each statement of nutritional support by placing the disclaimer immediately adjacent to the statement of nutritional support with no intervening material.

However, consistent with its desire to interpret section 403(r)(6) of the act in a practical way, FDA is proposing to provide for an alternative placement for the disclaimer on the label or in labeling in situations in which repetitive presentation of the disclaimer could be burdensome. In these situations, FDA wants to provide an approach to placement of the disclaimer that will give the disclaimer a prominence that will ensure that it will be read and understood by consumers but that will result in its presentation only once on the label panel or in labeling.

FDA tentatively concludes that where the label or labeling contains multiple statements of nutritional support, and the relationship between each of those statements and the disclaimer can be made obvious, the statutory requirement of prominent display of the disclaimer can be met without requiring that each statement of nutritional support actually include the disclaimer. FDA experience has been that one of the most effective ways of tieing two label statements that are physically separated on the same label panel is through the use of a symbol such as an asterisk. Symbols have been used within nutrition labeling since its inception in 1973 and have proven to be an effective way of relating label information to explanatory footnotes. For example, asterisks have been used adjacent to names of vitamins and minerals present at very low levels to refer the consumer to a footnote stating ''Contains less than 2 percent of the Daily Value (formerly the U.S. Recommended Daily Allowance).'' FDA is unaware of any data indicating consumer difficulties with such use of symbols. The use of symbols would also help consumers differentiate between label statements to which the disclaimer is referring and other label claims to which the disclaimer does not apply (e.g., authorized health claims or nutrient content claims).

Accordingly, FDA is proposing in § 101.94(c)(2) that where there is more than one statement of nutritional support on a label panel or in labeling

other than a label, and the manufacturer, packer, or distributor wishes to comply with section 403(r)(6) of the act without having to place the disclaimer immediately after each statement of nutritional support, it can place a symbol (e.g., an asterisk) at the end of each statement of nutritional support that refers to the same symbol placed elsewhere on the same label panel or in the labeling that is followed by the disclaimer.

In a citizen petition dated March 20, 1995 (petition number 95P–0079/CP 1), the Nutritional Health Alliance (NHA) requested, among other things, that FDA issue regulations implementing section 403(r)(6) of the act. With respect to the placement of the disclaimer, NHA suggested that an asterisk follow each statement of nutritional support to refer the consumer to a specific place on the label, such as the information panel, where the disclaimer would appear only once.

Although FDA is proposing to provide most of what this petition seeks, the agency tentatively rejects the last aspect of this suggestion. Splitting the statement of nutritional support from the required disclaimer and allowing the disclaimer to appear on another panel does not establish an obvious relationship between the two pieces of information. The agency is concerned that the placement of the disclaimer on another panel would not reveal material facts in conjunction with the statement of nutritional support that are necessary for consumers to fully understand the significance of the statement. However, the agency will consider establishing provisions for the use of asterisks that refer to the disclaimer in a single specific location (such as the information panel), instead of on each panel bearing a statement of nutritional support, if the comments convince it that such an approach is consistent with the statute and would be useful to consumers. FDA requests any data that bear on the question of the effect that splitting a statement from a disclaimer in this manner will have on the likelihood that consumers will read the disclaimer. Specifically, the agency requests data on whether a consumer will track a symbol from one label panel or page of labeling to another to obtain the information about a statement of nutritional support that follows the symbol.

In addition, the requirement in the act for prominent display means that when the disclaimer does not appear immediately adjacent to a statement of nutritional support, it must be presented on the label or labeling in a manner that renders it as readily observable and as likely to be read as the statement of nutritional support itself. In this regard, the agency's experience with the graphic requirements for the new nutrition label has been that a box around required label information greatly increases the prominence of the information placed inside the box (Ref. 2). Moreover, focus group discussions regarding warning labels show that messages put in a boxed area help consumers to distinguish the message from other information as well as draw attention to it (Ref. 3). Therefore, FDA is proposing in § 101.94(c)(2) to require that a box be drawn around the disclaimer when the disclaimer is not immediately adjacent to the statement of nutritional support.

For example, a side panel of a dietary supplement label may contain paragraphs of text that include more than one statement of nutritional support. Assuming that the manufacturer did not choose to place the disclaimer immediately after each statement of nutritional support, each such statement would be followed by a symbol, and the referenced symbol and disclaimer would be placed in a box on the same panel with the first sentence reading ''*These statements have not been evaluated by the Food and Drug Administration,'' as proposed in section § 101.94(b)(2).

4. Type Size and Style

With respect to the style of type to be used in the disclaimer, the DSHEA specifies that ''boldface type'' shall be used (section 403(r)(6)(C) of the act). FDA has reiterated this provision in proposed § 101.94(d).

With respect to type size requirements, FDA notes that even though section 403(r)(6) of the act does not include specific type size requirements for the accompanying information referred to as the disclaimer, other sections of the act, and the regulations promulgated thereunder, address a variety of requirements for information that is to accompany a claim. Sections 403(r)(2)(A)(iii) through (r)(2)(A)(v) of the act require that statements that disclose the level of fat, saturated fat, or cholesterol, which must be presented in conjunction with certain nutrient content claims, ''have appropriate prominence which shall be no less than one-half the size of the claim.'' The agency tentatively concludes that, for consistency, this requirement should be considered a key element of ''prominent display'' for the disclaimer.

FDA has long held that accompanying information should be in a size reasonably related to that of the information that it modifies. This relative prominence, when codified, has (except in the case of provisions pertaining to nutrient content claim referral and disclosure statements in § 101.13) been one-half the type size of the information modified (see, e.g., §§ 101.22(i)(2) and 102.5(b)(2)(ii)). For nutrient content claims, FDA did establish type size requirements for referral and disclosure statements related to the area of the surface bearing the principal display panel rather than to the type size used for the nutrient content claim. However, nutrient content claims often have very large type size, whereas nutritional support statements will likely not appear in such large type because they are intended to convey more lengthy information. Certainly the statements that would qualify as nutritional support statements under section 403(r)(6) of the act that have appeared in dietary supplement labeling are of much greater length than most nutrient content claims.

Because nutritional support statements are likely to be more lengthy, firms are likely to use relatively small type for them. The agency is concerned that one-half the size of the type commonly used for long statements or paragraphs may be too small for consumers to read easily. Thus, FDA is proposing one-sixteenth of an inch as the minimum type size for the disclaimer in § 101.94(d).

One-sixteenth of an inch is specified in § 101.2(c) as the minimum type size for most other mandatory information on the principal display panel or information panel, e.g., designation of ingredients, name and place of business, and warning and disclaimer statements. Further, one-sixteenth of an inch is the minimum size required in § 101.105(i) for net quantity of contents statements. Consequently, the agency tentatively concludes that a minimum type size of one-sixteenth of an inch for the disclaimer is necessary to ensure that it is prominently displayed in accordance with section 403(r)(6)(C) of the act.

E. Prominence of Ingredients That Are Not Vitamins or Minerals

Section 7(d) of the DSHEA strikes section 411(b)(2)(B) of the act. Before it was removed by the DSHEA, section 411(b)(2)(B) stated that the labeling and advertising of dietary supplements of vitamins and minerals could not give prominence to or emphasize ingredients that are not vitamins, minerals, or represented as a source of vitamins or minerals. Because of this provision, the agency stated that nutrient content claims about ingredients that are not

vitamins or minerals (e.g., ''more fiber,'' ''high protein'') could not be made on dietary supplements of vitamins or minerals (59 FR 378 at 387). This limitation was carried through in the final rule for nutrient content claims for dietary supplements in § 101.54(b)(1), (c)(1), and (e)(1) that addressed ''high,'' ''good source,'' and ''more'' claims, respectively, for dietary supplements.

For example, § 101.54(b)(1) as amended by the nutrient content claims for dietary supplements final rule (59 FR 378 at 394) reads:

> The terms ''high,'' ''rich in,'' or ''excellent source of'' may be used on the label and in the labeling of foods except meal products as defined in § 101.13(l), main dish products as defined in § 101.13(m), and *dietary supplements of vitamins or minerals to characterize the level of any substance that is not a vitamin or mineral,* provided that the food contains 20 percent or more of the RDI or the DRV per reference amount customarily consumed.

(emphasis added).

Similar restrictions were added to § 101.54(c)(1) and (e)(1) by the 1994 nutrient content claims for dietary supplements final rule.

In response to section 7(d) of the DSHEA, FDA is proposing to amend § 101.54(b)(1) for ''high'' claims, § 101.54(c)(1) for ''good source'' claims, and § 101.54(e)(1) for ''more,'' ''fortified,'' ''enriched,'' and ''added'' claims to remove these restrictions on claims on dietary supplements that characterize the levels of substances that are not vitamins and minerals. These restrictions are no longer required under the act.

III. Analysis of Impacts

FDA has examined the impacts of the proposed 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 proposed rule is consistent with the regulatory philosophy and principles identified in the Executive Order. In addition, the proposed rule is not a significant regulatory action as defined by the Executive Order and so is not subject to review under the Executive Order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. In accordance with the Regulatory Flexibility Act, 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.

The proposed rule does not significantly change the way in which claims are made with three exceptions: (1) Percentage claims for dietary supplements that do not have RDI's or DRV's are no longer prohibited; (2) dietary supplements of vitamins and minerals may now highlight an ingredient that is not a vitamin or mineral; and (3) labels or labeling of dietary supplements may include statements of nutritional support so long as those statements include an appropriate disclaimer, and the manufacturer has substantiation that the statement is truthful and not misleading. With regards to these actions, costs of redesigning labels will be incurred only by those firms wishing to take advantage of the DSHEA. With respect to the third, firms who wish to make nutritional support statements will incur the additional cost of redesigning labels to include the disclaimer. When the label or labeling contains more than one nutritional support statement, the cost of the disclaimer will depend on whether the disclaimer must be made on each label panel, page, or piece of labeling that contains a statement of nutritional support, or whether the disclaimer need only appear once.

FDA is unable to quantify the benefits from this proposed rule. It may be that some consumers will benefit from the additional information about dietary ingredients that will become available. However, because statements of nutritional support may now be made for some dietary ingredients without any publicly available information to demonstrate that the dietary ingredient is safe, or that it will have its claimed effect, it is uncertain whether this proposed rule will in fact provide any significant benefits to consumers. FDA requests comment on this issue.

IV. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(11) 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.

V. Paperwork Reduction Act

FDA tentatively concludes that this proposed rule contains no reporting, recordkeeping, labeling, or other third party disclosure requirements; thus there is no ''information collection'' necessitating clearance by the Office of Management and Budget. However, to ensure the accuracy of this tentative conclusion, FDA is asking for comment on whether this proposed rule to amend its regulations establishing requirements for the use of nutrient content claims and health claims for dietary supplements and to specify how the disclaimer required by section 403(r)(6)(C) of the act is to be presented on the labels or labeling or dietary supplements imposes any paperwork burden.

VI. Effective Date

FDA is proposing to make this regulation effective on January 1, 1997. This is consistent with section 7(e) of the DSHEA, which states that dietary supplements must be labeled in accordance with the amendments of that section after December 31, 1996.

VII. Comments

Interested persons may, on or before March 13, 1996, submit to the Dockets Management Branch (address above) written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

VIII. References

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

1. Office of Food Labeling, Center for Food Safety and Applied Nutrition, Food and Drug Administration, ''Food Labeling, Questions and Answers,'' August, 1993.

2. Wilkening, Virginia L., Memo to the Record, June 30, 1995.

3. Macro International Inc., ''Iron Supplement Warning Label Focus Group Report,'' U.S. Department of Health and Human Services, Food and Drug Administration, April 14, 1995.

List of Subjects in 21 CFR Part 101

Food labeling, Nutrition, 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 part 101 be amended as follows:

PART 101—FOOD LABELING

1. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: Secs. 4, 5, 6 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 301, 402, 403, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 371).

2. Section 101.13(a) is amended by revising paragraphs (a) and (b), redesignating paragraph (q)(3) as (q)(3)(i), and adding new paragraph (q)(3)(ii) to read as follows:

§ 101.13 Nutrient content claims—-general principles.

(a) This section and the regulations in subpart D of this part apply to foods that are intended for human consumption and that are offered for sale, including conventional foods and dietary supplements.

(b) A claim that expressly or implicitly characterizes the level of a nutrient of the type required to be in nutrition labeling under § 101.9 or under § 101.36 (that is, a nutrient content claim), with the exception of such claims on restaurant menus, may not be made on the label or in labeling of foods unless the claim is made in accordance with this regulation and with the applicable regulations in subpart D of this part or in part 105 or part 107 of this chapter.

* * * * *

(q) * * *

(3) * * *

(ii) Under section 403(r)(2)(F) of the act, a statement that characterizes the percentage level of a dietary ingredient for which an RDI or daily reference value (DRV) has not been established (e.g., ''40 percent omega-3 fatty acids,'' ''100 percent of the allicin in a bulb of garlic,'' or ''twice the allicin as (name of product alternative)'' [where ''twice'' is another way of saying 200 percent]) may be made on the label or in labeling of dietary supplements without a regulation that specifically defines such a statement. All such claims shall be accompanied by a referral or disclosure statement in accordance with paragraphs (g) or (h) of this section. In addition, whenever a statement that characterizes the percentage level of a dietary ingredient for which there is no RDI or DRV is made in a way that draws a comparison to the amount of the dietary ingredient in a reference food, the reference food shall be clearly identified, and the information on the actual amount of the dietary ingredient in both foods shall be declared in accordance with paragraph (j)(2)(iv) of this section.

* * * * *

3. Section 101.14 is amended by removing paragraph (a)(4); by redesignating paragraphs (a)(5) and (a)(6) as paragraphs (a)(4) and (a)(5), respectively; and by revising paragraphs (b)(3)(i) and (d)(3) to read as follows:

§ 101.14 Health claims: general requirements.

* * * * *

(b) * * *

(3) * * *

(i) The substance must, regardless of whether the food is a conventional food or a dietary supplement, contribute taste, aroma, or nutritive value, or any other technical effect listed in § 170.3(o) of this chapter, to the food and must retain that attribute when consumed at levels that are necessary to justify a claim; and

* * * * *

(d) * * *

(3) Nutrition labeling shall be provided in the label or labeling of any food for which a health claim is made in accordance with § 101.9; for restaurant foods, in accordance with § 101.10; or for dietary supplements, in accordance with § 101.36.

* * * * *

4. Section 101.54 is amended by revising paragraphs (b)(1), (c)(1), and (e)(1) introductory text to read as follows:

§ 101.54 Nutrient content claims for ''good source,'' ''high,'' and ''more.''

* * * * *

(b) *''High'' claims.* (1) The terms ''high,'' ''rich in,'' or ''excellent source of'' may be used on the label and in the labeling of foods, except meal products as defined in § 101.13(l) and main dish products as defined in § 101.13(m), provided that the food contains 20 percent or more of the RDI or the DRV per reference amount customarily consumed.

* * * * *

(c) *''Good Source'' claims.* (1) The terms ''good source,'' ''contains,'' or ''provides'' may be used on the label and in the labeling of foods, except meal products as defined in § 101.13(l) and main dish products as defined in § 101.13(m), provided that the food contains 10 to 19 percent of the RDI or the DRV per reference amount customarily consumed.

* * * * *

(e) *''More'' claims.* (1) A relative claim using the terms ''more,'' ''fortified,'' ''enriched,'' and ''added'' may be used on the label or in labeling of foods to describe the level of protein, vitamins, minerals, dietary fiber, or potassium, except as limited by § 101.13(j)(1)(i) and except meal products as defined in § 101.13(l) and main dish products as defined in § 101.13(m), provided that:

* * * * *

5. Section 101.94 is added to subpart F to read as follows:

§ 101.94 Statements of nutritional support; disclaimer.

(a) The requirements in this section apply to the label or labeling of dietary supplements where the dietary supplement bears a statement of nutritional support that is provided for by section 403(r)(6) of the Federal Food, Drug, and Cosmetic Act (the act), and where the manufacturer, packer, or distributor wishes to take advantage of the exemption to section 201(g)(1)(C) of the act by complying with section 403(r)(6) of the act.

(b) *Text for disclaimer.* (1) Where there is one statement of nutritional support on the label or in the labeling, the disclaimer shall be placed in accordance with paragraph (c)(1) of this section and shall state:

This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

(2) Where there is more than one statement of nutritional support on the label or in the labeling, each statement shall bear the disclaimer in accordance with paragraph (b)(1) of this section, or a plural disclaimer may be placed in accordance with paragraph (c)(2) of this section and shall state:

These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

(c) *Placement.* (1) Except as provided in paragraph (c)(2) of this section, the disclaimer shall be contained in each statement of nutritional support. The disclaimer shall be placed immediately adjacent to the statement of nutritional support with no intervening material.

(2) Where there is more than one statement of nutritional support on a label panel or in labeling other than a label, and the manufacturer, packer, or distributor wishes to comply with section 403(r)(6) of the act without having to place the disclaimer after each statement of nutritional support, it shall place a symbol (e.g., an asterisk) at the end of each statement of nutritional support that refers to the same symbol placed elsewhere on the same label panel or piece of labeling that is followed by the disclaimer. In this

situation, the referenced symbol and disclaimer shall be placed in a box.

(d) *Typesize.* The disclaimer in paragraph (b) of this section shall appear in boldface type in letters of a type size height no smaller than the larger of:

(1) One-half the type size of the largest statement of nutritional support; or

(2) One-sixteenth inch.

Dated: September 26, 1995.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 95–31193 Filed 12–27–95; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 95N–0347]

RIN 0910–AA23

Food Labeling; Nutrient Content Claims: Definition for ''High Potency'' Claim for Dietary Supplements and Definition of ''Antioxidant'' for Use in Nutrient Content Claims for Dietary Supplements and Conventional Foods

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its regulations to define the term ''high potency'' as a nutrient content claim for dietary supplements; define the term ''antioxidant'' for use in nutrient content claims on labels or in labeling of dietary supplements and conventional foods; and correct an omission pertaining to the use of ''sugar free'' claims on dietary supplements. FDA is taking these actions to provide for the use of additional nutrient content claims in response to provisions of the Nutrition Labeling and Education Act of 1990. This proposed rule will benefit consumers by providing established definitions for use in food labeling for the terms ''high potency,'' ''antioxidant,'' and ''sugar free.''

DATES: Written comments by March 13, 1996. The agency proposes that any final rule that may issue based upon this proposal become effective January 1, 1997.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Camille E. Brewer, Center for Food Safety and Applied Nutrition (HFS–165), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–5483.

SUPPLEMENTARY INFORMATION:

I. Regulatory History

A. The Nutrition Labeling and Education Act of 1990 and Subsequent Proposals

On November 8, 1990, the President signed into law the Nutrition Labeling and Education Act of 1990 (the 1990 amendments) (Pub. L. 101–535). The 1990 amendments revised the Federal Food, Drug, and Cosmetic Act (the act) in a number of important ways. One of the most notable aspects of the 1990 amendments is that they establish FDA's authority to regulate nutrient content claims on food labels and in food labeling. Section 403(r)(1)(A) of the act (21 U.S.C. 343(r)(1)(A)), which was added by the 1990 amendments, provides that a product is misbranded if it bears a claim in its label or labeling that either expressly or implicitly characterizes the level, in the food, of any nutrient of the type required to be declared as part of nutrition labeling, unless such claim has been specifically defined (or otherwise exempted) by regulation.

In the Federal Register of November 27, 1991 (56 FR 60421 and 56 FR 60478), FDA published two documents (''Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms;'' and ''Food Labeling: Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food'') in which it proposed, among other things, to define nutrient content claims and to provide for their use on food labels. FDA intended that these proposals would apply to dietary supplements as well as conventional foods.

B. The Dietary Supplement Act of 1992, Final Labeling Rules, and the Dietary Supplement Health and Education Act of 1994

On October 6, 1992, the President signed into law the Dietary Supplement Act of 1992, Title II of Pub. L. 102–571 (the DS Act). Section 202(a)(1) of the DS Act established a moratorium on the implementation of the 1990 amendments with respect to dietary supplements until December 15, 1993. Section 202(a)(2)(A) of the DS Act directed the Secretary of Health and Human Services to issue new proposed regulations that are applicable to dietary supplements of vitamins, minerals, herbs, and other similar nutritional substances.

FDA published final regulations that implemented the 1990 amendments with respect to nutrient content claims in the Federal Register of January 6, 1993, in a document entitled ''Food Labeling; Nutrient Content Claims; General Principles, Petitions, and Definition of Terms'' (hereinafter referred to as ''the 1993 nutrient content claims final rule''). As a result of the DS Act, this final rule applied only to the use of such claims on conventional foods (58 FR 2302 as corrected at 58 FR 17341). FDA made technical corrections to these final regulations in documents published in the Federal Register on August 18, 1993 (58 FR 44020).

In response to the requirements of the 1990 amendments and the DS Act, FDA published in the Federal Register of June 18, 1993 (58 FR 33731), a proposal entitled ''Food Labeling; Requirements for Nutrient Content Claims for Dietary Supplements of Vitamins, Minerals, Herbs, and Other Similar Nutritional Substances'' (hereinafter referred to as the 1993 nutrient content claims proposal) to: (1) Include dietary supplements of vitamins, minerals, herbs, and other similar nutritional substances under the coverage of the general principles for nutrient content claims; (2) provide for the use of expressed and implied nutrient content claims on labels or in labeling of dietary supplements; and (3) provide for petitions for nutrient content claims for dietary supplements. FDA received approximately 500 letters in response to its 1993 nutrient content claims proposal. FDA issued final regulations on nutrient content claims for dietary supplements on January 4, 1994 (59 FR 378) (hereinafter referred to as the 1994 nutrient content claims final rule).

On October 25, 1994, the President signed into law the Dietary Supplement Health and Education Act of 1994 (the DSHEA) (Pub. L. 103–417). Among other things, the DSHEA provided a statutory definition for ''dietary supplements,'' provided for some flexibility in the manner in which ingredient and nutrition labeling information is to be provided for dietary supplements, and made provision for statements that characterize the percentage level of dietary ingredients for which Reference Daily Intakes (RDI's) and Daily Reference Values (DRV's) have not been established. However, these changes do not bear directly on this rulemaking.

In the 1994 nutrient content claims final rule, FDA used the terms ''dietary supplements of vitamins, minerals, herbs, and other similar nutritional

substances'' and ''food in conventional food form.'' With the passage of the DSHEA, however, Congress has defined the term ''dietary supplement'' and has modified the act in sections 201(ff) and 411(c)(1) (21 U.S.C. 321(ff) and 350(c)(1)) to make clear that the form of the food is not necessarily determinative of whether it is a dietary supplement or not. Therefore, in this document, FDA will use the more simple terms ''dietary supplement'' and ''conventional food.''

II. FDA Authority

Section 403(r)(2)(A)(i) of the act states that claims that characterize the level of a nutrient may be made only if the claim uses terms that are defined in regulations. In response to this section, the agency is proposing to amend its regulations on nutrient content claims to define the term ''high potency'' as a nutrient content claim for use on labels and in labeling of dietary supplements and the term ''antioxidant'' for use in nutrient content claims for dietary supplements and conventional foods.

FDA has authority to take these actions regarding nutrient content claims under sections 201(n) and 403(a), as well as section 403(r), of the act (21 U.S.C. 321(n) and 343(a)). These sections prohibit labeling that: (1) Is false or misleading in that it fails to reveal facts that are material in light of other representations made in the labeling or that are material with respect to the consequences that may result from use of the food, and (2) uses terms to characterize the level of any nutrient in a food that have not been defined by regulation by FDA.

III. Proposed Rules

A. ''High Potency''

1. Background

In the 1993 nutrient content claims proposal, FDA requested comment on several terms, including ''high potency,'' that are often encountered on labels or in labeling of dietary supplements and that seem to imply that the dietary supplement will contribute to good health (58 FR 33731 at 33748). The agency requested comment on whether there are established meanings for these terms, and, if so, whether they characterize the level of the nutrients in the food. The agency received about 10 comments from trade associations, manufacturers of dietary supplements and conventional foods, academicians, and consumer groups regarding the term ''high potency.''

FDA was persuaded, based on comments that suggested definitions for the term, that ''high potency'' is a claim that characterizes the level of a nutrient or nutrients and, therefore, meets the definition in § 101.13(b) of a nutrient content claim (59 FR 378 at 391). However, given the time constraints under which FDA prepared the final rule, and the range and diversity of the suggested definitions, the agency was not able to adopt a definition of ''high potency'' in the final rule on nutrient content claims for dietary supplements. FDA announced its intention to review the suggestions for a definition of ''high potency'' and, based on information received in the comments, to propose an appropriate definition for this term (59 FR 378 at 391). In this document, the agency is proceeding with its commitment to propose a definition for ''high potency.''

2. Limitation to Dietary Supplements

In the 1994 nutrient content claims final rule, the agency determined that, in many respects, the regulations issued in the 1993 nutrient content claims final rule (58 FR 2302) are directly applicable to dietary supplements (59 FR 378 at 380). However, FDA acknowledged that dietary supplements differ in several respects from conventional foods in their history of use and in their perceived function in the diet (59 FR 378 at 380). This fact and the fact that certain dietary supplements are likely to contain much higher levels of nutrients than conventional foods led FDA to conclude that nutrient content claims that are specific for dietary supplements may be appropriate (59 FR 378 at 380). Comments to the nutrient content claims proposal for dietary supplements stated that the term ''high potency'' seems more appropriate for dietary supplements than for conventional foods (59 FR 378 at 390).

In considering the coverage of this term, FDA has relied, in part, on the National Academy of Sciences' (NAS) Institute of Medicine's (IOM) recommendations found in ''Nutrition Labeling, Issues and Directions for the 1990's'' (Ref. 1). In discussing claims, the IOM suggested that the terms that should be defined are those that are most commonly used (Ref. 1, p. 296). FDA has no evidence that the term ''high potency'' is used with any frequency on conventional foods, that the term was used on conventional foods before the enactment of the 1990 amendments, or that consumers expect or would understand it in association with conventional foods. In contrast, the term ''high potency'' was in widespread use on the labels of dietary supplements before the enactment of the 1990 amendments, continues to be used on dietary supplements, and appears to convey information to the consumer about the level of the nutrients in dietary supplements.

Lacking a clear history of use, or any other indication of the usefulness, of the term ''high potency'' on conventional foods, the agency tentatively concludes that this term should be limited to use on dietary supplements. Accordingly, FDA is proposing to amend part 101 (21 CFR part 101) by adding new § 101.13(b)(6), which states that the term ''high potency'' may be used only on dietary supplements.

FDA recognizes that defining a nutrient content claim exclusively for use on labels and in labeling of dietary supplements is a departure from previous practice. However, the agency tentatively concludes that limiting this claim to dietary supplements is the appropriate course for the reasons stated above. Comment is requested on this tentative conclusion.

3. Definition of ''High Potency'' as a Nutrient Content Claim

a. *Describing a nutrient*. FDA received several comments that presented a wide range of views on how ''high potency'' should be defined. One comment to the proposed rule on nutrient content claims suggested that the term ''high potency'' have the same definition as ''high'' (i.e., 20 percent or more of the RDI), but did not provide any elaboration on why this suggested definition is appropriate. Other comments asserted that this term could be used to establish an hierarchy of absolute claims (i.e., ''good source,'' ''high,'' and ''high potency'') to describe dietary supplements. This hierarchy, the comments suggested, will enable consumers to use the claims to quickly differentiate between varying nutrient levels in dietary supplements.

A few comments suggested that the term be defined to mean that the product contains 200 percent of the RDI. These comments argued that while a multivitamin supplement at 100 percent of the RDI might be ''high potency'' compared to a conventional food, it is not ''high potency'' when compared to other dietary supplements. These comments suggested that defining ''high potency'' as twice the RDI or more would more accurately reflect the level of nutrients found in dietary supplements. One of these comments stated that, in addition to requiring that single nutrient supplements be twice the RDI for that nutrient, FDA should require that the principal display panel disclose what multiple of the RDI the supplement contains. For example, the comment suggested that the principal display panel of a 250 milligram (mg)

vitamin C supplement carry an asterisk next to the words ''high potency'' with the following disclosure: ''Contains four times the RDI for vitamin C.'' The comment went on to state that under this scheme, some nutrients, such as calcium and selenium, would not qualify to carry a ''high potency'' claim because they are rarely sold at 200 percent of the RDI. The comment suggested that if the supplement industry begins to market those nutrients at higher doses to make ''high potency'' claims, FDA could establish a lower minimum level, such as 50 percent of the RDI for selenium and 50 percent of the RDI for calcium. The comment stated that those minimum levels would apply to those nutrients only.

Several comments, however, argued that the term ''high potency'' should mean 100 percent or more of the RDI because that is the current industry practice, and it has been helpful in directing consumers in their choice of products. One comment from the dietary supplement industry stated that, in their experience, the term ''high potency'' has generally been used for the last 20 years to refer to formulations that are at levels above the U.S. Recommended Daily Allowances (U.S. RDA's).

FDA acknowledges that many dietary supplements, particularly dietary supplements of vitamins or minerals, are likely to contain much higher levels of nutrients than conventional foods (Ref. 2). Currently approved nutrient content claims are of limited value in identifying those dietary supplements that contain amounts of vitamins or minerals at or above the Daily Value (DV). Claims such as ''good source'' and ''high'' are adequate to describe nutrient levels found in the majority of conventional foods, but they do not allow for differentiation of dietary supplement products containing much higher levels of nutrients. Therefore, the agency is in agreement with the comments that suggested that the term ''high potency'' should be defined in a way that permits such differentiation.

Accordingly, FDA rejects the comment that suggested that ''high potency'' be defined as 20 percent or more of the RDI. Such a definition would make ''high potency'' synonymous with ''high'' and thus would not help consumers differentiate between relatively low nutrient levels in many dietary supplements in the marketplace and those at higher levels.

FDA is not persuaded by the comments that suggested that 200 percent of the RDI is an appropriate definition for ''high potency.'' While the agency acknowledges that dietary supplements of vitamins and minerals often contain levels that meet or exceed 200 percent of the RDI per unit, that fact alone does not justify defining ''high potency'' at that level.

Supplement users report a variety of reasons for taking dietary supplements, including ensuring adequacy of intake of specific nutrients (Refs. 3, 4, and 5). FDA is interested in ensuring, and the nutrient content claim provisions were intended to ensure (see, e.g., section 403(r)(2)(A)(ii)(II) of the act) that consumers have useful label information that will help them maintain healthy dietary practices, in part by constructing nutritionally adequate diets. However, the agency is not persuaded that proposing a definition for ''high potency'' at 200 percent or more of the RDI will contribute to this goal. The RDI's are based on the NAS Recommended Dietary Allowances (RDA's), which are intended to reflect ''the levels of intake of essential nutrients that, on the basis of scientific knowledge, are judged by the Food and Nutrition Board, NAS to be adequate to meet the known nutrient needs of practically all healthy persons'' (Ref. 6). FDA is aware that the NAS is in the process of reevaluating the basis on which RDA's are determined and is considering expanding the RDA concept to include reducing the risk of chronic disease (Ref. 7). Until that debate is resolved, the agency tentatively concludes that it is appropriate to define ''high potency'' at a level that will assist consumers interested in using dietary supplements in obtaining an adequate intake as determined by established RDI values.

The agency tentatively concludes that 100 percent of the RDI per serving is a reasonable definition of ''high potency'' because this level is high enough ''to meet the needs of practically all healthy persons.'' RDI values represent the highest NAS RDA values from among the various age/sex groups specified by the NAS for persons 4 or more years of age (58 FR 2206 at 2210). Thus, a person consuming a ''high potency'' vitamin or mineral will be assured of meeting his or her need for the nutrient described as ''high potency.'' Such action would be a healthy dietary practice.

FDA tentatively concludes that the proposed definition of ''high potency'' makes sense for two additional reasons. First, as stated in the comments, it is consistent with current industry practice. Second, as a matter of common sense, providing of 100 percent of the RDI for a vitamin or mineral is to provide an amount of the vitamin or mineral that is highly potent.

FDA's tentative conclusion does not mean, however, that the agency is opposed to the presence of more than 100 percent of the RDI of a nutrient per serving. Manufacturers can formulate and describe the level of a nutrient as multiples of the RDI (e.g., using the terminology ''Daily Value'' to represent RDI's on the label, a vitamin C tablet containing 500 mg would declare ''833 percent of the Daily Value of vitamin C''). Nonetheless, because the purpose of nutrient content claims is to assist consumers in maintaining healthy dietary practices, and given the recommendations of the NAS on which the RDI's are based, FDA tentatively concludes that it is appropriate to tie a ''high potency'' claim to the RDI itself.

In addition to the nutrients for which RDI's have been established, FDA is proposing that the claim ''high potency'' may be used to describe protein and dietary fiber for which DRV's have been established in § 101.9(c)(9). Because dietary guidelines recommend that consumers moderate or reduce dietary levels of four other nutrients for which DRV's have been established (i.e., total fat, saturated fat, cholesterol, and sodium) to reduce the risk of developing certain chronic diseases (Ref. 8), FDA does not expect, and, therefore, is not proposing, that ''high potency'' claims be used to apply to them.

Additionally, the agency is not proposing that ''high potency'' claims be used to apply to two other nutrients, total carbohydrate and potassium, for which DRV's have been established. Section 101.54(a) precludes the use of the claims listed in that section in relation to total carbohydrate.[1] In the case of potassium, tablets containing potassium chloride or other potassium salts, which supply 100 mg or more of potassium per tablet, are considered to be drugs. (See 21 CFR 201.306.)

The agency is not aware of any reason why ''high potency'' claims should not be allowed to be used with protein and dietary fiber. FDA established the DRV's at levels for each nutrient that represent scientific consensus on the characteristics of foods Americans should choose both to have a healthier diet and to reduce risk factors for chronic diseases and conditions (58 FR

[1]In the 1993 nutrient content claims proposal, FDA stated that consensus reports and dietary recommendations generally encourage the increased consumption of complex carbohydrates, while suggesting that sugars be consumed in moderation (56 FR 60421 at 60444). The agency concluded that a nutrient content claim such as ''high in carbohydrate'' may provide misleading dietary advice because the claim does not allow for the distinction between high levels of complex carbohydrates and high levels of sugars (56 FR 60421 at 60444).

2206 at 2217). Nutrient content claims that assist consumers in constructing diets by identifying foods, including dietary supplements, that contain protein and dietary fiber at such levels should be allowed.

FDA tentatively concludes that, consistent with the agency's treatment of the claim for nutrients for which RDI's have been established, ''high potency'' should be defined for protein and dietary fiber at 100 percent of the DRV. The agency notes that throughout its rulemakings on nutrient content claims, it has used identical values for nutrients for which a DRV has been established as for those that are the subject of an RDI (e.g., ''good source'' claims are defined in § 101.54(c) as 10 to 19 percent of the RDI or DRV per reference amount customarily consumed).

Accordingly, FDA is proposing in § 101.54(f)(1) that the term ''high potency'' may be used on the label or in labeling of a dietary supplement to describe a nutrient that is present at 100 percent or more of the RDI for vitamins and minerals or the DRV for protein or dietary fiber per reference amount customarily consumed.

In response to the comment that suggested that FDA require that the principal display panel disclose what multiple of the nutrient's RDI is present (e.g., ''Contains 400 percent of the Daily Value of Vitamin C''), FDA is not persuaded that this action would be helpful to consumers. The referral statement, ''See ———————— for nutrition information,'' which directs the consumer to the nutrition panel is required for all nutrient content claims as specified in § 101.13(g). As proposed in a companion document published elsewhere in this issue of the Federal Register and entitled ''Food Labeling; Statement of Identity; Nutrition Labeling and Ingredient Labeling of Dietary Supplements,'' the nutrition label for dietary supplements of vitamins and minerals will have to provide quantitative information on the levels of specific nutrients as well as the percent Daily Value (DV) for each nutrient. Consequently, the consumer will have easy access to information regarding the levels of specific nutrients and may adjust their level of intake accordingly.

In addition, not requiring any additional information or disclosure beyond the referral statement is consistent with rules for the use of other expressed nutrient content claims, e.g., ''good source'' and ''high'' claims, which do not have to disclose the fraction of the RDI present. While FDA tentatively concludes that there is no need for additional disclosure requirements for products bearing a ''high potency'' claim, the agency points out that manufacturers may voluntarily place a statement on the label that discloses the amount or percentage of nutrients in relation to the DV as provided for in § 101.13(i) and (q)(3) (e.g., ''50 percent of the RDI for calcium,'' ''10 mg of iron'').

In response to the comment that suggested that the agency consider establishing a definition for ''high potency'' at lower levels for some nutrients if manufacturers start increasing amounts of the nutrients so that they can meet the criterion for the claim ''high potency,'' the agency believes that such action is unnecessary and potentially confusing to consumers. The agency tentatively concludes that the term ''high potency'' should have the same definition for all nutrients. In instances in which the product does not meet the proposed criteria for the claim ''high potency,'' the product may qualify to use another nutrient content claim, such as ''good source'' (defined in § 101.54(c) as 10 to 19 percent of the RDI or DRV) or ''high'' (defined in § 101.54(b) as 20 percent or more of the RDI or DRV). For example, when calcium is present in a dietary supplement at 20 percent or more of the RDI, the manufacturer can use the nutrient content claim ''high'' to describe the level of calcium. In addition, as stated above, under § 101.13(i) and (q)(3) the manufacturer may declare the amount or percentage of the nutrient on the label.

b. *Describing a dietary supplement product.* The comments stated that in addition to being used to describe the level of a nutrient in a product, the term ''high potency'' is also often used to describe multinutrient dietary supplement products themselves. Several comments discussed the use of a ''high potency'' claim on multinutrient products, and whether all nutrients in such a product would have to be present at levels that would meet the criterion for the claim. One comment stated that the claim should be permitted on any supplement that contains 100 percent of the RDI for each vitamin and mineral that is included in the product and for which an RDI has been established. The comment went on to state that the presence or absence of vitamins, minerals, or other substances for which no RDI's have been established should not affect a product's eligibility to bear the claim, so long as those nutrients for which RDI's have been established are present at required levels.

In contrast with this comment, a few comments stated that multinutrient products should be termed ''high potency'' when the majority of nutrients with RDI's are present at levels equal to or in excess of the RDI. Another comment stated that FDA should allow ''high potency'' claims on multinutrient supplements when more than one-third of the nutrients that they contain meet the minimum level required for a ''high potency'' claim. The latter comment stated that it is not reasonable to require that all of the nutrients in a multiingredient supplement be present at the level that is defined as ''high potency'' because many nutrients are not, and should not, be sold in such high doses. For example, the comment stated that ''high potency'' claims should be allowed on a multinutrient supplement that contains high levels of vitamins A, C, E, B6, B12, thiamin, riboflavin, and niacin, but smaller amounts of vitamin D, iron, calcium, magnesium, zinc, and copper. The comment stated that the latter nutrients are typically sold at lower doses, and some may pose a risk at high levels.

FDA has considered the comments that ''all,'' ''most,'' or ''one-third'' of the nutrients in a dietary supplement be present at 100 percent of the RDI or DRV for the supplement to qualify to bear the term ''high potency.'' A review of an informal FDA survey of labels of dietary supplements that bear the term ''high potency'' revealed that most multinutrient products that used the claim contained a majority, but not all, nutrients at 100 percent or more of the RDI (Ref. 9). FDA agrees with the comment that it may be impracticable to include 100 percent of the RDI or DRV for several nutrients for technological reasons. For instance, the bulkiness of calcium, phosphorus, magnesium, and fiber may make it difficult to provide sufficient amounts of those nutrients for them to be included in ''high potency'' tablets if they must be present at 100 percent of the RDI or DRV.

FDA tentatively concludes that it is not necessary to prohibit the use of a ''high potency'' claim on multinutrient dietary supplements if the supplements do not contain 100 percent or more of the RDI for each vitamin and mineral that is present, or 100 percent of the DRV for protein or dietary fiber, when present. The agency is persuaded by the comments that the public will be better served from a public health perspective if some nutrients are allowed to be present in such products at levels that are below 100 percent of the RDI or DRV. Without such an allowance, those nutrients that cannot be included at 100 percent levels because of technological difficulties could not be included at all if the dietary supplement is to bear a

''high potency'' claim. The exclusion of these nutrients will not necessarily help consumers to engage in healthy dietary practices.

Having tentatively concluded that some nutrients may be present in a ''high potency'' multinutrient dietary supplement at less than 100 percent of the RDI or DRV, the agency must determine what percentage of nutrients must be present in the product at 100 percent of the RDI or DRV for the product to qualify to make a ''high potency'' claim. A logical starting point is determination of: (1) How many nutrients have had RDI's and DRV's established for them, and (2) of those nutrients, how many cannot, or should not, be expected to be present at 100 percent of the RDI or DRV for technological reasons or because of public health concerns.

In the RDI/DRV final rules published on January 6, 1993 (58 FR 2206), FDA established RDI's in § 101.9(c)(8)(iv) for 19 vitamins and minerals (i.e., vitamin A, vitamin C, calcium, iron, vitamin D, vitamin E, thiamin, riboflavin, niacin, vitamin B6, folate, vitamin B12, biotin, pantothenic acid, phosphorus, iodine, magnesium, zinc, and copper) and DRV's in § 101.9(c)(9) for eight nutrients (i.e., total fat, saturated fat, cholesterol, total carbohydrate, dietary fiber, sodium, potassium, and protein). In addition, in a companion document entitled ''Food Labeling: Reference Daily Intakes'' published elsewhere in this issue of the Federal Register, FDA is establishing RDI's for six additional vitamins and minerals (i.e., vitamin K, selenium, chloride, manganese, chromium, molybdenum). Thus, there are a total of 33 nutrients for which RDI's or DRV's have been established. Of these 33 nutrients, 4 (i.e., calcium, phosphorus, magnesium, and fiber) have already been mentioned as being difficult to include in dietary supplements in amounts equal to 100 percent of the DV because of technological problems related to their bulk.

Other nutrients that should not be expected to be present at 100 percent of the DV include total fat, saturated fat, cholesterol, and sodium. It would be nonsensical to associate the term ''high potency'' with these nutrients because, as discussed earlier, dietary guidelines recommend that intake of these nutrients be limited or moderated in the diet (Ref. 8). In addition, it is not useful to include chloride at high levels in multinutrient supplements. Salt is the primary source of dietary chloride, and the typical American diet already contains significant levels of chloride because of high intakes of salt (Refs. 6 and 10). (See the discussion of the exemption of chloride in § 101.3(e)(4)(ii) in the final rule entitled ''Food Labeling: Reference Daily Intakes'' published elsewhere in this issue of the Federal Register.) Lastly, as discussed earlier, potassium would be considered a drug at such high levels, so it should not be included in dietary supplements at 100 percent of the DRV.

Therefore, FDA tentatively concludes that there are 11 nutrients (calcium, phosphorus, magnesium, dietary fiber, total carbohydrate, total fat, saturated fat, cholesterol, sodium, chloride, and potassium) for which it would be impracticable or imprudent to require that, when present in a multinutrient product, they be present at levels at or above 100 percent of the RDI or DRV for the product to qualify for the use of the nutrient content claim ''high potency.'' This amounts to one-third of the nutrients for which RDI's and DRV's have been established (11 out of 33 nutrients). Accordingly, the agency believes that it would be reasonable to expect that the remaining two-thirds of the nutrients for which RDI's and DRV's have been established could be present at 100 percent of the RDI or DRV in a ''high potency'' multinutrient dietary supplement product that contained all 33 nutrients for which RDI's and DRV's have been established.

FDA finds merit in the comment that suggested that not all nutrients need be present at or above the RDI for the product to qualify for the claim. This comment suggests that the agency establish a standard for ''high potency'' that applies to supplements that do not contain all of the 33 nutrients for which RDI's and DRV's have been established as well as those that do. FDA tentatively concludes that two-thirds represents a reasonable standard; it provides flexibility for supplements that do not contain all 33 nutrients, and it provides a consistent standard for all supplement products. Finally, it is a familiar fraction that is easy to use. With a two-thirds standard, the manufacturer would have latitude to decide, in formulating a product that will qualify to bear a ''high potency'' claim, which nutrients to include at 100 percent of the RDI or DRV. The alternative would be to require that any of the 22 nutrients that can be present at 100 percent of the DRV be present at that level if the supplement is to bear a ''high potency'' claim. FDA is concerned, however, that such a requirement would set too high a standard and not provide appropriate flexibility. Comment is requested on the agency's tentative conclusion.

Based on these factors, the agency is proposing in § 101.54(f)(2) that the term ''high potency'' may be used on the label or in the labeling of a dietary supplement to describe the product (e.g., ''High potency multivitamin, multimineral dietary supplement tablets'') if the product contains 100 percent or more of the RDI or DRV for at least two-thirds of the vitamins, minerals, protein, and dietary fiber present in the product. This proposed requirement will mean that each nutrient (i.e., vitamin, mineral, protein, or dietary fiber) in a dietary supplement containing only one or two nutrients will have to be present at 100 percent or more of the RDI or DRV because two-thirds of one or two nutrients does not result in a whole number that is different from the original number (e.g., 2 times 2/3 equals 1.34; the product 1.34 indicates that more than one nutrient is needed to meet the criterion; therefore both nutrients would have to meet or exceed 100 percent of the RDI or DRV).

The agency recognizes that dietary supplements that consist of an assortment of dietary ingredients are widely available in the marketplace. FDA agrees with the comment that stated that the presence or absence of dietary ingredients for which RDI's or DRV's have not been established (e.g., omega-3 fatty acids, choline, boron) (hereinafter referred to as ''other dietary ingredients'') should not affect the claim so long as those nutrients with RDI's or DRV's are present at levels required for the claim. The presence or absence of other dietary ingredients for which RDI's and DRV's have not been established is immaterial to the claim, and, therefore, the agency finds no basis for proposing alternate requirements for such products. It is important to note that because the definition that FDA is proposing is based on the presence of a nutrient at 100 percent of the RDI or DRV, dietary supplements that do not contain nutrients for which RDI's or DRV's have been established will not be able to use the term ''high potency.''

c. *Disclosure requirement.* One comment stated that the label of a ''high potency'' multivitamin product should disclose the names or number of nutrients that are present at high levels. For example, the comment suggested that the label could carry an asterisk next to the claim, with the following disclosure: ''contains high levels of [number] vitamins.''

The agency rejects this comment. The agency tentatively concludes that such a requirement for the label or labeling of a ''high potency'' multinutrient dietary supplement is not needed to prevent consumers from being misled by the claim. Section 403(s) of the act, added by the DSHEA, states that a dietary

supplement is misbranded if its label or labeling fails to list the quantity of each dietary ingredient present. (See implementing regulations proposed in a companion document published elsewhere in this issue of the Federal Register entitled ''Food Labeling; Statement of Identity, Nutrition Labeling and Ingredient Labeling of Dietary Supplements.'') In accordance with the proposed and current nutrition labeling regulations, information on what, and how many, nutrients are present at 100 percent or more of the RDI or DRV can be readily determined from the nutrition label.

In addition, it would be cumbersome for a product containing 100 percent of the RDI for several nutrients for which RDI's or DRV's have been established to list all of those nutrients on the principal display panel. Many comments to the agency's proposals on the labeling of dietary supplements have addressed the lack of available space to meet current labeling requirements on multinutrient dietary supplement products. Therefore, the agency tentatively concludes that it is unnecessary, and would be impracticable, to require a list on the principal display panel of the number or names of all nutrients present at 100 percent or more of the RDI or DRV.

4. Synonyms

Although the agency asked for specific comment on the term ''high potency,'' several comments in response to the nutrient content claims proposal for dietary supplements used the term ''full potency'' in discussions. FDA requests comment on whether the term ''full potency'' is generally viewed by consumers as a synonym to ''high potency,'' and if there are other terms that appropriately can be defined as synonymous with ''high potency.'' If reasonable synonyms are suggested in the comments, and the comments establish that use of these terms will not be misleading, the agency will consider defining them as synonyms with ''high potency'' in the final rule.

B. Nutrient Content Claims Using the Term ''Antioxidants''

1. Background

One comment to the 1993 nutrient content claims proposal (58 FR 33731) stated that FDA failed to address whether the currently used claim of ''high in antioxidants'' was within the scope of the proposed regulation. The agency stated in the 1994 nutrient content claims final rule that while this claim was not explicitly discussed in the 1993 nutrient content claims proposal. FDA considered it to be a nutrient content claim (59 FR 378 at 389). One problem noted with the claim, however, was that there is no established definition of the term ''antioxidants.''

In an informal survey of dietary supplement products sold in the Washington, DC area, FDA found that the claim ''high in antioxidants'' often refers to a variety of nutrients and other dietary ingredients that are present in widely varying amounts (Ref. 9). This inconsistent use of the claim can lead to consumer confusion. To ensure that consumers are not confused or misled, Congress found in passing the 1990 amendments that it is appropriate for FDA to establish specific definitions to standardize the terms used by manufacturers to describe the nutrient content of foods. Accordingly, in this document, FDA is proposing to define ''antioxidants'' so that it can be used in a clear and consistent manner in conjunction with currently defined nutrient content claims such as ''good source,'' ''high,'' and ''more'' and the proposed ''high potency'' claim. The agency is following up on the commitment that it made in the 1994 nutrient content claims final rule to propose to adopt a definition for the term (59 FR 378 at 389).

The term ''antioxidants'' is unique in comparison to the names of other nutrients associated with nutrient content claims. Unlike previously approved nutrient content claims that characterize the level of a particular nutrient (e.g., ''low sodium''), a term such as ''high in antioxidants'' ties a claim (i.e., ''high'') to a class of nutrients that share a specific characteristic (i.e., they are antioxidants) whose very name indicates a metabolic function. Because of this fact, it is important to make a clear distinction between the term when used as part of a nutrient content claim and possible uses of the term as part of a health claim or a statement of nutritional support.

Nutrient content claims expressly or implicitly characterize the level of a nutrient in a food and are regulated under § 101.13. Health claims are claims that expressly or by implication characterize the relationship of any substance to a disease or health-related condition. They are regulated under § 101.14. Moreover, statements of nutritional support, authorized by section 403(r)(6) of the act, which was added by the DSHEA, encompass label statements on dietary supplements that claim a benefit related to a classical nutrient deficiency disease, describe how a nutrient or dietary ingredient affects the structure or function in humans, characterize the documented mechanism by which a nutrient or dietary ingredient acts to maintain the structure or function, or describe general well-being from consumption of a nutrient or dietary ingredient.

In the case of a claim such as ''high in antioxidants,'' a set of substances is clearly identified (i.e., ''antioxidants'') and a level of nutrients is stated (i.e., ''high''), but there is no disease or health-related condition stated or implied, and the descriptive or characterizing aspects of nutritional support statements are not present. Accordingly, such a term is properly regulated as a nutrient content claim.

2. Express Versus Implied Nutrient Content Claims

In the 1994 nutrient content claims final rule, FDA stated that it considered ''high in antioxidants'' to be an implied nutrient content claim that would come under § 101.65 (59 FR 378 at 389). However, after further consideration, the agency tentatively concludes that when the term ''antioxidants'' appears in association with expressed nutrient content claims (i.e., ''good source,'' ''high,'' ''more,'' and the proposed ''high potency''), the claim is more properly classified as an expressed claim. Therefore, the agency is defining the term ''antioxidants'' in § 101.54 *Nutrient Content Claims for ''Good Source,'' ''High,'' and ''More*.'' This placement is consistent with the manner in which fiber claims (e.g., ''high in fiber'') are regulated. (See § 101.54(d).) Accordingly, the agency is proposing to add paragraph (g) to § 101.54 to address nutrient content claims using the term ''antioxidants.''

3. Definition of ''Antioxidants''

As stated, the agency is proposing to define the term ''antioxidants'' for use with nutrient content claims such as ''good source,'' ''high,'' and ''more'' that are defined in § 101.54, and with the proposed ''high potency.'' This task entails determining which nutrients are to be included within the coverage of the term ''antioxidants.''

In a previous rulemaking, FDA has reviewed the characteristics of three vitamins that function as antioxidants. Section 3(b)(1)(A)(x) of the 1990 amendments directed the agency to address the relationship between antioxidant vitamins and cancer. In its proposed regulations to implement the 1990 amendments, FDA considered the effects of vitamin C, vitamin E, and beta-carotene on cancer (56 FR 60624, November 27, 1991). In that document, FDA summarized the antioxidant properties of those nutrients.

FDA stated that vitamin C serves as an effective free-radical scavenger to protect cells from damage by reactive oxygen molecules (a free-radical being an atom containing an unpaired electron which tends to give the atom more reactivity, often leading to a pro-oxidative chain reaction which can damage cells). The basic biological function of vitamin E was found to be as an antioxidant where it acts as a defense against potentially harmful reactions with oxygen by deactivation of the free-radicals. In the case of beta-carotene, the agency stated that it was chosen because it is an antioxidant, and, although it is not recognized as a vitamin itself, it is a provitamin and makes important contributions to the vitamin A activity of most diets. Beta-carotene acts by trapping, deactivating, and destroying reactive oxygen molecules and preventing the damage that they can cause. FDA did not include vitamin A (retinol) and retinoic acid in its consideration because their biological functions are not achieved through an antioxidant role, and because vitamin A cannot function in a fashion similar to that of beta carotene (carotenoids) and vitamins C and E (Refs. 11 and 12).

In the final rule on antioxidant vitamins and cancer, FDA concluded that this selection of nutrients was appropriate (58 FR 2622, January 6, 1993).

In addition, a recent conference entitled ''Antioxidant Vitamins and Cancer and Cardiovascular Disease,'' initiated by FDA, supported this conclusion and affirmed that the biological role of other vitamins as direct antioxidants remains unsubstantiated (Ref. 13). Riboflavin and niacin, two of the B-vitamins, are precursors of coenzymes that are involved in large numbers of oxidation and reduction reactions. By themselves, however, these vitamins do not have direct antioxidant activities. Moreover, after conversion to their coenzyme forms, they have indirect effects that are both antioxidant and pro-oxidative in character (Refs. 14 and 15). When pro-oxidative conditions (i.e., the opposite of antioxidative) predominate, oxidative damage occurs to cells, lipids, proteins, and carbohydrates (Ref. 16). Thus, FDA tentatively concludes that these nutrients should not be classed as antioxidants.

As stated earlier, the 1990 amendments specifically required that the agency evaluate the relationship of antioxidant vitamins to cancer. Antioxidant minerals were not mentioned in the statute and were not considered by the agency. However, in this rulemaking to define ''antioxidants'' for use in nutrient content claims, FDA is not restricted in the nutrients that are to be encompassed by this term. Based on its informal survey, the agency notes that some dietary supplements, including both single nutrient and multinutrient products, use the term ''antioxidant'' on their label and in labeling to describe minerals such as copper, zinc, manganese, iron, and selenium (Ref. 9). Accordingly, FDA has reviewed the literature on the biological activities of these minerals.

As a result of its review, the agency tentatively concludes that there is no evidence that these substances have direct antioxidant properties, and that, in fact, some of them are pro-oxidative at certain levels. For example, copper, manganese, and zinc activate specific forms of the enzyme superoxide dismutase (SOD) which acts to remove the superoxide radical, and thus these minerals have indirect antioxidant effects (Refs. 17, 18, and 19). However, copper and manganese, in their free forms, are effective catalysts for oxidation reactions (i.e., pro-oxidants). Their role as an indirect antioxidant would be expected to predominate only at intakes at or below the quantities needed to saturate SOD. Higher intakes would be expected to have pro-oxidative effects (Refs. 17 and 18). Zinc does not have direct antioxidant or oxidant effects. It activates one form of SOD and thus has only indirect antioxidant activity (Ref. 19). Iron, another mineral, is an activator of catalase, which destroys peroxides, and thus has indirect antioxidant effects, but, again, iron itself catalyzes oxidative reactions (Ref. 20). Selenium is required for the activity of the enzyme glutathione peroxidase and thus has indirect antioxidant effects (Ref. 21).

The agency's tentative view is that it is appropriate to identify only those nutrients having a clear, direct antioxidant function in defining the coverage of the term ''antioxidants.'' Because none of the minerals discussed above function directly as antioxidants, the agency tentatively concludes that they should not be included in the definition of the term ''antioxidants'' for purposes of making a nutrient content claim. Accordingly, FDA is proposing in § 101.54(g)(1), in part, that ''antioxidants'' be defined as a collective term inclusive of vitamin C, vitamin E, and beta-carotene when used as a part of nutrient content claims (e.g., ''good source of antioxidants,'' ''high in antioxidants'') that describe food products. FDA also provides in the proposed regulation that the food must contain the requisite amounts of each of the three nutrients to qualify to bear the claim (e.g., for ''high in antioxidants,'' the product must contain 20 percent or more of the RDI for vitamin C and vitamin E per reference amount customarily consumed, and 20 percent or more of the RDI for vitamin A must be present as beta-carotene per reference amount customarily consumed).

Because there is a recent history of use of nutrient content claims for ''antioxidants'' on both dietary supplements and conventional foods, the agency is proposing in § 101.54(g)(1) that such claims be allowed on both types of foods. It should be noted, however, that because the agency is proposing in this document that the term ''high potency'' be limited to dietary supplements, the term ''high potency antioxidants'' could be used only on dietary supplements.

FDA notes that some herbs and other dietary ingredients use the term ''antioxidants'' in association with a nutrient content claim (e.g., ''raspberry leaf—high in antioxidants''). The agency advises that the regulations being proposed would not permit such nutrient content claims unless the product contains the nutrients identified in the proposed definition of ''antioxidants.''

4. Beta-carotene

Nutrient content claims are authorized for nutrients for which there are RDI's or DRV's. This approach has the advantage of linking nutrient content claims to established reference values, thereby providing a consistent and quantitative basis for defining terms. As a pro-vitamin, beta-carotene does not have an RDI or DRV. However, FDA stated in the final rule on nutrient content claims for dietary supplements that claims regarding beta-carotene (e.g., ''contains beta-carotene'') are claims that make implied representations about the level of vitamin A that is present in the food as beta-carotene (59 FR 378 at 384). Accordingly, the agency stated that it considers that the claim ''contains beta-carotene'' implies that there is enough beta-carotene in the food for the food to qualify as a ''good source'' of vitamin A (i.e., it contains 10 percent or more of the DV for vitamin A from beta-carotene) (59 FR 378 at 384). Such a claim is provided for in § 101.65(c).

The agency tentatively concludes that this standard should also apply to beta-carotene when it, either by itself or in association with other antioxidants, is the subject of an ''antioxidant'' claim. This standard allows beta-carotene to be tied to vitamin A, a nutrient with an RDI, as an implied claim, thereby

permitting nutrient content claims to be made about this substance. Therefore, proposed § 101.54(g)(1) includes a requirement that vitamin A present as beta-carotene be present at a sufficient level to qualify for the claim (e.g., for ''high in antioxidants,'' 20 percent or more of the DV for vitamin A must be present as beta-carotene; for ''high potency antioxidant,'' 100 percent or more of the DV for vitamin A must be present as beta-carotene).

FDA acknowledges that the antioxidant role of beta-carotene was not taken into account by the NAS in setting the RDA's for vitamin A (Ref. 6). Therefore, there is no reason to believe that the amount of beta-carotene potentially useful as an antioxidant is related to the RDI for vitamin A. However, the agency tentatively concludes that the above approach is a practical means of quantifying the level of beta-carotene that must be present for a food to qualify to bear an antioxidant nutrient content claim.

5. Disclosure Requirement

FDA is aware of the availability of products that do not contain all three of the nutrients included in the proposed definition of ''antioxidants'' (i.e., vitamin C, vitamin E, and beta-carotene) yet that highlight the antioxidant properties of a particular nutrient (e.g., ''Contains antioxidant vitamin E'') on the label or in labeling. FDA tentatively concludes that it is appropriate to allow products to bear such claims because the antioxidant properties of each nutrient are significant enough to highlight. However, the agency finds that when a food makes a claim for ''antioxidants'' yet fails to contain all three nutrients, the disclosure of the specific antioxidant nutrients that are present in the product is necessary to ensure that consumers are not misled into thinking that the product contains all three nutrients. Such a disclosure is necessary to reveal a fact that is material in light of the antioxidant claim (section 201(n) of the act), that is, to disclose which nutrients with antioxidant effects are present in the product at the highlighted level.

Accordingly, the agency is proposing in § 101.54(g)(2) that when a nutrient content claim using the term ''antioxidant'' is included on the label or in labeling of a product that does not contain all three antioxidants at the required levels, the claim may only be used on the label or in labeling when the food contains at least one of the nutrients at the requisite level, and the label or labeling discloses the antioxidants contained in the product in sufficient amounts to qualify for the claim (e.g., ''High in antioxidant vitamins C and E'').

6. Collective Claims

Collective claims such as ''complete antioxidant complex'' and ''antioxidant formula'' seem to convey that the product contains each antioxidant. Because FDA has identified three vitamins with direct antioxidant activity, it is reasonable to expect that a dietary supplement or conventional food making such a collective claim about antioxidants will contain each of these vitamins. Further, such claims imply that each nutrient is present at a level sufficient to make a significant contribution to the total daily diet, or at a minimum, is a ''good source'' of each nutrient.

Therefore, FDA tentatively concludes that collective claims about antioxidants, such as ''complete antioxidant complex'' or ''antioxidant formula'' state that the labeled product contains 10 percent or more of the RDI of vitamin C and vitamin E, and that 10 percent or more of the RDI for vitamin A is present as beta-carotene.

Accordingly, FDA is proposing to add § 101.54(g)(3) to provide for the use, under section 403(r)(2)(A)(i) of the act, of such collective antioxidant terms (e.g., ''complete antioxidant formula,'' ''antioxidant complex'') as nutrient content claims provided that vitamin C and vitamin E are present at 10 percent or more of the RDI per reference amount customarily consumed, and that 10 percent or more of the RDI for vitamin A is present as beta-carotene per reference amount customarily consumed when such a term is used. This definition, if adopted, would not preclude the presence of other nutrients (e.g., selenium and zinc) in the product, nor would this definition preclude manufacturers from making other nutrient content claims that characterize the level of other nutrients that have RDI's or DRV's. Further, manufacturers may also describe the nutritional properties of other ingredients as long as the statements are not false or misleading or do not constitute unauthorized health claims or unapproved drug claims.

C. Limitation of ''High Potency'' and Nutrient Content Claims Using the Term ''Antioxidant'' on Products for Infants and Toddlers

The agency points out that § 101.13(b)(3) states that except for percentage claims regarding vitamins and minerals described in § 101.13(q)(3), no nutrient content claims may be made on food intended specifically for use by infants and children less than 2 years of age unless the claim is specifically provided for in parts 101, 105, or 107 (21 CFR parts 105 and 107).

The agency sees no reason why an exception should be made to extend the use of the terms discussed in this rulemaking to products for infants and toddlers. FDA is not aware of any evidence that the intake of dietary supplements at ''high potency'' levels, or that an increased intake of antioxidants, are appropriate for infants and toddlers. Relatively little attention has been given to the role of the diet of children less than 2 years of age in modifying the risk of chronic diseases, such as hypertension and cancer, found in adults (Refs. 10 and 22). Thus, FDA is not aware of any basis on which to conclude that these claims would be useful to the parents of young children. In fact, such terms would be misleading on foods for infants and toddlers because they imply benefits that have not been demonstrated.

In addition, the definitions of nutrient content claims for both ''high potency'' and for the several possible levels of ''antioxidants'' (e.g., ''good source,'' ''high,'' and ''more'') are dependent upon calculation of the percent of the RDI for the appropriate nutrient present in the product. However, no RDI's are currently established for infants and children less than 2 years of age. The agency has stated that it intends to address the issue of RDI's for infants, children less than 4 years, and pregnant and lactating women in future rulemaking (59 FR 427 at 430, January 4, 1994), and it reiterates that intention in the final rule on RDI's published elsewhere in this issue of the Federal Register. However, until it establishes these levels, there is no basis on which to define these terms for use on foods intended for infants and children less than 2 years of age.

D. Amendment to § 101.60 Concerning Nutrient Content Claims for the Calorie Content of Foods for Dietary Supplements

Section 101.60(c)(1) states that consumers may reasonably be expected to regard terms that represent that the food contains no sugars or sweeteners as an indication that a product is low in calories or is significantly reduced in calories. This section also states that a food cannot be labeled ''sugar free'' or ''no sugar'' unless it meets the following conditions: (1) The food contains less than 0.5 gram (g) of sugars per reference amount and per labeled serving, (2) the food contains no ingredient that is a sugar or that is generally understood by consumers to contain sugars unless the

listing of the ingredient in the ingredient statement is followed by an asterisk that refers to a statement below the list of ingredients such as ''adds a negligible amount of sugar,'' and (3) it is labeled ''low calorie'' or ''reduced calorie'' or bears a relative claim of special dietary usefulness, or is labeled ''not a reduced calorie food,'' ''not a low calorie food,'' or ''not for weight control.''

In the 1994 nutrient content claims final rule, FDA added paragraph § 101.60(a)(4) to state that ''calorie free'' and ''low calorie'' claims may not be made on dietary supplement products, except when an equivalent amount of a dietary supplement that the labeled food resembles and for which it substitutes (e.g., another protein supplement), normally exceeds the definition for ''low calorie'' in § 101.60(b)(2). The agency also similarly revised § 101.13(b)(5). This change in §§ 101.13(b)(5) and 101.60(a)(4) had the unintended effect of limiting the use of ''sugar free'' or ''no sugar'' claims on dietary supplements that would otherwise meet the requirements for ''low calorie'' in § 101.60(b)(2) but are not permitted to bear the claim because they do not substitute for a similar dietary supplement that normally exceeds the definition for ''low calorie.''

In the 1994 nutrient content claims final rule, FDA had found that, because the level of sugars in dietary supplements can vary substantially, claims about the sugars content of dietary supplements may be useful in helping consumers make purchasing decisions that will assist them in maintaining healthy dietary practices (59 FR 378 at 382). Thus, the agency concluded that extending the definitions of ''sugar free'' and ''reduced sugar'' to dietary supplements was appropriate irrespective of the calorie level of the dietary supplement. Therefore, FDA did not modify the requirements governing claims for sugars in § 101.60(c) for dietary supplements. In not making a change to § 101.60(c), however, FDA overlooked the impact of new §§ 101.13(b)(5) and 101.60(a)(4).

In order to allow for ''sugar free'' or ''no sugar'' claims on dietary supplements that meet the other criteria for the claim (i.e., contain less than 0.5 g of sugars per reference amount and contain no ingredient that is a sugar or that is generally understood by consumers to contain sugars unless an appropriate statement is added after the ingredient list), the requirement that the product be labeled ''low calorie'' should have been modified for dietary supplements that were prohibited from making ''low calorie'' claims because no other dietary supplement that the labeled food resembles and for which it substitutes exceeded the definition for ''low calorie.'' FDA is proposing to make that change now. No modification is needed for dietary supplements labeled ''reduced calorie'' since that claim was not changed by the final rules on nutrient content claims for dietary supplements or for those dietary supplements that are not low or reduced in calories.

The agency is not aware of any reason why its position in § 101.60(c)(1) that consumers may be expected to regard ''sugar free'' and ''no sugar'' claims as indicative of a product that is low or reduced in calories should be different for dietary supplements than for conventional foods. Therefore, FDA is proposing to revise § 101.60(c)(1)(iii)(A) to excuse only dietary supplements that otherwise meet the definition of ''low calorie'' under § 101.60(b)(2) but that are prohibited by §§ 101.13(b)(5) and 101.60(a)(4) from bearing the claim.

IV. Effective Date

FDA is proposing an effective date of January 1, 1997. This date is consistent with the effective date proposed in two companion proposals published elsewhere in this issue of the Federal Register entitled ''Food Labeling; Statement of Identity, Nutrition Labeling and Ingredient Labeling of Dietary Supplements'' and ''Food Labeling; Requirements for Nutrient Content Claims, Health Claims, and Statements of Nutritional Support for Dietary Supplements.'' This date will allow firms to make all label changes associated with the DSHEA and with the two companion proposals at the same time.

V. Economic Impact

FDA has examined the economic implications of the proposed rule amending 21 CFR 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 which maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). The Regulatory Flexibility Act requires analyzing options for regulatory relief for small businesses. FDA finds that this proposed rule is not a significant rule as defined by Executive Order 12866. In accordance with the Regulatory Flexibility Act, the agency certifies that the proposed rule will not have a significant impact on a substantial number of small businesses.

Many currently marketed foods and dietary supplements use the terms ''high potency'' and ''high in antioxidants'' to describe the level of nutrients in the products. Without definitions for these terms, manufacturers will not be able to continue to use them. This proposed rule will require that any manufacturer currently using the terms ''high potency'' or ''antioxidant'' bear the costs of removing such statements from their labels only if the products do not meet the proposed definition. FDA does not believe that the number of products that would not meet the proposed definition is high.

VI. Paperwork Reduction Act

FDA tentatively concludes that this proposed rule contains no reporting, recordkeeping, labeling, or other third party disclosure requirements; thus there is no ''information collection'' necessitating clearance by the Office of Management and Budget. However, to ensure the accuracy of this tentative conclusion, FDA is asking for comment on whether this proposed rule to define the term ''high potency'' as a nutrient content claim for dietary supplements, to define the term ''antioxidant'' for use in nutrient content claims for dietary supplements, and to correct an omission pertaining to the use of ''sugar free'' claims on dietary supplements imposes any paperwork burden.

VII. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(11) 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.

VIII. Comments

Interested persons may, on or before March 13, 1996, submit to the Dockets Management Branch (address above) written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

IX. References

The following references have been placed on file in the Dockets Management Branch (address above) and may be seen by interested persons

between 9 a.m. and 4 p.m., Monday through Friday.

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6. Subcommittee on the 10th Edition of the Recommended Dietary Allowances, Food and Nutrition Board, Commission on Life Sciences, National Research Council, ''Recommended Dietary Allowances, 10th ed.,'' Washington, DC, National Academy Press, 1989.

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9. Memorandum from C. E. Brewer, FDA, to file, nutrient content of multinutrient products, March 28, 1994.

10. Committee on Diet and Health, Food and Nutrition Board, Commission on Life Sciences, National Research Council, National Academy of Sciences, ''Diet and Health, Implications for Reducing Chronic Disease Risk,'' National Academy Press, Washington, DC, 1989.

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12. Olson, J. A., ''Vitamin A, Retinoids, and Carotenoids,'' edited by Shils, M. E., J. A. Olson, and M. Shike, *Modern Nutrition in Health and Disease*, pp. 287–307, Lea & Febiger, Philadelphia, 1994.

13. Transcript to Docket 93N–0389 for FDA-initiated public conference on antioxidant vitamins and cancer and cardiovascular disease, November, 1993.

14. McCormick, D. B., ''Riboflavin,'' edited by Shils, M. E., J. A. Olson, and M. Shike, *Modern Nutrition in Health and Disease*, pp. 367–375, Lea & Febiger, Philadelphia, 1994.

15. Swendseid, M. E., and R. A. Jacob, ''Niacin,'' edited by Shils, M. E., J. A. Olson, and M. Shike, *Modern Nutrition in Health and Disease*, pp. 376–382, Lea & Febiger, Philadelphia, 1994.

16. Thomas, J. A. ''Oxidative Stress, Oxidant Defense, and Dietary Constituents,'' edited by Shils, M. E., J. A. Olson, and M. Shike, *Modern Nutrition in Health and Disease*, pp. 501–512, Lea & Febiger, Philadelphia, 1994.

17. Turnland, J. R., ''Copper,'' edited by Shils, M. E., J. A. Olson, and M. Shike, *Modern Nutrition in Health and Disease*, pp. 231–241, Lea & Febiger, Philadelphia, 1994.

18. Nielsen, F. H., ''Ultratrace Elements,'' edited by Shils, M. E., J. A. Olson, and M. Shike, *Modern Nutrition in Health and Disease*, pp. 269–286, Lea & Febiger, Philadelphia, 1994.

19. King, J. C., and C. L. Keen, ''Zinc,'' edited by Shils, M. E., J. A. Olson, and M. Shike, *Modern Nutrition in Health and Disease*, pp. 214–230, Lea & Febiger, Philadelphia, 1994.

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21. Levander, O. A., and R. F. Burk, ''Selenium,'' edited by Shils, M. E., J. A. Olson, and M. Shike, *Modern Nutrition in Health and Disease*, pp. 242–251, Lea & Febiger, Philadelphia, 1994.

22. U.S. Department of Health and Human Services, ''The Surgeon General's Report on Nutrition and Health,'' DHHS (Public Health Service) Publication No. 88–50210 (Government Printing Office Stock No. 017–001–00465–1), U.S. Government Printing Office, Washington, DC, 1988.

List of Subjects in 21 CFR Part 101

Food labeling, Nutrition, 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 part 101 be amended as follows:

PART 101—FOOD LABELING

1. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: Secs. 4, 5, 6 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 301, 402, 403, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 371).

2. Section 101.13 is amended by adding new paragraph (b)(6) to read as follows:

§ 101.13 Nutrient content claims—general principles.

* * * * *

(b) * * *

(6) The term ''high potency'' may only be used on the labels or in the labeling of dietary supplements as defined by section 201(ff) of the Federal Food, Drug, and Cosmetic Act.

* * * * *

3. Section 101.54 is amended by revising the section heading and adding new paragraphs (f) and (g) to read as follows:

§ 101.54 Nutrient content claims for ''good source,'' ''high,'' ''more,'' and ''high potency.''

* * * * *

(f) ''High potency'' claims. (1) The term ''high potency'' may be used on the label or in the labeling of dietary supplements to describe a nutrient that is present at 100 percent or more of the RDI for vitamins and minerals or of the DRV for protein and dietary fiber per reference amount customarily consumed.

(2) The term ''high potency'' may be used on the label or in the labeling of dietary supplements to describe a product that contains 100 percent or more of the RDI, or of the DRV, for at least two-thirds of the vitamins and minerals, and of the protein and dietary fiber, present in the product (e.g., ''High potency multivitamin, multimineral dietary supplement tablets'').

(g) ''Antioxidants'' claims. (1) The term ''antioxidants'' is defined as a collective term inclusive of vitamin C, vitamin E, and the provitamin beta-carotene when used as part of a nutrient content claim (e.g., ''good source of antioxidants,'' ''high in antioxidants'') on labels or in labeling of conventional foods or dietary supplements. The levels of vitamin C and vitamin E and the level of vitamin A present as beta-carotene in the food that bears the claim all must be sufficient to qualify for the claim (i.e., for ''high in antioxidants,'' the product must contain 20 percent or more of the RDI for vitamin C and vitamin E per reference amount customarily consumed and 20 percent or more of the RDI for vitamin A must be present as beta-carotene per reference amount customarily consumed).

(2) The term ''antioxidants'' may only be used on the label or in labeling of a food that does not contain each of the three antioxidants (i.e., vitamin C, vitamin E, and beta-carotene) in sufficient amounts to qualify for the claim if the food contains at least one of these nutrients at the requisite level, and the claim discloses which antioxidants in the food meet the required level (e.g., ''High in antioxidant vitamins C and E'').

(3) A collective claim about antioxidant nutrients (e.g., ''complete antioxidant formula,'' ''antioxidant complex'') may be used on the label or in labeling of foods provided that

vitamin C and vitamin E are present at 10 percent or more of the RDI per reference amount customarily consumed, and that 10 percent or more of the RDI for vitamin A is present as beta-carotene per reference amount customarily consumed.

4. Section 101.60 is amended by revising paragraph (c)(1)(iii)(A) to read as follows:

§ 101.60 Nutrient content claims for the calorie content of foods.

* * * * *

(c) * * *

(1) * * *

(iii)(A) It is labeled ''low calorie'' or ''reduced calorie'' or bears a relative claim of special dietary usefulness labeled in compliance with paragraphs (b)(2), (b)(3), (b)(4), or (b)(5) of this section, or, if a dietary supplement, it meets the definition in paragraph (b)(2) of this section for ''low calorie'' but is prohibited by §§ 101.13(b)(5) and 101.60(a)(4) from bearing the claim; or

* * * * *

Dated: December 18, 1995.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 95–31194 Filed 12–27–95; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 95N–0245]

RIN 0910–AA59

Food Labeling; Statement of Identity, Nutrition Labeling and Ingredient Labeling of Dietary Supplements

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its food labeling regulations to require that dietary supplements be identified with the statement of identity ''Dietary Supplement'' on the principal display panel of the label and modify the nutrition labeling and ingredient labeling requirements for these foods. FDA is proposing these actions in response to the Dietary Supplement Health and Education Act of 1994 (the DSHEA). FDA is also responding to a citizen petition on type size requirements for these products.

DATES: Written comments by March 13, 1996; except that comments regarding information collection should be submitted by January 29, 1996, but not later than February 26, 1996. The agency is proposing that any final rule that may issue based upon this proposal become effective January 1, 1997.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857. Written comments regarding paperwork burden estimates should be sent to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, rm. 10235, Washington, DC 20503, ATTN: Desk Officer for FDA.

FOR FURTHER INFORMATION CONTACT: Susan Thompson, Center for Food Safety and Applied Nutrition (HFS–165), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–5587.

SUPPLEMENTARY INFORMATION:

I. Background

On November 8, 1990, the President signed into law the Nutrition Labeling and Education Act of 1990 (the 1990 amendments) (Pub. L. 101–535). This new law amended the Federal Food, Drug, and Cosmetic Act (the act) in a number of important ways. One of the notable aspects of the 1990 amendments is that they added section 403(q) to the act (21 U.S.C. 343(q)). This section provided that most foods are misbranded unless they bear nutrition labeling.

In particular, section 403(q)(5)(F) of the act (originally section 403(q)(5)(E)) provided that if a food to which section 411 of the act (21 U.S.C. 350) applies (i.e., a dietary supplement of vitamins or minerals) contained any of the nutrients required to be listed in nutrition labeling, ''the label or labeling of such food shall comply with requirements of subparagraphs (1) and (2) [of section 403(q) of the act] in a manner which is appropriate for such food and which is specified in regulations of the Secretary.''

In response to this provision of the 1990 amendments, FDA published a proposal on nutrition labeling in the Federal Register of November 27, 1991 (56 FR 60366 at 60393). The document proposed, among other things, specific nutrition labeling requirements for dietary supplements of vitamins or minerals (proposed § 101.36) and to require that dietary supplements of herbs or other similar nutritional substances comply with the general regulation on nutrition labeling (§ 101.9) (21 CFR 101.9).

On October 6, 1992, the President signed into law the Dietary Supplement Act of 1992 (the DS act) (Pub. L. 102–571). In section 202(a)(1) (21 U.S.C. 343 note), the DS act established a moratorium until December 15, 1993, on the implementation of the 1990 amendments with respect to dietary supplements not in the form of conventional food. Section 202(a)(2) of the DS act required that the Secretary of Health and Human Services (the Secretary), and by delegation FDA, issue new proposed regulations applicable to dietary supplements no later than June 15, 1993, and final regulations by December 31, 1993.

In the Federal Register of January 6, 1993 (58 FR 2079), FDA published a final rule on the nutrition labeling of food in conventional food form (§ 101.9). Because of the DS act, however, this final rule did not cover the nutrition labeling of dietary supplements.

In the Federal Register of June 18, 1993 (58 FR 33715), FDA published a new proposed rule on the nutrition labeling of dietary supplements, as required by the DS act. FDA received over 400 responses to that proposed rule. In the Federal Register of January 4, 1994 (59 FR 354), FDA published a final rule (hereinafter referred to as ''the 1994 dietary supplement final rule'') based on the June 1993 proposed rule. Consistent with section 403(q)(5)(F) of the act, the 1994 dietary supplement final rule included separate nutrition labeling requirements for dietary supplements of vitamins or minerals, which are set out in § 101.36, and for dietary supplements of herbs and other nutritional substances, which the agency said were subject to § 101.9.

In the Federal Register of January 4, 1994 (59 FR 427), the agency proposed to expand the list of nutrients for which there are Reference Daily Intake (RDI) values in § 101.9(c)(8)(iv) to include vitamin K, selenium, chloride, manganese, fluoride, chromium, and molybdenum. The final rule based on that proposed rule is published elsewhere in this issue of the Federal Register.

On October 25, 1994, the DSHEA (Pub. L. 103–417) was signed into law. The DSHEA, among other things, amended the act by adding section 201(ff) (21 U.S.C. 321(ff)), which defines a ''dietary supplement,'' in part, as a product, other than tobacco, intended to supplement the diet that contains at least one or more of the following ingredients: A vitamin; a mineral; an herb or other botanical; an amino acid; a dietary substance for use to supplement the diet by increasing the total dietary intake; or a concentrate, metabolite, constituent, extract, or

combination of any of the previously mentioned ingredients (section 201(ff)(1) of the act). These ingredients are referred to in the provisions added to the act by the DSHEA, and in this document, as ''dietary ingredients.''

Additionally, the DSHEA amended section 403(q)(5)(F) of the act. While this section continues to provide that dietary supplement products shall comply with section 403 (q)(1) and (q)(2) of the act and provide nutrition labeling, it has been changed in a number of significant ways. First, it no longer distinguishes between supplements of vitamins and minerals and other dietary supplements. Second, it now contains specific provisions on: (1) The order in which dietary ingredients are to be listed in the nutrition information, (2) the listing of the quantity of each dietary ingredient, (3) the optional listing of the source of a dietary ingredient within the nutrition label, and (4) the listing of the other ingredients of the dietary supplement.

Given these changes in the law that requires that dietary supplements be nutrition labeled, changes in the regulations that FDA adopted to implement the 1990 amendments for dietary supplements are also necessary. In this document, the agency is proposing changes in its regulations that are necessary to reflect the changes that were enacted as part of the DSHEA. FDA's regulations were scheduled to go into effect on July 1, 1995. Given the need for these revisions, however, the agency has published notice of its intention not to enforce the regulations until after it has conformed its labeling regulations to the DSHEA, and industry has had an opportunity to relabel their products; that is, until after December 31, 1996 (60 FR 7711, February 9, 1995).

In this preamble, the agency will explain the proposed revisions to § 101.36 (21 CFR 101.36) and state which provisions of that regulation it is not proposing to change. The latter provisions will be discussed only to the extent necessary to understand how the revised provisions fit in the overall scheme on the nutrition labeling of dietary supplements. The agency seeks comments on the proposed changes to implement the DSHEA with respect to nutrition labeling. Although the codified section will be reproduced in its entirety, the agency urges those who comment to focus on the provisions in which changes are being proposed. Cooperation in this respect will hasten the publication of the final rule and thus maximize the time that industry will have to plan changes in its labeling.

II. The Term ''Dietary Supplement'' in the Statement of Identity

The DSHEA definition of ''dietary supplement'' provides, in part (section 201(ff)(2)(C) of the act), that such a product must be labeled as a dietary supplement. In addition, the DSHEA amended section 403 of the act by adding a new paragraph (s)(2)(B), which states that a food shall be deemed to be misbranded if it is a dietary supplement, and the label or labeling of the dietary supplement fails to identify the product by using the term ''dietary supplement,'' which term may be modified with the name of such an ingredient.

Thus, the label of a dietary supplement clearly must bear the term ''dietary supplement.'' However, no provision of the DSHEA explicitly addresses where on the food label identification with this term must appear. The Statement of Agreement on the bill that ultimately became the DSHEA states clearly that there is no legislative history for the DSHEA other than that agreement, and the agreement is silent with respect to where this term must appear (140 Congressional Record S14801 (October 7, 1994)).

It is a general rule of statutory construction that the act must be read as a whole. Thus, section 403(s)(2)(B) of the act, which states that the term must ''identify the product,'' must be read in conjunction with the other provisions of the act that address how food products are to be identified. These provisions, which have been in effect for many years, are section 403 (g)(2) and (i)(1) of the act. Section 403(g)(2) of the act, which pertains to a food for which a definition and standard of identity have been prescribed by regulation, provides that the food label must bear the name of the food specified in the definition and standard. Section 403(i)(1) of the act, which pertains to all other foods, provides that the food label must bear the common or usual name of the food, if any exists. Dietary supplements are labeled subject to the provisions of section 403(i)(1) of the act.

FDA has implemented section 403(g)(2) and (i)(1) of the act by adopting § 101.3 (21 CFR 101.3) on the identity of food in packaged form. This regulation states that the principal display panel of a food shall bear as one of its principal features a statement of the identity of the commodity (§ 101.3(a)). The regulation goes on in § 101.3(b) to state that the statement of identity shall be in terms of: (1) The name specified in or required by any applicable Federal law or regulation; or, in the absence thereof, (2) the common or usual name of the food; or, in the absence thereof, (3) an appropriately descriptive term, or when the nature of the food is obvious, a fanciful name commonly used by the public for such food.

When the requirement of section 403(s)(2)(B) of the act that the food be identified as a ''dietary supplement'' is read in conjunction with section 403(i)(1), which requires that the label of the food bear its common or usual name, that is, a statement that identifies the food (see § 102.5(a) (21 CFR 102.5(a))), it is clear that the term ''dietary supplement'' needs to appear as part of the common or usual name of any food that is to be marketed subject to the definition in section 201(ff) of the act. While under section 403(s)(2)(B) of this act this term may be modified with the name of a dietary ingredient, FDA tentatively concludes that the term ''dietary supplement'' must appear in the statement of identity of such products. To reflect this tentative conclusion, FDA is proposing to require in § 101.3(g) that when a food is marketed as a dietary supplement, its label shall bear the term ''dietary supplement'' as part of its statement of identity.

This proposed requirement is further supported by § 102.5 of FDA's regulations. This regulation sets out general principles for arriving at the common or usual name of a nonstandardized product, that is, a product that is not subject to a definition adopted under section 401 of the act (21 U.S.C. 341). Section 102.5(a) states in part:

> The common or usual name of a food, which may be a coined term, shall accurately identify or describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients. The name shall be uniform among all identical or similar products and may not be confusingly similar to the name of any other food that is not reasonably encompassed within the same name. Each class or subclass of food shall be given its own common or usual name that states, in clear terms, what it is in a way that distinguishes it from different foods.

Requiring that ''dietary supplement'' be included as part of the statement of identity of such foods is consistent with § 102.5 in several important respects. First, it will ensure that a term that accurately describes the basic nature of the food will appear prominently on the label of each dietary supplement. Second, it will ensure that there is consistency in the labeling of dietary supplements by requiring that they bear a consistent term. The agency stresses that the provisions of § 102.5 pertaining to uniformity of common or usual

names among all identical or similar products could be seriously compromised unless the term ''dietary supplement'' is included in the common or usual name of such a supplement. As explained below, the potential for compromising this requirement would be particularly great where dietary supplements are in other than tablet, capsule, powder, softgel, gelcap, or liquid form. Finally, use of this term as part of the statement of identity of dietary supplements will distinguish this potentially broad class of products from other types of food.

New section 201(ff)(2) of the act provides that a ''dietary supplement'' is a product that is not represented for use as a conventional food. At the same time, the DSHEA struck the provision that excluded products that simulate conventional foods from the coverage of section 411 of the act. (See section 3(c)(2) of the DSHEA.) As a result of the latter change, however, there may now be dietary supplements for which the presence of the term ''dietary supplement'' constitutes the primary, if not the only, means by which consumers will be able to determine that the food is a dietary supplement. Under such circumstances, it seems imperative that the term ''dietary supplement'' appear in the statement of identity.

For the foregoing reasons, FDA is proposing to add § 101.3(g), which states that products marketed as dietary supplements shall bear the term ''dietary supplement'' as part of their statement of identity, to its regulations.

III. Provisions of Proposed § 101.36

A. Foods Covered by § 101.36

The agency is proposing to revise § 101.36(a) to state that the label of a dietary supplement shall bear nutrition labeling in accordance with § 101.36, unless an exemption is provided for the product in § 101.36(h). Previously, only dietary supplements of vitamins and minerals were subject to the provisions of § 101.36. As stated above, dietary supplements of herbs and other similar nutritional substances were to follow the general nutrition labeling requirements in § 101.9. This separation was in accordance with section 403(q)(5)(F) of the act as passed in the 1990 amendments, which instructed the Secretary to issue nutrition labeling regulations appropriate for dietary supplements of vitamins and minerals.

However, the DSHEA revised 403(q)(5)(F) of the act to provide that it covers all dietary supplements, that is, all products that meet the definition in section 201(ff) of the act. Consequently, the agency is proposing to amend § 101.36(a) to reflect this change.

B. General Requirements

In § 101.36(b), the agency is proposing to require that nutrition information on dietary supplements include the information specified in this section of the regulations, and that it be presented in the format specified in proposed § 101.36(e). These proposed requirements reflect the requirements in section 403(q)(1) of the act and in section 2(b)(1)(A) of the 1990 amendments, which states that the information required under section 403(q) is to ''be conveyed to the public in a manner which enables the public to readily observe and comprehend such information and to understand its relative significance in the context of the total daily diet.''

The agency notes that it has been asked whether current § 101.36(b) is to be interpreted as requiring nutrition labeling in all dietary supplement labeling (i.e., printed material accompanying a product) as well as on the label attached to a product. The agency advises that it does not intend that nutrition labeling appear on all labeling. It generally must appear on the label of dietary supplement products, although there may be circumstances in which it appears in labeling in lieu of the label. When nutrition labeling is presented, however, it must conform to the requirements of § 101.36.

C. Serving Size

Proposed § 101.36 (b)(1)(i) and (b)(1)(ii) on serving size and on servings per container, respectively, differ only slightly from current § 101.36 (b)(1) and (b)(2). In the first sentence of proposed § 101.36(b)(1)(i), the agency is stating that the subheading ''Serving Size'' is to be placed under the heading of ''Supplement Facts.'' The agency is proposing to include the name of the heading (i.e., ''Supplement Facts'') in § 101.36(b)(1)(i) for clarity.

On a related note, the agency points out that it is proposing to change the language in § 101.12(b), Table 2, to read ''Dietary supplements'' instead of ''Dietary supplements not in conventional food form'' in response to the DSHEA. The language in current § 101.12(b) reflected the DS act, which, in its legislative history, made clear that the moratorium it effected applied only to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances not in the form of conventional food. (See 138 Congressional Record S17240 (Joint Statement Senators Kennedy and Hatch) (October 7, 1992).) The DSHEA, however, evidences an intent, for labeling purposes, to treat all dietary supplements in a similar manner. In particular, section 7 of the DSHEA addresses dietary supplement labeling and does not distinguish between dietary supplements that are not in conventional food form and those that are. Therefore, FDA is proposing to amend § 101.12(b), Table 2, to reflect this development.

D. Requirements for Dietary Ingredients Having Recommendations for Daily Consumption

The DSHEA added four subclauses to section 403(q)(5)(F) of the act. Subclause (i) states that the Secretary (and, by delegation, FDA) shall provide by regulation that the nutrition information on dietary supplements first list those dietary ingredients that are present in the product in a significant amount and for which a recommendation for daily consumption has been established by the Secretary, except that a dietary ingredient shall not be required to be listed if it is not present in a significant amount, and shall list any other dietary ingredient present and identified as having no such recommendation. The agency tentatively concludes that by a dietary ingredient ''for which a recommendation for daily consumption has been established by the Secretary,'' the DSHEA is referring to a nutrient having an RDI as established in § 101.9 (c)(7)(iii) and (c)(8)(iv) or a Daily Reference Value (DRV) as established in § 101.9 (c)(7)(iii) and (c)(9).

The requirement in section 403(q)(5)(F)(i) of the act that the dietary ingredients for which there are no RDI's or DRV's be listed in the nutrition label following the listing of dietary ingredients for which RDI's or DRV's have been established necessitates changes in the organization of § 101.36. The agency is therefore consolidating all of the information required in the listing of dietary ingredients for which RDI's or DRV's have been established under proposed § 101.36(b)(2) and the information required in the listing of other dietary ingredients in proposed § 101.36(b)(3). (See section III. E. of this document.)

1. Listing of Dietary Ingredients for Which RDI's and DRV's Have Been Established

With respect to the listing of dietary ingredients for which RDI's and DRV's have been established, the agency tentatively concludes that no major change in the 1994 dietary supplement final rule is needed as a result of the DSHEA. The agency is proposing in § 101.36(b)(2)(i) that the 14 nutrients

that, under § 101.9(c), must be listed in the nutrition labeling of a conventional food, when they are present, shall be listed in the nutrition label of a dietary supplement when they are present in the supplement in amounts greater than that that can be declared as zero under § 101.9(c). For clarity, the agency is identifying these nutrients by name in this proposed paragraph. This requirement is consistent with current § 101.36(b)(3), except that the current provision calls for ''a listing of all nutrients required in § 101.9(c),'' rather than specifying the name of each nutrient.

However, current § 101.36(b)(3) is silent on the subcomponents (e.g., polyunsaturated fat, soluble fiber, sugar alcohols) specified in § 101.9(c) that provide additional information about some of the nutrients required to be listed in the nutrition labeling of conventional foods. The listing of most subcomponents is voluntary under § 101.9(c). Generally, it is required only when claims are made. For example, the listing of soluble fiber is voluntary for conventional foods, except when a nutrient content claim is made about this nutrient. The agency did not require a listing of subcomponents in the 1994 dietary supplement final rule because it concluded that such labeling was not appropriate for such foods under section 403(q)(5)(F) of the act because that section applied only to dietary supplements of vitamins and minerals. Therefore, a fiber supplement, for example, did not come under the scope of supplement labeling.

Now, however, all dietary supplements, including products such as fiber supplements, are to be covered by the same nutrition labeling regulation (i.e., § 101.36). Therefore, the agency has tentatively concluded that it is appropriate to provide for the listing of the subcomponents specified in § 101.9(c). Accordingly, the agency is providing in proposed § 101.36(b)(2)(i) that calories from saturated fat and amounts of polyunsaturated fat, monounsaturated fat, soluble fiber, insoluble fiber, sugar alcohol, and other carbohydrate may be declared in the nutrition label of dietary supplements and is proposing to require that they be declared when a claim is made about them.

There are other subcomponents of the nutrients that are required under § 101.9(c) to be listed in nutrition labeling that are not mentioned in that regulation (e.g., amino acids (subcomponents of protein), omega-3 fatty acids (subcomponents of fat)), and that may not be included in the nutrition label on conventional foods (see § 101.9(c)). However, because these subcomponents may be classified as dietary ingredients under section 201(ff)(1) of the act, manufacturers of dietary supplements may list them in the nutrition label under § 101.36. The difference in treatment of these subcomponents when they are present in dietary supplements as compared to when they are present in conventional foods creates the possibility of consumer confusion. To minimize this possibility, FDA is trying to retain as much consistency as possible between the nutrition labeling of conventional foods under § 101.9 and dietary supplements under § 101.36 (section 2(b)(1)(A) of the 1990 amendments). Thus, the agency is proposing that subcomponents that are not specified in § 101.9(c), e.g., individual amino acids, be listed under proposed § 101.36(b)(3) as dietary ingredients for which RDI's and DRV's have not been established.[1]

Among the 14 nutrients required to be listed in nutrition labeling of conventional foods are sodium, vitamin A, vitamin C, calcium, and iron. The other vitamins and minerals for which RDI's have been established in § 101.9(c)(8)(iv) are not required to be listed in the nutrition label of conventional foods except when they are added for the purpose of supplementation, or when a claim is made about them. (See § 101.9(c)(8)(ii).) The agency did not include this distinction among vitamins and minerals in the 1994 dietary supplement final rule because that rule pertained exclusively to supplements of vitamins and minerals. Because dietary supplements of vitamins and minerals are usually fabricated and, with few exceptions, contain only vitamins and minerals that are added for purposes of supplementation, the agency requires in current § 101.36(b)(3) that vitamins and minerals be listed whenever they are present in significant amounts.

Although the act, as amended by the DSHEA, requires that all dietary ingredients and their amounts be listed, the agency tentatively finds that requiring the listing of all vitamins and minerals with RDI's or DRV's that are present in herbal products, for example, would be unduly burdensome and in conflict with section 403(q)(1)(E) of the act, which requires the listing of vitamins and minerals only if the Secretary (and, by delegation, FDA) determines that such information will assist consumers in maintaining healthy dietary practices. In implementing the 1990 amendments, the agency made such a finding only for sodium, vitamin A, vitamin C, calcium, and iron (58 FR 2079 at 2106). Requiring all dietary ingredients in herbal products to be listed would necessitate extensive nutritional analyses of the vitamin and mineral content of all such products. While manufacturers are free to do so, FDA tentatively finds that it is unnecessary and inappropriate to require that such analyses be done. Thus, FDA tentatively concludes that, because the act must be read as a whole, and because section 403(q)(5)(F)(i) of the act must be read in conjunction with section 403(q)(1)(E) (in fact, it explicitly references that section), it is appropriate for the agency to follow the approach that it used in § 101.9 for conventional foods and to require the listings of vitamins and minerals (including potassium) other than sodium, vitamin A, vitamin C, calcium, and iron in the nutrition label of dietary supplements only when such other vitamins and minerals are added to the product for purposes of supplementation, or when a claim is made about them. Comments are requested on this tentative conclusion.

The agency observes that it did not clearly express in the 1994 dietary supplement final rule the amounts of vitamins and minerals that are not to be declared on the labels of dietary supplements because they are so small. Current § 101.36(b)(3) requires a listing of ''nutrients required in § 101.9(c) that are present in the dietary supplement in quantitative amounts by weight that exceed the amount that can be declared as zero in § 101.9(c),'' while § 101.9(c)(8)(iii) states that amounts of vitamins and minerals present at less than 2 percent of the RDI are not required to be declared in nutrition labeling but may be declared by a zero. For clarity on what amounts do not have to be declared, the agency is proposing to include a statement in § 101.36(b)(2)(i) that amounts of vitamins and minerals corresponding to less than 2 percent of the RDI shall not be declared. The agency points out that this statement does not represent a change from the 1994 dietary supplement final rule but is merely a clarification of its provisions.

The agency notes that current § 101.36(b)(3) specifies that vitamin K, chloride, chromium, fluoride, manganese, molybdenum, and selenium shall be listed, when present. Because the agency has established RDI's for these nutrients (except for fluoride) (see the final rule on RDI's published

[1] To save space and to help the reader differentiate between these two types of dietary ingredients, the agency will refer to the dietary ingredients listed in proposed § 101.36(b)(2) as ''(b)(2)-dietary ingredients'' and to all other dietary ingredients as ''other dietary ingredients.''

elsewhere in this issue of the Federal Register), their listing is covered by the reference to all other vitamins or minerals listed in § 101.9(c)(8)(iv) in proposed § 101.36(b)(2). Accordingly, special mention of vitamin K, chloride, chromium, manganese, molybdenum, and selenium is no longer needed. Because FDA has not established an RDI for fluoride, if it is declared in nutrition labeling, under the proposed rule, it will have to be listed with the other dietary ingredients, as provided for in proposed § 101.36(b)(3).

FDA is also providing in proposed § 101.36(b)(2)(i) that protein not be declared in the nutrition label of dietary supplements that, other than ingredients added solely for technological reasons, contain only individual amino acids. While § 101.9(c)(7) allows protein content to be calculated as 6.25 times the nitrogen content of the food, the agency tentatively finds that it is misleading to declare the protein content in the nutrition label of a dietary supplement that contains free (individual) amino acids because protein, by definition, is composed of chains of amino acids connected together by peptide bonds. Such linkages are not found in products composed of free amino acids (Ref. 1, pp. 57 and 58).

The agency is proposing to require in § 101.36(b)(2)(i)(A) use of the heading ''Amount Per Serving,'' except that the agency is proposing to allow other appropriate headings when the serving size of the product is one unit. This aspect of the proposal is unchanged from what appeared in the 1994 dietary supplement final rule. The agency tentatively concludes that the proposed requirement is consistent with section 403(q)(1)(A) of the act, which provides that nutrition information is to be expressed on a ''per serving'' basis.

The agency notes that because it is proposing that quantitative amounts be presented in a separate column, rather than immediately following the listing of names as provided in the 1994 dietary supplement final rule, the agency is proposing that the heading may appear over the column of amounts rather than the column of names. The agency is proposing to provide flexibility in the placement of this heading because space constraints may make placement over the column of amounts impractical in some cases. Comments are requested on the placement of this heading.

The agency points out that, under current § 101.36(b)(3), the heading ''Amount Per Serving'' must be separated from the other information on the nutrition label by a bar above and beneath it. While the agency is proposing to carry forward this requirement, it is doing so in proposed § 101.36(e) on format. FDA will discuss this proposed requirement in more detail as part of its description of that paragraph.

The agency is proposing in § 101.36(b)(2)(i)(B) that (b)(2)-dietary ingredients be listed in a column on the left side of the nutrition label in the order and manner of indentation that is specified in that paragraph. No change in the order from current § 101.36(b)(3)(ii) is required as a result of the DSHEA, and FDA is not proposing to make any change.

The agency is addressing issues related to the column of names of (b)(2)-dietary ingredients in three paragraphs under proposed § 101.36(b)(2)(i)(B). Proposed § 101.36(b)(2)(i)(B)(*1*) specifies how calorie information is to be presented. The agency is proposing that, instead of listing calories above the column of names, they be listed first in the column of names, under a bar that separates the list from the heading ''Amount Per Serving.'' The agency tentatively concludes that giving calories prominence over other nutrients is not appropriate for supplements, which usually do not contain many calories. In addition, this change will save space. Proposed § 101.36(b)(2)(i)(B)(*1*) also requires that when ''Calories from fat'' or ''Calories from saturated fat'' are declared, they are to be indented beneath ''Calories'' in a manner similar to the indentation specified in § 101.9(d)(5).

Proposed § 101.36(b)(2)(i)(B)(*2*) specifies the synonyms that may be added in parentheses following the names of the (b)(2)-dietary ingredients. This paragraph is identical to the current regulation on synonyms in dietary supplement labeling (current § 101.36(b)(3)(v)), except that the agency is proposing to permit the use of ''folic acid'' as a synonym for folate. FDA recognizes that current regulations for nutrition labeling in §§ 101.9 and 101.36 do not include the term ''folic acid'' as an allowable synonym for folate. This omission was an oversight when FDA amended § 101.9 (58 FR 2079 at 2178) and issued § 101.36 (59 FR 373). Before the agency took these actions, § 101.9 had listed ''folic acid'' as the preferred term, with ''folacin'' as an allowable parenthetical synonym. When amendments to § 101.9 were initially proposed (55 FR 29847, July 19, 1990), the agency explained why the term ''folate'' was preferred to ''folacin.'' However, an explanation for the transition from ''folic acid'' to ''folate'' was inadvertently omitted, as was inclusion of the term ''folic acid'' as a synonym.

In light of common usage and FDA policy, and for consistency among the nutrition labeling and health claim regulations, the agency is proposing to correct § 101.36(b)(3)(v) to include ''folic acid'' as an allowable synonym for folate. The agency advises that it intends to revise § 101.9(c)(8)(v) to allow the listing of folic acid as a synonym for folate on conventional foods as well.

In proposed § 101.36(b)(2)(i)(B)(*3*), the agency provides that the percent of vitamin A that is present as beta-carotene may be declared immediately adjacent to or beneath the listing of vitamin A. This proposed provision essentially carries forward current § 101.36(b)(3)(iv). The agency tentatively finds that no change is needed in this provision as a result of the DSHEA, except that the agency is deleting the amount of vitamin A from the example given in this provision because, under this proposal, information on the quantity of each dietary ingredient will no longer appear immediately following the name but instead in a separate column.

2. Quantity of Each (b)(2)-Dietary Ingredient

The DSHEA added section 403(q)(5)(F)(ii) to the act. This section states that the listing of dietary ingredients shall include the quantity of each such ingredient (described in section 413(q)(5)(F)(i)), per serving, except that only the total quantity is required for proprietary blends, as discussed elsewhere in this preamble. Consistent with this section, the agency is proposing to require in § 101.36(b)(2)(ii) that the number of calories, if declared, and the quantitative amounts by weight of the (b)(2)-dietary ingredients be listed in a column to the right of the column of names. As previously discussed, this proposal differs from the 1994 dietary supplement final rule in that this information is to be listed in a separate column instead of immediately following the name of any dietary ingredient listed. The agency is proposing this change to allow space for information on the source of the dietary ingredient to be included immediately following the name, as discussed elsewhere in this document. The agency considered continuing to have the weight of the dietary ingredient placed immediately after the name of the dietary ingredient or its source but tentatively concluded that the wide variation in placement that could result when some dietary ingredients are listed

by name only, while others include the source ingredient, would make it difficult for some consumers to find the declaration of weight. Comments on this tentative conclusion, and on its possible impact on space requirements for the nutrition label, are requested.

The agency emphasizes that, consistent with the 1994 dietary supplement final rule (59 FR 354 at 360) and the DSHEA, the quantitative amount by weight declared for any dietary ingredient is to be the weight of the dietary ingredient rather than the weight of the source of the dietary ingredient.[2] The agency points out that new section 403(s)(2)(A) of the act states that a dietary supplement is misbranded if its label or labeling fails to list, among other things, the ''name of each ingredient of the supplement that is described in section 201(ff)'' and the quantity of each such ingredient. The use of the word ''ingredient'' in section 403(s)(2)(A) of the act, instead of ''dietary ingredient,'' creates some ambiguity. However, the agency tentatively concludes that in this section the phrase ''that is described in section 201(ff)'' modifies the word ''ingredient'' rather than ''supplement.'' Thus, this provision is referring to a listing of the names and amounts of dietary ingredients. Accordingly, using the example of calcium carbonate, the weight of calcium would be declared, rather than the weight of calcium carbonate, the source of the dietary ingredient.

Section 403(s)(2)(A)(ii) of the act is also unclear on what basis the quantitative information should be reported (e.g., per dosage unit). The agency tentatively concludes that it is appropriate to require that this quantitative information be provided on a ''per serving'' basis because interpreting this provision in this way will mean that there need only be one list of the quantitative amounts of dietary ingredients in a supplement. Section 403(q)(5)(F) of the act also requires a list of dietary ingredients, but it specifies that the listing be on a ''per serving'' basis. If FDA were to interpret section 403(s)(2)(A)(ii) of the act differently, for example, to require information on a per dosage unit basis, it would mean that for dietary supplements whose serving size is two capsules, there would have to be two lists of dietary ingredient amounts on the label, one per capsule, the other per serving (two capsules). The agency tentatively concludes that such an interpretation would result in overcrowded labels with essentially redundant information. The agency recognizes, however, that the interpretation that it is proposing renders section 403(s)(2)(A) of the act somewhat redundant to section 403(q)(5)(F), and that the rules of statutory construction generally do not favor such a reading. Therefore, FDA specifically requests comments on the proposed interpretation.

In proposed § 101.36(b)(2)(ii)(A), the agency states that the declaration of quantitative amounts by weight shall be expressed using the increments specified in § 101.9(c)(1) through (c)(7), which includes increments for sodium and potassium. This proposed provision is carried forward from current § 101.36(b)(3)(i). As explained in the proposal of June 18, 1993 (58 FR 33715 at 33719), the agency was not aware of any reason for treating dietary supplements of vitamins and minerals any differently in this regard than conventional food. The agency is still unaware of any reason to modify this approach.

In proposed § 101.36(b)(2)(ii)(B), the agency states that the amounts of vitamins and minerals, excluding sodium and potassium, shall be the actual amounts present, using the units of measurement given in § 101.9(c)(8)(iv). The agency points out that in a final rule published elsewhere in this issue of the Federal Register entitled ''Food Labeling; Reference Daily Intakes,'' it is amending § 101.9 to change the units for biotin and folate to micrograms (mcg) and for calcium and phosphorus to milligrams (mg). The proposed specifications pertaining to the manner in which quantitative amounts by weight are to be declared simply carry forward those found in current § 101.36(b)(3)(i).

3. Declaration of Percent Daily Value for Each (b)(2)-Dietary Ingredient

In proposed § 101.36(b)(2)(iii), the agency is requiring that a percent Daily Value, where appropriate, be listed for the dietary ingredients declared under § 101.36(b)(2)(i), except that: (1) The percent for protein may be omitted as provided in § 101.9(c)(7) because the methods for analyzing protein are costly, and protein deficiency is not a public health concern in the United States; (2) no percent shall be given for the subcomponents for which DRV's have not been established (e.g., sugars) because it is not possible to calculate percent Daily Values when there are no DRV's; and (3) for the labels of dietary supplements that are represented or purported to be for use by infants, children less than 4 years of age, or pregnant or lactating women, no percent shall be given for total fat, saturated fat, cholesterol, total carbohydrate, dietary fiber, sodium, potassium, vitamin K, chloride, chromium, manganese, molybdenum, or selenium because RDI's or DRV's have not been established for these groups.

The agency points out that the exception for protein is carried forward from current § 101.36. The listing of no percent Daily Value for subcomponents is new in this proposal, but it is consistent with current § 101.36(b)(4) which states that ''no percent shall be given for sugars.'' As discussed previously, the agency did not address the listing of other subcomponents specified in § 101.9(c) because § 101.36 had applied only to dietary supplements of vitamins and minerals. Thus, the exception for these subcomponents was not needed because they were not declared.

The exception for total fat, saturated fat, cholesterol, total carbohydrate, dietary fiber, sodium, and potassium on the labels of dietary supplements for use by infants, children less than 4 years of age, or pregnant or lactating women is new in this proposal and was omitted inadvertently in current § 101.36. Because DRV's are not established for these groups, percents of Daily Values cannot be calculated. Hence, the exception is needed.

Finally, the exception for vitamin K, chloride, chromium, manganese, molybdenum, and selenium for the population subgroups specified above is carried forward from current § 101.36. The agency points out that, in current § 101.36(b)(4), this exception had covered products intended for adults and children 4 or more years of age. Because the agency is adopting RDI's for these nutrients for adults and children 4 or more years of age in the final rule on RDI's published elsewhere in this issue of the Federal Register, this exception is no longer needed for products for that group.

The agency acknowledges that there are no RDI values codified for infants, children less than 4 years of age, or pregnant or lactating women for any of the vitamins and minerals. However, as explained in the 1994 dietary

[2] It is important to distinguish between the terms ''ingredient'' and ''dietary ingredient.'' The DSHEA uses the term ''dietary ingredient'' to refer to the primary substances to be listed in nutrition labeling, as opposed to ''ingredients'' that are the compounds used in the manufacture of the product. For instance, when calcium carbonate is an ingredient used to provide calcium in the manufacture of a dietary supplement, calcium is the ''dietary ingredient,'' and calcium carbonate is the ''ingredient,'' or, as specified in new section 403(q)(5)(F)(iii) of the act, the ''source of'' the dietary ingredient. Similarly, omega-3 fatty acids are ''dietary ingredients,'' while their source, fish liver oil, is the ''ingredient.'' (See section III., G. of this document for a further discussion.)

supplement final rule (58 FR 33721), FDA had intended to codify RDI values for these groups but did not in accordance with section 203 of the DS act, which provided that the agency could not adopt recommended daily values different from the values set forth in the agency regulation then in effect (§ 101.9(c)(7)(1992)) before November 8, 1993. To provide guidance to manufacturers in lieu of codifying values, the agency published label reference values for these groups in the preamble of the final rule on RDI's and DRV's on January 6, 1993 (58 FR 2206 at 2213). The agency encourages manufacturers to use these values for the labels of products intended for use by these groups. FDA intends to propose to codify RDI values for these groups in the near future for both the nutrients listed on the bottom of page 2213 of the final rule on RDI's and DRV's (58 FR 2206 at 2213) and the nutrients for which FDA is establishing RDI's for adults and children 4 or more years of age in the final rule published elsewhere in this issue of the Federal Register.

In proposed § 101.36(b)(2)(iii)(A), the agency is requiring that, when information on the percent of Daily Values is listed, the percentages be presented in a column on the right side of the nutrition label under the heading ''% Daily Value.'' This requirement is not different from what appears in current § 101.36(b)(4), except that the heading need not appear on a line lower than the heading ''Amount Per Serving.'' Current § 101.36(b)(4) provides for ''% Daily Value'' to appear below ''Amount Per Serving'' when calorie information is presented. Under this proposal, calorie information will go in the column of dietary ingredients. Therefore, FDA is proposing that ''Amount Per Serving'' and ''% Daily Value'' appear on the same line.

In proposed § 101.36(b)(2)(iii)(B), the agency set forth how the percent Daily Value is to be calculated. Although the agency is making no change in this calculation, it is rewording current § 101.36(b)(4)(i) to clarify that the actual amount is to be used in the calculation for vitamins and minerals (except for sodium and potassium), and that either the actual amount or the rounded amount may be used for other nutrients, e.g., fat. Under the proposed regulation, sodium and potassium are treated in the same manner as the other nutrients for which DRV's are established because § 101.9(c) provides for the declaration of their weight in rounded increments.

The agency is also rewording current § 101.36(b)(4)(ii), which it is carrying forward as proposed § 101.36(b)(2)(iii)(C), to make clear when ''Less than 1%'' (or ''<1%'') is to be used. Under proposed § 101.36(b)(2)(iii)(C), it is to be used to describe the percent Daily Value of a dietary ingredient when the dietary ingredient is present in an amount by weight that requires declaration (i.e., exceeds the amount that can be declared as zero), yet the amount is so small that the percent Daily Value when rounded to the nearest percent comes to ''0%.'' In place of ''0%,'' which might be confusing to consumers when a quantitative amount by weight is listed, ''Less than 1%'' is to be listed as the percent Daily Value for these substances. For example, for 1 gram (g) of total carbohydrate, the manufacturer could list ''Less than 1%'' as the percent of Daily Value.

As previously discussed, vitamins and minerals at less than 2 percent of the RDI shall not be declared, except that sodium and potassium can be listed at values less than 2 percent, consistent with § 101.9(c)(4) and (c)(5), respectively. Thus, proposed § 101.36(b)(2)(iii)(C), if adopted, will not apply to vitamins and minerals other than to sodium and potassium.

The agency is proposing that ''<1%'' may be used in place of ''Less than 1%'' to provide more flexibility when space is limited on the label. FDA did not provide for use of the symbol ''<'' for ''less than'' in regulations implementing the 1990 amendments because of concerns that a large number of persons would not understand its meaning. The agency has received numerous requests, however, to permit use of the symbol and is aware that it is being used on some nutrition labels with tight space constraints. FDA requests comments on the advisability of allowing use of the symbol ''<'' and the submission of any available data that would demonstrate consumers' comprehension of it. If the agency allows the symbol on nutrition labels of dietary supplements, it intends to provide for such use on conventional foods as well.

The agency points out that proposed § 101.36(b)(2)(iii)(D) through (F) parallel provisions in the current regulations. Proposed § 101.36(b)(2)(iii)(D) carries forward the requirement in current § 101.36(b)(4)(v) that the footnote ''Percent Daily Values are based on a 2,000 calorie diet'' be present when the percent of Daily Value is declared for total fat, saturated fat, total carbohydrate, dietary fiber, or protein. The agency is proposing to require that the symbol that refers to the footnote, when needed, immediately follow the value listed. For clarity, the agency is proposing to add to this provision that the footnote is to go below the last heavy bar required under proposed § 101.36(e)(6) and inside the box.

Consistent with current § 101.36(b)(4)(iii), in proposed § 101.36(b)(2)(iii)(E), the agency provides that the percent of Daily Value shall be based upon values for adults and children 4 or more years of age, unless the product is represented for one of the subgroups specified, in which case the column heading shall clearly state the intended subgroup. If the product is for persons within more than one group, the percent of Daily Value for each group shall be presented in separate columns, as shown in the sample label in § 101.36(e)(10)(ii).

Finally, proposed § 101.36(b)(2)(iii)(F), consistent with current § 101.36(b)(4)(vi), requires the use of the footnote ''Daily Value not established'' for dietary ingredients that have no RDI's or DRV's and, therefore, for which a percent Daily Value cannot be calculated. Under this proposed rule, this footnote will apply to most subcomponents and, on labels of dietary supplements that are intended for use by infants, children less than 4 years of age, and pregnant and lactating women, to total fat, saturated fat, cholesterol, total carbohydrate, dietary fiber, sodium, potassium, vitamin K, chloride, chromium, manganese, molybdenum, or selenium. As previously explained, a final rule published elsewhere in this issue of the Federal Register establishes RDI values for vitamin K, chloride, chromium, manganese, molybdenum and selenium for adults and children 4 or more years of age, and, thus, percent Daily Values can now be calculated for those nutrients for that group. Therefore, the proposed footnote will have a more narrow application than under current § 101.36(b)(4)(vi). The agency points out that when both the footnotes ''Daily Value not established'' and ''Percent Daily Values are based on a 2,000 calorie diet'' are required, different symbols must be used to refer to each footnote so that consumers will not be confused.

Proposed § 101.36(b)(2)(iii)(G) is new and specifies that when calories, calories from fat, or calories from saturated fat are declared, the space under the ''% Daily Value'' column must be left blank for these items. This provision is necessary as a result of proposed § 101.36(b)(2)(i)(B)(*1*) that includes calories in the list of (b)(2)-dietary ingredients that are placed beneath the line in which the column headings, ''Amount Per Serving'' and ''% Daily Value,'' are specified. In nutrition labels of foods labeled in accordance with § 101.9, calories are

listed above the heading ''% Daily Value.''

In addition, proposed paragraph § 101.36(b)(2)(iii)(G) provides that the column ''% Daily Value'' may be omitted when there are no numerical values declared beneath it. For example, this situation will occur when only calories and protein are listed (a percent Daily Value cannot be calculated for calories in the absence of an RDI or DRV, and this declaration is optional for protein except as noted in § 101.9(c)(7)(i)), or when only calories or dietary ingredients subject to proposed § 101.36(b)(2)(iii)(F) are listed. Where the latter situation occurs, and the footnote ''Daily Value not established'' is required, the symbol (e.g., asterisk) must immediately follow the quantitative amount by weight for each dietary ingredient listed under ''Amount Per Serving.''

E. Requirements for Other Dietary Ingredients

The agency is proposing in § 101.36(b)(3) to prescribe how dietary ingredients that do not have RDI's or DRV's, and that are not subject to regulation under § 101.36(b)(2), are to be declared in the nutrition label when present in a dietary supplement. The agency is proposing this provision, which did not appear in the 1994 dietary supplement final rule, in response to section 403(q)(5)(F)(i) of the act, which was added by the DSHEA. As stated above, this provision states that the nutrition information on a dietary supplement shall first list those dietary ingredients for which RDI's or DRV's have been established and then list ''any other dietary ingredient present and identified as having no such recommendation'' (i.e., no RDI or DRV). As discussed earlier, to avoid confusion, the agency is proposing to refer to the latter group of dietary ingredients as ''other dietary ingredients.'' FDA is also proposing in § 101.36(b)(3) to set out how the quantitative amounts of these dietary ingredients are to be presented.

1. Names of Other Dietary Ingredients

The agency is proposing in § 101.36(b)(3)(i) that other dietary ingredients are to be listed in the nutrition label by their common or usual name in a column that is underneath the column of names of (b)(2)-dietary ingredients and the heavy bar described in proposed § 101.36(e)(6). The agency tentatively concludes that it is appropriate to list these names in a column because it is consistent with the format proposed for the listing of names of (b)(2)-dietary ingredients. Consistency makes the label more comprehensible to consumers. To enable consumers to distinguish between these two columns of dietary ingredients, the agency is proposing that they be separated by a heavy bar (see section H of this preamble on format specifications).

The agency considered specifying that the other dietary ingredients be listed in a particular order, such as alphabetical order or descending order of predominance by weight, to provide for a consistent theme in their presentation to assist consumers. Alphabetical order would have the advantage of being user friendly but would not be scientifically meaningful. Descending order of predominance by weight would be consistent with § 101.4 which specifies the order used in the ingredient statement on conventional foods. Because conventional foods are not required to declare the amounts of ingredients, this manner of listing gives consumers an indication of the relative amount of ingredients present. However, imposing this requirement on dietary supplements may be unnecessary because the amounts of the dietary ingredients (although not necessarily the ingredient sources of the dietary ingredients) are required to be listed in the nutrition label under section 403(q)(5)(F)(ii) of the act. Furthermore, such a listing would not necessarily reflect the relative biological activity of the dietary ingredients. Consequently, the agency has tentatively concluded that specifying a particular order is not justified. The agency requests comments on this issue.

The agency is proposing in § 101.36(b)(3)(i) that other dietary ingredients be listed by their common or usual name. This requirement is consistent with § 101.4 which requires that the ingredients of conventional foods be listed by common or usual name. To the extent that another dietary ingredient is covered by an official compendium, FDA would expect that the dietary ingredient's common or usual name to be drawn from that source (see section 403(s)(2)(D) of the act).

With regard to herbs and other botanicals, the agency encourages manufacturers to use common or usual names that are found in botanical data bases and that are widely used. Many of these names are part of our everyday language and are easily recognized by consumers. However, the agency realizes that arriving at an appropriate name for botanicals may be a problem because some plants have more than one common or usual name, or one name is used to describe many different species. In other cases, a particular species may not even have a common or usual name. Furthermore, the agency notes that uncertainty may exist as to which dietary ingredients are botanicals. For example, those in the trade may regard fungi (i.e., yeasts, molds, mushrooms) as ''botanicals,'' while a taxonomist may not (Ref. 2).

For the purposes of this regulation, the agency considers the term ''botanical'' as used in section 201(ff)(1)(C) of the act to include fungi and algae. While some questions may be raised about fungi, the agency believes there is general agreement that they are botanicals (Ref. 2). With respect to bacteria, the agency believes it is clear from both a botanical as well as a commercial viewpoint, they are not botanicals (Ref. 2).

2. Quantity of Other Dietary Ingredients

The agency is proposing in § 101.36(b)(3)(ii) that the quantitative amount by weight per serving of other dietary ingredients shall be presented in a column aligned to the right of the column of names and beneath the column of amounts described in proposed § 101.36(b)(2)(ii). The agency is proposing § 101.36(b)(3)(ii) in response to section 403(q)(5)(F)(ii) of the act, which was added by the DSHEA. This provision specifies that the listing of dietary ingredients shall include the quantity of each such ingredient per serving.

FDA is proposing to require that the quantitative amount listed in the nutrition label for a declared dietary ingredient be the total weight of that dietary ingredient and not the weight of a component of that dietary ingredient or of the source of that dietary ingredient. While a component of an ingredient may be listed as the dietary ingredient, under the proposed regulation, the name of that component ought to appear in the left column, and the weight of that component is what would be listed. For example, if a dietary supplement lists garlic as a dietary ingredient and makes no reference to a component of garlic, then the weight specified should be the weight of garlic. However, if the nutrition label lists allicin as the dietary ingredient, with garlic noted as the source ingredient, the weight specified should be the weight of allicin only. Liquid extracts of dietary ingredients are not to be treated any differently in that the weight specified should be the weight of the dietary ingredient listed that is in the extract and not include the weight of any solvent. The agency appreciates that such determinations may be difficult and seeks comments on this issue.

Manufacturers have the option of deciding what to list as a dietary ingredient (e.g., either garlic or the constituent, allicin). The agency is proposing this flexibility in accordance with section 201(ff) of the act, which provides, among other things, that a dietary ingredient may be a botanical or a constituent of a botanical. Thus, the agency is proposing that either the botanical or one or more constituents of a botanical may be declared as the dietary ingredient. The agency considered allowing manufacturers to declare both the botanical and one or more constituents as dietary ingredients within a single product, with the constituents of the botanical indented beneath the listing of the botanical. The quantitative amounts for the botanical and listed constituents would also be declared. This approach would possibly give consumers more information. However, the agency has tentatively rejected this approach because of concern that it would be potentially confusing to consumers who may not understand that the indented items are constituents of the nonindented dietary ingredient listed immediately above, or that the quantitative amounts of the constituents are also included in the quantitative amount of the nonindented dietary ingredient. The agency requests comments on whether it should consider allowing declaration of constituent information in the manner described above, whether there are alterative approaches to providing this type of information, and whether such flexibility is consistent with the DSHEA.

The agency notes that the DSHEA provides that dietary ingredients having RDI's or DRV's need be listed only when present in ''significant amounts.'' This limitation on listing in section 403(q)(5)(F)(i) of the act does not apply to other dietary ingredients, apparently because they do not have RDI's or DRV's, and, consequently, there is no basis for determining what constitutes a ''significant amount'' with respect to daily consumption. Hence, under the act, for other dietary ingredients there is no level below which declaration is not required.

In the absence of RDI's or DRV's, which are expressed in the units suitable for the declaration of nutrients in the nutrition label (i.e., mg for vitamin C), the agency is proposing to require that manufacturers express the amounts of other dietary ingredients in metric units that are appropriate. While it is not possible to specify appropriate units for every possible other dietary ingredient, for uniformity, FDA is proposing that any declaration of 1,000 or more units (mcg, mg, g) be declared in the next higher set of units (e.g., 1,100 mg should be declared as 1.1 g).

3. Symbol To Reflect Lack of Daily Value

In accordance with section 403(q)(5)(F)(i) of the act, which requires that other dietary ingredients be identified as having no recommendation for daily consumption, the agency is proposing in § 101.36(b)(3)(iii) that other dietary ingredients bear a symbol (e.g., an asterisk) in the column under the heading of ''% Daily Value'' that refers to another symbol placed at the bottom of the nutrition label that is followed by the statement ''Daily Value not established.'' When no dietary ingredients are declared in accordance with § 101.36(b)(2)(i), and the heading ''% Daily Value'' is not used, the agency is proposing that the symbol shall follow the declaration of the quantitative amount by weight for each other dietary ingredient listed. The agency considered placing the symbol elsewhere on the label (e.g., following the heading ''Amount Per Serving'' or with the name of each dietary ingredient) but tentatively concluded that it is most appropriate with the declaration of amounts because these values are used in the calculation of percent Daily Values when there are RDI's or DRV's.

The agency gave extensive consideration to the most appropriate wording for the statement to which the symbol refers. The agency considered a statement such as ''Not currently determined essential,'' which was suggested in a letter from a dietary supplement trade association (Ref. 3). The agency is unsure if such a statement would be more useful to consumers than the proposed statement, ''Daily Value not established,'' which is consistent with the statement used in current § 101.36(b)(4)(vi) and proposed § 101.36(b)(2)(iii)(F) for dietary ingredients without Daily Values. The agency requests comments on this issue.

F. Proprietary Blends

The agency is proposing in § 101.36(c) to provide for the listing of dietary ingredients in proprietary blends. New section 403(q)(5)(F)(ii) of the act provides that ''the listing of dietary ingredients shall include the quantity of each such ingredient (or of a proprietary blend of such ingredients) per serving.'' New section 403(s)(2)(A)(ii)(II) of the act contains a similar provision that requires ''the quantity of each such ingredient; or with respect to a proprietary blend of such ingredients, the total quantity of all ingredients in the blend.'' The ingredients referred to in this section are those in section 403(s)(2)(A)(i) of the act that are described in 201(ff), i.e., dietary ingredients. The agency notes that section 403(q)(5)(F)(ii) of the act specifies that the information is to be reported on a ''per serving'' basis. While section 403(s)(2)(A)(ii)(II) of the act does not specify any basis, FDA tentatively concludes, for the reasons set out in the earlier discussion of section 403(s)(2)(A)(ii) (see section III. D. 2. of this document) that the more specific instructions given in section 403(q), which directly addresses nutrition labeling and the listing of dietary ingredients, provide an appropriate basis for the declaration of the information required under section 403(s)(2)(A)(ii)(II) of the act.

Accordingly, the agency is proposing in § 101.36(c) to provide that a blend of dietary ingredients shall be identified by the term ''Proprietary Blend,'' which may be modified by an appropriate descriptive term or fanciful name (e.g., ''Proprietary Blend of Bioflavonoids''). To promote uniform presentation and, thereby, to minimize consumer confusion, FDA is proposing that the dietary ingredients in the proprietary blend be indented under the term ''Proprietary Blend'' (or a modification of this term) and be listed in a column or in a linear fashion.

The agency is proposing that the total weight of the dietary ingredients listed as components of the proprietary blend appear on the same line as the name of the blend, as illustrated in the sample label in § 101.36(e)(10)(v), to make it clear that the weight represents the total weight of the dietary ingredients listed. As previously explained, the manufacturer has the discretion to decide what to list as a dietary ingredient, e.g., whether to list garlic or a component of garlic, such as allicin. Regardless of what is considered to be the dietary ingredient, it is the weight of the dietary ingredient declared that is to be used in calculating the total weight of the blend.

Proposed § 101.36(c) also requires that the list of other dietary ingredients in a proprietary blend be given in order of predominance by weight since the weights of the individual dietary ingredients need not be specified (proposed § 101.36(c)(2)). The required listing by order of predominance by weight is consistent with ingredient labeling of conventional foods under § 101.4(a)(1) and is intended to give consumers an indication of the relative amounts of the other dietary ingredients present in the absence of information on their actual amounts.

All other requirements for the listing of dietary ingredients remain in effect for dietary supplements containing, or consisting solely of, a proprietary blend. For example, under proposed § 101.36(c)(3), the total weight must be specified to the right (beneath the column of amounts described in paragraph (b)(2)(ii) of § 101.36), and the symbol (e.g., asterisk) referring to the statement ''Daily Value not established'' must be placed in the column under the heading of ''% Daily Value,'' if present, or immediately following the quantitative amount by weight for the proprietary blend.

In addition, the agency is proposing to require that a dietary supplement containing a proprietary blend comply with § 101.36(b)(2) (§ 101.36(c)(1)). If the proprietary blend furnishes more than insignificant amounts of any required (b)(2)-dietary ingredients (i.e., calories, calories from fat, total fat, saturated fat, cholesterol, sodium, total carbohydrate, sugars, dietary fiber, protein, vitamin A, vitamin C, calcium, iron, or any other dietary ingredient listed in proposed § 101.36(b)(2)(i) that is added for purposes of supplementation or about which claims are made), that dietary ingredient must be declared, as well as the amount of the ingredient and the percent of the Daily Value that the supplement supplies. While FDA recognizes some ambiguity in the language of section 403 (q)(5)(F)(ii) and (s)(2)(ii)(II) of the act, the agency tentatively concludes that an interpretation of these provisions of the act to mean that amounts of (b)(2)-dietary ingredients need not be listed individually, but rather be included in the total weight of the proprietary blend, would be inconsistent with section 403(q)(5)(F) of the act, which states that dietary supplement products ''shall comply with the requirements of subparagraphs (1) and (2),'' albeit in a manner which is appropriate for the product. Section 403(q)(1) and (q)(2) of the act require the listing of the individual nutrients determined by the Secretary to assist consumers in maintaining healthy dietary practices. FDA tentatively concludes that it would be contrary to the intent of the 1990 amendments to fail to list nutrients such as calories, total fat, sodium, or vitamin C, when present, in the nutrition labeling of dietary supplements containing proprietary blends.

Inasmuch as FDA is proposing that any (b)(2)-dietary ingredients present in the proprietary blend be listed in accordance with § 101.36(b)(2) (e.g., above the heavy bar separating (b)(2)-dietary ingredients and other dietary ingredients), these (b)(2)-dietary ingredients in the blend would not need to be listed a second time under the term ''Proprietary Blend'' and, if not listed, would not be included in the weight specified for such blend.

G. Information on the Source of a Dietary Ingredient and Other Ingredient Labeling Issues

In response to sections 403 (q)(5)(F)(iii) and (q)(5)(F)(iv) of the act, which were added by the DSHEA, FDA is proposing in new § 101.36(d) to allow the source of a dietary ingredient to be declared in the nutrition label. Section 403(q)(5)(F)(iii) of the act states that ''the listing of dietary ingredients may include the source of a dietary ingredient,'' and subclause (iv) states that ''the nutrition information shall immediately precede the ingredient information required under subclause (i), except that no ingredient identified pursuant to subclause (i) shall be required to be identified a second time.'' With respect to subclause (iv), the agency observes that it has received questions regarding the intent of the phrase ''except that no ingredient identified pursuant to subclause (i) shall be required to be identified a second time.'' The agency acknowledges that the meaning of this phrase is not clear and has speculated whether the reference to ''subclause (i)'' is intended to refer to section 403(i) of the act. Given this ambiguity, the agency is interpreting subclause (iv) to mean that any ingredient listed in the nutrition label need not be listed a second time in the ingredient statement required in § 101.4. For example, under the agency's proposal, if an ingredient such as calcium carbonate is listed as the source of ''calcium'' in the nutrition information, it would not need to be listed again in the ingredient statement. Accordingly, the agency is proposing to revise § 101.4(a)(1) to provide that any ingredient of a dietary supplement that is listed in the nutrition label in accordance with proposed § 101.36(d) (i.e., inside the box) need not be repeated in the ingredient list.

The agency notes that one of the analyses of the DSHEA that it has received addressed section 403(q)(5)(F)(iv) of the act in detail (Ref. 4). The analysis stated: ''The listing [of dietary ingredients] can also include the source ingredient of the dietary ingredient, and the traditional ingredient declaration need not repeat those ingredients (although a technical correction is needed so that the first cross reference in section 403(q)(5)(F)(iv) of the act is to 'subsection (i)' rather than to 'subclause(i)').'' Hence, this analysis is suggesting the first cross reference is to section 403(i) of the act that deals with the ingredient statement that is required in § 101.4. This analysis is consistent with FDA's interpretation that: (1) A source ingredient may be included in the nutrition information, (2) the nutrition information must immediately precede the ingredient statement required in § 101.4, and (3) no ingredient listed in the nutrition label is required to be declared a second time in the ingredient statement.

Accordingly, the agency is proposing in § 101.36(d) that the source of any dietary ingredient (i.e., the ingredient supplying the dietary ingredient) may be added in parentheses immediately following or indented beneath the name of the dietary ingredient, and that the words ''as'' or ''from'' must precede the name of the source ingredient, e.g., ''calcium (as calcium carbonate)'' or ''calcium (from oyster shell powder).'' By way of exception, the agency is proposing that, if the name of the dietary ingredient (e.g., Siberian ginseng) or its synonym (e.g., ascorbic acid as a synonym for vitamin C) is itself the source ingredient, the listing of the dietary ingredient will fulfill the requirement for the listing of the ingredient. In regard to the use of the words ''as'' or ''from,'' many dietary supplements in the marketplace currently use such terminology. The agency tentatively concludes that these words will help to convey to consumers the understanding that such compounds are the source of the dietary ingredients.

If this proposal becomes final, when a source is disclosed in parentheses in the nutrition label, or when the name of a dietary ingredient or its synonym (e.g., ascorbic acid) is itself the source ingredient, the ingredient need not be listed in the ingredient statement that is required under section 403(i)(2) of the act. When a source is not identified within the nutrition label, proposed § 101.36(d) provides that it shall be listed in the ingredient statement in accordance with proposed § 101.4(g).

Under proposed § 101.4(g), the ingredient statement on a dietary supplement shall appear outside and immediately below the nutrition label or, if there is insufficient space below the nutrition label, immediately contiguous and to the right of the nutrition label. This provision is in accordance with section 403(q)(5)(F)(iv) of the act, which was added by the DSHEA. It requires that the nutrition information immediately precede the ingredient information. The agency tentatively concludes that when there is insufficient space below the nutrition label, it is appropriate to allow the

flexibility indicated and have the nutrition label precede the ingredient statement horizontally.

FDA is proposing in § 101.4(g) to require that the ingredient list be preceded by the word ''Ingredients,'' unless some ingredients (i.e., dietary ingredients or sources of dietary ingredients) are identified within the nutrition label, in which case the ingredients listed outside the nutrition label shall be in a list preceded by the words ''Other Ingredients.'' FDA is proposing that the word ''Ingredients'' precede the list of ingredients so that the appearance of this aspect of the label is as consistent as possible with the labeling of other foods. As stated above, consistency in the presentation of food labeling information enhances consumer understanding. FDA is proposing that the term ''Other Ingredients'' be used to indicate to consumers that some ingredient information appears in the nutrition information that precedes the ingredient list.

Proposed § 101.4(g) also requires that ingredients that are not, or do not contain, dietary ingredients, such as excipients, fillers, artificial colors, artificial sweeteners, flavors, or binders, be listed in the ingredient statement. The agency acknowledges that a 1942 Trade Correspondence identified as TC-387 (Ref. 5) exempted ''excipients, fillers, binders, and other fabricating ingredients'' from complete ingredient declaration when used in manufacturing dietary supplements (i.e., labels could list ''excipients'' rather than listing excipients by name). As explained in the final rule on ingredient labeling (58 FR 2850 at 2869, January 6, 1993), however, although TC–387 has not been officially revoked, its position has been overturned by more recent agency statements of policy on this subject, as expressed in the Federal Register of August 2, 1973 (38 FR 20730), the Federal Register of March 16, 1979 (44 FR 16005), and in subsequent correspondence with industry (Refs. 6 and 7). These more recent statements of policy make it clear that the label for dietary supplements must contain a list of nutrients and a full statement of ingredients (except those exempted under section 403(i)(2) of the act), declared by their common or usual name. At this time, because TC–387 expresses a position contrary to the agency's policy since 1973, the agency is revoking TC–387.

In proposed § 101.36(d)(1), the agency is providing that source ingredients in dietary supplements be identified in accordance with § 101.4 that addresses ingredient labeling for all food products. A basic requirement of this section is that ingredients be listed by common or usual name (see § 101.4(a)). To help ensure correct identification of herbs or other botanicals, including algae and fungi, the agency is proposing in § 101.4(h)(1) that the botanical name in Latin binomial form be included in parentheses following the common or usual name. Proper scientific reference to a species is done with its Latin binomial, representing the genus in which the species has been placed and the species epithet, followed by the designation of the author or authors who published the name. When an author has moved a species from one genus to another, the name of the original author is enclosed in parentheses followed by the author who made the transfer. To ensure that there is consistency and clarity in declaration, the agency is proposing that any botanical name declared should be in accordance with internationally accepted rules on nomenclature, such as those found in the *International Code of Botanical Nomenclature* (Ref. 8). The agency requests comments on this issue.

FDA recognizes that it is possible to have more than one acceptable botanical name in Latin form (i.e., a synonym). FDA advises manufacturers to choose the name that is most currently used in commerce and in appropriate references and, in cases of confusion, to consult with the agency.

Section 403(s)(2)(C) of the act, which was added by the DSHEA, provides that a dietary supplement is misbranded if it contains an herb or other botanical, and the label or labeling of the supplement fails to identify any part of the plant from which the dietary ingredient is derived. Accordingly, FDA is proposing in § 101.4(h)(2) that this information be provided as part of the required ingredient information. While nothing in the act requires that information on the part of the plant from which a botanical is derived be in a particular place on the label, FDA tentatively finds that it would be in the interest of consumers if the information were presented as part of the ingredient information because it would ensure that all the identifying information about the herb or other botanical (i.e., common or usual name, Latin binomial, and part of plant from which it is derived) is presented in one place.

FDA is proposing in § 101.4(h)(2) to require that the part or parts of the plant (e.g., leaf, flower, root, fruit, seed, or bark) be presented in parentheses immediately following the Latin binomial name of the botanical ingredient. This manner of presentation is consistent with the way other clarifying information is presented in ingredient statements (see § 101.4(d) and (e)). Whenever information on the part of the plant is presented on the label or in labeling, FDA is proposing to require that the name of the part of the plant be expressed in English. FDA tentatively concludes that pharmaceutical names such as ''flos'' for flower, ''radix'' for root, or ''fructus'' for fruit should not be used because they are not recognized in botanical nomenclature, and their meanings would not be commonly understood by American consumers. When an entire plant is used, the label should specify ''entire plant'' to meet the requirements of the act.

The requirements of proposed § 101.4(h)(1) and (2) apply whether the botanical ingredient is listed in an ingredient statement or in the nutrition label as provided by proposed § 101.36(d). However, inasmuch as section 403(i) of the act does not require ingredients to be listed when the food contains only one ingredient, FDA is proposing in § 101.36(h)(3) that for single-ingredient dietary supplements, the Latin binomial name and the part of the plant from which the dietary ingredient is derived may be prominently placed on the principal display panel or the information panel, or included in the nutrition label.

In proposed § 101.36(d)(2), the agency is requiring that when two or more sources are listed within a parentheses, they be listed in descending order by weight, which is consistent with the way ingredients are to be listed in § 101.4. This listing of ingredients in descending order by weight will provide consumers with an indication of the relative amount of each ingredient in the absence of information on their actual amounts. As discussed elsewhere in this preamble, the agency is not proposing that other dietary ingredients be listed in descending order by weight because the amounts of these dietary ingredients are required to be listed.

In proposed § 101.36(d)(3), the agency is providing that representations that a source ingredient conforms to an official compendium may be included such as by a reference to the compendium (e.g., ''Calcium (from calcium carbonate USP)''). This provision is consistent with the discussion in the preamble of the 1994 dietary supplement final rule that explained that the agency would not object to the use of the U.S.P. symbol in the ingredient list to identify those ingredients that are U.S.P. grade (59 FR 354 at 369), as long as the ingredients meet FDA's compliance requirements in § 101.9(g)(4), which are discussed below under *Compliance and*

Location Requirements. The agency recognizes that in some cases individual dietary ingredients may conform to compendial specifications even though the entire product does not. Thus, the agency is proposing in § 101.36(d)(3) to allow individual dietary ingredients to be so represented.

If such a representation is made, and the ingredient does not comply with the specifications of the official compendium, the supplement would be misbranded under 403(a) of the act. The agency notes that section 403(s)(2)(D) of the act provides that a dietary supplement is misbranded if it is represented as complying with an official compendium and fails to do so. Proposed § 101.36(d)(3) applies to representations about a particular ingredient and not the entire supplement, as does section 403(s)(2)(D) of the act.

H. Format Requirements

As stated above, the agency continues to believe that consistency in the presentation of nutrition information on all foods will help consumers observe and comprehend such information, as required by section 2(b)(1)(A) of the 1990 amendments. Accordingly, FDA is proposing in § 101.36(e) that the information required in proposed § 101.36 (b) and (c) be presented in a manner that is similar to the requirements listed in § 101.9(d) for conventional foods, as well as those in current § 101.36 for dietary supplements of vitamins and minerals. In this rulemaking, the agency is proposing to alter slightly the organization in current § 101.36 to combine all format requirements in proposed § 101.36(e), all exemptions in § 101.36(h), and all special labeling provisions (such as those for small or intermediate-sized containers) in § 101.36(i), respectively.

Despite the desire for consistency in the appearance of nutrition information on dietary supplements and conventional foods, the requirements adopted in the DSHEA, such as the listing of the names and amounts of other dietary ingredients and the optional listing of source information, necessitate that there be some differences in format. Accordingly, to signal to consumers that nutrition labeling on dietary supplements differs in several significant respects from that on conventional foods, FDA is proposing in § 101.36(e)(1) that the title for the nutrition information on packages of dietary supplements be ''Supplement Facts.'' The agency tentatively concludes that the title ''Supplement Facts'' and the proposed format structure are sufficiently similar to the title ''Nutrition Facts'' and the format requirements used in nutrition labeling of conventional foods for the consumer to immediately recognize that the information in the two boxes is related. However, by the use of a different name, the consumer can be taught to recognize the basic structural differences in nutrition information on the two different types of food products. For example, the nutrition information on dietary supplements will have the quantitative amounts by weight located in a separate column; may include source ingredients; and may not have a ''% Daily Value'' column if no dietary ingredients having RDI's or DRV's are present in the product. Comments are requested on the appropriateness of the title ''Supplement Facts.''

FDA is proposing in § 101.36 (e)(1) through (e)(3) to maintain the graphic requirements in current § 101.36(b) and (c)(1) through (c)(5). These sections require the use of the largest type size within the nutrition label for the title; bolding of the title and column headings; a hairline box around the nutrition label; a single easy-to-read type style; all black or one color type on a white or other neutral contrasting background, whenever practical; upper and lower case letters, except on very small packages; at least one point leading; and letters that do not touch. The agency is retaining these requirements because they are responsible, in large measure, for the appearance of the nutrition label and are designed to maximize the legibility of the label.

The agency is addressing type size requirements in proposed § 101.36(e)(4). Current § 101.36(c)(6) requires that: (1) packages with less than 12 square inches of total surface area available to bear labeling (i.e., small-sized packages) use a type size no smaller than 4.5 point for the nutrition label, (2) packages with 12 to 40 square inches of total surface area available to bear labeling (i.e., intermediate-sized packages) use a type size no smaller than 6 point, and (3) packages with more than 40 square inches of total surface area available to bear labeling use type size no smaller than 8 point, except that these larger packages could use 6 point type for column headings, footnotes, and information on beta-carotene, when present. Because the DSHEA does not necessitate any changes in type size, the agency is proposing in § 101.36(e)(4) to carry forward the requirement for larger-sized packages of 8 point type with 6 point type for column headings and footnotes. (The agency is not proposing to carry forward 6 point type for the information on beta-carotene because the agency tentatively concludes that the type size for all dietary ingredients should be uniform.) To be more consistent with the organization of § 101.9, FDA is proposing to move the exceptions in type size for small and intermediate-sized packages to § 101.36(i)(2). The agency will discuss these exceptions under section III.J. of this document.

Proposed § 101.36(e)(5) requires a hairline rule between the listing of each dietary ingredient. This requirement is identical to that in current § 101.36(c)(7). Following publication of the 1994 dietary supplement final rule, the agency received comment on this requirement and on the effect that the multiple hairlines could have on the legibility of labels of products with large numbers of dietary ingredients, where labels have severe space constraints, and where the minimum type size (i.e., 4.5 point type) is used. FDA requests comments on the use of hairlines to separate the dietary ingredients listed. Such comments will be particularly helpful if actual sample labels are included as well as suggestions for when relief from such a requirement should be provided, e.g., should hairlines be omitted when more than 8 (or some other number) dietary ingredients that qualify to use 4.5 point type are listed? Comments should set out in detail the basis for their recommendations.

Comments received by the agency since publication of the 1994 dietary supplement final rule suggest that there is some confusion about the relative size of bars used to separate parts of the nutrition label, and whether the bars are required by regulation. It appears that many persons were unable to find the regulatory references to the bars in current § 101.36 (b)(3), (b)(3)(ii), and (b)(4). Therefore, FDA is proposing to focus two paragraphs, § 101.36 (e)(6) and (e)(7), specifically on bars, rather than addressing them as ancillary issues in broader provisions. These paragraphs identify the points in the label format where bars are required and differentiate the thickness of the bars (i.e., ''heavy bars'' versus ''light bars'').

In proposed § 101.36(e)(6), the agency is requiring that a heavy bar be placed beneath the subheading ''Serving Size'' or the subheading ''Servings Per Container'' when it is required, beneath the last dietary ingredient to be listed in proposed § 101.36(b)(2)(i), and beneath the last other dietary ingredient to be listed in proposed § 101.36(b)(3). Also, in proposed § 101.36(e)(7), the agency is proposing that a light bar be placed beneath the headings ''Amount Per Serving'' and ''% Daily Value,'' which

will be above the listing of ''Calories,'' when the latter is required.

Except for the introduction in this rulemaking of a bar above, rather than below, the listing of ''Calories'' and of a bar to separate (b)(2)-dietary ingredients from other dietary ingredients, FDA is proposing no change from the bars as currently required above and beneath the ''Amount Per Serving'' heading in current § 101.36(b)(3) and at the bottom of the nutrition label in current § 101.36(b)(3)(ii). The use of the bars and their respective thickness is illustrated in sample labels under proposed § 101.36(e)(10).

For products that contain both (b)(2)-dietary ingredients and other dietary ingredients, the heavy bar that FDA is proposing to require in § 101.36(e)(6)(ii) beneath the last (b)(2)-dietary ingredient will result in a bar separating the list of (b)(2)-dietary ingredients from that of other dietary ingredients. FDA has tentatively concluded that this visual separation will assist consumers to differentiate dietary ingredients for which RDI's and DRV's have been established from other dietary ingredients for which such daily values have not been established.

The agency interprets the direction given in section 403(q)(5)(F)(i) of the act that ''nutrition information shall first list those dietary ingredients * * * for which a recommendation for daily consumption has been established * * * and shall list any other dietary ingredient present and identified as having no such recommendation'' as evidencing that such a differentiation should be made. FDA has tentatively concluded that the use of a heavy bar, similar to that which is used in § 101.9 to differentiate vitamins and minerals from preceding nutrients, will distinguish the two groups of dietary ingredients while helping to maintain some consistency in the appearance between nutrition labels on dietary supplements and products represented as conventional foods.

Proposed § 101.36(e)(8) addresses how nutrition information is to be presented on products that contain two or more separately packaged dietary supplements that differ from each other. This section, which allows manufacturers to choose between separate nutrition labels for each product or one aggregate nutrition label, is analogous to § 101.9(d)(13) for conventional foods and maintains the provisions of current § 101.36(b)(3)(iii), except that there is no longer a need to specify that separate columns be used to list quantitative amounts because the agency is proposing to require that the quantitative amounts on all dietary supplements be listed in separate columns.

Proposed § 101.36(e)(9), which encourages uniformity in presentation, and proposed § 101.36(e)(11), which allows for flexibility when there is insufficient continuous vertical space to accommodate the required components of the nutrition label, are identical to current § 101.36(c)(8) and (c)(10).

Proposed § 101.36(e)(10) provides sample labels to illustrate the format requirements of § 101.36.

I. Compliance and Location Requirements

FDA is proposing in § 101.36(f)(1) to provide that compliance with § 101.36 will be determined using the procedures outlined in § 101.9(g)(1) through (g)(8) for conventional foods. These regulations, which are cited in current § 101.36(d)(1), describe how FDA will collect samples for compliance reviews and the types of analytical methods that it will use, set quantitative criteria (e.g., allowable margins of error) for added and naturally occurring nutrients, and provide for the use of FDA-approved data bases.

An issue addressed in the preamble to the 1994 dietary supplement final rule was the requirement in § 101.9(g)(4)(i) for added vitamins, minerals, protein, dietary fiber, or potassium to be present in amounts ''at least equal to the value for that nutrient declared on the label'' (59 FR 354 at 369). A comment pointed out that U.S.P. monographs for several nutritional products require a minimum nutrient content of 90 percent of the label declaration, and that this specification was in conflict with FDA's requirement that added nutrients be present at 100 percent of declared value when tested during the shelf life of the product. In responding, the agency noted an inconsistency in U.S.P. directives in that the General Notices of the U.S.P. state that a dosage should be formulated to provide 100 percent of the labeled amount (Ref. 9).

In light of new section 403(s)(2)(D) of the act, the agency questioned whether it should alter its long-standing compliance criterion in § 101.9(g)(4)(i). The agency reviewed its response to the comment mentioned above and earlier correspondence from the agency to U.S.P. informing that organization that anything less than 100 percent of the value declared on the label for vitamin and mineral products is not acceptable, and that the only permissible deviation from this requirement would be a deviation that is attributable to the variability of the analytical method (Ref. 10).

The agency tentatively concludes that any deviation from the criterion in § 101.9(g)(4)(i) that is attributable to reasons other than variability of analytical methods would be a material fact and would need to be disclosed on the label if the agency were to allow less than 100 percent of the value declared. Accordingly, FDA has considered proposing that, on labels of products where U.S.P. specifications are met but less than 100 percent of the labeled amount is present, the U.S.P. designation would be allowed with a disclosure of the lack of the declared amount (e.g., a symbol by the U.S.P. designation that refers to a footnote that states ''May contain only ——% of the amount listed''). However, the agency is concerned that such a message could diminish consumer confidence in the values declared in nutrition labeling for all foods. Therefore, FDA tentatively concludes that its previous position is the better course of action (i.e., that, other than deviations that are attributable to the variability of the analytical method, anything less than 100 percent of the value declared on the label is not acceptable for added nutrients). Consequently, FDA is not proposing any change in its position that the requirements for the nutrients listed in § 101.9(g)(4) should pertain regardless of whether these nutrients are present in conventional foods or in dietary supplements.

Likewise, the agency is proposing in § 101.36(f)(1) that the criteria in § 101.9(g)(3) and (g)(4) are applicable to other dietary ingredients described in proposed § 101.36(b)(3)(i). The agency is unaware of any reason why these criteria that pertain to dietary ingredients that are nutrients should not apply to other dietary ingredients. Hence, the agency tentatively concludes that other dietary ingredients, when they are added, be present in amounts at least equal to the values declared in the nutrition label and, when they occur naturally, be present in amounts at least equal to 80 percent of the value declared. The agency is also proposing that reasonable excesses of other dietary ingredients over labeled amounts are acceptable within current good manufacturing practice, which is consistent with § 101.9(g)(6). The agency is unaware of any reason at this time for applying the approach in § 101.9(g)(5) to any other dietary ingredients. This section provides that food with a label declaration of calories, sugars, total fat, saturated fat, cholesterol, or sodium shall be deemed to be misbranded under section 403(a) of the act if a composite of the product

is found to contain more than 20 percent in excess of the amount declared for one of these nutrients. FDA is not aware of any other dietary ingredient that should be singled out in this way. The agency requests comments on the proposed criteria for other dietary ingredients.

In recognition of the fact that the exemptive provisions referenced in proposed § 101.36(f)(1) may not include all situations in which nutrition information is technologically infeasible or impracticable on a particular package, the agency is proposing in § 101.36(f)(2) to carry forward current § 101.36(d)(2), which provides the opportunity in such a situation for firms to write to the Office of Food Labeling, FDA, to request additional exemptions or alternative means of compliance. This provision is identical to that in § 101.9(g)(9) for conventional foods. In such a situation, the firm should state why it is technologically infeasible or impracticable for the specified products to comply with the nutrition labeling regulations, identify alternative means of compliance that would be used to provide nutrition information for the product (e.g., specify type size variations needed), and explain why this mode of compliance would be consistent with the intent of the 1990 amendments and the DSHEA.

With respect to analytical procedures for compliance programs, § 101.9(g)(2) states that FDA will use methods as given in the ''Official Methods of Analysis of the AOAC [Association of Official Analytical Chemists] International'' unless no AOAC method is available or appropriate, in which case other reliable and appropriate analytical procedures will be used. AOAC methods and other reliable analytical methods exist for most vitamins and minerals used as, or as a component of, dietary supplements. However, AOAC methods do not exist for most other dietary ingredients, including many botanicals. Accordingly, the agency is interested in identifying a variety of analytical procedures and sources of information that can be used for other dietary ingredients. FDA requests comments on appropriate analytical procedures or other alternative approaches for determining whether the dietary supplement provides the quantity of dietary ingredient listed in the nutrition label for the supplement. Additionally, FDA is requesting information on organizations that establish such procedures.

The agency is proposing in § 101.36(g) to require that the location of nutrition information on a label be in compliance with § 101.2, except as provided in proposed paragraphs (i)(2) and (i)(5) of § 101.36. Proposed (i)(2) states that dietary supplements are subject to the special labeling provisions specified in § 101.9(j)(13) for foods in small or intermediate-sized packages. Section 101.9(j)(13)(ii)(D) provides that foods in packages that have a total surface area available to bear labeling of 40 or less square inches may present the required nutrition information on any label panel. In addition, proposed (i)(5) states that dietary supplements are subject to the special labeling provision specified in § 101.9(j)(17) for foods in packages that have a total surface area available to bear labeling greater than 40 square inches but whose principal display panel and information panel do not provide sufficient space to accommodate all required label information (see 50 FR 17202, April 5, 1995). Section 101.9(j)(17) allows the nutrition label on such packages to be moved to any other label panel that is readily seen by consumers. However, because of the requirement in section 403(q)(5)(F)(iv) of the act that the ingredient list immediately follow the nutrition label, proposed § 101.36(i)(5) states that the ingredient list shall continue to be located immediately below the nutrition label, or, if there is insufficient space below the nutrition label, immediately contiguous and to the right of the nutrition label as specified in § 101.4(g), which FDA has proposed to adopt in this document.

J. Exemptions and Special Labeling Provisions

FDA is proposing in § 101.36(h)(1) and (h)(2) to provide for small business exemptions in accordance with the 1990 amendments and the Nutrition Labeling and Education Act Amendments of 1993 (the 1993 amendments) (Pub. L. 103–80), which (1) stated that, after May 8, 1995, section 403(q)(5)(D) of the act, which provides an exemption based on total gross annual sales, shall apply to food from retailers only, and (2) established a new exemption for low-volume food products from manufacturers, packers, distributors, and retailers that are small businesses. A proposed rule to implement this change in § 101.9(j) and current § 101.36(f) was published on March 14, 1994 (59 FR 11872). A final rule has not yet been published.

To streamline the regulations and be consistent with the manner in which other exemptions and special labeling provisions are listed in current § 101.36(f) and (g) (proposed § 101.36(h) and (i)), FDA is proposing in § 101.36(h)(1) and (2) to cross reference the small business exemption in § 101.9(j)(1) and the exemption for low-volume food products of small businesses in proposed § 101.9(j)(18), respectively, rather than to independently codify those exemptions under § 101.36.

Proposed § 101.36(h)(3) incorporates the exemption in § 101.9(j)(9) for foods shipped in bulk form that are not for distribution to consumers in such form and that are for use solely in the manufacture of other foods or that are to be processed, labeled, or repacked at a site other than where originally processed or packed. This exemption was incorrectly listed in current § 101.36(g) and identified as a special labeling condition. Inasmuch as nutrition labeling is not required on products shipped in bulk form that are not intended to be seen by consumers (section 403(q)(5)(A)(v)) of the act, it is being redesignated as an exemption under proposed § 101.36(h)(3).

Special labeling provisions (or conditions) are provided for specific situations in which the product is not exempt from nutrition labeling requirements, but deviations from the general nutrition labeling requirements are necessary for a variety of reasons. For example, proposed § 101.36(i)(1), which was carried forward from current § 101.36(g), references § 101.9(j)(5)(i) which describes a special labeling provision that pertains to the nutrition labeling of foods represented or purported to be for children less the 2 years of age. In the nutrition labeling of these foods, other than infant formula, the listing of calories from fat, calories from saturated fat, saturated fat, polysaturated fat, monounsaturated fat, and cholesterol is prohibited. FDA included this special labeling provision in its regulations to discourage the inappropriate application of adult dietary guidelines to infants and toddlers (55 FR 29487 at 29506, July 19, 1990, as modified in 58 FR 2079 at 2150). While current § 101.36(g) also cross references § 101.9(j)(5)(ii), which addresses broader issues of the format of nutrition labeling on foods intended for children less than 4 years of ages, these format issues are addressed elsewhere in this proposed regulation (e.g., the exclusion of percent Daily Value in proposed § 101.36(b)(2)(iii)(F) for total fat, saturated fat, cholesterol, sodium, potassium, total carbohydrate, and dietary fiber because DRV's have not been established for this age group). Accordingly, proposed § 101.36(i)(1) references only that portion of § 101.9(j)(5)(i) that prohibits the inclusion of calories from fat, calories from saturated fat, saturated fat,

polyunsaturated fat, monounsaturated fat, and cholesterol in the nutrition label of foods, other than infant formula, represented or purported to be for children less than 2 years of age.

Proposed § 101.36(i)(2) describes special labeling provisions for small and intermediate-sized containers. Special labeling provisions are provided for these containers in current § 101.36(g) which cross references § 101.9(j)(13). Section 101.9(j)(13)(i) allows small packages with less than 12 square inches of space available to bear labeling to supply an address or telephone number for the consumer's use in obtaining nutrition information in lieu of nutrition labeling when no claims or other nutrition information are present on the label or in labeling or advertising, or, if they are present, to provide the required nutrition information in 6 point type or in all upper case type of 1/16 inches minimum height. Section 101.9(j)(13)(ii) allows packages with 40 or less square inches of space available to bear labeling to present the nutrition label in a tabular format when the package shape and size cannot accommodate a standard vertical display and in a linear display if the label will not accommodate a tabular display; to use specified abbreviations; to shorten the required footnotes; and to place the required nutrition information on any label panel.

In addition to cross referencing these special labeling provisions, current § 101.36(c)(6) provides for smaller type size requirements for dietary supplements in small and intermediate-sized containers. That provision allows labels of dietary supplements in packages with less than 12 square inches of total surface area available to bear labeling to use a type size no smaller than 4.5 point in the nutrition label, in packages with 12 to 40 square inches of total surface area available to bear labeling to use a type size no smaller than 6 point, and in packages with more than 40 square inches of total surface area available to bear labeling to use type size no smaller than 8 point, except that these larger packages can use 6 point type for column headings, footnotes, and information on beta-carotene, when present.

In proposed § 101.36(i)(2), FDA is continuing to cross reference the special provisions in § 101.9(j)(13) and to allow the use of 4.5 point type on packages with less than 12 square inches of available label space and the use of 6 point type on packages with 12 to 40 square inches of available label space. However, in response to a citizen petition (Docket No. 94P–0110/CP1) (Ref. 11) from a trade association, the agency is proposing to provide additional flexibility for multi-ingredient dietary supplements in packages with less than 20 square inches of available label space. The petition stated that the majority of dietary supplement products on the market have labels that are 12 to 20 square inches in size, and that, while 6 point type in the nutrition label is feasible on single-nutrient products with this size label, there is insufficient space for all the required information on multinutrient products. The petitioner submitted sample labels in support of their position.

FDA is persuaded by this citizen petition that it is infeasible to use 6 point type on many products containing multiple dietary ingredients in packages with less than 20 square inches of space available to bear labeling. However, the agency tentatively finds that 6 point type is feasible on products with a limited number of dietary ingredients based on the following calculations. The agency calculates that a listing of 8 dietary ingredients in 6 point type plus one point leading between each name would take less than 1 inch of vertical space. Adding another inch to this for the title, headings, bars, and footnote would result in a nutrition label for a product declaring up to 8 dietary ingredients of no more, and possibly less, than 2 inches in height. Assuming a 1½ inch width, such a nutrition label would take no more than 3 square inches of surface area.

In the preamble to the final rule implementing the 1990 amendments, FDA based decisions on small package sizes on the assumption that not more than 30 percent of the total surface area of a package should be required to be devoted to FDA-required information that is not on the principal display panel (58 FR 2079 at 2155). On a package with 12 square inches of available label space, 30 percent of the total surface area is 3.6 square inches. Inasmuch as the ingredient list can be included in the nutrition label and based on the above calculations, the agency tentatively concludes that it is reasonable to require that 6 point type be used on a package with 12 to 20 square inches of space available to bear labeling when 8 or fewer dietary ingredients are listed. However, when a dietary supplement is in a package that has from 12 to 20 square inches of surface area available to bear labeling, and the nutrition label lists more than 8 dietary ingredients, the use of 6 point type would likely mean that more than 30 percent of the total surface area of the package would have to be devoted to FDA required information. Therefore, FDA is proposing in § 101.36(i)(2)(ii) to provide for the use of a smaller type size (i.e., a minimum of 4.5 point type) in such circumstances.

It should be noted that the dimensions used by the agency are inclusive of ''space available to bear labeling,'' not merely the dimensions of the current label. When there is space on the container to enlarge the current label (i.e., unused surface area available to bear labeling), and the current label is not large enough to provide the required information in accordance with format and type size specifications, FDA considers it is reasonable to expect that the manufacturer, packer, or distributor will increase the size of the label.

This action (i.e., proposing to allow only those products with more than eight dietary ingredients to use the smaller type size) is supported by the petitioner referred to above (Ref. 11), who stated in followup correspondence that, in a survey of its membership, ''responding companies agreed that eight or ten would be an appropriate cutoff number, triggering the smaller type size for multinutrient products,'' and that the responding companies believed that the cutoff should be set at eight nutrients (Ref. 12).

The aforementioned citizen petition (Ref. 11) also requested that § 101.2(c) be amended to allow the type size requirements in § 101.2 (c)(1) through (c)(3) to apply to the labeling of dietary supplements of vitamins and minerals. Current § 101.36 and proposed § 101.36 include type size requirements for varying sizes of packages of dietary supplements. Therefore, the agency is denying the request to have the type size requirements in § 101.2(c) pertain to the nutrition labeling of dietary supplements.

The agency notes that § 101.2 (c)(1) through (c)(3) were added to the regulations in 1974 (39 FR 15268), in part, in an effort to encourage manufacturers, packers, and distributors to include nutrition labeling on conventional foods. However, because the final rule on nutrition labeling (58 FR 2079) includes type size requirements, the agency believes there is no longer a need for § 101.2 (c)(1) through (c)(3) to address the type size of information in the nutrition label. The agency plans to amend § 101.2 (c)(1) through (c)(3) accordingly in a later document dealing with the labeling of conventional foods, as well as dietary supplements, so that the rulemaking will be seen by the greatest number of persons who may be affected by such action.

The agency is proposing, however, to amend § 101.2 (b) and (f) to include § 101.36 among the list of sections noted. Section 101.2(b) states that the information required to appear under the sections noted shall appear either on the principal display panel or the information panel unless otherwise specified by regulation. Section 101.2(f) provides that when the label of any package is too small to accommodate all of the information required under the sections noted, FDA may establish by regulation an acceptable alternative method of disseminating such information to the public (e.g., by the use of smaller type size).

FDA is proposing a special labeling provision in proposed § 101.36(i)(2)(iii) for dietary supplements in packages that have a surface area available to bear labeling of 40 or less square inches. Under this provision, when the nutrition label on packages of this size is presented on a label panel other than the principal display or information panels, as allowed in § 101.9(j)(13)(ii)(D), the ingredient information must move in conjunction with the nutrition label. This provision is in response to section 403(q)(5)(F)(iv) of the act as added by the DSHEA, which states that nutrition information shall immediately precede the ingredient information.

In proposed § 101.36(i)(2)(iv), the agency is providing additional flexibility for dietary supplements in packages that have a surface area available to bear labeling of 40 or less square inches. When it is not possible for primary (inner) containers of this size to comply with the type size requirements, the agency is proposing that type as small as needed may be used in the nutrition label as long as the primary container is securely enclosed in outer packaging that bears nutrition labeling in required type size. In the preamble of the 1994 dietary supplement final rule (59 FR 354 at 367), the agency erroneously advised that it considered outer packaging that securely encloses a primary container and that is not intended to be separated from the primary container under conditions of retail sale to be the equivalent of the product label. In these situations, the agency stated that manufacturers did not have to repeat the nutrition information on the primary container, although it encouraged them to do so to give consumers easy access to the information once the container is removed from the outer packaging. These statements were inconsistent with section 201(k) of the act which defines the term ''label'' as ''* * * a display of written, printed, or graphic matter upon the immediate container of any article * * *'' as well as with previous agency policy that requires that other required information appear on the primary container (e.g., statement of identity, quantity of contents, name and place of business of the manufacturer, packer, or distributor). Therefore, nutrition labeling is required to appear on the label of the primary container. However, consistent with FDA's intent in the preamble of the 1994 dietary supplement final rule to allow flexibility, the agency is proposing in § 101.36(i)(2)(iv) that when nutrition labeling is presented in required type size on outer packaging that securely encloses a primary container and is not intended to be separated from the primary container under conditions of retail sale, the nutrition labeling on the primary container may use type size as small as needed to accommodate all of the required information on the label.

FDA is proposing to carry forward the special labeling provisions in current § 101.36(g) for foods in multiunit containers in proposed § 101.36(i)(3) and for foods sold in bulk containers in proposed § 101.36(i)(4).

FDA is proposing to add a special labeling provision in proposed § 101.36(i)(5) for foods in packages that have a total surface area available to bear labeling greater than 40 square inches but whose principal display panel and information panel do not provide sufficient space to accommodate all required label information. This provision cross references § 101.9(j)(17), which was recently added to the regulations (60 FR 17202, April 5, 1995) and allows the nutrition label on such packages to be placed on any alternate panel that can be readily seen by consumers. However, as previously discussed, ingredient information must move in conjunction with the nutrition label. Accordingly, proposed § 101.36(i)(5) includes an exception to § 101.9(j)(17) whereby the ingredient list would continue to be located immediately beneath the nutrition label, or, if there is insufficient space below the nutrition label, immediately contiguous and to the right of the nutrition label as proposed in § 101.4(g).

K. Misbranding Provisions

Current § 101.36(h), redesignated as § 101.36(j) in this proposed rulemaking, cross references the misbranding provisions of § 101.9(k) that were first proposed in the Federal Register of March 30, 1972 (37 FR 6493) and that were issued and published in the Federal Register of January 19, 1973 (38 FR 2125). These provisions were based on findings of fact and conclusions of law resulting from 1968–1970 Special Dietary Hearings (38 FR 2143). Following a comment period, these regulations were modified and published as final regulations in § 1.17 (i)(2) through (i)(6) on March 14, 1973 (38 FR 6961). In the reorganization and republication of Title 21 of the Code of Federal Regulations that appeared in the Federal Register of March 15, 1977 (42 FR 14308), § 1.17(i) was recodified as § 101.9(i).

No changes were made to the original codified language of the subject paragraphs until regulations implementing the 1990 amendments were published on January 6, 1993, at which time FDA redesignated the paragraphs as § 101.9(k) and modified § 101.9(k)(1) to incorporate a reference to the general requirements for health claims in §§ 101.14 and 101.9(k)(5) in response to requests to remove restrictions about the incorporation of substances such as rutin, inositol, and other similar substances to conventional foods or dietary supplements (38 FR 2478 at 2502 and 38 FR 2079 at 2166, respectively).

The current misbranding provisions in § 101.9(k) state that a food will be considered to be misbranded under sections 201(n) and 403(a) of the act if its label or labeling represents, suggests, or implies: (1) That the food, because of the presence or absence of certain dietary properties, is adequate or effective in the prevention, cure, mitigation, or treatment of any disease or symptom except as provided for in health claim regulations; (2) that a balanced diet of ordinary foods cannot supply adequate amounts of nutrients; (3) that the lack of optimum nutritive quality of a food, by reason of the soil on which the food was grown, is or may be responsible for an inadequacy or deficiency in the quality of the diet; (4) that the storage, transportation, processing, or cooking of a food is or may be responsible for an inadequacy or deficiency in the quality of the diet; (5) that the food has special dietary properties when such properties are of no significant value or need in human nutrition; and (6) that a natural vitamin in a food is superior to an added or synthetic vitamin or to differentiate in any way between vitamins naturally present from those added.

FDA has reviewed these misbranding provisions in light of the DSHEA and current scientific knowledge. As a result of its review, the agency is proposing to delete current § 101.9 (k)(2) and (k)(5). Section 101.9(k)(2) states that a food is misbranded if its label or labeling represents, suggests, or implies that a

balanced diet of ordinary foods cannot supply adequate amounts of nutrients. The agency is deleting this provision based on the acknowledgment by scientific and consensus groups that there are certain situations in which the use of dietary supplements may be needed for persons to obtain adequate nutrient intakes. For example, the National Academy of Sciences has stated in the 10th edition of ''Recommended Dietary Allowances'' that ''In a few cases where deficiency is commonly observed (e.g., iron deficiency in women), food fortification and individual supplementation are appropriate'' (Ref. 13, p. 14). Also, the ''Dietary Guidelines for Americans'' states that supplements may be needed by pregnant or lactating women; other women in their childbearing years; people who are unable to be active and eat little food; and people, especially older people, who take medicines that interact with nutrients (Ref. 14). These conclusions are supported by other documents such as ''Diet and Health, Implications for Reducing Chronic Disease Risk'' (Ref. 15, pp. 509–525) and a task force representing the American Dietetic Association, National Council Against Health Fraud, Inc., Society for Nutrition Education, American Society for Clinical Nutrition, and the American Institute of Nutrition (Ref. 16).

Section 101.9(k)(5) states that a food is misbranded if its label or labeling represents, suggests, or implies that ''the food has dietary properties when such properties are of no significant value or need in human nutrition.'' New section 403(r)(6) of the act, which was added by the DSHEA, provides for statements that, in part, describe the role of a nutrient or dietary ingredient intended to affect the structure or function in humans or which describe general well-being from consumption of a nutrient or dietary ingredient. There is no requirement in this new section that the subject of the statement be of significant value or need in human nutrition. Therefore, to eliminate any inconsistency between section 403(r)(6) of the act and the agency's regulations, FDA is proposing to delete § 101.9(k)(5). If it adopts the proposed deletion of § 101.9 (k)(2) and (k)(5), the agency will redesignate current § 101.9(k)(3) as (k)(2), § 101.9(k)(4) as (k)(3), and § 101.9(k)(6) as (k)(4).

FDA is not aware of grounds for eliminating the other provisions under § 101.9(k). However, if information is provided in comments to this proposed rule that persuades the agency that the findings of fact and conclusions of law resulting from 1968–1970 special dietary hearings (38 FR 2143) that underlie the other provisions in § 101.9(k) are no longer supportable, FDA will consider deleting the subject provisions in the final rule.

IV. Conforming Amendments

As previously discussed (in section III.J. of this document), FDA is proposing to amend § 101.2 (b) and (f) to include § 101.36 in the lists of sections noted. The agency is also proposing to amend § 101.2(d)(1), which states that all required label information shall appear on the principal display panel or the information panel. This paragraph was recently amended in a document entitled ''Food Labeling; Placement of the Nutrition Label on Food Packages'' (60 FR 17202, April 5, 1995) to exclude from its coverage products that are exempt under § 101.9(j)(13), which allows flexibility in the placement of the nutrition label on packages that have less than 40 square inches of space available to bear labeling, and § 101.9(j)(17), which allows the nutrition label on packages that have a total surface area available to bear labeling greater than 40 square inches but whose principal display panel and information panel do not provide sufficient space to accommodate all required information to be placed on any alternate panel that can be readily seen by consumers. Inasmuch as proposed § 101.36 (i)(2) and (i)(5) cross reference § 101.9 (j)(13) and (j)(17), respectively, and therefore similarly exclude dietary supplements that meet the criteria in § 101.9 (j)(13) and (j)(17) from coverage of § 101.2(d)(1), FDA is proposing to amend that paragraph to cite § 101.36 (i)(2) and (i)(5) as exceptions.

Section 101.9(j)(6) of the nutrition labeling regulations lists as an exemption: Dietary supplements of vitamins and minerals that have an RDI as established in § 101.9(c)(8)(iv) of this section or a DRV as established in § 101.9(c)(9) of this section shall be labeled in compliance with § 101.36, except that dietary supplements of vitamins and minerals in food in conventional form (e.g., a breakfast cereals), of herbs, and of other similar nutritional substances shall conform to the labeling of this section.

As discussed previously (in section III. of this document), the definition of dietary supplements in new section 201(ff) of the act broadens the coverage of proposed § 101.36 and eliminates differentiation based on the form of the food. Therefore, FDA is proposing to amend § 101.9(j)(6) to exempt all dietary supplements from coverage under § 101.9, noting that such foods must be labeled in compliance with § 101.36.

The agency is also proposing to amend § 101.65(b)(4) to modify the example given of the statement of identity of a dietary supplement of vitamin C to incorporate the term ''dietary supplement'' in accordance with proposed § 101.3(g). The amended paragraph will state:

> A statement of identity for a food in which an ingredient constitutes essentially 100 percent of a food (e.g., ''corn oil,'' ''oat bran,'' ''dietary supplement of vitamin C 60 mg tablet'').

V. Regulatory Review Under Executive Order 12866

This proposed rule has been deemed by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget to be a significant regulatory action pursuant to Section 3(f)(4) of Executive Order 12866 because it raises novel legal and/or policy issues arising out of a legal mandate, namely the DSHEA, or principles set forth in Executive Order 12866. Accordingly, this proposed rule has been formally reviewed by OIRA pursuant to the provisions of Executive Order 12866.

VI. Economic Impact

FDA has examined the economic implications of the proposed rule as required by Executive Order 12866 and the Regulatory Flexibility Act (Pub. Law 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 effects; distributive impacts; and equity). The Regulatory Flexibility Act requires analyzing options for regulatory relief for small businesses. FDA finds that this proposed rule is not an economically significant rule as defined by Executive Order 12866. In accordance with the Regulatory Flexibility Act, the agency certifies that the proposed rule will not have a significant impact on a substantial number of small businesses.

There are several different types of products that may be considered to be dietary supplements. These products include, but are not limited to, vitamin and mineral supplements, herbal products, and products that contain other similar nutritional substances. Estimates of the number of such products range from 4,000 to over 25,000 such products. Similarly, estimates of the number of dietary supplement manufacturers range from 150 to 600.

A. Costs

Categories of costs for relabeling include administrative, analytical, printing, inventory disposal, and reformulation. The administrative costs associated with a labeling regulation result from the incremental administrative labor expended in order to comply with it. The administrative activities that FDA anticipates will be undertaken in response to a change in regulation include: Identifying the underlying policy of the regulation, interpreting that policy relative to a firm's products, determining the scope and coverage related to product labels, establishing a corporate position, formulating a method for compliance, and managing the compliance method. Longer compliance periods decrease administrative costs because firm executives often delegate downward decisions that are less immediate. Many firms estimate that administrative effort would be twice as high for a 6-month compliance period as for a 12- month compliance period (Ref. 17). FDA is proposing that any final rule that may issue based upon this proposal become effective January 1, 1997. This effective date leads to a compliance period of approximately 1 year. FDA estimates that for a 1-year compliance period, manufacturers of dietary supplements will incur administrative costs of $425 per firm for each of between 150 and 600 firms, or a total of between approximately $65,000 and $300,000.

FDA requests comments on whether dietary supplement products will undergo analytical testing as a result of these regulations if implemented as proposed. Dietary supplement products need only list those nutrients present in significant amounts. The agency assumes that manufacturers of vitamin and mineral supplements are already aware of the nutritional content of their products, and that those products will not undergo any additional testing. However, it is possible that herbal and other botanical products may undergo additional testing for their nutritional content. The agency estimates that between 4,000 and 20,000 products may undergo testing once every 5 years for a total discounted analytical cost over the next 20 years of between $8.3 and $41 million (7 percent discount rate).

However, many herbs do not contain significant amounts of the nutrients that must be listed in the nutrition label, and this fact may be determinable from reference works without testing. Thus, some herbal and botanical products may not require nutrient testing at all. FDA requests comments on this issue.

FDA estimates that printing/redesign costs for dietary supplement manufacturers would be approximately $1,000 per label for each of 75,000 labels with a 6-month compliance period, or a total of $75 million. However, the length of the compliance period determines a firm's ability to combine planned label changes with mandated changes. Therefore, incremental labeling and redesign activities are less costly with lengthier compliance periods. With the proposed compliance period of 1 year, printing and redesign costs would be approximately half that of a 6-month compliance period, or approximately $37.5 million.

FDA estimates the cost of inventory disposal associated with a 1-year compliance period to be approximately $13 million. However, manufacturers of these products have been aware of the potential for regulated labeling changes due to recent regulatory and legal activities. FDA assumes that the majority of these manufacturers have been taking the necessary steps to reduce their label inventories since January of 1994, the date of publication of FDA's previous regulations regarding the labeling of dietary supplements. Therefore, the cost of inventory disposal is more accurately calculated on a compliance period of 2 years, or approximately $6.5 million.

FDA has examined the impact of the proposed regulations on dietary supplement manufacturers and has determined that administrative costs would be between $65,000 and $300,000, discounted analytical testing costs would be between $8.3 and $41 million over the next 20 years (7 percent discount rate), printing and redesign costs would be $37.5 million, and inventory disposal costs would be $6.5 million. Therefore, total discounted costs are estimated to be between $52 and $85 million.

B. Benefits

According to Congress as stated in the DSHEA, almost 50 percent of the 260,000,000 Americans regularly consume dietary supplements of vitamins, minerals, or herbs as a means of improving their nutrition. Although almost all dietary supplements of vitamins and minerals currently contain substantial nutrition information, many other dietary supplements do not typically provide such information. Moreover, the information that is presented is not presented in any particular order or following any particular format.

This proposed regulation will benefit consumers by ensuring that adequate and complete nutrition information is provided accurately and consistently in order to aid consumers in their dietary choices. As consumers are given more informative labeling in an improved format, uncertainty and ignorance concerning the ingredient and nutrient content of the products they consume will decrease, and some consumers may select more nutritious, healthier products. Moreover, since FDA began its food labeling initiative in 1989, a theme that has been consistently sounded is that consumers will benefit from nutrition labeling that is presented in a consistent manner, not only within a particular product class but also across all foods. Such a consistent manner will not only help to make the information presented more comprehensible but will facilitate comparisons among food products. This proposed rule, if adopted, will help to ensure that dietary supplements are nutrition labeled in a manner that is as consistent as possible with other foods, yet, with such features as the listing of substances for which no daily reference amount has been established, in a manner that is fully tailored to the special nature of those products.

All told, this action, if adopted, will benefit consumers by ensuring that nutrition labeling is provided on dietary supplements in a manner that will help consumers to follow healthy dietary practices.

C. Regulatory Flexibility

According to the Regulatory Flexibility Act, the definition of small business is a business independently owned and operated and not dominant in its field. The Small Business Administration (SBA) has set size standards for most business categories through use of four-digit Standard Industrial Classification codes. For most food processing industries, a business is considered small if it has fewer than 500 employees. For dietary supplements, a business is considered small if it has fewer than 750 employees. FDA estimates that the majority of manufacturers of dietary supplements meet the SBA definition of a small business.

The agency has published an exemption from mandatory nutrition labeling for small businesses in § 101.9(j)(1) (incorporated in this proposed rule in § 101.36(h)(1)) and has proposed an exemption for low-volume food products of small businesses in § 101.9(j)(18) (59 FR 11872, March 14, 1994) (incorporated in this proposed rule in § 101.36(h)(2)). As of the date this subject rulemaking is proposed to become effective, January 1, 1997,

§ 101.9(j)(1) (and proposed § 101.36(h)(1)) will only apply to retailers. Proposed § 101.9(j)(18) (and proposed § 101.36(h)(2)) will apply to manufacturers, packers, distributors, or retailers of low volume products, defined as fewer than 200,000 units, produced by firms with fewer than 200 employees. As of May 1997, criteria for meeting the definition of low volume product will be reduced to 100,000 units and 100 employees. FDA does not have information to show how many dietary supplement products would be exempted under this provision. The agency believes that several herbal and botanical products will have unit sales and firm size low enough to meet this definition. Therefore, many of the products produced by businesses defined as small by the SBA will not be subject to the rules if issued as proposed.

The agency requests information regarding the impact of this regulation on small firms. Most of the costs associated with labeling regulations are fixed costs which are typically more burdensome for small firms than for large firms because of the smaller sales base on which to spread costs. Estimates of annual sales for the dietary supplement industry range from $2.9 billion to over $4 billion. The estimated cost of between $52 and $85 million is approximately one to three percent of industry annual sales. In relation to the volume of sales, this amount does not appear to represent a significant cost.

D. Summary

Total discounted costs of this regulation is estimated to be between $52 and $85 million over the next 20 years (7 percent discount rate). These costs include administrative, analytical, printing, and inventory disposal costs. The benefits are improved and more consistent information with which consumers can refine their choices for health or other reasons. FDA is unable to quantify this benefit.

FDA has analyzed the costs and benefits of this proposed rule and has determined that it does not constitute an economically significant rule as defined by Executive Order 12866.

FDA has also analyzed the impacts on small firms according to the Regulatory Flexibility Act and has determined that the proposed rules will probably not have an adverse impact on a substantial number of small businesses. Nonetheless, the agency requests comments on the impact on small businesses and any burden-reducing options.

VII. Environmental Impact

The agency has determined under § 25.24(a)(11) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environment assessment nor an environmental impact statement is required.

VIII. Paperwork Reduction Act of 1995

This proposed rule contains information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (Pub. L. 104–13). In particular, the proposed regulations would require that manufacturers and distributors of dietary supplements disclose information on the levels of specific nutrients on the label or in labeling of their products with some exceptions. Additionally, the proposed regulations would require that these firms disclose the quantity of other dietary ingredients in their dietary supplements. Therefore, in accordance with 5 CFR Part 1320, FDA is providing below the title, description, and respondent descriptions for the information collection requirements that will be submitted to OMB along with an estimate of the annual collection of information burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering necessary information, and disclosure of the information.

FDA is soliciting comments 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; (3) evaluate 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 automated collection techniques or other forms of information technology, when appropriate.

Title: Requirements for Nutrition and Ingredient Labeling of Dietary Supplements.

Description: The proposed rule, § 101.36, would require that most dietary supplements provide on their labels and in their labeling information on the quantity of specific nutrients present in them, along with daily value for each, and the quantity of other dietary ingredients. This requirement is being proposed to implement the requirements of the 1990 amendments and the DSHEA.

The DSHEA requires that dietary supplements provide information on their labels as to the level of nutrients and other dietary ingredients present in them. The DSHEA requires that FDA issue regulations to implement these requirements within specific timeframes. Section 101.36(b)(2) specifies the nutrients for which amount must be present on the labels of dietary supplements and § 101.36(b)(3) provides for the listing of the quantity of other dietary ingredients, respectively. Other paragraphs of § 101.36 provide information to assist manufacturers and distributors of dietary supplements to determine the amount of nutrient that their products contain and that should be disclosed on the labels of the products.

Description of Respondents: Persons and businesses, including small businesses.

Title 21	No. of respondents	No. of responses per respondent	Total annual responses	Hours per response	Total annual hours	Total operating maintenance costs
101.36	600	40	24,000	4	96,000	$51,616,000

FDA estimates that each supplier of dietary supplements will revise the labels for each product that is not otherwise exempt to comply with the requirements for nutrition labeling within the first year after publication of a final rule. The agency expects that the number of respondents and corresponding annual burden hours will decrease over succeeding years because it does not believe that firms will modify the composition of each of their products and revise the labeling for each of their products each year. FDA has estimated the total annual operating and

maintenance costs of $51,616,000 based on maximum estimated relabeling costs of $34 million, all of which will be incurred in the first year; annualized analytical costs of $13.2 million; and labor and overhead costs of $4.616 million for the first year. The agency believes that these costs will decrease significantly over succeeding years. The agency does not believe that this proposed regulation requires capital costs on the part of respondents.

The agency has submitted copies of the proposed rule to OMB for its review of these requirements. Interested persons are requested to send comments regarding information collection by Janaury 29, 1996, but not later than February 26, 1996 to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, rm. 10235, Washington, DC 20503, ATTN: Desk Officer for FDA.

IX. Effective Date

FDA is proposing to make this regulation effective on January 1, 1997. This date is consistent with section 7(e) of the DSHEA, which states that dietary supplements must be labeled in accordance with its provisions after December 31, 1996.

X. Comments

Interested persons may, on or before March 13, 1996 submit to the Dockets Management Branch (address above) written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

XI. References

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

1. Lehninger, A. L., ''*Biochemistry*,'' Second Edition, pp. 57–58, Worth Publishers, Inc., New York, NY, 1977.

2. Memorandum of telephone conversation between Mr. Mark Blumenthal, American Botanical Council, and Susan Thompson, FDA, March 16, 1995.

3. Bass, I. S., A. L. Young, and S. C. Stolzer, Piper & Marbury, letter to F. E. Scarbrough, January 31, 1995.

4. Covington & Burling, ''Dietary Supplement Health and Education Act of 1994,'' October 12, 1994.

5. FDA trade correspondence letter (387), June 23, 1942.

6. FDA opinion letter, Taylor M. Quinn, Office of Compliance, Bureau of Foods, to Stanley Skelskie, March 30, 1979.

7. FDA opinion letter, Taylor M. Quinn, Office of Compliance, Bureau of Foods, to Stanley Skelskie, January 25, 1980.

8. Greuter, W., editor (chairperson), *International Code of Botanical Nomenclature (Tokyo Code) Adopted by the 15th International Botanical Congress*, Koeltz Scientific Books, D–61453 Konigstein, Germany, 1994.

9. U. S. Pharmacopeial Convention, Inc. *USP XXII, NF XVII, The United States Pharmacopeia*, The National Formulary, General Notices and Requirements Applying to Standards, Test, Assays, and Other Specifications of the United States Pharmacopeia, pp. 1 to 3, January 1, 1990.

10. Tanner, J. T., letter to V. Srinivasan, U.S. Pharmacopeial Convention, Inc., May 7, 1991.

11. Citizen Petition, Docket No. 94P–0110/CP1.

12. Dickinson, Annette, Council for Responsible Nutrition, Letter to Susan Thompson, FDA, February 28, 1995.

13. Subcommittee on the 10th Edition of the RDA's, Food and Nutrition Board, Commission of Life Sciences, National Research Council, ''Recommended Dietary Allowances, 10th Ed.,'' p. 14, Washington, DC, National Academy Press, 1989.

14. U.S. Department of Agriculture and U.S. Department of Health and Human Services, ''Nutrition and Your Health, Dietary Guidelines for Americans,'' Home and Garden Bulletin No. 232, U.S. Government Printing Office, Washington DC, 1990.

15. Committee on Diet and Health, Food and Nutrition Board, Commission of Life Sciences, National Research Council, ''Diet and Health, Implications for Reducing Chronic Disease Risk,'' Chapter 18, Dietary Supplements, National Academy Press, Washington, DC, 1989.

16. ''Recommendations concerning supplement usage: ADA statement,'' *Journal of the American Dietetic Association*, 87:1742–3, 1987.

17. Center for Economics Research, ''Compliance Costs of Food Labeling Regulations Final Report,'' prepared under FDA Contract No. 223–87–2097, Washington, DC, FDA, DHHS, 1991.

List of Subjects in 21 CFR Part 101

Food labeling, Nutrition, 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 part 101 be amended as follows:

PART 101—FOOD LABELING

1. The authority citation for 21 CFR part 101 is revised to read as follows:

Authority: Secs. 4, 5, 6 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 301, 402, 403, 409, 501, 502, 505, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 351, 352, 355, 371).

1. Section 101.2 is amended by revising paragraphs (b), (d)(1), and (f) to read as follows:

§ 101.2 Information panel of package form food.

* * * * *

(b) All information required to appear on the label of any package of food pursuant to §§ 101.4, 101.5, 101.8, 101.9, 101.13, 101.17, 101.36, subpart D of part 101, and part 105 of this chapter shall appear either on the principal display panel or on the information panel, unless otherwise specified by regulations in this chapter.

* * * * *

(d)(1) Except as provided by § 101.9(j)(13) and (j)(17) and § 101.36(i)(2) and (i)(5), all information required to appear on the principal display panel or on the information panel under this section shall appear on the same panel unless there is insufficient space. In determining the sufficiency of the available space, except as provided by § 101.9(j)(17) and § 101.36(i)(5), any vignettes, designs, and other nonmandatory label information shall not be considered. If there is insufficient space for all of this information to appear on a single panel, it may be divided between these two panels except that the information required under any given section or part shall all appear on the same panel. A food whose label is required to bear the ingredient statement on the principal display panel may bear all other information specified in paragraph (b) of this section on the information panel.

* * * * *

(f) If the label of any package of food is too small to accommodate all of the information required by §§ 101.4, 101.5, 101.8, 101.9, 101.13, 101.17, 101.36, subpart D of part 101, and part 105 of this chapter, the Commissioner may establish by regulation an acceptable alternative method of disseminating such information to the public, e.g., a type size smaller than one-sixteenth inch in height, or labeling attached to or inserted in the package or available at the point of purchase. A petition requesting such a regulation, as an amendment to this paragraph, shall be submitted under part 10 of this chapter.

2. Section 101.3 is amended by adding new paragraph (g) to read as follows:

§ 101.3 Identity labeling of food in packaged form.

* * * * *

(g) When a food is marketed as a dietary supplement, the label shall bear the term ''dietary supplement'' as a part of the statement of identity in

conformance with the provisions of paragraph (d) of this section.

3. Section 101.4 is amended by revising paragraph (a)(1) and adding new paragraphs (g) and (h) to read as follows:

§ 101.4 Food; designation of ingredients.

(a)(1) Ingredients required to be declared on the label or labeling of a food, including foods that comply with standards of identity, except those ingredients exempted by § 101.100, shall be listed by common or usual name in descending order of predominance by weight on either the principal display panel or the information panel in accordance with the provisions of § 101.2, except that ingredients in dietary supplements that are listed in the nutrition label in accordance with § 101.36 need not be repeated in the ingredient list. Paragraph (g) of this section describes the ingredient list on dietary supplement products.

* * * * *

(g) When present, the ingredient list on dietary supplement products shall be located immediately below the nutrition label, or, if there is insufficient space below the nutrition label, immediately contiguous and to the right of the nutrition label and shall be preceded by the word ''Ingredients,'' unless some ingredients (i.e., sources) are identified within the nutrition label in accordance with § 101.36(d), in which case the ingredients listed outside the nutrition label shall be in a list preceded by the words ''Other Ingredients.'' Ingredients in dietary supplements that are not dietary ingredients or that do not contain dietary ingredients, such as excipients, fillers, artificial colors, artificial sweeteners, flavors, or binders, shall be included in the ingredient list.

(h) The common or usual name of ingredients of dietary supplements that are botanicals (including fungi and algae) shall be immediately followed by parenthetical statements of:

(1) The Latin binomial name of the plant. Any name in Latin form shall be in accordance with internationally accepted rules on nomenclature, such as those found in the *International Code of Botanical Nomenclature,* and shall include the designation of the author or authors who published the Latin name, when appropriate; and

(2) The part of the plant (e.g., root, leaves) from which the dietary ingredient is derived (e.g., ''Garlic (*Allium sativum* L.) (bulb)''), except that this designation is not required for algae. The name of the part of the plant shall be expressed in English (e.g., ''flower'' rather than ''flos'').

(3) On labels of single-ingredient dietary supplements that do not include an ingredient list, the required identification of the Latin binomial name and the part of the plant may be prominently placed on the principal display panel or information panel, or included in the nutrition label.

4. Section 101.9 is amended by revising paragraph (j)(6), by removing paragraphs (k)(2) and (k)(5), and by redesignating paragraphs (k)(3), (k)(4), and (k)(6) as (k)(2), (k)(3), and (k)(4), respectively, to read as follows:

§ 101.9 Nutrition labeling of food.

* * * * *

(j) * * *

(6) Dietary supplements, except that such foods shall be labeled in compliance with § 101.36.

* * * * *

5. Section 101.12 is amended in paragraph (b), Table 2, by revising the entry ''Dietary supplements not in conventional food form'' under the subheading ''Miscellaneous category'' to read as follows:

§ 101.12 Reference amounts customarily consumed per eating occasion.

* * * * *

(b) * * *

TABLE 2.—REFERENCE AMOUNTS CUSTOMARILY CONSUMED PER EATING OCCASION: GENERAL FOOD SUPPLY [1,2,3,4]

Product category	Reference amount	Label statement [5]
*	*	*
Miscellaneous Category—		
*	*	*
Dietary supplements	The maximum amount recommended, as appropriate, on the label for consumption per eating occasion, or, in the absence of recommendations, 1 unit, e.g., tablet, capsule, packet, teaspoonsful, etc.	_____ tablet(s) _____ capsule(s), ____ packet(s), tsp(s) (_____g), etc.
*	*	*

[1] These values represent the amount (edible portion) of food customarily consumed per eating occasion and were primarily derived from the 1977–78 and the 1987–1988 Nationwide Food Consumption Surveys conducted by the U.S. Department of Agriculture.

[2] Unless otherwise noted in the Reference Amount column, the reference amounts are for the ready-to-serve or almost ready-to-serve form of the product (i.e, heat and serve, brown and serve). If not listed separately, the reference amount for the unprepared form (e.g., dry mixes; concentrates; dough; batter; dry, fresh, and frozen pasta) is the amount required to make the reference amount of the prepared form. Prepared means prepared for consumption (e.g., cooked).

[3] Manufacturers are required to convert the reference amount to the label serving size in a household measure most appropriate to their specific product using the procedures in 21 CFR 101.9(b).

[4] Copies of the list of products for each product category are available from the Office of Food Labeling (HFS–150), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 200 C St. SW., Washington, DC 20204.

[5] The label statements are meant to provide guidance to manufacturers on the presentation of serving size information on the label, but they are not required. The term ''piece'' is used as a generic description of a discrete unit. Manufacturers should use the description of a unit that is most appropriate for the specific product (e.g., sandwich for sandwiches, cookie for cookies, and bar for ice cream bars). The guidance provided is for the label statement of products in ready-to-serve or almost ready-to-serve form. The guidance does not apply to the products which require further preparation for consumption (e.g., dry mixes, concentrates) unless specifically stated in the product category, reference amount, or label statement column that it is for these forms of the product. For products that require further preparation, manufacturers must determine the label statement following the rules in § 101.9(b) using the reference amount determined according to § 101.12(c).

* * * * *

6. Section 101.36 is revised to read as follows:

§ 101.36 Nutrition labeling of dietary supplements.

(a) The label of a dietary supplement shall bear nutrition labeling in accordance with this regulation unless an exemption is provided for the product in paragraph (h) of this section.

(b) The declaration of nutrition information on the label and in labeling shall contain the following information, using the subheadings and the format specified in paragraph (e) of this section.

(1) *Serving size.* (i) The subheading ''Serving Size'' shall be placed under the heading ''Supplement Facts'' and aligned on the left side of the nutrition label. The serving size shall be determined in accordance with §§ 101.9(b) and 101.12(b), Table 2. Serving size for dietary supplements shall be expressed using a term that is appropriate for the form of the supplement, such as ''tablets,'' ''capsules,'' ''packets,'' or ''teaspoonfuls.''

(ii) The subheading ''Servings Per Container'' shall be placed under the subheading ''Serving Size'' and aligned on the left side of the nutrition label, except that this information need not be provided when it is stated in the net quantity of contents declaration.

(2) *Information on dietary ingredients that have a Reference Daily Intake (RDI) or a Daily Reference Value (DRV) as established in § 101.9(c) and their subcomponents (hereinafter referred to as ''(b)(2)-dietary ingredients'').*

(i) The (b)(2)-dietary ingredients to be declared, that is, total calories, calories from fat, total fat, saturated fat, cholesterol, sodium, total carbohydrate, dietary fiber, sugars, protein, vitamin A, vitamin C, calcium and iron, shall be declared when they are present in a dietary supplement in quantitative amounts by weight that exceed the amount that can be declared as zero in nutrition labeling of foods in accordance with § 101.9(c). Calories from saturated fat and polyunsaturated fat, monounsaturated fat, soluble fiber, insoluble fiber, sugar alcohol, and other carbohydrate may be declared, but they shall be declared when a claim is made about them. Any other vitamins or minerals listed in § 101.9(c)(8)(iv) or in § 101.9(c)(9) may be declared, but they shall be declared when they are added to the product for purposes of supplementation, or when a claim is made about them. Any (b)(2)-dietary ingredients that are not present, or that are present in amounts that can be declared as zero in § 101.9(c), shall not be declared (e.g., amounts corresponding to less than 2 percent of the RDI for vitamins and minerals). Protein shall not be declared on labels of products that, other than ingredients added solely for technological reasons, contain only individual amino acids.

(A) The names and the quantitative amounts by weight of each (b)(2)-dietary ingredient shall be presented under the heading ''Amount Per Serving.'' The heading may be centered over the column of quantitative amounts, described by paragraph (b)(2)(ii) of this section, if space permits. When the serving size of the product is one unit (e.g., one tablet), a heading consistent with the declaration of the serving size, such as ''Amount Per Tablet'' or ''Each Tablet Contains,'' may be used in place of the heading ''Amount Per Serving.'' Other appropriate terms, such as capsule, packet, or teaspoonful, also may be used in place of the term ''Serving.''

(B) The names of dietary ingredients that are declared under paragraph (b)(2)(i) of this section shall be presented in a column aligned on the left side of the nutrition label in the order and manner of indentation specified in § 101.9(c) except that calcium and iron shall follow pantothenic acid, and sodium and potassium shall follow chloride. This results in the following order for vitamins and minerals: Vitamin A, vitamin C, vitamin D, vitamin E, vitamin K, thiamin, riboflavin, niacin, vitamin B6, folate, vitamin B12, biotin, pantothenic acid, calcium, iron, phosphorus, iodine, magnesium, zinc, selenium, copper, manganese, chromium, molybdenum, chloride, sodium, and potassium. The (b)(2)-dietary ingredients shall be listed according to the nomenclature specified in § 101.9.

(*1*) When ''Calories'' are declared, they shall be listed first in the column of names, beneath a light bar separating the heading ''Amount Per Serving'' from the list of names. When ''Calories from fat'' or ''Calories from saturated fat'' are declared, they shall be indented beneath ''Calories.''

(*2*) The following synonyms may be added in parentheses immediately following the name of these (b)(2)-dietary ingredients: Vitamin C (ascorbic acid), thiamin (vitamin B1), riboflavin (vitamin B2), folate (folacin or folic acid), and calories (energy). Energy content per serving may be expressed in kilojoules units, added in parentheses immediately following the statement of caloric content.

(*3*) Beta-carotene may be declared as the percent of vitamin A that is present as beta-carotene, except that the declaration is required when a claim is made about beta-carotene. When declared, the percent shall be declared to the nearest whole percent, immediately adjacent to or beneath the name vitamin A (e.g., ''Vitamin A (90% as beta-carotene)''). The amount of beta-carotene in terms of international units (IU) may be included in parentheses following the percent statement (e.g., ''Vitamin A (90% (4500 IU) as beta-carotene)'').

(ii) The number of calories, if declared, and the quantitative amount by weight per serving of each dietary ingredient required to be listed under paragraph (b)(2)(i) of this section shall be presented in a separate column aligned to the right of the column of names. The quantitative amounts by weight shall represent the weight of the dietary ingredient rather than the weight of the source of the dietary ingredient (e.g., the weight of calcium rather than that of calcium carbonate).

(A) These amounts shall be expressed in the increments specified in § 101.9 (c)(1) through (c)(7), which includes increments for sodium and potassium.

(B) The amounts of vitamins and minerals, excluding sodium and potassium, shall be the actual amount of the vitamin or mineral included in one serving of the product, using the units of measurement and the levels of significance given in § 101.9(c)(8)(iv), except that zeros following decimal points may be dropped, and additional levels of significance may be used when the number of decimal places indicated is not sufficient to express lower amounts (e.g., the RDI for zinc is given in whole milligrams (mg), but the quantitative amount may be declared in tenths of a mg).

(iii) The percent of the Daily Value of all dietary ingredients declared under paragraph (b)(2)(i) of this section shall be listed except that the percent for protein may be omitted as provided in § 101.9(c)(7), no percent shall be given for subcomponents for which DRV's have not been established (e.g., sugars), and, for labels of dietary supplements of vitamins and minerals that are represented or purported to be for use by infants, children less than 4 years of age, or pregnant or lactating women, no percent shall be given for total fat, saturated fat, cholesterol, total carbohydrate, dietary fiber, sodium, potassium, vitamin K, chloride, chromium, manganese, molybdenum, or selenium.

(A) When information on the percent of Daily Values is listed, this

information shall be presented in one column aligned under the heading of ''% Daily Value'' and to the right of the column of amounts. The headings ''% Daily Value (DV),'' ''% DV,'' ''Percent Daily Value,'' or ''Percent DV'' may be substituted for ''% Daily Value.'' The heading ''% Daily Value'' shall be placed on the same line as the heading ''Amount Per Serving.''

(B) The percent of Daily Value shall be calculated by dividing the quantitative amount by weight of each (b)(2)-dietary ingredient by the RDI as established in § 101.9(c)(8)(iv) or the DRV as established in § 101.9(c)(9) for the specified dietary ingredient and multiplying by 100, except that the percent of Daily Value for protein, when present, shall be calculated as specified in § 101.9(c)(7)(ii). The actual quantitative amount by weight of each dietary ingredient shall be used in this calculation, except that for total fat, saturated fat, cholesterol, sodium, potassium, total carbohydrate, and dietary fiber, the percent shall be calculated by dividing either the quantitative amount by weight declared on the label or the actual amount (i.e., before rounding) by the DRV for the dietary ingredient. The numerical value shall be followed by the symbol for percent (i.e., %).

(C) The percentages based on RDI's and on DRV's shall be expressed to the nearest whole percent, except that for dietary ingredients for which DRV's have been established, ''Less than 1%'' or ''<1%'' shall be used to declare the ''% Daily Value'' when the quantitative amount of the dietary ingredient by weight is great enough to require that the dietary ingredient be listed, but the amount is so small that the ''% Daily Value'' when rounded to the nearest percent is zero (e.g., the percent Daily Value for 1 gram of total carbohydrate is to be listed as ''Less than 1%'' or ''<1%'').

(D) If the percent of Daily Value is declared for total fat, saturated fat, total carbohydrate, dietary fiber, or protein, a symbol shall follow the value listed for those nutrients that refers to the same symbol that is placed at the bottom of the nutrition label, below the bar required under paragraph (e)(6) of this section and inside the box, that is followed by the statement ''Percent Daily Values are based on a 2,000 calorie diet.''

(E) The percent of Daily Value shall be based on RDI and DRV values for adults and children 4 or more years of age, unless the product is represented or purported to be for use by infants, children less than 4 years of age, pregnant women, or lactating women, in which case the column heading shall clearly state the intended group. If the product is for persons within more than one group, the percent of Daily Value for each group shall be presented in separate columns as shown in paragraph (e)(10)(ii) of this section.

(F) For declared subcomponents that have no DRV's and, on the labels of dietary supplements of vitamins and minerals that are represented or purported to be for use by infants, children less that 4 years of age, or pregnant or lactating women, for total fat, saturated fat, cholesterol, total carbohydrate, dietary fiber, sodium, potassium, vitamin K, chloride, chromium, manganese, molybdenum, or selenium, a symbol (e.g., an asterisk) shall be placed in the ''Percent Daily Value'' column that shall refer to the same symbol that is placed at the bottom of the nutrition label, below the last heavy bar and inside the box, and followed by the statement ''Daily Value not established.''

(G) When calories, calories from fat, or calories from saturated fat are declared, the space under the ''% Daily Value'' column shall be left blank for these items. When there are no other (b)(2)-dietary ingredients listed for which a value must be declared in the ''% Daily Value'' column, the column may be omitted as shown in paragraph (e)(10)(vii) of this section. When the ''% Daily Value'' column is not required, but the dietary ingredients listed are subject to paragraph (b)(2)(iii)(F) of this section, the symbol required in that paragraph shall immediately follow the quantitative amount by weight for each dietary ingredient listed under ''Amount Per Serving.''

(3) *Information on dietary ingredients for which RDI's and DRV's have not been established.* (i) Dietary ingredients for which FDA has not established an RDI or DRV and that are not subject to regulation under paragraph (b)(2) of this section (hereinafter referred to as ''other dietary ingredients'') shall be declared by their common or usual name when they are present in a dietary supplement, in a column that is under the column of names described in paragraph (b)(2)(i)(B) of this section and under the heavy bar described in paragraph (e)(6) of this section, except that if no (b)(2)-dietary ingredients are declared, other dietary ingredients shall be listed directly beneath the heading ''Amount Per Serving'' described in paragraph (b)(2)(i)(A).

(ii) The quantitative amount by weight per serving of other dietary ingredients shall be presented in a separate column aligned to the right of the column of names and underneath the column of amounts described in paragraph (b)(2)(ii) of this section. The quantitative amount by weight shall be the weight of the other dietary ingredient listed and not the weight of any component, or the source, of that dietary ingredient. These amounts shall be expressed using metric measures in appropriate units (i.e., 1,000 or more units shall be declared in the next higher set of units, e.g., 1,100 mg shall be declared as 1.1 g). For any dietary ingredients that are liquid extracts, the weight shall not include the weight of solvents.

(iii) Other dietary ingredients shall bear a symbol (e.g., an asterisk) in the column under the heading of ''% Daily Value'' that refers to the same symbol placed at the bottom of the nutrition label and followed by the statement ''Daily Value not established,'' except that when the heading ''% Daily Value'' is not used, the symbol shall follow the quantitative amount by weight for each dietary ingredient listed.

(c) A proprietary blend of dietary ingredients shall be included in the list of dietary ingredients described in paragraph (b)(3)(i) of this section and identified by the term ''Proprietary Blend,'' which may be modified by an appropriate descriptive term or fanciful name. Except as specified in this paragraph, all other requirements for the listing of dietary ingredients in dietary supplements are applicable.

(1) Dietary ingredients contained in the proprietary blend that are listed under paragraph (b)(2) of this section shall be declared in accordance with paragraph (b)(2) of this section.

(2) Dietary ingredients contained in the proprietary blend that are listed under paragraph (b)(3) of this section (i.e., ''other dietary ingredients'') shall be declared in descending order of predominance by weight, in a column or linear fashion, and indented under the term ''Proprietary Blend.''

(3) The quantitative amount by weight specified for the proprietary blend shall be the total weight of all other dietary ingredients contained in the proprietary blend and shall be placed on the same line to the right of the term ''Proprietary Blend'' underneath the column of amounts described in paragraph (b)(2)(ii) of this section. A symbol (e.g., asterisk), which refers to the same symbol placed at the bottom of the nutrition label that is followed by the statement ''Daily Value not established,'' shall be placed under the heading ''% Daily Value,'' if present, or immediately following the quantitative amount by weight for the proprietary blend.

(4) The sample label shown in paragraph (e)(10)(v) of this section illustrates one method of nutrition labeling a proprietary blend of dietary ingredients.

(d) The source ingredient that supplies a dietary ingredient may be identified within the nutrition label in parentheses immediately following or indented beneath the name of a dietary ingredient and preceded by the words ''as'' or ''from'', e.g., ''Calcium (as calcium carbonate),'' except that manner of presentation is unnecessary when the name of the dietary ingredient (e.g., Siberian ginseng) or its synonym (e.g., ascorbic acid) is itself the source ingredient. When a source ingredient is identified in parentheses within the nutrition label, or when the name of the dietary ingredient or its synonym is the source ingredient, it shall not be required to be listed again in the ingredient statement that appears outside of the nutrition label. When a source ingredient is not identified within the nutrition label, it shall be listed in an ingredient statement in accordance with § 101.4(g), which shall appear outside and immediately below the nutrition label or, if there is insufficient space below the nutrition label, immediately contiguous and to the right of the nutrition label.

(1) Source ingredients shall be identified in accordance with § 101.4 (i.e., shall be listed by common or usual name, and the listing of botanicals shall specify the Latin binomial name and the part of the plant from which the ingredient is derived) regardless of whether they are listed in an ingredient statement or in the nutrition label.

(2) When source ingredients are listed within the nutrition label, and two or more are used to provide a single dietary ingredient, all of the sources shall be listed within the parentheses in descending order by weight.

(3) Representations that the source ingredient conforms to an official compendium may be included either in the nutrition label or in the ingredient list (e.g., ''Calcium (as calcium carbonate USP)'').

(e) Nutrition information specified in this section shall be presented as follows:

(1) The title, ''Supplement Facts,'' shall be set in a type size larger than all other print size in the nutrition label and, unless impractical, shall be set full width of the nutrition label. The title and all headings shall be bolded to distinguish them from other information.

(2) The nutrition information shall be enclosed in a box by using hairlines.

(3) All information within the nutrition label shall utilize:

(i) A single easy-to-read type style,

(ii) All black or one color type, printed on a white or other neutral contrasting background whenever practical,

(iii) Upper and lower case letters, except that all uppercase lettering may be utilized for packages that have a total surface area available to bear labeling of less than 12 square inches,

(iv) At least one point leading (i.e., space between lines of text), and

(v) Letters that do not touch.

(4) Except as provided for small and intermediate-sized packages under paragraph (i)(2) of this section, information other than the title, headings, and footnotes shall be in uniform type size no smaller than 8 point. Type size no smaller than 6 point may be used for column headings (e.g., ''Amount Per Serving'' and ''% Daily Value'') and for footnotes (e.g., ''Percent Daily Values are based on a 2,000 calorie diet'').

(5) A hairline rule that is centered between the lines of text shall separate each dietary ingredient required in paragraph (b)(2) and (b)(3) of this section from the dietary ingredient above and beneath it, as shown in paragraph (e)(10) of this section.

(6) A heavy bar shall be placed:

(i) Beneath the subheading ''Servings Per Container'' except that if ''Servings Per Container'' is not required and, as a result, not declared, the bar shall be placed beneath the subheading ''Serving Size,''

(ii) Beneath the last dietary ingredient to be listed under paragraph (b)(2)(i) of this section, if any, and

(iii) Beneath the last other dietary ingredient to be listed under paragraph (b)(3) of this section, if any.

(7) A light bar shall be placed beneath the headings ''Amount Per Serving'' and ''% Daily Value.''

(8) If the product contains two or more separately packaged dietary supplements that differ from each other (e.g., the product has a packet of supplements to be taken in the morning and a different packet to be taken in the afternoon), the quantitative amounts and percent of Daily Value may be presented as specified in this paragraph in individual nutrition labels or in one aggregate nutrition label as illustrated in paragraph (e)(10)(iii) of this section.

(9) In the interest of uniformity of presentation, FDA urges that the information be presented using the graphic specifications set forth in Appendix B to part 101, as applicable.

(10) The following sample labels are presented for the purpose of illustration:

BILLING CODE 4160–01–P

(i) Multiple vitamins:

Supplement Facts

Serving Size 1 Tablet

	Amount Per Serving	% Daily Value
Vitamin A (as retinyl acetate and 50% as beta-carotene)	5000 IU	100%
Vitamin C (as ascorbic acid)	60 mg	100%
Vitamin D	400 IU	100%
Vitamin E (as dl-alpha tocopheryl acetate)	30 IU	100%
Thiamin (as thiamin mononitrate)	1.5 mg	100%
Riboflavin	1.7 mg	100%
Niacin (as niacinamide)	20 mg	100%
Vitamin B_6 (as pyridoxine hydrochloride)	2.0 mg	100%
Folate (as folic acid)	400 mcg	100%
Vitamin B_{12} (as cyanocobalamin)	6 mcg	100%
Biotin	30 mcg	10%
Pantothenic Acid (as calcium pantothenate)	10 mg	100%

Other ingredients: Gelatin, lactose, magnesium stearate, microcrystalline cellulose, FD&C Yellow No. 6, propylene glycol, propylparaben, and sodium benozate.

(ii) Multiple vitamins for children and adults:

Supplement Facts

Serving Size 1 Tablet

Amount Per Serving		% Daily Value for Children Under 4 Years of Age	% Daily Value for Adults and Children 4 or more Years of Age
Calories	5		
Total Carbohydrate	1 g	†	< 1%*
Sugars	1 g	†	†
Vitamin A (50% as beta-carotene)	2500 IU	100%	50%
Vitamin C	40 mg	100%	67%
Vitamin D	400 IU	100%	100%
Vitamin E	15 IU	150%	50%
Thiamin	1.1 mg	157%	73%
Riboflavin	1.2 mg	150%	71%
Niacin	14 mg	156%	70%
Vitamin B_6	1.1 mg	157%	55%
Folate	300 mcg	150%	75%
Vitamin B_{12}	5 mcg	167%	83%

* Percent Daily Values are based on 2,000 calorie diet.
† Daily Value not established.

Other ingredients: Sucrose, sodium ascorbate, stearic acid, gelatin, maltodextrins, artificial flavors, vitamin E acetate, niacinamide, magnesium stearate, Yellow 6, artificial colors, stearic acid, palmitic acid, pyridoxine hydrochloride, thiamin mononitrate, vitamin A acetate, beta-carotene, and folic acid.

(iii) Multiple vitamins in packets:

Supplement Facts

Serving Size 1 Packet
Servings Per Container 10

	AM Packet		PM Packet	
Amount Per Serving		% Daily Value		% Daily Value
Vitamin A	2500 IU	50%	2500 IU	50%
Vitamin C	60 mg	100%	60 mg	100%
Vitamin D	400 IU	100%		
Vitamin E	30 IU	100%		
Thiamin	1.5 mg	100%	1.5 mg	100%
Riboflavin	1.7 mg	100%	1.7 mg	100%
Niacin	20 mg	100%	20 mg	100%
Vitamin B_6	2.0 mg	100%	2.0 mg	100%
Folate	200 mcg	50%	200 mcg	50%
Vitamin B_{12}	3 mcg	50%	3 mcg	50%
Biotin			30 mcg	10%
Pantothenic Acid	5 mg	50%	5 mg	50%

Ingredients: Sodium ascorbate, ascorbic acid, niacinamide, vitamin E acetate, microcrystalline cellulose, artificial flavors, dextrin, starch, mono- and diglycerides, vitamin A acetate. magnesium stearate, riboflavin, gelatin, FD&C Blue #1, FD&C Red #3, artificial colors, thiamin mononitrate, pyridoxine hydrochloride, citric acid, lactose, folic acid, sorbic acid, tricalcium phosphate, sodium benzoate, sodium caseinate, methylparaben, potassium sorbate, BHA, BHT, vitamin D and vitamin B_{12}.

(iv) Dietary supplement containing dietary ingredient with and without RDI's and DRV's:

Supplement Facts

Serving Size 1 Capsule

	Amount Per Capsule	% Daily Value
Calories	20	
Calories from Fat	20	
Total Fat	2 g	3%*
Saturated Fat	0.5 g	3%*
Polyunsaturated Fat	1 g	†
Monounsaturated Fat	0.5 g	†
Vitamin A	4250 IU	85%
Vitamin D	425 IU	106%
Omega-3 fatty acids	0.5 g	†

* Percent Daily Values are based on 2,000 calorie diet.
† Daily Value not established.

Ingredients: Cod fish oil, gelatin, water, and glycerin.

(v) A proprietary blend of dietary ingredients:

Supplement Facts

Serving Size 1 tsp (2.7 g) (makes 8 fl oz prepared)
Servings Per Container 24

	Amount Per Teaspoon	% Daily Value
Calories	10	
Total Carbohydrate	2 g	< 1%*
Sugars	2 g	†
Proprietary blend	0.7 g	†
Chamomile, Hungarian (*Matricaria chamomillia* L.)(flower)		
Hyssop (*Hyssopus officinalis* L.)(leaves)		

* Percent Daily Values are based on 2,000 calorie diet.
† Daily Value not established.

Other ingredients: Fructose, lactose, starch, and stearic acid.

(vi) Dietary supplement of an herb

Supplement Facts

Serving Size 1 Capsule

Amount Per Capsule	
Ginseng, powdered (*Panax ginseng* C. A. Mey.)(root)	250 mcg*

* Daily Value not established.

Other ingredients: Gelatin, water, and glycerin.

(vii) Dietary supplement of amino acids:

Supplement Facts

Serving size 1 Tablet

Amount Per Tablet	
Calories	15
L-isoleucine (as L-isoleucine hydrochloride)	450 mg*
L-leucine (as L-leucine hydrochloride)	620 mg*
L-lysine (as L-lysine hydrochloride)	500 mg*
L-methionine (as L-methionine hydrochloride)	350 mg*
L-cystine (as L-cystine hydrochloride)	200 mg*
L-phenylalanine (as L-phenylalanine hydrochloride)	220 mg*
L-tryosine (as L-tryosine hydrochloride)	900 mg*
L-threonine (as L-threonine hydrochloride)	300 mg*
L-valine (as L-valine hydrochloride)	650 mg*

* Daily Value not established.

Other ingredients: Cellulose, lactose, and magnesium stearate.

BILLING CODE 4160–01–C

(11) If space is not adequate to list the required information as shown in the sample labels in paragraph (e)(10) of this section, the list may be split and continued to the right as long as the headings are repeated. The list to the right shall be set off by a line that distinguishes it and sets it apart from the dietary ingredients and percent of Daily Value information given to the left. The following sample label illustrates this display:

BILLING CODE 4160–01–P

Supplement Facts

Serving Size 1 Packet

Amount Per Packet		% Daily Value
Vitamin A (from fish liver oil)	5,000 IU	100%
Vitamin C (as ascorbic acid and from rose hips, *Rosa* L. spp.)(fruit)	250 mg	417%
Vitamin D	400 IU	100%
Vitamin E (as d-alpha tocopherol)	150 IU	500%
Thiamin (as thiamin mononitrate)	75 mg	5000%
Riboflavin	75 mg	4412%
Niacin (as niacinamide)	75 mg	375%
Vitamin B_6 (as pyridoxine hydrochloride)	75 mg	3750%
Folate (as folic acid)	400 mcg	100%
Vitamin B_{12} (as cyanocobalamin)	100 mcg	1667%
Biotin	100 mcg	33%
Pantothenic Acid	75 mg	750%
Calcium (from oystershell)	100 mg	10%
Iron (as ferrous fumarate)	10 mg	56%
Iodine (from kelp)	150 mcg	100%
Magnesium (as magnesium oxide)	60 mg	15%

Amount Per Packet		% Daily Value
Zinc (as zinc oxide)	15 mg	100%
Selenium (as sodium selenate)	25 mcg	36%
Copper (as cupric oxide)	1 mg	50%
Manganese (as manganese sulfate)	5 mg	143%
Chromium (as chromium chloride)	50 mcg	38%
Molybdenum (as sodium molybdate)	50 mcg	31%
Potassium (as potassium chloride)	10 mg	< 1%
Choline (as choline chloride)	100 mg	*
Betaine (as betaine hydrochloride)	25 mg	*
Glutamic Acid (as L-glutamic acid)	25 mg	*
Inositol (as inositol monophosphate)	75 mg	*
Rutin (from common buckwheat, *Polygonum fagopyrum* L.)(leaves)	25 mg	*
para-Aminobenzoic acid	30 mg	*
Deoxyribonucleic acid	50 mg	*
Boron	500 mcg	*

* Daily Value not established

Other ingredients: Cellulose, stearic acid and silica.

BILLING CODE 4160–01–C

(f)(1) Compliance with this section will be determined in accordance with § 101.9 (g)(1) through (g)(8). The criteria on class I and class II nutrients given in § 101.9 (g)(3) and (g)(4) also are applicable to other dietary ingredients described in paragraph (b)(3)(i) of this section. Reasonable excesses of these other dietary ingredients over labeled amounts are acceptable within current good manufacturing practice.

(2) When it is not technologically feasible, or some other circumstance makes it impracticable, for firms to comply with the requirements of this section, FDA may permit alternative means of compliance or additional exemptions to deal with the situation in accordance with § 101.9(g)(9). Firms in need of such special allowances shall make their request in writing to the Office of Food Labeling (HFS–150), Food and Drug Administration, 200 C St. SW., Washington, DC 20204.

(g) Except as provided in paragraphs (i)(2) and (i)(5) of this section, the location of nutrition information on a label shall be in compliance with § 101.2.

(h) Dietary supplements are subject to the exemptions specified in:

(1) § 101.9(j)(1) for dietary supplements that are offered for sale by a person who makes direct sales to consumers (i.e., a retailer) who has annual gross sales or business done in sales to consumers that is not more than $500,000 or has annual gross sales made or business done in sales of food to consumers of not more than $50,000, and whose labels, labeling, and advertising do not provide nutrition information or make a nutrient content or health claim;

(2) § 101.9(j)(18) for dietary supplements that are low- volume products (that is, they meet the requirements for units sold in § 101.9(j)(18) (i) or (ii)) that, except as provided in § 101.9(j)(18)(iv), are the subject of a claim for an exemption that provides the information required under § 101.9(j)(18)(iv), that is filed before the beginning of the time period for which the exemption is claimed, and that is filed by a person that qualifies to claim the exemption under the requirements for average full-time equivalent employees in § 101.9(j)(18) (i) or (ii), and whose labels, labeling, and advertising do not provide nutrition information or make a nutrient content or health claim;

(3) § 101.9(j)(9) for dietary supplements shipped in bulk form that are not for distribution to consumers in such form and that are for use solely in the manufacture of other dietary supplements or that are to be processed, labeled, or repacked at a site other than where originally processed or packed.

(i) Dietary supplements are subject to the special labeling provisions specified in:

(1) § 101.9(j)(5)(i) for food, other than infant formula, represented or purported to be specifically for infants and children less than 2 years of age, in that nutrition labels on such foods shall not include calories from fat, calories from saturated fat, saturated fat, polyunsaturated fat, monounsaturated fat, and cholesterol;

(2) § 101.9(j)(13) for foods in small or intermediate-sized packages, except that:

(i) All information within the nutrition label on small-sized packages, which have a total surface area available to labeling of less than 12 square inches, shall be in type size no smaller than 4.5 point;

(ii) All information within the nutrition label on intermediate-sized packages, which have from 12 to 40 square inches of surface area available to bear labeling, shall be in type size no smaller than 6 point, except that dietary supplements in which there are more than 8 dietary ingredients to be listed in the nutrition label, and that are in packages that have less than 20 square inches of surface area available to bear labeling, may use type size no smaller than 4.5 point when necessary.

(iii) When the nutrition information is presented on any panel under § 101.9(j)(13)(ii)(D), the ingredient list shall continue to be located immediately below the nutrition label, or, if there is insufficient space below the nutrition label, immediately contiguous and to the right of the nutrition label as specified in § 101.4(g).

(iv) When it is not possible for a small or intermediate-sized package that is enclosed in an outer package to comply with these type size requirements, the type size of the nutrition label on the primary (inner) container may be as small as needed to accommodate all of the required label information provided that the primary container is securely enclosed in outer packaging, the nutrition labeling on the outer packaging meets the applicable type size requirements, and such outer packaging is not intended to be separated from the primary container under conditions of retail sale.

(3) § 101.9(j)(15) for foods in multiunit food containers;

(4) § 101.9(j)(16) for foods sold in bulk containers; and

(5) § 101.9(j)(17) for foods in packages that have a total surface area available to bear labeling greater than 40 square inches but whose principal display panel and information panel do not provide sufficient space to accommodate all required label information, except that the ingredient list shall continue to be located immediately below the nutrition label, or, if there is insufficient space below the nutrition label, immediately contiguous and to the right of the nutrition label as specified in § 101.4(g).

(j) Dietary supplements shall be subject to the misbranding provisions of § 101.9(k).

7. Section 101.65 is amended by revising paragraph (b)(4) to read as follows:

§ 101.65 Implied Nutrient Content Claims and Related Label Statements.

* * * * *

(b) * * *

(4) A statement of identity for a food in which an ingredient constitutes essentially 100 percent of a food (e.g., ''corn oil,'' ''oat bran,'' ''dietary supplement of vitamin C 60 mg tablet'').

* * * * *

Dated: October 11, 1995.

David A. Kessler,

Commissioner of Food and Drugs.

Donna E. Shalala,

Secretary of Health and Human Services.

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Part III

Department of Transportation

Coast Guard

33 CFR Part 157

Structural Measures To Reduce Oil Spills From Existing Tank Vessels Without Double Hulls; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 157

[CGD 91–045]

RIN 2115–AE01

Structural Measures To Reduce Oil Spills From Existing Tank Vessels Without Double Hulls

AGENCY: Coast Guard, DOT.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Coast Guard solicits comments on structural measures for certain existing tank vessels of 5,000 gross tons (GT) or more that do not have double hulls. This supplemental notice of proposed rulemaking (SNPRM) responds to comments received on the notice of proposed rulemaking, presents a summary of a regulatory assessment for various structural measures, notifies the public of the availability of this assessment, and solicits comments on the economic feasibility of the measures. This SNPRM represents the third step in the Coast Guard's three-step effort to establish structural and operational measures, that are economically and technologically feasible for reducing the threat of oil spills from tank vessels without double hulls, as required by the Oil Pollution Act of 1990 (OPA 90). It analyzes a number of measures and describes the results of extensive cost and benefit research on those measures deemed technologically feasible. No regulatory text is introduced in this SNPRM; however, comments received on this SNPRM will enable the Coast Guard to assess the economic feasibility for structural measures.

DATES: Comments on this notice must be received on or before March 27, 1996.

ADDRESSES: Comments may be mailed to the Executive Secretary, Marine Safety Council (G–LRA/3406) (CGD 91–045), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001, or may be delivered to room 3406 at the same address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267–1477.

The Executive Secretary maintains the public docket for this rulemaking. Comments will become part of this docket and will be available for inspection or copying in room 3406, U.S. Coast Guard Headquarters, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: LCDR Suzanne Englebert, Project Manager, Standards Evaluation and Development Division, at (202) 267–6490. This number is equipped to record messages on a 24-hour basis.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should include their names and addresses, identify this rulemaking (CGD 91–045) and the specific section of this proposal to which each comment applies, and give the reason for each comment. Please submit two copies of all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgment of receipt of comments should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period. It may change this proposal in view of the comments.

The Coast Guard plans to hold a public meeting concerning this SNPRM. A notice of public meeting will be published in the Federal Register to announce the date, time, and location of the meeting.

Regulatory History

Section 4115(b) of the Oil Pollution Act of 1990 (OPA 90) (which appears as a statutory note following 46 U.S.C. 3703a) directs the Coast Guard to develop structural or operational requirements for tank vessels of 5,000 gross tons or more without double hulls to serve as regulations until 2015, when all tank vessels operating in U.S. waters are required to have double hulls under section 4115(a) of OPA 90 (46 U.S.C. 3703a). Regulations issued under the authority of section 4115(b) must provide as substantial protection to the environment as is economically and technologically feasible.

On November 1, 1991, the Coast Guard published an advance notice of proposed rulemaking (ANPRM) (56 FR 56284) which discussed structural and operational measures intended to meet the requirements of section 4115(b) of OPA 90. The ANPRM included a request for data on the technical and economic feasibility of those measures for use on vessels covered by section 4115(b). Eighty-eight comments were received by the close of the extended comment period, which ended on January 30, 1992 (57 FR 1243).

After reviewing the comments, the Coast Guard published an NPRM entitled ''Structural and Operational Measures to Reduce Oil Spills from Existing Tank Vessels Without Double Hulls'' (existing Vessels) on October 22, 1993 (58 FR 54870). The Coast Guard issued two subsequent correction notices on November 19, 1993 (58 FR 61143), and December 14, 1993 (58 FR 65298), which made technical corrections to the NPRM. In response to several comments received on the NPRM, the Coast Guard published, on December 16, 1993, a notice of public meeting and extension of comment period (58 FR 65683).

The Coast Guard held a public meeting on January 20, 1994, to obtain information from the public on the proposed regulations. Topics addressed by speakers included applicability, differences between tank barges and tankships, exemptions, and economic and technical feasibility of the proposed regulations. Some of the basic assumptions of the proposed regulations related to certain structural measures were also discussed, particularly their reliance on Regulation 13G of Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78). Information on the public meeting is available for public review at the address under **ADDRESSES**.

In light of the comments received at the public meeting and in response to the written comments received on the NPRM, the Coast Guard conducted an extensive review of its regulatory plan for this rulemaking. To expedite the implementation of section 4115(b) of OPA 90, the Coast Guard developed a three-pronged approach which encompassed three separate rulemaking projects. First, the Coast Guard issued a final rule on August 5, 1994, requiring the carriage of emergency lightering equipment and the inclusion of the vessel's International Maritime Organization (IMO) number in the advance notice of arrival report (59 FR 40186); second, it issued a supplemental notice of proposed rulemaking (SNPRM) on November 3, 1995, (60 FR 55904) regarding additional operational measures; and third, it is issuing this SNPRM to describe its analysis of the technological feasibility and cost effectiveness of imposing various structural requirements.

Comments received on most of the structural measures proposed in the regulatory text of the Existing Vessels NPRM (58 FR 54870) were negative. As a result, the Coast Guard is no longer proposing any of the structural

measures it proposed in the NPRM. Instead, the Coast Guard is reexamining the economic and technological feasibility of imposing certain structural requirements in light of the findings contained in the revised regulatory assessment. The Coast Guard also intends to carefully consider all comments received from the public on this analysis of the revised regulatory assessment, and determine whether any structural measure is both economically and technologically feasible.

Background and Purpose

The Coast Guard recognizes that operational and structural measures perform unique and important functions to prevent oil pollution. The second phase of the Coast Guard's three-phase effort to establish measures for existing tank vessels addresses reducing the risk of a grounding, collision, or fire. Many pollution incidents from tank vessels can be prevented by applying operational measures. Common failure modes which lead to pollution incidents include personnel error, navigation problems, and improper maintenance practices. A separate SNPRM entitled ''Operational Measures to Reduce Oil Spills From Existing Tank Vessels Without Double Hulls'' (Operational Measures SNPRM) (60 FR 55904; November 3, 1995) proposes requirements for bridge resource management training, vessel specific training, rest hour minimums, enhanced structural surveys, maneuvering performance capability requirements, and other requirements aimed at reducing the risk of accidents involving existing tank vessels.

The Coast Guard's third phase of this effort to reduce oil pollution from certain existing tank vessels addresses mitigation of pollution if an accident occurs. The Coast Guard evaluated those structural measures that would reduce the oil outflow on various existing vessel designs. This analysis included measures such as fitting double bottoms or sides, requiring hydrostatic-balanced loading (HBL) for all vessel configurations, and fitting segregated ballast tanks (SBTs) or clean ballast tanks (CBTs) on those vessels presently without them.

Discussion of Comments and Changes

Background information on proposals for structural measures for existing vessels without double hulls is provided in the preambles to the ANPRM and NPRM. These proposals focus on measures to reduce oil outflow after a collision or grounding has occurred.

The Coast Guard received 132 comments on the Existing Vessels NPRM. Thirty of these comments related to the operational measures phase of this rulemaking project while the remaining 102 comments discussed issues related to reducing the oil outflow on an existing tank vessel after an accident occurs. The following discussion summarizes the comments received on the NPRM and is divided by topic: (1) applicability and treatment of existing double hull or double bottom vessels, (2) consistency with international standards, (3) protectively-located spaces (PL/spaces), (4) hydrostatic-balanced loading (HBL), (5) protectively-located segregated ballast tanks (PL/SBT) requirements, (5) alternative measures, (6) phase-in alternatives and economic incentives, (7) regulatory assessment—general, (8) regulatory assessment—costs, and (9) regulatory assessment—benefits.

1. Applicability and Treatment of Existing Double Hull or Double Bottom Vessels

The Coast Guard received one comment that inquired about the lightering zones referred to in section 4115 of OPA 90. The comment questioned how the lightering zones would impact the vessels that are required to comply with structural requirements for existing tank vessels. The Coast Guard issued a final rule on August 29, 1995, entitled ''Designation of Lightering Zones'' (60 FR 45006), which established four lightering zones in the Gulf of Mexico. Under the provisions of the final rule, tank vessels without double hulls may lighter in the Exclusive Economic Zone (EEZ) in these zones, including the existing vessels affected by this rulemaking. These vessels would be allowed to continue conducting lightering operations in these zones after they are phased out of service under the provisions of section 4115(a) of OPA 90 until 2015. However, under section 4115(b) of OPA 90, these vessels would also be required to meet any structural and operational measures for tank vessels without double hulls.

Another comment indicated that States should not attempt to preempt this proposed Federal regulation. The Coast Guard works closely with local and State governments and encourages them to actively participate in its regulatory process. There should be no conflict between State and Federal law; however, to the extent there is such a conflict, Federal law remains supreme (U.S. CONST. art. VI, cl. 2).

On comment stated that the more limited definition of oil used in this rulemaking, which excludes animal fats and vegetable oils, should apply to all OPA 90 regulations. Other comments requested the exemption of vessels which carry non-persistent oils. The NPRM specifically excluded vessels carrying only animal fats and vegetable oils because the proposed structural requirements were believed to be too costly for vessels carrying only non-petroleum oils. Additionally, the exemption was proposed in an effort to be consistent with the international structural measures for existing vessels established in MARPOL 73/78. The Coast Guard has determined that the application of some of the structural measures presented in this SNPRM is technologically feasible for all existing tank vessels. Comments on the economic feasibility of imposing structural measures on vessels that carry only non-petroleum oils are solicited. The Coast Guard also requests comments on the benefits that may result from structural requirements. It should be noted that the Operational Measures SNPRM (60 FR XXXX; date) proposes the application of operational measures to all existing tank vessels, including non-petroleum oil carriers.

Several comments requested clarification on whether the proposed rulemaking would apply to vessels operating in the U.S. EEZ and to vessels that carry cargo to foreign destinations. One comment asked whether the rulemaking would apply to vessels that unload cargo at deepwater ports or that engage in lightering in U.S. waters. The Coast Guard determined that any operational or structural measures reulemaking implementing section 4115(b) would be consistent with the applicability section 4115(a) of OPA 90 which requires certain existing tank vessels without double hulls to be phased out of operation by 2015. Therefore, this SNPRM would apply to vessels unloading cargo at deepwater ports or engaging in lightering in U.S. waters. It would also apply to any other existing tank vessel without a double hull that is required to be phased out under section 4115(a) of OPA 90.

The Coast Guard rulemaking implementing section 4115(a) entitled ''Double Hull Standards for Vessels Carrying Oil in Bulk'' (CGD 90–051) (60 FR 13318; March 10, 1995) added 33 CFR 157.10(d), which applies the regulations to certain tank vessels carrying oil in bulk as cargo operating in U.S. waters, including vessels unloading oil as cargo at deepwater ports and lightering in established lightering zones more than 60 miles from the territorial sea baseline. The regulations also apply to non-dedicated oil spill response vessels (OSRVs). The Navigation and Inspection Circular (NVIC) 10–94, ''Guidance for

Determination and Documentation of the Oil Pollution Act of 1990 (OPA 90) Phase-out Schedule for Existing Single Hull Vessel Carrying Oil in Bulk,'' provides a detailed explanation of the applicability of section 4115(a). Without conclusively resolving all the complex interplay between the Oil Pollution Act and the Law of the Sea, the Coast Guard presently intends that operational and structural requirements would not apply to foreign tankships engaged in innocent passage on U.S. navigable waters, which includes the territorial sea of the United States and the EEZ.

One comment requested clarification on whether structural measures would apply to Floating Production and Storage Off-loading (FPSO) Systems, Floating Production Systems (FPS), and Mobile Offshore Drilling Units (MODUs). FPSO systems and FPS are tank vessels; however, they would be excluded from this rulemaking if they are less than 5,000 GT, are not engaged in the movement of petroleum oils, and are not used in lightering operations. MODUs are not included under the definition of tank vessel in OPA 90. Therefore, they would not have to comply with structural measures.

One comment asked why the NPRM differentiated between crude tankships of 20,000 deadweight tons (dwt) or more and product carriers of 30,000 dwt or more. The NPRM reflected the distinction in vessel size made by Regulation 13G of Annex I of MARPOL 73/78. This distinction was continued in the regulatory assessment in this SNPRM to enable those companies operating vessels on international routes to compare estimated cost and benefit results.

The Coast Guard received several comments which objected to the imposition of structural measures on tank barges. The regulatory assessment in this SNPRM reviewed several technologically feasible measures that could be implemented on barges to reduce oil outflow. Comments are solicited on the economic feasibility of these measures.

The Coast Guard received one comment on the double hull requirements proposed in § 157.410(a) of the NPRM. The comment recommended the immediate construction of double hull vessels in lieu of retrofitting existing vessels with structural measures. Section 4115(a) of OPA 90 establishes a phase-in schedule for double hull requirements for all existing tank vessels. These section 4115(a) provisions establish a schedule that balances environmental safety with the overall impact on the U.S. economy, worldwide U.S. shipping capability, and oil availability to U.S. consumers. The Coast Guard does not have the authority to change the phase-out schedule of section 4115(a); rather, it is tasked with issuing interim regulations to protect the marine environment until all vessels are required to be equipped with double hulls under section 4115(a).

2. Consistency With International Standards

The Coast Guard received several comments which expressed support for the development of regulations that are equivalent to Regulation 13G of Annex I of MARPOL 73/78. Another comment stated that for 70 percent of the fleet that it applied to, the NPRM duplicated the requirements of the proposed Regulation 13G of Annex I of MARPOL 73/78. The comment further stated that the Coast Guard has neglected its responsibility to make an independent decision to designate the strongest feasible antipollution measures. As previously stated, the Coast Guard's goal is to implement its statutory mandates in regulations that are consistent with international regulations wherever doing so is lawful, appropriate, and practical. Based on comments from the NPRM, the Coast Guard has reevaluated various pollution prevention measures. Accordingly, the Coast Guard conducted an extensive cost and benefit analysis of structural measures that are both consistent with international standards and that exceed current international agreements. The regulatory assessment in this SNPRM reflects the structural measures deemed technologically feasible for existing tank vessels.

One comment recommended that product tankships from 20,000 dwt to 30,000 dwt be exempted from further rulemaking action because they presently comply with MARPOL 73/78 and the Port and Tanker Safety Act of 1978. The comment contended that these tankers would already be in compliance with the provisions of the published NPRM. The above statements are accurate; however, the Coast Guard also considered requirements above those of MARPOL for the regulatory assessment in this SNPRM and has continued to include this group of vessels to ensure it reflects accurate cost benefits.

3. Protectively-located Spaces (PL/Spaces)

The Coast Guard received several comments on the proposed requirements for PL/spaces. In the NPRM, a PL/space includes any tank or void space that is not used for the carriage of cargo, cargo residue, slops, dirty ballast or fuel oil. The protectively-located (PL) qualifier refers to the distribution of these spaces along the length of the vessel's hull as described in Appendix C to 33 CFR 157. One comment stated that a requirement for oil-free spaces has already been in effect under international rules and corresponding U.S. law that covers all vessels except for small tank vessels built since 1979; thus, the comment contends, the proposed requirement for PL/spaces would provide no additional improvement for nearly 30 percent of the world's single hull tanker fleet. Another comment contended that approximately 75 to 80 percent of the world fleet of crude carriers consists of tankers that are not fitted with SBT or CBT (pre-MARPOL tankers). The comment indicated that HBL with a safety factor of 1.0 or less, as used in Regulation 13F of MARPOL, is more economical and technically viable in the case of groundings than the originally proposed PL/spaces for these vessels.

The Coast Guard focused its analysis for this SNPRM on determining what would happen if various PL/space requirements were applied to pre-MARPOL vessels. In this assessment, it took into account whether the pre-MARPOL vessels are fitted with SBT or CBT. This SNPRM summarizes a revised regulatory assessment and solicits comments on the economic feasibility of requiring pre-MARPOL tank vessels to be fitted with PL/spaces as compared to HBL.

One comment stated that requiring PL/spaces on non-SBT tankships would lead to greater oil outflow in a grounding or collision. Another comment indicated that, based on recent calculations performed by the oil tanker industry on ships of different sizes, PL/spaces are capable of achieving an improvement in estimated oil outflow reduction, provided certain operating conditions are maintained. The Coast Guard agrees with both comments. When PL/spaces are used in such a way that they result in an increased freeboard, oil outflow in groundings could be expected to increase. However, the use of PL/spaces, in such a way that the operational freeboard is essentially unchanged (by ballasting the PL/spaces), will result in reduced oil outflow. As suggested by several comments, the Coast Guard modified its original assessment and considered the implementation of PL/spaces made in conjunction with HBL.

One comment questioned whether ships that are fitted with SBTs in accordance with the provisions of Regulation 13E of Annex I of MARPOL 73/78 would be accepted as meeting the provisions of § 157.410(a) in the NPRM

as it applies to the provision of side or bottom protection. The comment indicated that under a strict interpretation of the provisions of § 157.410(a) of the NPRM, these vessels would not be in compliance with the proposed requirement. The intent of the NPRM proposal was that any vessel in compliance with Regulation 13E of Annex I of MARPOL 73/78 would also be in compliance with proposed 157.410(a) of the NPRM.

One comment recommended that existing tank vessels be fitted with PL/spaces that protect 100 percent of the cargo tank length encompassing the full depth of each side. The comment suggested that the benefits would include a significantly reduced likelihood of oil outflow and greater use of surplus tonnage for pollution control. The comment stated that this would also accelerate a replacement program with double hull tankers as freight rates rise and estimated that existing tankers would have about the same operating cost as a new double hull tanker. The Coast Guard analyzed the retrofit of full double sides, which may be interpreted as fitting PL/spaces along the length of the vessel, and presents the results in the regulatory assessment in this SNPRM. Comments on the economic feasibility of this measure for existing tankships are solicited.

One comment stated that both the preamble and proposed rule explicitly state that PL/spaces must either protect 30 percent of each side or 30 percent of the bottom of the vessel. The comment stated that more consideration should be given to all around protection, especially in cases where a vessel falls short of the NPRM's proposed PL/space requirement. The NPRM proposed PL/spaces in this proportion because doing so is consistent with existing international standards. The Coast Guard continued to consider this arrangement in the regulatory assessment of this SNPRM, and also considered more stringent variations of PL/space protection.

One comment questioned whether a non-SBT tank vessel would be able to use its full cargo carrying capacity when trading outside the U.S. EEZ, and whether it would be accepted as meeting the proposed provisions of the NPRM if certain cargo tanks are simply left empty when trading in U.S. waters. The comment suggested that tanks that are normally used for carrying cargo during worldwide trading could be converted to void spaces for U.S. trading if adequate crude oil washing, full gas freeing, and blanking of pipelines leading to the tanks are accomplished. According to the comment, these operations could be witnessed by a classification society which could issue voyage certificates listing the tanks as void or SBT spaces. Blanks could be removed for resuming worldwide trading. For non-SBT tank vessels, simply leaving certain cargo tanks empty is one of the measures considered in the regulatory assessment in this SNPRM. As explained in the discussion on applicability, there are also certain circumstances in which a non-SBT tank vessel could be able to carry a full cargo load and engage in U.S. trade. While it is technologically feasible to take tanks out of service and reduce oil outflow, comments are solicited on the economic feasibility of this practice. Comments that propose enforcement mechanisms for this type of measure are also requested.

One comment recommended that PL/spaces be required to protect against collisions by permanently filling them with ballast water. The Coast Guard has focused this phase of the rulemaking on reducing oil outflow after an accident. The regulatory assessment in this SNPRM evaluated PL/spaces in unballasted, HBL, and full-ballast states to determine the effects on oil outflow. While oil outflow is reduced when the vessel is completely ballasted down, the practice also causes cost increases due to possible port draft restrictions and may compound a vessel's grounding risk. Comments are solicited on this SNPRM's assessment of the different ballast states as they are combined with PL/spaces and the economic feasibility of such combinations.

One comment stated that locating all PL/spaces forward could lead to unacceptable levels of trim or stress on some ships. On most tank vessel designs, the most technologically feasible place to install PL/spaces is in the tankship's midbody; however, due to unique design considerations and the need to vary a vessel's draft or cargo carrying capacity based on the route traveled, the Coast Guard does not intend to require PL/spaces be located in a particular part of a ship.

4. Hydrostatic-Balanced Loading (HBL)

The Coast Guard received several comments concerning the HBL option proposed in the NPRM. Two comments stated that the NPRM must require HBL as a minimum measure to effectively provide ''as substantial protection to the environment as is economically and technologically feasible.'' The Coast Guard recognizes HBL as an effective outflow reduction measure and included it in several forms for the regulatory assessment in this SNPRM. The assessment considers HBL as a technologically feasible measure for all existing tank vessels, even those presently meeting MARPOL 73/78 requirements. Comments on the economic feasibility of HBL requirements are solicited.

The Coast Guard received one comment stating that requiring specific structural or operational measures like HBL, which force ships to change loading or operational practices from one trade to another, are unsafe because of an increase in the opportunity for human error. The concerns expressed in the comment are valid; however, the degree of human error that would be introduced into the vessel's procedures depends on several factors. An example could be a poorly worded loading procedure which complicates loading and increases accident risk to a tank vessel. The Operational Measures SNPRM (60 FR 55904; November 3, 1995) attempts to mitigate the risk of human error that could be incurred by complex or confusing loading instructions. In contrast, the regulatory assessment in this SNPRM assumes that adequate operational measures are in place to mitigate this type of potential human error and only considers HBL for its potential oil outflow reduction capabilities. The Coast Guard solicits comments on quantifying the negative effect that HBL could cause due to frequent loading adjustments.

Several comments expressed concern that the Coast Guard is imposing measures, such as HBL, on ships for which they were not designed and could be introducing hull bending stresses which exceed classification society standards. The Coast Guard studied the structural consequences of the measures proposed in the NPRM, in terms of hull bending moments, and concluded in the regulatory assessment for this SNPRM that, in general, excessively high global stress levels due to HBL should not be a problem. The technical feasibility of HBL is assumed based on hull bending stresses and sloshing loads. However, in some cases, unacceptably high local stresses may be created due to HBL. The Coast Guard solicits comments on specific cases in which local stresses would exceed maximums set by recognized classification societies.

One comment stated that the formula for HBL presented in the NPRM was based on the draft guidelines for alternatives required under Regulation 13G of Annex I of MARPOL 73/78. The comment stated that use of the formula for HBL results in a high loss of cargo carrying capacity. Further, the comment states that the original formula was based on the height of an intermediate

oil-tight deck on a tankship fitted with double sides, and may not be suitable for application to the definition of HBL in the context of existing tankers. The Coast Guard believes that the definition of ''hydrostatic-balanced loading'' used in the NPRM should not be used. The IMO has finalized the guidelines concerning the implementation of HBL and modified the original definition. A factor of 1.0 replaced the original factor of 1.1. Consequently, the Coast Guard has used the definition of ''hydrostatic-balanced loading'' that is consistent with the guidelines developed by the IMO for the regulatory assessment in this SNPRM.

Another comment suggested the use of HBL combined with PL/spaces as an alternative to applying HBL to all tanks. The Coast Guard presents several combinations of PL/space and HBL in the regulatory assessment for this SNPRM and solicits comments on them.

One comment stated that 50 percent of all tankship collision damage is located above the waterline only; therefore, vessels should be required to load their side tanks only to the waterline level. The comment stated that if side tanks were filled using HBL procedures, and 40 percent of the cargo was carried in the side tanks, all spills due to grounding would be reduced by 40 percent in the case of a grounding. The Coast Guard's probabilistic oil outflow analyses, as described in ''Interim Guidelines for the Approval of Alternative Methods of Design and Construction of Oil Tankers Under Regulation 13F(5) of Annex I of MARPOL 73/78'' (IMO Marine Environmental Protection Committee's Resolution MEPC 37/14; December 23, 1994), of various measures, including HBL, is assessed in this SNPRM. Comments are solicited on the oil outflow reduction estimates achieved through HBL and the resulting costs associated with the reduction.

One comment suggested that the Coast Guard place a notation in 33 CFR 157, subpart G, that states that structural increases or modifications to the cargo area of a vessel may be necessary to apply HBL when a vessel receives cargo. Another comment stated that the high tensile steel used in some ships may not be suitable for the fatigue effects that could result from HBL. Other comments expressed concerns about using HBL because of the possibility of sloshing. The Coast Guard recognizes that when employing HBL, in some cases, it may be necessary to retrofit swash bulkheads or modify the vessel's structure to reduce the effects of fatigue. Prior to applying HBL, the owner or operator of a loading tankship would have to evaluate the effects of HBL on a tankship's cargo tanks and structure to determine if swash bulkheads or other modifications are necessary. The regulatory assessment in this SNPRM did not consider shipyard cost for the modifications needed to accommodate HBL. Comments are solicited on specific structural modifications and their anticipated added shipyard cost, if any, for HBL measures.

One comment expressed concern that HBL may raise the risk of spillage due to an increase in total sailings resulting from reduced unit cargo loading. The oil outflow benefit analyses summarized in this SNPRM does not directly account for the effects of increased traffic due to reductions in cargo carrying capacity. Another comment stated that the benefits for all structural measures were overestimated because they did not reflect the added risk of an accident due to an increase in traffic volume. Historical accident data was used to estimate how much oil is spilled annually as a result of accidents. Estimated cargo shutout from measures similar to Regulation 13G of Annex I of MARPOL 73/78 reveal that the resultant increase in tank vessel traffic would be 12 percent. While this traffic increase could also increase accident risk, it represents approximately a 2 percent increase in the total U.S. port deep draft traffic volume. It is reasonable to assume that this small increase in traffic volume would be offset by the accident reduction measures implemented through the Coast Guard's proposed Operational Measures (60 FR 55904; November 3, 1995.

One comment inquired as to whether a load line would be necessary to enforce the use of HBL. The Coast Guard did not propose any changes to the International Convention on Load Lines, 1966, within the NPRM. If an HBL requirement is deemed economically feasible, it could be enforced using a number of methods. A tankship's master could be required to ensure that the ullage measurement reports or other tank gauging reports are recorded, kept in the Oil Record Book, and available for examination. Additionally, a visual inspection of draft marks should be sufficient to determine if a vessel has employed HBL loading procedures. The Coast Guard requests comments on the best way to determine whether a vessel is in compliance with its HBL loading plans.

One comment stated that, for ultra large crude carriers (ULCCs) and very large crude carriers (VLCCs) operating at offshore terminals, the risk of grounding is limited; however, collision is the most likely accident to occur. The comment proposed that, for these vessels, a very safe method of operation would be to HBL only the side cargo tanks. The Coast Guard disagrees. For collisions, the use of PL/spaces is necessary to reduce oil outflow. HBL provides added oil outflow protection only in groundings. If a collision were to cause the side of a large tankship to be pierced and a cargo tank to be ruptured, the hydrostatic head, which acts in balance with the seawater, would be lost; thus, oil would flow out of the tank.

5. Alternative Measures

The Coast Guard received several comments which encouraged it to adopt alternative systems to reduce oil outflow. These include emergency rescue and emergency transfer systems, resilient membranes, vacuum and underpressure systems, independent tanks, and intermediate oil tight decks. Alternative measures to prevent oil outflow are viable in some applications. For the regulatory assessment in this SNPRM, specific alternative measures were not researched. Cost assessments for alternative measures vary greatly. While there are indications that some of these measures could be less costly than PL/spaces or HBL, they were not included in the regulatory assessment because none of them meet the benchmark equivalency for alternative compliance found in ''Guidelines For Approval of Alternative Structural or Operational Arrangements as Called for in Regulation 13G(7) of Annex I of MARPOL 73/78,'' Resolution MEPC.64(36) adopted on November 4, 1994. These guidelines include oil outflow criteria that must be met for certain damage assumptions and general operational and safety points such as exposure of the tanker to stress, creation of fire or explosion hazards, stability considerations, and loading requirements. The Coast Guard solicits comments on these alternative measures. Specifically, the Coast Guard requests comments on whether they meet or exceed the IMO guidelines, whether they have been submitted and approved by IMO's Marine Environment Protection Committee (MEPC), and whether they are economically and technologically feasible.

Four comments recommended that the Coast Guard include provisions for using alternative systems to provide flexibility in complying with the requirements for structural measures. One comment suggested that the Coast Guard adopt the recommendations of the National Research Council report entitled ''Tanker Spills: Prevention by Design,'' which encourages the adoption

of multifaceted measures such as a combination of PL/spaces and HBL. Another comment stated that the regulation should provide an owner or operator with a choice of equivalent measures so that the owner or operator may select the best arrangement for each ship in his or her fleet. The third comment stated that the NPRM should describe the results that a system should achieve, or quantitative measures of effectiveness, instead of mandating a single structure measure. The fourth comment stated that the proposed alternative oil outflow prevention measure provision grants total discretion to the Coast Guard without providing any criteria for the alternative measure, such as ensuring that it is at least as environmentally protective as the specified measure for the type and size of tankship under review.

The regulatory assessment in this SNPRM analyzes multifaceted measures such as combining PL/spaces with HBL and SBT with HBL. The Coast Guard still considers alternatives to, or choices between measures viable and solicits comments on the measures that should be deemed equivalent and their economic feasibility. Additionally, the Coast Guard is reviewing the performance criteria in the IMO alternative guidelines and encourages comment on them. The Coast Guard views the following safety requirements as key in this type of system equivalency evaluation: the human interface required by the operator to control the system: the operational complexity and increased burden placed on the operating crew as a result of working with an inherently complex system that would increase the probability of a spill due to human error; the added potential for fire and explosion, including the performance of the inert gas and vapor recovery systems (if installed) once the alternative measure has been installed; the adverse impact on intact and damage stability; the adverse impact the installed alternative measure has on structural strength, including sloshing loads and the need to fit large structural fixtures in existing tank structures; and the overall consideration of the operational history of the alternative and its components.

The Coast Guard received several comments which suggested that response systems be fitted as alternative measures to the ones proposed in the NPRM. These systems have already been evaluated in ''Discharge Removal Equipment for Vessels Carrying Oil'' (58 FR 67988; December 22, 1993). The alternatives considered in this SNPRM are passive pollution prevention systems, not spill response systems which require human or machine intervention following a collision or grounding. The Coast Guard has implemented several response oriented requirements including Vessel Response Plans (58 FR 7424; February 5, 1993) and the discharge removal requirements and believes that the structural measures intended by section 4115(b) should be addressed through vessel design or passive protection.

6. Phase-in Alternatives and Economic Incentives

The Coast Guard received several comments regarding the 3-year phase-in provision that was proposed in the NPRM. One comment stated that the 3-year phase-in period would result in the acceleration of shipyard schedules, higher costs, and tonnage restraints. The comment contended that the 3-year phase-in schedule would be economically overburdensome on the tankship owner because it would require many vessels to be removed from normal service to perform the modifications required by the proposed rulemaking. The assessment for this SNPRM reflects cost estimates associated with removing the vessel from service for an extended shipyard period. However, no shipyard scheduling constraints were considered. Comments on this phase-in cost and specific shipyard availability constraints are solicited.

Many comments expressed concern that the original proposed 3-year phase-in period was too generous. One comment expressed concern that no action would be taken by industry and the Coast Guard to reduce oil spills and pollution during this period. Other comments stated that the proposed phase-in period penalizes operators who have already invested in modern double hull vessels because it reduces the cost of single hull vessel operation. One comment contended that a vessel should be required to retrofit during the regularly scheduled drydocking period which immediately follows the issuance of the final rule.

The Coast Guard has taken action to implement interim measures for existing tank vessels by issuing regulations for emergency lightering equipment and advanced notice of arrival requirements (59 FR 40186; August 5, 1994) and proposing regulations for operational measures (60 FR 55904; November 3, 1994; STD). These two efforts will reduce the risk of oil discharges from existing tank vessels that do not have double hulls, regardless of the outcome of the feasibility assessment for structural measures. Since a tank vessel on an ocean or international route is required by its flag administration or classification society to drydock twice every 5 years, the 3-year phase-in schedule proposed in the NPRM reflected an implementation period comparable to one for the regularly scheduled drydocking period immediately following the issuance of the final rule. The Coast Guard requests comments on the economic feasibility of the 3-year phase-in period versus a 5-year period or a 1-year period. Comments are also requested on an appropriate phase-in period for those measures that do not require drydocking. The regulatory assessment for this SNPRM estimates that a 60,000 dwt pre-MARPOL vessel's annualized value and cost is $273,000 less for its estimated 5 remaining years than its counterpart double hull vessel which can operate indefinitely.

One comment stated that the 3-year phase-in schedule for Regulation 13G is flawed. The comment contended that newer vessels should be allowed a longer time period to comply with the proposed structural requirements. The comment stated that for these vessels, the risk to the environment should be commensurately lower, provided the vessels have been properly maintained. Oil outflow can be reduced even on newer single hull vessels meeting MARPOL 73 or MARPOL 78 requirements as shown by the regulatory assessment in this SNPRM. While it is true that the oil outflow reduction benefits presented in this SNPRM for vessels fitted with SBT or CBT are less than for pre-MARPOL tankers, they exist. Comments are requested on possible phase-in periods for vessels fitted with SBT or CBT that, in light of the benefit analysis presented in this SNPRM, would be economically feasible.

One comment contended that the phase-in period would place U.S. vessels at a significant disadvantage in relation to foreign vessels. The comment stated that U.S. vessels were required to retrofit SBTs in accordance with the Port and Tanker Safety Act of 1978, and would already be in compliance with the proposed SBT requirements of the NPRM. The comment indicated that the proposed phase-in period would provide foreign vessels with additional time to retrofit SBTs. Section 4115(b) of OPA 90 requires the Coast Guard to issue this rulemaking so that it is economically feasible for both U.S. and foreign tank vessels. The Coast Guard solicits comments on the economic feasibility of a phase-in period for foreign tank vessels that is shorter than 3 years.

One comment expressed concern that the NPRM does not provide incentives to tanker owners for pursuing and adopting new technologies. The comment stated that shipowners' budgets generally do not include monies for pure research, and without clear incentives to embrace new technologies, there is a small chance that vessel owners will use them. The comment urged the Coast Guard to amend the proposed rule to include specific incentives to encourage the industry to develop and adopt such technologies. Another comment stated that many vessel owners already are operating with double hull vessels and/or SBTs. The comment stated that companies using these vessels should receive pollution credits. Additionally, the comment contended that pollution credits should be issued to owners who build new tankers or significantly upgrade existing tankers. The comment stated that these credits could be traded for debits to continue using existing tankers with little modification. Similarly, another comment stated that owners who build new tankers should receive tax credits. Issuing monetary incentives for company research, granting pollution credits to a company to support uneven implementation of oil outflow reduction measures among their fleet, or granting tax credits for companies that comply with requirements are beyond the authority and scope of this rulemaking.

7. Regulatory Assessment—General Comments

Several comments questioned the assumptions made in the Regulatory Impact Analysis (RIA) performed by Mercer Management Consulting, Inc. for the NPRM. One comment stated that the RIA for the NPRM does not take into account the barrels of oil saved from spillage by other OPA 90 rules. The Coast Guard has developed a wide range of regulations mandated by OPA 90 to implement provisions pertaining to spill prevention, mitigation, cleanup, and liability. To facilitate the rulemaking process, the Coast Guard has divided rulemaking requirements into relatively small, individual rulemaking projects and has prepared regulatory, environmental, regulatory flexibility, and paperwork analyses for each project. To expedite effective rulemaking, the Coast Guard analyzed each project as a stand alone rulemaking. Recognizing that there are interactive effects of the suite of OPA 90-derived regulations, the Coast Guard has begun a programmatic regulatory assessment for the OPA 90 rulemaking projects.

One comment stated that the RIA for the NPRM assumed that all the work for structural modifications can be done during a normal drydocking period. The comment contended that this is not correct because the cleaning for hot work entails a much higher degree of cleaning and more lost service time. The Coast Guard recognizes that additional cleaning and gas freeing would be necessary to perform structural modifications and has included the cost of an extended drydock in the regulatory assessment for this SNPRM.

One comment disagreed with the assumption that some existing ships will be replaced rather than converted. The results of the assessment conducted for this SNPRM indicate that no vessels are expected to be replaced early as a result of the measures researched.

One comment disputed the size of the international vessel population assumed in the RIA. The comment stated that the international fleet affected by the NPRM would range from 1,500 to 2,000 vessels, not the 300 or 400 assumed in the RIA. The regulatory assessment in this SNPRM revises the NPRM vessel population numbers, based on the number of tankships applying for a Certificate of Financial Responsibility, excluding certain tankships such as double hull tankships. The RIA for this SNPRM estimates that there are a total of 1,085 existing tankships likely to be affected by this SNPRM.

Several comments stated that the assumption made in the NPRM RIA that newer vessels that comply with MARPOL Regulation 13G will be allocated to U.S. trades in the same proportion as non-complying vessels is inaccurate. The comments went on to state that the number of newer vessels operating in the U.S. trade is higher because of the Port and Tanker Safety Act of 1978. The comments contend that the existing fleet of vessels meeting either MARPOL PL/SBT standards or having double hulls is already sufficient to carry all U.S. cargo. One comment stated that the NPRM proposals would have a devastating impact on the product tanker market. Another comment stated that there was no consideration in the NPRM for a company's ability to secure adequate capital to replace existing vessels with double hull vessels. The vessel population and U.S. coastal trade population affected by this rulemaking were reconsidered for the regulatory assessment in this SNPRM. Build dates were also researched and correlated with trade estimates. Neither the ability of the existing fleet of double hull or MARPOL PL/SBT tankers to meet U.S. import needs nor a company's ability to secure funding is influential for this rulemaking. Comments are solicited on the specific economic feasibility of these measures on product tankers.

8. Regulatory Assessment—Costs

Comments on the Existing Vessels NPRM and from the public meeting expressed concern about the accuracy of the costs and benefits stated in the Regulatory Impact Assessment (RIA). The comments indicated that the costs, in some cases, were not fully developed. Comments included concern over using only two ship sizes to calculate the cost, the assumption that there will be minimal cargo capacity loss across the fleet, the gross underestimate of compliance costs for tank barges, the potential adverse costs to vessels which carry non-persistent oils, and the 3-year phase-in costs as compared to following the MARPOL 73/78, Regulation 13G schedule. After reviewing the comments, the Coast Guard redirected its approach, expanded the vessel models used in the cost analysis, and revised its assessment to reflect these comments.

The Coast Guard received several comments regarding the economic feasibility of the regulations. One comment stated that Congress made it clear that all regulations should be economically feasible. The comment stated that requiring industry to spend $573 million over a 3-year period for unknown environmental benefits would be pressing the intent of Congress. Another comment stressed that a requirement that a measure be economically feasible does not mean that it must be the least expensive. Pollution prevention benefits are measured as a ratio of cost per barrel of oil not spilled. The most desirable measures would be those that prevent the spillage of the greatest number of barrels of oil at the lowest cost. The Coast Guard recognizes that a measure can be costly; however, if it provides a significantly improved degree of protection in terms of barrels of oil not spilled, it may still be cost effective. The Coast Guard solicits comments on the cost effectiveness of the measures presented in this SNPRM.

One comment noted that when retrofitting PL/spaces on vessels in the 80,000 dwt to 300,000 dwt range, there is a loss of approximately 15 percent of the cargo volume. The comment further stated that for an 80,000 dwt vessel without SBT, there is a loss of approximately 29 percent of the cargo volume. A tank vessel owner commented that if the company's VLCCs were required to be converted to PL/SBT or PL/spaces, the company

would lose more than $1 million of revenue per year, and that a medium size crude carrier could have a $500,000 reduction in revenue per year. The comment stated that this would change the economic formulas for the company's fleet and would force the company to lay up or sell half of its fleet because it would no longer be economically feasible to operate the vessels. Another comment stated that the capital costs and lost cargo capacity costs for dedicated PL/spaces or HBL would be much higher for most ships than the amount estimated in the NPRM RIA because many existing vessels would be required to have their cargo compartments structurally refit to accommodate a 30 percent PL/Space requirement of the NPRM. The Coast Guard recognizes this argument and includes a revised cargo shutout estimate in this SNPRM assessment. Comments on the regulatory assessment for this SNPRM and the economic feasibility of the measures within it are solicited.

The Coast Guard received several comments on the economics of requiring HBL for existing tank vessels. One comment stated that requiring HBL would be economically burdensome. Four comments questioned the NPRM's statement that HBL was not economically feasible. Three comments stated that HBL could be implemented without costly structural modifications. One comment added that the most costly structural modification would be the installation of swash bulkheads; however, the comment stated that it has been demonstrated that swash bulkheads are not necessary in most cases. Two of the comments stated that HBL is economically feasible because the reduced cargo carrying capacity requires more trips to be made. The comment contended that as a result of the need to make more voyages to haul a given amount of cargo, more revenue would be generated and the market demand for tankers would increase. Cargo shutout and structural refit needs for HBL implementation were revised and are presented in the regulatory assessment in this SNPRM. Comments on the economic and technological feasibility of the different HBL measures discussed within this SNPRM are solicited.

One comment stated that the NPRM RIA's estimate of $4 billion for the present value of total compliance for HBL over 20 years could readily be financed by the major oil companies out of annual profits. The comment stated that, traditionally, the oil industry has passed on a doubling or even a tripling of the price of crude oil, as well as the price of its transportation, and could do so for this rulemaking. Section 4115(b) tasked the Coast guard with implementing interim structural and operational measures that were technologically and economically feasible. The definitions of these two qualifiers were not developed within OPA 90 or its associated documents. The Coast Guard has researched structural measures deemed technologically feasible and is publishing this SNPRM assessment in order to receive comments on their economic feasibility. After the comment period for this SNPRM has closed, an assessment of the economic feasibility for structural measures will be done and further action will be taken accordingly. Specific comments justifying why a measure is either economically infeasible or how it could be feasible are solicited.

9. Regulatory Assessment—Benefits

The Coast Guard received several comments questioning the accuracy of the benefit estimates presented in the NPRM. Many comments stated that, in general, the benefits specified in the NPRM RIA were overstated. Four comments stated that the effectiveness estimates were not accurate. One comment specifically indicated that projected effectiveness for PL/spaces, the Underpressure System (UPS),the Emergency Rapid Transfer System (ERTS), and the Emergency Rescue System (ERS) were extremely optimistic. Other comments stated that the estimated effectiveness of SBT was correct as presented in the tables but underestimated within the NPRM text. Another comment stated that the benefits associated with PL/spaces were significantly understated in the NPRM because the costs for cleanup, third-party claims, and damage to natural resources were not included.

The Coast Guard reviewed the NPRM RIA and has revised the benefit assessment for certain measures presented in the NPRM. It has also added benefit analysis on other structural measures and presents a summary in this SNPRM. The costs associated with third-party cleanup and damage to natural resources were not considered because the Coast Guard reviews benefits as the amount of oil not spilled rather than a dollar value. Details on the extensive work the National Oceanic and Atmospheric Administration has done on this subject can be found in its NPRM entitled, ''Natural Resources Damage Assessments; Proposed Rule'' published on August 3, 1995 (60 FR 39804). Comments are solicited on the revised benefits assessment for this SNPRM.

Other comments argued that PL/spaces would not reduce oil outflow by 30 percent in collisions as assumed in the RIA. The comment contended that the reduction in oil outflow would be considerably less because collisions do not occur uniformly along the side-shell of a vessel. At the public meeting held on January 20, 1994, a speaker presented his company's conclusions about oil outflow from PL/spaces based on probabilistic investigations and analyses, as described in ''Interim Guidelines for the Approval of Alternative Methods of Design and Construction of Oil Tankers Under Regulation 13F(5) of Annex I of MARPOL 73/78'' (IMO Marine Environmental Protection Committee's Resolution MEPC 37/14; December 23, 1994). The results indicated that PL/spaces, when retrofitted on a non-SBT tankship, would result in a higher oil outflow when compared to the outflow of the same tankship that has not been fitted with PL/spaces. The speaker indicated that retrofitting PL/spaces on a non-SBT tankship would create a higher freeboard, which would result in greater oil outflow if the vessel's hull were to become damaged. The Coast Guard agrees that the effectiveness of PL/spaces as assumed in the NPRM RIA may have been overstated. The Coast Guard has conducted further studies to obtain more accurate estimates of the effectiveness of PL/spaces. A summary of the revised benefit estimates for PL/spaces is contained in the regulatory assessment for this SNPRM.

One comment stated that an IMO sponsored model of oil outflow indicated that, for any unprotected tank configuration, it is not possible to attain 100 percent effectiveness in a grounding scenario. The comment contended that within the structural limitations of most existing ships, the UPS system will be substantially less than 100 percent effective and that the NPRM overestimated its effectiveness. The Coast Guard has revised its estimates for the measures presented in this SNPRM. The UPS was not analyzed further; however, the Coast Guard is willing to analyze alternative oil outflow prevention measures if they meet international alternative standards, including safety assessments.

One comment stated that the RIA for the NPRM did not analyze historical incidents. Two comments stated that, without accurate estimates of the number of oil spills and the volume of oil spilled, it is impossible to accurately quantify environmental benefits and costs. The Coast Guard reviewed the

historical data used for the NPRM RIA and revised it for the regulatory assessment for this SNPRM. Comments on the revised data are solicited.

Assessment

The methodology for completing the regulatory assessment for this SNPRM employed a two phase process. First, a screening analysis was conducted to evaluate the effectiveness, efficiency, and technological feasibility of certain structural measures on a baseline of analytical tank vessel models. The screening analysis included an estimation of the onetime expense associated with refitting the vessel at a shipyard, called a rough order-of-magnitude (ROM) estimate; the cost of losing cargo carrying capacity due to implementing a measure that would not allow cargo carriage in certain tanks or above certain levels, called cargo shutout; and other costs such as loss of revenue during the shipyard period, called opportunity costs. It also included an estimate of the potential reduction in accidental oil outflow and operational oil outflow for certain measures. For this assessment, operational oil outflow is the oil prevented from being discharged by pre-MARPOL vessels if, instead of being allowed to discharge dirty ballast water, they are fitted with SBT or CBT and are not permitted to discharge dirty ballast water. Vessels are not allowed to discharge dirty ballast water in U.S. navigable waters; however, in accordance with international conventions they may do so in certain areas outside of these waters.

The second phase of this regulatory assessment consists of a detailed analysis conducted to estimate the costs and benefits of those measures which were deemed not only technologically feasible, but also appeared to be the most effective at reducing oil outflow on the affected existing single hull tank vessel fleet. The detailed analysis included a breakdown in costs, benefits, and a cost-benefit analysis over the 19-year period this rule is expected to be in effect.

Screening Analysis

1. General

There were five steps to the screening analysis phase of this assessment. First, baseline analytical tank vessel models were developed that represented the existing single hull tank vessel fleet. Second, selected measures were imposed on four of these analytical tank vessel models and the resultant oil outflow reductions were calculated. Third, cargo shutout, operating costs, and onetime ROM refit costs were developed. Then cost-effectiveness ratios were developed and the results of each measure were correlated with selected baseline analytical tank vessel models. Finally, the ratios were used to rank the measures and identify those combinations of measures and vessel categories that resulted in the lowest cost per barrel of oil not spilled. Table 1 summarizes the combinations of vessels and measures researched for this screening analysis.

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Table 1

Regulatory Alternatives and Baseline Model Combinations

MEASURES	DWT Model Sizes	
	70,000 dwt	264,000 dwt
1.a. PL/Spaces, 30% coverage	Pre-MARPOL	Pre-MARPOL
1.b. PL/SBT, 30% coverage, with ballast to max. feasible draft	Pre-MARPOL	Pre-MARPOL
1.c. PL/CBT, 30% coverage, empty to extent feasible	Pre-MARPOL	Pre-MARPOL
2.a. HBL all tanks	MARPOL '73	MARPOL '73
2.b. HBL, equivalent to Regulation 13G	MARPOL '73	MARPOL '73
3. PL/Spaces as in 1.c. and HBL as in 2.b.	Pre-MARPOL	Pre-MARPOL
4. Retrofit double bottom	MARPOL '73	Pre-MARPOL
5. Retrofit double sides	MARPOL '73	Pre-MARPOL
	31,000 dwt	12,700 dwt
6. PL/Spaces (install bulkheads)	Tank Barge	Tank Barge
7. PL/Spaces using existing cargo tanks	Tank Barge	Tank Barge

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To develop the baseline fleet and its characteristics, several designs were considered. It was assumed that the pre-MARPOL tank vessel had crude oil washing capabilities but no other required MARPOL features. MARPOL 73 tank vessels were assumed to be fitted with SBT, and MARPOL 78 tank vessels were assumed to have PL/SBT. As part of the process of ensuring that the design of the baseline models was appropriate, the baseline tank vessels were investigated for intact stability, longitudinal bending stresses, shear stresses, and sloshing frequencies. It was also assumed that the vessels were constructed to comply with the prevailing American Bureau of Shipping rules when the vessels were built; specifically, the still water bending moment, bending stress, and shear stress values. The resulting average shear stresses and bending moments were satisfactory. The fill depth level to tank depth level ratio for all loading conditions of the vessels investigated did not fall below 75–80 percent,

meaning that the sloshing frequencies were not near the roll or pitch periods of the vessels. Resonance can occur in longitudinal modes for liquid level ratios in the range of 30–45 percent, which are well below normal oil cargo levels and well below levels resulting from the application of HBL in this assessment. Another important consideration in developing the analytical tank vessel models was to ensure that they were, in general, reasonable representations of tank vessels serving the U.S. An analysis was conducted to determine the representativeness of the model tank vessels with respect to the existing fleet. The 70,000 dwt and 264,000 dwt pre-MARPOL, MARPOL 73 and MARPOL 78 models, and the 40,000 dwt pre-MARPOL model were compared to data on existing tank vessels obtained from ''The Tanker Register,'' Clarkson Research Studies, 1994. Information on the number of center and wing tanks, and on the cargo and ballast capacity, for existing vessels was analyzed. This analysis confirmed that the key vessel characteristics associated with the model vessels were within the distributions found on existing tank vessels.

The four deadweight categories (two tankship categories and two tank barge categories) selected for this screening represent a significant portion of tank vessels that are affected by section 4115(b) of OPA 90. Due to the nature of the measures and baseline tank vessels examined, certain of the baseline vessel and pollution prevention combinations were not analyzed because the tank vessel model already substantially meets the specification of the measure. For example, the MARPOL 78 baseline model tank vessel already substantially meets (and exceeds) PL/Space specifications. Additionally, because analyses of the pre-MARPOL baseline tank vessels and tank barges indicated that they generally operate at close to an HBL condition, the MARPOL 73 tank vessel models were selected to analyze the benefits of the measures employing HBL.

The measures researched in this screening have the following parameters:

Measure 1.a. reflects a measure that includes PL/Spaces covering 30 percent of the projected area of the sides or the projected area of the bottom of the vessels. For this measure, additional bulkheads were assumed to be installed to provide the minimum width of the PL/Spaces.

Measure 1.b. reflects a measure for PL/Spaces covering 30 percent of the projected area of the sides or the projected area of the bottom of the vessels; however, the vessels were also required to include water ballast in the wing tanks selected as PL/Spaces to provide the maximum feasible draft in the load condition. It was assumed additional ballast piping and pumping capability would be required.

Measure 1.c. reflects a measure for PL/CBT or PL/Spaces covering 30 percent of the projected area of the sides or the projected area of the bottom of the vessels; however, the vessels were also configured to carry ballast to the maximum extent possible in lieu of other spaces, with no new pumps or piping being refit. Exiting cargo wing tanks were assumed to remain as empty as possible with trim and longitudinal bending moment considerations.

Measure 2.a. reflects a measure for HBL which is incorporated in all cargo tanks.

Measure 2.b. reflects a measure for HBL which is incorporated only to the extent necessary for compliance with Regulation 13G of Annex I of MARPOL 73/78.

Measure 3 reflects a measure for a combination of HBL and PL/Spaces covering 30 percent of the projected area of the sides or the projected area of the bottom of the vessels; however, they were also configured to carry ballast to the maximum extent possible in lieu of other spaces, with no new pumps or piping being refit.

Measure 4 reflects a measure to refit a double bottom that has the minimum required depth of B/15 or 2 meters (6.56 feet) installed to cover the full length of the cargo tanks.

Measure 5 reflects a measure to refit double sides that have a minimum width of 2 meters to cover the full length of the cargo tanks.

Measure 6 reflects a measure to fit PL/Spaces covering 30 percent of the projected area of the sides or the projected area of the bottom of the vessels on tank barges. For this measure, additional bulkheads were assumed to be installed to provide the minimum width of the PL/Spaces.

Measure 7 reflects a measure to have PL/Spaces covering 30 percent of the projected of the projected area of the sides or the projected area of the bottom of the tank barge; however, the barges were also configured to carry ballast to the maximum extent possible in lieu of other spaces, with no new pumps or piping being refit. Existing cargo wing tanks were assumed to remain as empty as possible with trim and longitudinal bending moment considerations.

2. Costs

Table 2 summarizes the estimates of the cargo shutout, the onetime refit ROM costs, and the operating and voyage costs as a result of implementing the measure on the tank vessel models. Cargo shutout was calculated as the difference between the cargo capacity (98 percent) of the unmodified vessel and the cargo capacity after the measure was applied. It is expressed in both the volumetric difference and as a percentage of the cargo capacity of the baseline model.

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Table 2
Screening Analysis – Summary of Costs

Baseline Tanker Model	MEASURE	New Total Cargo Oil (Bbls) (cu.m.)	Cargo Oil Shut-Out (Bbls) (cu.m.)	Cargo Oil Shut-Out % initial	One-time refit (ROM) Costs (M$)	Opportunity Costs Per Year International	Opportunity Costs Per Year U.S. Coastal
70,000 dwt Pre-MARPOL	1.a. PL/Spaces, 30% coverage	523,444 83,221	7,072 1,124	1.3%	1.9	$6,402,000	$9,918,000
70,000 DWT Pre-MARPOL	1.b. PL/SBT, 30% coverage, with ballast to max. feasible draft	470,283 74,769	60,233 9,576	11.4%	0.5	$6,402,000	$9,918,000
70,000 dwt Pre-MARPOL	1.c. PL/CBT, 30% coverage, empty to extent feasible	470,283 74,769	60,233 9,576	11.4%	0.2	$6,402,000	$9,918,000
70,000 dwt MARPOL '73	2.a. HBL all tanks	389,854 61,962	153,655 24,429	28.3%	0	$6,402,000	$9,918,000
70,000 dwt MARPOL '73	2.b. HBL, equivalent to Regulation 13G	477,892 75,979	65,617 10,432	12.1%	0	$6,402,000	$9,918,000
70,000 dwt Pre-MARPOL	3. PL/Spaces as in 1.c. and HBL as in 2.b.	443,948 70,582	86,567 13,763	16.3%	0.2	$6,402,000	$9,918,000
70,000 dwt MARPOL '73	4. Retrofit double bottom	484,209 76,963	59,300 9,428	10.9%	9.7	$6,402,000	$9,918,000
70,000 dwt MARPOL '73	5. Retrofit double sides	502,573 79,903	502,573 79,903	7.5%	13.6	$6,402,000	$9,918,000
12,700 dwt Tank Barge	6. PL/Spaces (install bulkheads)	237,072 37,691	12,844 2,042	5.1%	2.8	*	*
12,700 dwt Tank Barge	7. PL/Spaces using existing cargo tanks	207,712 33,204	42,203 6,710	16.9%	0.3	*	*
264,000 dwt Pre-MARPOL	1.a. PL/Spaces, 30% coverage	2,031,370 322,962	46,597 7,408	2.2%	12.4	$11,279,000	$12,143,000
264,000 dwt Pre-MARPOL	1.b. PL/SBT, 30% coverage, with ballast to max. feasible draft	1,657,648 263,545	420,319 66,825	20.2%	1.8	$11,279,000	$12,143,000
264,000 dwt Pre-MARPOL	1.c. PL/CBT, 30% coverage, empty to extent feasible	1,657,648 263,545	932,159 148,201	20.2%	0.4	$11,279,000	$12,143,000
264,000 dwt MARPOL '73	2.a. HBL all tanks	1,134,047 180,299	570,481 90,699	45.1%	0	$11,279,000	$12,143,000
264,000 dwt MARPOL '73	2.b. HBL, equivalent to Regulation 13G	1,495,725 237,801	652,153 103,684	27.6%	0	$11,279,000	$12,143,000
264,000 dwt Pre-MARPOL	3. PL/Spaces as in 1.c. and HBL as in 2.b.	1,425,814 306,715	148,786 23,655	31.4%	0.4	$11,279,000	$12,143,000
264,000 dwt Pre-MARPOL	4. Retrofit double bottom	1,929,181 306,715	148,786 23,655	7.2%	26.6	$11,279,000	$12,143,000
264,000 dwt Pre-MARPOL	5. Retrofit double sides	1,921,087 305,428	156,880 24,942	7.5%	39.9	$11,279,000	$12,143,000
31,000 dwt Tank Barge	6. PL/Spaces (install bulkheads)	97,015 15,424	6,483 1,031	6.3%	1.4	*	*
31,000 dwt Tank Barge	7. PL/Spaces using existing cargo tanks	68,281 10,856	35,217 5,599	34%	0.2	*	*

*Opportunity costs were not calculated for tank barges. However, if the opportunity costs for tank vessels were extrapolated to apply to tank barges and required shipyard time is accounted for, tank barge opportunity costs would range from $2,506,000 to $5,859,000.

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3. Benefits

Benefits were developed by estimating the total annual expected accidental and operational oil outflow avoided as a result of each measure. The estimate the annual reduction in the number of barrels spilled as a result of the measures, the total annual accidental and operational oil outflow was estimated both before and after the measure was implemented. The accidental oil outflow estimates for grounding and collisions were annualized using historical spill data provided in the regulatory assessment for the NPRM and verified through an independent calculation using worldwide casualty data. Lloyd's Maritime Information Services Casualty Information System was analyzed for a sample of tank vessels drawn from Clarkson's Tanker Register to estimate the per-vessel annual probability of having grounding and collisions. The analysis resulted in annual grounding and collision probabilities of 0.026 and 0.017, respectively, for an existing tank vessel moving oil through U.S. waters in 1990.

The accidental oil outflow estimates are also presented using both Regulation 13F and 13G calculations. The Regulation 13F calculations are based on a probabilistic methodology, described in ''Interim Guidelines for the Approval of Alternative Methods of Design and Construction of Oil Tankers Under Regulation 13F(5) of Annex I of MARPOL 73/78'' (IMO Marine Environmental Protection Committee's Resolution MEPC 37/14; December 23, 1994), which uses currently available accident damage statistics for tank vessels. To obtain the total accidental oil outflow, the average bottom outflow estimate was combined with the average collision outflow estimate by using a weight of 0.6 for grounding damage and a weight of 0.4 for collision damage. The Regulation 13G calculations are more deterministic, as described in MEPC Resolution 64(36) entitled, ''Guidelines for Approval of Alternative Structural or Operational Arrangements as Called for in Regulation 13G(7) of Annex I of MARPOL 73/78.'' Both calculations take into account hydrostatic pressure from the cargo oil and the outside sea water in the case of bottom damage. They also allow for 50 percent capture by double bottom tanks in cases where bottom damage extends through these tanks. To estimate the reduction in the expected annual oil outflow as a result of the measures, the annual oil outflow for the vessel after the measure was implemented was subtracted from the total oil outflow of the baseline tank vessel. Table 3 summarizes the estimated oil outflows after implementation of each measure.

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Table 3
Screening Analysis - Summary of Estimated Oil Outflows

Baseline Tanker Model	Measure	13F Total Mean Oil (Bbls) (cu.m.)	Reg. 13G Total Oil (Bbls) (cu.m.)	% Outflow of Total Oil Carried 13F	% Outflow of Total Oil Carried 13G	Annual Mean Accidental Oil Outflow	Annual Operational Oil Outflow	Total Annual Oil Outflow
70,000 dwt	1.a. PL/Spaces,	24,742	17,804	4.7%	3.4%	1,064	953	2,017
Pre-MARPOL	30% coverage	3,934	2,831			169	151	321
70,000 dwt	1.b. PL/SBT, 30% coverage,	18,130	14,497	3.9%	3.1%		0	780
Pre-MARPOL	with ballast to max.	2,882	2,305			780	0	124
	feasible draft					124		
70,000 dwt	1.c. PL/CBT, 30% coverage,	23,022	18,181	4.9%	3.9%	990	0	990
Pre-MARPOL	empty to extent feasible	3,660	2,891			157	0	157
70,000 dwt	2.a. HBL all tanks	15,191	9,726	3.9%	2.5%	653	0	653
MARPOL '73		2,415	1,546			104	0	104
70,000 dwt	2.b. HBL, equivalent to	18,907	15,408	4.0%	3.2%	813	0	813
MARPOL '73	Regulation 13G	3,006	2,450			129	0	129
70,000 dwt	3. PL/Spaces as in 1.c.	15,037	12,645	3.4%	2.8%	647	808	1,455
Pre-MARPOL	and HBL as in 2.b.	2,391	2,010			103	128	321
70,000 dwt	4. Retrofit double bottom	13,010	10,806	2.7%	2.2%	559	0	559
MARPOL '73		2,068	1,718			89	0	89
70,000 dwt	5. Retrofit double sides	26,519	20,056	5.3%	4.0%	1,140	0	1,140
MARPOL '73		4,216	3,189			181	0	181
12,700 dwt	6. PL/Spaces	8,195	5,835	3.5%	2.5%	337*	0	337*
Tank Barge	(install bulkheads)	1,303	928			53*	0	53*
12,700 dwt	7. PL/Spaces using	9,989	6,649	4.8%	3.2%	399*	0	399*
Tank Barge	existing cargo tanks	1588	1,057			63*	0	63*
264,000 dwt	1.a. PL/Spaces,	60,888	61,072	3.0%	3.0%	2,617	677	3,294
Pre-MARPOL	30% coverage	9,677	9,710			416	108	524
264,000 dwt	1.b. PL/SBT, 30% coverage,	45,659	39,933	2.8%	2.4%	1963	0	1,963
Pre-MARPOL	with ballast to max.	7,259	6,349			312	0	312
	feasible draft						0	
264,000 dwt	1.c. PL/CBT, 30% coverage,	81,422	66,510	4.9%	4.0%	3,502	0	3,502
Pre-MARPOL	empty to extent feasible	12,948	10,574			557	0	557
264,000 dwt	2.a. HBL all tanks	36,196	28,243	3.2%	2.5%	1,556	0	1,556
MARPOL '73		5,755	4,490			247	0	247
264,000 dwt	2.b. HBL, equivalent to	45,260	42,696	3.0%	2.9%	1,946	0	1,946
MARPOL '73	Regulation 13G	7,196	6,788			309	0	309
264,000 dwt	3. PL/Spaces as in 1.c.	47,976	44,508	3.4%	3.1%	2,063	475	2,538
Pre-MARPOL	and HBL as in 2.b.	7,628	7,076			328	76	404
264,000 dwt	4. Retrofit double	50,005	49,443	2.6%	2.6%	2,150	643	2,793
Pre-MARPOL	bottom	7,950	7,861			342	102	444
264,000 dwt	5. Retrofit double sides	52,938	57,655	2.8%	3.0%	2,276	640	2,917
Pre-MARPOL		8,416	9,166			362	102	464
31,000 dwt	6. PL/Spaces	5,669	4,358	5.8%	4.5%	241*	0	241*
Tank Barge	(install bulkheads)	901	693			38*	0	38*
31,000 dwt	7. PL/Spaces using	6,606	5,038	9.7%	7.4%	279*	0	279*
Tank Barge	existing cargo tanks	1,050	801			44*	0	44*

*Annual mean accidental oil outflow calculations were not done for tank barges. However, if the average combined collision and grounding probabilities for tank vessels are extrapolated to apply to tank barges, this estimated oil outflow results.

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4. Cost-benefits

To estimate the cost-effectiveness ratio for each combination of tank vessel model and measure, an annualized cost of compliance calculation was divided by the annualized total expected oil outflow avoided. Because operating and voyage costs differ significantly depending on whether the tank vessel is deployed in the international or U.S. coastal fleet, cost-effectiveness ratios were developed separately for the tank vessel models by these fleet categories. These ratios were also developed assuming the tank vessels have another 5 years of remaining service life; however, the ranking of the results of the analysis do not change if a longer remaining service life is assumed. Table 4 summarizes the cost-effectiveness ratios attained in this screening analysis.

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Table 4

Screening Analysis - Summary of Benefits

Baseline Vessel Model Analyzed	Measure	Annualized Cost ($)	Outflows after Measure ACC (Bbls)	Outflows after Measure OPER Annual (Bbls)	Outflows after Measure Total (Bbls)	Baseline Outflows ACC (Bbls)	Baseline Outflows OPER Annual (Bbls)	Baseline Outflows Total (Bbls)	Reduction Increment Outfows Total (Bbls)	Cost Effectiveness ACC ($/Bbl)	Cost Effectiveness OPER Annual ($/Bbl)	Cost Effectiveness Total ($/Bbl)
International Fleet												
70,000 dwt Pre-MARPOL	1.a. PL/Spaces, 30% coverage	$507,186	1,064	953	2,017	1,149	985	2,134	118	$5,967	$15,569	$4,314
70,000 dwt Pre-MARPOL	1.b. PL/SBT, 30% coverage, with ballast to max. feasible draft	$850,643	780	0	780	1,149	985	2,134	1,354	$2,305	$863	$628
70,000 dwt Pre-MARPOL	1.c. PL/CBT, 30% coverage, empty to extent feasible	$777,694	990	0	990	1,149	985	2,134	1,144	$4,891	$789	$680
70,000 dwt MARPOL '73	2.a. HBL all tanks	$1,811,766	653	0	653	1,285	0	1,285	632	$2,867	N	$2,867
70,000 dwt MARPOL '73	2.b. HBL, equivalent to Regulation 13G	$774,642	813	0	813	1,285	0	1,284	472	$1,641	N	$1,641
70,000 dwt Pre-MARPOL	3. PL/Spaces as in 1.c. and HBL as in 2.b.	$1,091,392	647	0	647	1,149	985	2,134	1,487	$2,174	$1,108	$734
70,000 dwt MARPOL '73	4. Retrofit double bottom	$2,899,672	559	0	559	1,285	0	1,285	726	$3,994	N	$3,994
70,000 dwt MARPOL '73	5. Retrofit double sides	$3,589,187	1,140	0	1,140	1,285	0	1,285	145	$24,753	N	$24,753
264,000 dwt Pre-MARPOL	1.a. PL/Spaces, 30% coverage	$3,076,814	2,617	677	3,294	2,884	707	3,591	297	$11,524	$103,708	$10,371
264,000 dwt Pre-MARPOL	1.b. PL/SBT, 30% coverage, with ballast to max. feasible draft	$2,688,641	1,963	0	1,963	2,884	707	3,591	1,628	$2,919	$3,804	$1,652
264,000 dwt Pre-MARPOL	1.c. PL/CBT, 30% coverage, empty to extent feasible	$2,376,370	3,502	0	3,502	2,884	707	3,591	89	-3,845	$3,362	$26,763
264,000 dwt MARPOL '73	2.a. HBL all tanks	$5,086,829	1,556	0	1,556	3,803	0	3,803	2,247	$2,264	N	$2,264
264,000 dwt MARPOL '73	2.b. HBL, equivalent to Regulation 13G	$3,113,004	1,946	0	1,946	3,803	0	3,803	1,857	$1,676	N	$1,676
264,000 dwt Pre-MARPOL	3. PL/Spaces as in 1.c. and HBL as in 2.b.	$3,639,618	2,063	0	2,063	2,884	707	3,591	1,528	$4,433	$5,149	$2,382
264,000 dwt Pre-MARPOL	4. Retrofit double bottom	$6,872,886	2,150	643	2,793	2,884	707	3,591	798	$9,364	$107,842	$8,616
264,000 dwt Pre-MARPOL	5. Retrofit double sides	$9,935,982	2,276	640	2,916	2,884	707	3,591	674	$16,342	$149,573	$14,732

Table 4 (continued)
Screening Analysis - Summary of Benefits

Baseline Vessel Model Analyzed	Measure	Annualized Cost ($)	Outflows after Measure ACC (Bbls)	Outflows after Measure OPER Annual (Bbls)	Outflows after Measure Total (Bbls)	Baseline Outflows ACC (Bbls)	Baseline Outflows OPER Annual (Bbls)	Baseline Outflows Total (Bbls)	Reduction Increment Outfows Total (Bbls)	Cost Effectiveness ACC ($/Bbl)	Cost Effectiveness OPER Annual ($/Bbl)	Cost Effectiveness Total ($/Bbl)
U.S. Coastal Fleet												
70,000 dwt Pre-MARPOL	1.a. PL/Spaces, 30% coverage	$552,894	1,064	0	1,064	1,149	0	1,149	85	$6,505	N	$6,505
70,000 dwt Pre-MARPOL	1.b. PL/SBT, 30% coverage, with ballast to max. feasible draft	$1,251,458	780	0	780	1,149	0	1,149	369	$3,391	N	$3,391
70,000 dwt Pre-MARPOL	1.c. PL/CBT, 30% coverage, empty to extent feasible	$1,178,518	990	0	990	1,149	0	1,149	159	$7,412	N	$7,412
70,000 dwt MARPOL '73	2.a. HBL all tanks	$2,806,794	653	0	653	1,285	0	1,285	632	$4,441	N	$4,441
70,000 dwt MARPOL '73	2.b. HBL, equivalent to Regulation 13G	$1,200,078	813	0	813	1,285	0	1,285	472	$2,543	N	$2,543
70,000 dwt Pre-MARPOL	3. PL/Spaces as in 1.c. and HBL as in 2.b.	$1,664,500	647	0	647	1,149	0	1,149	502	$3,316	N	$3,316
70,000 dwt MARPOL '73	4. Retrofit double bottom	$3,282,916	559	0	559	1,285	0	1,285	726	$4,522	N	$4,522
70,000 dwt MARPOL '73	5. Retrofit double sides	$3,852,887	1,140	0	1,140	1,285	0	1,285	145	$26,572	N	$26,572
264,000 dwt Pre-MARPOL	1.a. PL/Spaces, 30% coverage	$3,095,882	2,617	0	2,617	2,884	0	2,884	297	$11,595	N	$11,595
264,000 dwt Pre-MARPOL	1.b. PL/SBT, 30% coverage, with ballast to max. feasible draft	$2,863,169	1,963	0	1,963	2,884	0	2,884	921	$3,109	N	$3,109
264,000 dwt Pre-MARPOL	1.c. PL/CBT, 30% coverage, empty to extent feasible	$2,550,898	3,502	0	3,502	2,884	0	2,884	-618	-4,128	N	-4,128
264,000 dwt MARPOL '73	2.a. HBL all tanks	$5,476,493	1,556	0	1,556	3,803	0	3,803	2247	$2,437	N	$2,437
264,000 dwt MARPOL '73	2.b. HBL, equivalent to regulation 13G	$3,351,468	1,946	0	1,946	3,803	0	3,803	1,857	$1,805	N	$1,805
264,000 dwt Pre-MARPOL	3. PL/Spaces as in 1.c. and HBL as in 2.b.	$3,910,914	2,063	0	2,063	2,884	0	2,884	821	$4,764	N	$4,764
264,000 dwt Pre-MARPOL	4. Retrofit double bottom	$6,935,094	2,150	0	2,150	2,884	0	2,884	734	$9,448	N	$9,448
264,000 dwt Pre-MARPOL	5. Retrofit double sides	$10,000,782	2,276	0	2,276	2,884	0	2,884	608	$16,449	N	$16,449

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Detailed Analysis

1. General.

The results from the screening analysis cost-effectiveness phase indicated that for tank vessels in both the international and U.S. coastal fleets, the appropriate measures to analyze in depth included: (1) pre-MARPOL vessels with a combination of PL/CBT and HBL (measure 3), and (2) for both MARPOL 73 vessels and MARPOL 78 vessels, an HBL measure on certain tanks (measure 2.b.). Although MARPOL 78 model tank vessels were not analyzed in the screening analysis, these vessels are similar to MARPOL 73 vessels in terms of oil outflow and related characteristics.

The screening analysis measure 3, pre-MARPOL vessels with a combination of PL/CBT and HBL, was chosen over measures 1.b and 1.c because of its overall cost-effectiveness and accidental oil outflow mitigation characteristics. In general, implementation of measure 1.c. results in higher oil outflow when bottom damage occurs. The cost effectiveness of measure 1.b and measure 3 may be considered to be roughly equivalent, however, the accidental oil outflow cost effectiveness for pre-MARPOL 264,000 dwt tankers in 34 percent greater for both international and U.S. coastal tank vessels.

To analyze the measures further, four steps were taken. First, the affected vessel population was determined and categorized by the three vessel categories. Second, a cost analysis was conducted including per vessel and total cost estimates. Then a benefit estimate was developed based on an expanded range of analytical tank vessel models developed with the same assumptions and criteria used for the screening analysis. Finally, a cost-benefit analysis was developed along with an effectiveness analysis.

Data on the world tanker fleet was obtained from several sources, including Lloyd's Maritime Information Services, Clarkson Research Studies Limited, Coast Guard Marine Safety Management System, and industry. Vessels that are expected to comply with this rulemaking were identified based on whether the vessel had complied with current financial responsibility regulations as implemented under OPA 90 and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended. All oil tankers in the world fleet that complied with the Coast Guard's financial responsibility final rulemaking (59 FR 34210) requirements to obtain a Certificate of Financial Responsibility (COFR) as of April 30, 1995, were used as a baseline tank vessel population for this assessment. A check of the COFR database was completed to update the tank vessel numbers and make them reflect COFRs issued as of August 30, 1995. An alternative approach was also developed to assess the accuracy of using COFRs to define the baseline fleet. Port call data from 1991 to 1993 was obtained for U.S. ports, including the Louisiana Offshore Oil Port (LOOP). This data was matched with the worldwide tanker database to estimate the number of annual port calls to and from the U.S. for tank vessels in the international fleet.

Once the affected fleet was identified, vessels were categorized into one of the three vessel categories: pre-MARPOL, MARPOL 73, and MARPOL 78. Because the measures vary depending on vessel category, total fleet compliance costs and the number of barrels of spilled oil avoided as a result of the measure vary significantly depending on the distribution of the existing tank vessel fleet by vessel category. This categorization was based primarily on the vessel's delivery date, deadweight tonnage, and type (product or crude carrier). Vessels permitted to engage in U.S. coastal trade are commonly referred to as Jones Act vessels and are required to be built and flagged in the United States. These vessels must, in general, be serviced and repaired in the United States, and were designated to be in the U.S. coastal trade. Because not all U.S. flag vessels qualify as Jones Act tankers, U.S. flag tankers that operate on routes to international ports were included in the international fleet. Analysis of port call data confirmed that these vessels are engaged in international trade.

2. Costs

The incremental costs for existing single hull tank vessels to comply with the proposed measures were estimated for eight international tank vessel models and six U.S. coast tank vessel models, and for three vessel categories: pre-MARPOL. MARPOL 73, and MARPOL 78. To estimate total costs, the baseline fleet of existing single hull tank vessels was projected from 1996 to 2015 based on the double hull rulemaking phaseout schedule. Once the regulated baseline fleet are defined and projected from 1996 to 2015, total costs were estimated by multiplying the number of vessels projected to be in operation in a given year by the appropriate per-vessel compliance cost estimates. Table 5 summarizes the estimated fleet categorization and the phaseout of tank vessels affected by this rulemaking.

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Table 5
Projection of the Existing Single Hull Tank Vessel Fleet

YEAR	International			U.S. Coastal		
	Pre-MARPOL	MARPOL '73	MARPOL '78	Pre-MARPOL	MARPOL '73	MARPOL '78
1995	407	63	435	42	34	11
1996	253	50	424	6	8	11
1997	253	50	424	6	8	11
1998	253	50	424	6	8	11
1999	253	50	424	6	8	11
2000	253	50	424	6	8	11
2001	253	50	424	6	8	11
2002	235	41	424	6	8	8
2003	216	33	406	5	8	7
2004	188	28	380	5	8	7
2005	118	16	370	3	6	7
2006	81	4	351	1	1	7
2007	55	0	322	0	0	7
2008	46	0	280	0	0	4
2009	44	0	241	0	0	1
2010	26	0	217	0	0	0
2011	18	0	179	0	0	0
2012	15	0	140	0	0	0
2013	11	0	100	0	0	0
2014	7	0	74	0	0	0
2015	0	0	0	0	0	0

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General assumptions for this phase of the regulatory assessment included: (1) a vessel owner or operator will begin to comply with this rulemaking starting in 1999 and the entire fleet of tank vessels will be in compliance with the proposed measures by 2002; (2) one-third of the fleet would be in compliance with the rulemaking each year between 1999 and 2001 until the entire fleet is in full compliance by the beginning of 2002; (3) pre-MARPOL tank vessels would require physical modifications to implement PL/CBT and the number of days the tank vessel would be laid up was estimated by deadweight tonnage; (4) MARPOL 73 and 78 vessels would have no disruption in service since HBL would not require steel work or other physical modifications; (5) all tank vessels were assumed to be in full compliance with all applicable existing U.S. laws; and (6) prior compliance with HBL on MARPOL 73 or MARPOL 78 vessels was assumed to be zero.

The incremental compliance costs as a result of the measures were estimated by deadweight and vessel category for the international and U.S. coastal fleets. The categories for compliance costs were estimated as: (1) cost of operating or voyage inefficiency due to cargo shutout as a result of implementing the proposed measures; (2) cost to retrofit the existing tank vessel; and (3) cost associated with the time the vessel is expected to be out of service (i.e., opportunity costs) while the vessel is being retrofitted with the measure.

For each modeled tank vessel (pre-MARPOL, MARPOL 73, and MARPOL 78), the percentage of cargo shutout was estimated by dividing the change in cargo capacity before and after the proposed measure was implemented by the cargo capacity of the baseline vessel. Although the cargo shutout percentage varies depending on the characteristics of the tank vessel, an averaged effectiveness ratio was used for the several tank vessels that were modeled. Table 6 summarizes the cargo shutout estimates for the affected vessels.

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Table 6

Annual Per Vessel Cargo Shut-Out Cost by Vessel Category and DWT Range

DWT Ranges (DWT x 1,000)		Cargo Shut-Out			U.S. Voyages Annually			Voyage Cost (thousands $)			Cargo Shut-Out Cost (thousands $)		
		Pre-MARPOL	MARPOL '73	MARPOL '78	Pre-MARPOL	MARPOL '73	MARPOL '78	Pre-MARPOL	MARPOL '73	MARPOL '78	Pre-MARPOL	MARPOL '73	MARPOL '78
International Fleet	5-29	19%	9%	8%	7.0	6.0	9.0	1,800	1,540	2,310	350	145	192
	30-49	19%	9%	8%	7.0	7.0	7.0	2,590	2,590	2,590	503	244	215
	50-64	19%	9%	8%	10.5	15.0	10.0	3,020	4,320	2,880	588	407	239
	65-89	19%	9%	8%	10.0	11.0	28.0	2,270	2,500	6,360	442	236	529
	90-144	19%	9%	8%	7.0	6.0	9.0	4,440	3,800	5,700	863	359	475
	145-199	19%	9%	8%	9.0	9.0	9.0	10,600	10,600	10,600	2,063	1,000	882
	200-299	19%	9%	8%	2.0	2.0	2.0	4,440	4,440	4,440	865	419	370
	300+	19%	9%	8%	1.5	2.0	2.0	3,860	5,150	5,150	752	486	428
U.S. Coastal Fleet	5-29	19%	9%	8%	45.9	45.9	45.9	5,545	5,291	5,290	1,079	499	440
	30-49	19%	9%	8%	37.6	37.6	37.6	7,589	7,023	7,022	1,477	663	584
	50-64	19%	9%	8%	33.0	33.0	33.0	9,014	8,152	8,152	1,754	769	678
	65-89	19%	9%	8%	28.0	28.0	28.0	9,959	8,736	8,736	1,938	824	727
	90-199	19%	9%	8%	23.8	23.8	23.8	11,159	9,690	9,690	2,171	914	806
	200+	19%	9%	8%	10.5	10.5	10.5	12,100	11,396	11,396	2,354	1,075	948

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Retrofit cost estimates were developed by vessel category to conform to the structure of the proposed measures. The measure researched for pre-MARPOL tankers required implementation of PL/CBT using existing cargo wing tanks. These vessels would incur costs associated with converting the cargo tanks to ballast tanks and modifying the cargo piping and related systems. Cost differences were included in this analysis for the disparity between foreign and U.S. shipyards. MARPOL 73 and MARPOL 78 vessels, however, would not incur a onetime cost because the measure researched for these vessels required implementation of HBL. A structural analysis of the analytical tank vessel models determined that, in general, HBL could be implemented on

these vessels without having to reinforce bulkheads and related structures.

Opportunity costs were estimated to account for the onetime cost tank vessels would be out of service as a result of being retrofitted. This cost was estimated by subtracting from the daily time charter rate the daily operating cost that would be saved as a result of being out of service as well as crew cost savings if the retrofit would take more than two weeks since crews would be flown home. For pre-MARPOL vessels, the number of days the tank vessel would be laid up was estimated by deadweight ton range. A summary of the onetime costs and opportunity costs for the measures is presented in Table 7. For MARPOL 73 and MARPOL 78 vessels, no disruption in service was assumed. Therefore, no opportunity costs were considered.

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Table 7
Summary of Onetime and Opportunity Costs

Pre-MARPOL Vessels DWT Ranges (DWT x 1,000)		Opportunity Costs						Onetime Refit Costs (ROM)
		Timecharter Rates ($/day)	Avoided Op. Cost Exc. Crew ($/day)	Crew Costs ($/day)	Time Out of Service (days)	Lost Daily Operating Contrib. ($/day)	Total Annual Opportunity Cost	
International Fleet	5-29	13,000	2,500	2,400	6	10,600	$63,000	$328,000
	30-49	15,000	2,800	2,700	7	12,300	$84,000	$552,000
	50-64	17,000	3,530	3,000	7	13,600	$93,000	$702,000
	65-89	19,000	3,910	3,570	7	15,200	$104,000	$803,000
	90-144	19,000	4,700	3,600	7	14,400	$99,000	$988,000
	145-199	19,000	5,490	4,000	8	13,600	$107,000	$1,183,000
	200-299	23,000	6,890	4,700	8	16,000	$125,000	$1,474,000
	300+	32,000	8,280	5,000	8	23,600	$185,000	$1,792,000
U.S. Coastal Fleet	5-29	25,000	3,650	5,600	6	21,400	$128,000	$340,000
	30-49	30,000	5,250	6,600	7	24,700	$170,000	$600,000
	50-64	35,000	6,050	7,200	7	28,900	$199,000	$780,000
	65-89	40,000	6,320	7,200	7	33,700	$231,000	$930,000
	90-199	50,000	6,450	8,000	7	43,600	$299,000	$1,330,000
	200+	62,000	7,930	7,100	8	54,100	$424,000	$1,710,000

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The affected fleet was also analyzed to determine whether a vessel owner or operator would replace the vessel with a double hull vessel rather than implement the measures researched in this regulatory assessment. The key consideration underlying the decision about whether to ''replace'' or ''retrofit'' depends on whether the amortized costs to purchase and operate a double hull tank vessel are less than the annualized incremental cost for a single hull vessel to comply with the proposed measure. The existing single hull tank vessel is assumed to be replaced if the amortized cost of purchasing and operating a new double hull vessel earlier than required is less expensive than retrofitting the existing tank vessel with the proposed measure. This analysis dependent on several factors, including the onetime retrofit costs of the measures; the annual costs related to cargo shutout; the number of years remaining until the existing single hull vessel must be replaced by a double hull vessel; the price the vessel owner would receive if the single hull vessel was replaced (scrap or secondhand price); and the capital costs and operating costs of a double hull vessel. The analysis indicated that none of the fleet of existing single hull vessels would be replaced early by double hull vessels due to the measures in this phase of the regulatory assessment. The primary reason for this outcome is that the compliance costs for the measures, including the onetime capital costs, are relatively low in comparison to the annualized cost to purchase and operate double hull vessels.

3. Government Costs

The majority of tank vessels owned or operated by the Federal Government, such as oil tank vessels used by the U.S. Navy, qualify as public vessels under OPA 90 and are not subject to this rulemaking. The National Defense Reserve Fleet/Ready Reserve Force (NDRF/RRF) currently does not qualify for the public vessel exemption and has ten tank vessels available for service that would be affected by this rulemaking. Because the NDRF/RRF is composed of vessels similar to those used in this analysis, costs and benefits would be similar. However, there is legislation being discussed that would exempt these vessels from the OPA 90 double hull phase-in requirements. Because these vessels may not be subject to this rulemaking and no specific regulatory language is proposed in this SNPRM, this analysis did not include costs to the NDRF/RRF.

The burden of implementing structural measures may require the Coast Guard to conduct plan review for those vessels refitting their tanks or

spend time inspecting vessels for compliance; however, since specific regulatory language is not proposed in this SNPRM, no government cost is associated with it.

4. Benefits

The incremental reduction in the volume of oil spilled as a result of the measures was determined by estimating the difference in the accidental oil volume spilled and operational discharges for the baseline fleet before and after the measures were implemented on the analytical tanker models. This benefit analysis was completed in three steps. First, accidental oil spill volumes and operational discharges for the baseline fleet over time by vessel category and deadweight ton ranges were completed. Second, the effectiveness of the measures to reduce accidental spill volumes and operational discharges on the applicable portions of the baseline fleet was determined. Third, the effectiveness ratios were used to estimate the reduction in oil spill volumes as a result of each measure.

The volume of oil spilled due to accidents by the baseline fleet was estimated based on an analysis of historical oil spill data in both U.S. waters and international waters. This analysis was similar to the accident analysis done for the screening phase of this regulatory assessment. Historical data taken from the regulatory assessment done for the NPRM was adjusted using worldwide spill data to fully account for the effectiveness of the measures in reducing oil spills for the international fleet. Additionally, annual spill rates were estimated based on oil movement projections and an annualized estimate of the adjusted accidental spill data. The volume of oil moved in any year after 1995 was estimated by reducing the volume of oil moved by the baseline fleet by the proportion of existing single hull tank vessels projected to be in operation for each year between 1996 and 2015. Accidental oil spill volumes were estimated by applying the spill rates to the volume of oil moved by the baseline fleet in future years. These spill volumes were estimated by deadweight ton range and vessel category for tank vessels in the international and U.S. coastal fleets.

The benefits also included estimates on the difference in the operational discharges for the baseline fleet before and after the proposed measures would be implemented. Assumptions made for the benefits of the measures for reducing operation discharges included: (1) for the operational discharge analyses, only pre-MARPOL tank vessels have operational discharges because these vessels are not equipped with sufficient SBT or CBT capacity; (2) pre-MARPOL tank vessels in the U.S. coastal fleet were assumed to have no operational discharges because they spend the majority of their time in U.S. waters; however, the pre-MARPOL tank vessels in the international fleet were estimated to have operational discharges when outside U.S. waters; (3) for the operational discharge analyses, pre-MARPOL tank vessels were assumed to meet MARPOL 73 requirements and discharge no more than 1/15,000 of their cargo per voyage; and (4) annual operational discharge volume varies proportionately with the estimated number of U.S. voyages. Projected accidental and operational discharges for the baseline fleet with no measures implemented were estimated over the period of this rulemaking and are summarized in Table 8.

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Table 8

Accidental and Operational Oil Spill Volumes for the Baseline Fleet

VESSEL CATEGORY			TOTAL BARRELS SPILLED/DISCHARGED					
			1996	1999	2001	2005	2010	2015
U.S. Coastal	Pre-MARPOL		1,207	1,207	1,207	463	0	0
	MARPOL '73		1,418	1,418	1,418	962	0	0
	MARPOL '78		2,021	2,021	2,021	988	0	0
International	Pre-MARPOL	Accidental	7,135	7,135	7,135	2,522	439	0
		Operational	28,440	28,440	28,440	11,308	1,347	0
		Total	35,575	35,575	35,575	13,830	1,787	0
	MARPOL '73		2,550	2,550	2,550	478	0	0
	MARPOL '78		32,693	32,693	32,693	24,170	12,837	0
Total			75,464	75,464	75,464	40,891	14,624	0

Note: As indicated in Table 8, only international Pre-MARPOL tank vessel are estimated to have appreciable operational discharges. Consequently, for this vessel category, accidental oil outflow and operational discharges are shown separately. For all other vessel categories, only the accidental oil spill volume is shown.

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Effectiveness ratios were developed based on the results of the oil outflow analyses conducted on the analytical tank vessel models. In addition to developing the effectiveness ratios for the existing single hull tank vessel fleet, ratios were also developed for potential ''early phase-in'' of double hull tank vessels with comparable carriage capacity. Accidental oil spill incident effectiveness ratios were developed for three of the five incident categories: groundings, collisions, and structural failures. The measures were not expected to directly affect oil outflow in the event of fires or explosions or oil spills that occur during cargo transfer operations. Effectiveness ratios for groundings and collisions were developed based on the oil outflow estimates using the guidelines for Regulation 13F and 13G of Annex I of MARPOL 73/78. Structural failure ratios were developed based on an analysis of casualty incidents as reported in a Ship Structural Committee report entitled ''A Limited Survey of Ship Structural

Damage,'' published in 1971 (NO. SSC-220). A 100 percent effectiveness ratio for operational spills, applicable to the PL/CBT and HBL measure on pre-MARPOL tank vessels, was used for this analysis because it was assumed they would use the CBTs, thereby avoiding the need to discharge dirty ballast from cargo tanks. Effectiveness ratios for each measure and a comparison between comparable deadweight ton double hull design are summarized in Table 9.

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Table 9
Percent Effectiveness Ratios for Vessels

DWT Ranges (DWT x 1,000)		Incident Category					
		Groundings		Collisions		Structural Failures	
		Single Hull Vessels	Double Hull Vessels	Single Hull Vessels	Double Hull Vessels	Single Hull Vessels	Double Hull Vessels
Pre-MARPOL Vessels with PL/CBT and HBL Implemented							
International and U.S. Coastal	5-29	12%	85%	39%	70%	30%	90%
	30-49	18%	82%	39%	68%	30%	90%
	50-64	23%	79%	39%	65%	30%	90%
	65-89	20%	75%	39%	62%	30%	90%
International	90-144	25%	67%	39%	55%	30%	90%
	145-199	23%	58%	39%	49%	30%	90%
	200-299	26%	51%	39%	60%	30%	90%
	300+	25%	30%	39%	55%	30%	90%
U.S. Coastal	90-199	25%	62%	39%	51%	30%	90%
	200+	25%	52%	39%	61%	30%	90%
MARPOL '73 with HBL Implemented							
International and U.S. Coastal	5-29	38%	92%	11%	52%	3%	90%
	30-49	38%	90%	12%	49%	3%	90%
	50-64	43%	88%	14%	47%	3%	90%
	65-89	45%	86%	15%	43%	3%	90%
International	90-144	47%	82%	14%	36%	3%	90%
	145-199	50%	79%	12%	31%	3%	90%
	200-299	56%	78%	12%	51%	4%	90%
	300+	62%	72%	11%	49%	4%	90%
U.S. Coastal	90-199	49%	80%	16%	33%	3%	90%
	200+	56%	78%	11%	51%	4%	90%
MARPOL '78 with HBL Implemented							
International and U.S. Coastal	5-29	35%	92%	8%	29%	2%	90%
	30-49	38%	90%	10%	32%	3%	90%
	50-64	40%	89%	12%	31%	3%	90%
	65-89	41%	87%	12%	28%	3%	90%
International	90-144	41%	85%	11%	22%	3%	90%
	145-199	42%	82%	10%	16%	3%	90%
	200-299	43%	82%	9%	42%	3%	90%
	300+	44%	79%	9%	42%	3%	90%
U.S. Coastal	90-199	42%	83%	10%	19%	3%	90%
	200+	43%	83%	9%	42%	3%	90%

BILLING CODE 4710–14–C

The estimated incremental benefits of the measure in terms of the number of spilled barrels avoided was calculated by multiplying the effectiveness ratios by the accidental oil spill and operational discharge volumes estimated for the baseline fleet. As the existing single hull tank vessel fleet is phased out over time, the benefits are projected to decrease to zero at the beginning of 2015. The present value and annualized value of the number of barrels spilled that would be avoided were also estimated using a real discount rate of seven percent. Table 10 summarizes the number of spilled barrels avoided in selected years starting in 1999, by vessel category, for the international and U.S. coastal fleets. It also includes a break down of benefits by fleet categories. For this section of the table, small vessels are defined as all international and U.S. coastal tank vessels less than 30,000 dwt and large vessels are defined as all international and U.S. coastal tank vessels that are greater than or equal or 30,000 dwt. The Jones Act fleet numbers represent both small and large vessels numbers. Therefore, these three categories are not mutually exclusive.

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TABLE 10

Benefits of the Proposed Measures by Category

VESSEL CATEGORY		Total Spilled Barrels Avoided		YEAR				
		Present-Value	Annualized	1999	2001	2005	2010	2015
U.S. Coastal	Pre-MARPOL	848	80	87	261	108	0	0
	MARPOL '73	1,001	95	93	278	190	0	0
	MARPOL '78	1,286	121	137	411	196	0	0
International	Pre-MARPOL	94,873	8,955	10,014	30,042	11,855	1,435	0
	MARPOL '73	1,250	118	185	555	98	0	0
	MARPOL '78	31,901	3,011	2,228	6,685	4,933	2,631	0
Total		131,159	12,380	12,744	38,232	17,380	4,066	0
Fleet Category								
Jones Act		3,135	296	317	951	494	0	0
Small Vessels		32,305	3,049	2,479	7,438	4,496	1,510	0
Large Vessels		98,853	9,331	10,265	30,794	12,884	2,556	0

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5. Cost-benefits

The estimated cost per barrel of unspilled oil is categorized by international and U.S. coastal fleets in Table 11. These cost-effectiveness estimates were developed using a 7 percent real discount rate. The table also includes a breakdown of estimated cost per barrel of unspilled oil for small vessels, large vessels and Jones Act vessels. These fleet categories are not mutually exclusive. As shown in Table 11, there is a difference in the estimated cost-benefit for pre-MARPOL international tank vessels as compared to the U.S. coastal tank vessel fleet. The primary reason for this difference is that the measure reduces both accidental and operational oil outflow for the pre-MARPOL international fleet. The retrofit costs for these vessels to implement the measures are also greater for U.S. coastal tank vessels of a given deadweight tonnage because they would be required to have the retrofit work performed at U.S. shipyards, which historically have charged higher rates than foreign shipyards.

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Table 11
Cost per Barrel of Spilled Oil Avoided by Category

VESSEL CATEGORY		Present Value Cost Per Barrel	YEAR 1999	2001	2005	2010	2015
U.S. Coastal	Pre-MARPOL	$35,517	$44,445	$36,119	$43,785	$0	$0
	MARPOL '73	$19,235	$18,842	$18,842	$21,496	$0	$0
	MARPOL '78	$22,999	$20,004	$20,004	$25,473	$0	$0
International	Pre-MARPOL	$4,954	$7,782	$5,068	$4,101	$6,332	$0
	MARPOL '73	$34,335	$26,963	$26,963	$50,275	$0	$0
	MARPOL '78	$25,744	$23,911	$23,911	$26,653	$30,017	$0
FLEET CATEGORY							
Jones Act		$25,186	$26,376	$24,090	$27,931	$0	$0
Small Vessels		$8,834	$13,411	$9,560	$8,055	$9,200	$0
Large Vessels		$11,408	$10,844	$9,055	$12,622	$29,014	$0

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The present value cost of the measures researched in this assessment was estimated over a 19-year time period (1996 to 2015). Using a 7 percent real discount rate, the present value cost would be $1.41 billion. The annualized value is approximately $133 million. The present and annualized value of the number of barrels of spilled oil avoided is estimated to be about 131,000 barrels and 12,300 barrels, respectively.

This SNPRM is an economically significant regulatory action under section 3(f) of Executive Order 12866 and has been reviewed by the Office of Management and Budget under that order. It requires an assessment of potential costs and benefits under section 6(a)(3) of that order. It is significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979).

Because the Coast Guard wishes to provide the public with an opportunity to comment on the economic feasibility of this assessment, no regularity text is introduced in this SNPRM. Comments received on this SNPRM will enable the Coast Guard to further evaluate the economic feasibility for structural measures and determine whether additional regulations are appropriate to implement section 4115(b) of OPA 90.

Notice of Availability

The Coast Guard solicits comments on the regulatory assessment for this SNPRM. Copies of the regulatory assessment, entitled ''Regulatory Assessment of Supplemental Notice of Proposed Rulemaking on Structural Measures for Existing Single Hull Tankers'' are available for inspection at U.S. coast Guard Headquarters or can be ordered through the National Technical Information Service (NTIS), Springfield, Virginia, 22161 by requesting report number PB96–119086. Orders can also be placed by calling NTIS at (703) 487–4650 or (800) 553–6847.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*,), the Coast Guard must consider whether this proposal, if adopted, will 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.

This rulemaking considered small business impact for vessels privately held by independent companies with an estimated capital investment value of less than $500 million or companies with that have less than 500 employees. State and local governments, which altogether own less than a dozen tank vessels, will not be significantly affected. Not-for-profit organizations do not engage in the transportation of oil in bulk by water.

There are a number of companies meeting the definition of a small business operating tank vessels. Of the 190 U.S. tankships affected by this rulemaking, 16 are owned by 6 small businesses. Many of these company's tankships are over 30 years old, have less cargo carrying capacity than their competition, and are laid up due to market or company financial conditions. Six small businesses own or operate 32 of the affected U.S. tank barge population. No foreign small businesses own or operate foreign tank vessels that would be affected by this rulemaking.

If structural measures were imposed on the small businesses that own or operate tank vessels, an economic impact is unavoidable, as the statue clearly targets existing vessels of 5,000 GT or more that carry oil in bulk as cargo and that do not have double hulls. A complete review of this impact on small entities would be done if the Coast Guard proposes specific structural requirements.

This SNPRM responds to comments received on the NPRM, presents a summary of a regulatory assessment for various structural measures, notifies the public of the availability of this assessment, and solicits comments on the economic feasibility of the measures. This SNPRM does not propose specific regulatory text. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this SNPRM will not have a significant economic impact on a substantial number of small entities. If you think that your business or organization qualifies as a small entity and the NPRM cost assessment, as modified by the discussions and data provided in this document, will have a significant economic impact on your business or organization, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and in what

way and to what degree this proposal will economically affect it.

Collection of Information

Under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*,), the Office of Management and Budget (OMB) reviews each proposed rule that contains a collection-of-information requirement to determine whether the practical value of the information is worth the burden imposed by its collection. Collection-of-information requirements include reporting, recordkeeping, notification, and other similar requirements. This proposal contains no collection of information requirements.

Federalism

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

Environment

The Coast Guard has considered the environmental impact of this supplemental notice of proposed rulemaking under COMDTINST M16475.1B. Although this SNPRM proposes no Federal regulations and therefore does not amount to the type of major Federal action typically subject to analysis under the National Environmental Policy Act (NEPA), the Coast Guard solicits comments on its analysis of structural measures. An Environmental Assessment (EA) from the notice of proposed rulemaking (NPRM) is available in the docket for copying and inspection as indicated in the ''ADDRESSES'' section of this preamble.

By the year 2015, all tank vessels (with certain exceptions) over 5,000 dwt operating in U.S. waters will be equipped with double hulls. In the interim, the Coast Guard has been given wide latitude under OPA 90 section 4115(b) to set structural and operational standards for single hull vessels for the purpose of reducing the amount of oil spilled into the marine environment.

Sound structural design and efficient operational procedures, when combined with other requirements of OPA 90, should contribute to increased environmental protection and human safety. The impact of section 4115(b), however is not expected to result in significant impact on the quality of human environment, as defined in the NEPA.

Although no regulatory text is introduced in this SNPRM, the public is encouraged to comment on the technological and economic feasibility of the structural measures discussed in this SNPRM. Comments received on this SNPRM will enable the Coast Guard to assess the economic and technological feasibility of structural measures to reduce the risk of oil outflow from existing tank vessels and effectively implement section 4115(b) of OPA 90.

Dated: December 21, 1995.

A.E. Henn,

Vice Admiral, U.S. Coast Guard, Acting Commandant.

[FR Doc. 95–31371 Filed 12–22–95; 2:10 pm]

BILLING CODE 4910–14–M

federal register

Thursday
December 28, 1995

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Part 1, et al.
Authority Citations Revision; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 1, 11, 13, 14, 15, 21, 23, 25, 27, 29, 31, 33, 34, 35, 36, 39, 43, 45, 47, 49, 61, 63, 65, 67, 71, 73, 77, 91, 93, 95, 97, 99, 101, 103, 105, 107, 108, 109, 121, 125, 129, 133, 135, 137, 139, 141, 143, 145, 147, 150, 151, 152, 155, 156, 157, 158, 161, 169, 170, 171, 183, 185, 187, 189, 191, 198

[Docket No. 28417; Amendment Nos.: 1–41, 11–39, 13–25, 14–2, 15–3, 21–72, 23–47, 25–85, 27–31, 29–37, 31–6, 33–16, 34–2, 35–7, 36–21, 39–9473, 43–35, 45–22, 47–25, 49–10, 61–98, 63–30, 65–39, 67–16, 71–27, 73–7, 77–12, 91–246, 93–72, 95–394, 97–1703, 99–17, 101–7, 103–5, 105–11, 107–8, 108–13, 109–2, 121–252, 125–24, 129–25, 133–13, 135–59, 137–15, 139–21, 141–6, 143–5, 145–22, 147–7, 150–3, 151–40, 152–14, 155–2, 156–1, 157–7, 158–1, 161–1, 169–3, 170–2, 171–17, 183–10, 185–2, 187–6, 189–4, 191–3, 198–3]

Revision of Authority Citations

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This rule adopts new authority citations for Chapter I of Title 14 of the Code of Federal Regulations (CFR). In 1994, the Federal Aviation Act of 1958 and several other statutes conferring authority upon the Federal Aviation Administration were recodified into positive law. This document updates the authority citations listed in the Code of Federal Regulations to reference the current law.

DATES: This final rule is effective December 28, 1995. Comments on this final rule must be received by March 1, 1996.

ADDRESSES: Comments on this final rule should be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC–200), Docket No. 28417, 800 Independence Avenue, SW., Washington, DC 20951. Comments delivered must be marked Docket No. 28417. Comments may be examined in room 915G weekdays between 8:30 a.m. and 5 p.m., except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Karen Petronis, Office of the Chief Counsel, Regulations Division, AGC–210, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone: 202–267–3073.

SUPPLEMENTARY INFORMATION: In July 1994, the Federal Aviation Act of 1958 and numerous other pieces of legislation affecting transportation in general were recodified. The statutory material became ''positive law'' and was recodified at 49 U.S.C. 1101 *et seq.*

The Federal Aviation Administration is amending the authority citations for its regulations in Chapter I of 14 CFR to reflect the recodification of its statutory authority. No substantive change was intended to any statutory authority by the recodification, and no substantive change is introduced to any regulation by this change.

Although this action is in the form of a final rule and was not preceded by notice and an opportunity for public comment, comments are invited on this action. Interested persons are invited to comment by submitting such written data, views, or arguments as they may desire by March 1, 1996. Comments should identify the rules docket number and be submitted to the address specified under the caption **ADDRESSES**.

Because of the editorial nature of this change, it has been determined that prior notice is unnecessary under the Administrative Procedure Act. It has also been determined that this final rule is not a ''significant regulatory action'' under Executive Order 12866, nor is it a significant action under DOT regulatory policies and procedures (44 FR 11034, February 26, 1979). Further, the editorial nature of this change has no known or anticipated economic impact; accordingly, no regulatory analysis has been prepared.

Adoption of the Amendment

In consideration of the forgoing, the Federal Aviation Administration amends 14 CFR Chapter I as follows:

PART 1—DEFINITIONS AND ABBREVIATIONS

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

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

PART 11—GENERAL RULE-MAKING PROCEDURES

2. The authority citation for part 11 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40101, 40103, 40105, 40109, 40113, 44110, 44502, 44701–44702, 44711, 46102.

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

3. The authority citation for part 13 is revised to read as follows:

Authority: 18 U.S.C. 6002; 49 U.S.C. 106(g), 5121–5124, 40113–40114, 44103–44106, 44702–44703, 44709–44710, 44713, 46101–46110, 46301–46316, 46501–46502, 46504–46507, 47106, 47111, 47122, 47306, 47531–47532.

PART 14—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

4. The authority citation for part 14 is revised to read as follows:

Authority: 5 U.S.C. 504; 49 U.S.C. 106(g), 40113, 46104.

PART 15—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

5. The authority citation for part 15 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 2672, 2675; 49 U.S.C. 106(g), 40113, 44721.

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND PARTS

6. The authority citation for part 21 is revised to read as follows:

Authority: 42 U.S.C. 7572; 49 U.S.C. 106(g), 40105, 40113, 44701–44702, 44707, 44709, 44711, 44713, 44715, 45303.

PART 23—AIRWORTHINESS STANDARDS: NORMAL, UTILITY, ACROBATIC, AND COMMUTER CATEGORY AIRPLANES

7. The authority citation for part 23 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

8. The authority citation for part 25 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.

PART 27—AIRWORTHINESS STANDARDS: NORMAL CATEGORY ROTORCRAFT

9. The authority citation for part 27 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.

PART 29—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY ROTORCRAFT

10. The authority citation for part 29 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.

PART 31—AIRWORTHINESS STANDARDS; MANNED FREE BALLOONS

11. The authority citation for part 31 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.

PART 33—AIRWORTHINESS STANDARDS: AIRCRAFT ENGINES

12. The authority citation for part 33 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.

PART 34—FUEL VENTING AND EXHAUST EMISSION REQUIREMENTS FOR TURBINE ENGINE POWERED AIRPLANES

13. The authority citation for part 34 is revised to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 7572; 49 U.S.C. 106(g), 40113, 44701–44702, 44704, 44714.

PART 35—AIRWORTHINESS STANDARDS: PROPELLERS

14. The authority citation for part 35 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.

PART 36—NOISE STANDARDS: AIRCRAFT TYPE AND AIRWORTHINESS CERTIFICATION

15. The authority citation for part 36 is revised to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 106(g), 40113, 44701–44702, 44704, 44715; sec. 305, Pub. L. 96–193, 94 Stat. 50, 57; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970 Comp., p. 902.

PART 39—AIRWORTHINESS DIRECTIVES

16. The authority citation for part 39 is revised to read as follows:

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

PART 43—MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION

17. The authority citation for part 43 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44703, 44705, 44707, 44711, 44713, 44717.

PART 45—IDENTIFICATION AND REGISTRATION MARKING

18. The authority citation for part 45 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40109, 40113–40114, 44101–44105, 44107–44108, 44110–44111, 44504, 44701, 44708–44709, 44711–44713, 45302–45303, 46104, 46304, 46306, 47122.

PART 47—AIRCRAFT REGISTRATION

19. The authority citation for part 47 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113–40114, 44101–44108, 44110–44111, 44703–44704, 44713, 45302, 46104, 46301; 4 U.S.T. 1830.

PART 49—RECORDING OF AIRCRAFT TITLES AND SECURITY DOCUMENTS

20. The authority citation for part 49 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113–40114, 44101–44108, 44110–44111, 44704, 44713, 45302, 46104, 46301; 4 U.S.T. 1830.

PART 61—CERTIFICATION: PILOTS AND FLIGHT INSTRUCTORS

21. The authority citation for part 61 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45302.

PART 63—CERTIFICATION: FLIGHT CREWMEMBERS OTHER THAN PILOTS

22. The authority citation for part 63 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45302.

PART 65—CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS

23. The authority citation for part 65 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45302.

PART 67—MEDICAL STANDARDS AND CERTIFICATION

24. The authority citation for part 67 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45303.

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

25. The authority citation for part 71 is revised 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.

PART 73—SPECIAL USE AIRSPACE

26. The authority citation for part 73 is revised 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.

PART 77—OBJECTS AFFECTING NAVIGABLE AIRSPACE

27. The authority citation for part 77 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113–40114, 44502, 44701, 44718, 46101–46102, 46104.

PART 91—GENERAL OPERATING AND FLIGHT RULES

28. The authority citation for part 91 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46502, 46504, 46506–46507, 47122, 47508, 47528–47531.

PART 93—SPECIAL AIR TRAFFIC RULES AND AIRPORT TRAFFIC PATTERNS

29. The authority citation for part 93 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40109, 40113, 44502, 44514, 44701, 44719, 46301.

PART 95—IFR ALTITUDES

30. The authority citation for part 95 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44719, 44721.

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

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

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113–40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

PART 99—SECURITY CONTROL OF AIR TRAFFIC

32. The authority citation for part 99 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40101, 40103, 40106, 40113, 40120, 44502, 44721.

PART 101—MOORED BALLOONS, KITES, UNMANNED ROCKETS AND UNMANNED FREE BALLOONS

33. The authority citation for part 101 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113–40114, 45302, 44502, 44514, 44701–44702, 44721, 46308.

PART 103—ULTRALIGHT VEHICLES

34. The authority citation for part 103 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103–40104, 40113, 44701.

PART 105—PARACHUTE JUMPING

35. The authority citation for part 105 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113–40114, 44701–44702, 44721.

PART 107—AIRPORT SECURITY

36. The authority citation for part 107 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 5103, 40113, 40119, 44701–44702, 44706, 44901–44905, 44907, 44913–44914, 44932, 44935–44936, 46105.

PART 108—AIRPLANE OPERATOR SECURITY

37. The authority citation for part 108 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 5103, 40113, 40119, 44701–44702, 44705, 44901–44905, 44907, 44913–44914, 44932, 44935–44936, 46105.

PART 109—INDIRECT AIR CARRIER SECURITY

38. The authority citation for part 109 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 5103, 40113, 40119, 44701–44702, 44705, 44901–44905, 44907, 44913–44914, 44932, 44935–44936, 46105.

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

39. The authority citation for part 121 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 46105.

PART 125—CERTIFICATION AND OPERATIONS: AIRPLANES HAVING A SEATING CAPACITY OF 20 OR MORE PASSENGERS OR A MAXIMUM PAYLOAD CAPACITY OF 6,000 POUNDS OR GREATER

40. The authority citation for part 125 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44705, 44710–44711, 44713, 44716–44717, 44722.

PART 129—OPERATIONS: FOREIGN AIR CARRIERS AND FOREIGN OPERATORS OF U.S.-REGISTERED AIRCRAFT ENGAGED IN COMMON CARRIAGE

41. The authority citation for part 129 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40104–40105, 40113, 40119, 44701–44702, 44712, 44716–44717, 44722, 44901–44904, 44906.

PART 133—ROTORCRAFT EXTERNAL-LOAD OPERATIONS

42. The authority citation for part 133 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702.

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

43. The authority citation for part 135 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44705, 44709, 44711–44713, 44715–44717, 44722.

PART 137—AGRICULTURAL AIRCRAFT OPERATIONS

44. The authority citation for part 137 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 44701–44702.

PART 139—CERTIFICATION AND OPERATIONS: LAND AIRPORTS SERVING CERTAIN AIR CARRIERS

45. The authority citation for part 139 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44706, 44709, 44719.

PART 141—PILOT SCHOOLS

46. The authority citation for part 141 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709, 44711, 45102–45103, 45301–45302.

PART 143—GROUND INSTRUCTORS

47. The authority citation for part 143 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45106, 45301–45302.

PART 145—REPAIR STATIONS

48. The authority citation for part 145 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44707, 44717.

PART 147—AVIATION MAINTENANCE TECHNICIAN SCHOOLS

49. The authority citation for part 147 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44707–44709.

PART 150—AIRPORT NOISE COMPATIBILITY PLANNING

50. The authority citation for part 150 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44715, 47101, 47501–47504.

PART 151—FEDERAL AID TO AIRPORTS

51. The authority citation for part 151 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 47151, 47153.

PART 152—AIRPORT AID PROGRAM

52. The authority citation for part 152 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 47106, 47127.

PART 155—RELEASE OF AIRPORT PROPERTY FROM SURPLUS PROPERTY DISPOSAL RESTRICTIONS

53. The authority citation for part 155 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 47151–47153.

PART 156—STATE BLOCK GRANT PILOT PROGRAM

54. The authority citation for part 156 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 47101, 47128; 49 CFR 1.47(f), (k).

PART 157—NOTICE OF CONSTRUCTION, ALTERATION, ACTIVATION, AND DEACTIVATION OF AIRPORTS

55. The authority citation for part 157 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 44502.

PART 158—PASSENGER FACILITY CHARGES (PFC'S)

56. The authority citation for part 158 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40116–40117, 47111, 47114–47116.

PART 161—NOTICE AND APPROVAL OF AIRPORT NOISE AND ACCESS RESTRICTIONS

57. The authority citation for part 161 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 47523–47527, 47533.

PART 169—EXPENDITURE OF FEDERAL FUNDS FOR NONMILITARY AIRPORTS OR AIR NAVIGATION FACILITIES THEREON

58. The authority citation for part 169 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40101–40107, 40113–40114, 44501–44502, 46104, 47122, 47151–47153, 47302–47306.

PART 170—ESTABLISHMENT AND DISCONTINUANCE CRITERIA FOR AIR TRAFFIC CONTROL SERVICES AND NAVIGATIONAL FACILITIES

59. The authority citation for part 170 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103–40107, 40113, 44502, 44701–44702, 44708–44709, 44719, 44721–44722, 46308.

PART 171—NON-FEDERAL NAVIGATION FACILITIES

60. The authority citation for part 171 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103–40107, 40109, 40113, 44502, 44701- 44702, 44708–44709, 44711, 44719–44721, 45303, 46308.

PART 183—REPRESENTATIVES OF THE ADMINISTRATOR

61. The authority citation for part 183 is revised to read as follows:

Authority: 31 U.S.C. 9701; 49 U.S.C. 106(g), 40113, 44702, 45303.

PART 185—TESTIMONY BY EMPLOYEES AND PRODUCTION OF RECORDS IN LEGAL PROCEEDINGS, AND SERVICE OF LEGAL PROCESS AND PLEADINGS

62. The authority citation for part 185 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113–40114, 46104; 49 CFR part 9.

PART 187—FEES

63. The authority citation for part 187 is revised to read as follows:

Authority: 31 U.S.C. 9701; 49 U.S.C. 106(g), 40104–40105, 40109, 40113–40114, 44702, 45301–45303.

PART 189—USE OF FEDERAL AVIATION ADMINISTRATION COMMUNICATIONS SYSTEM

64. The authority citation for part 189 is revised to read as follows:

Authority: 31 U.S.C. 9701; 49 U.S.C. 106(g), 40104, 40113, 44502, 45303.

PART 191—WITHHOLDING SECURITY INFORMATION FROM DISCLOSURE UNDER THE AIR TRANSPORTATION SECURITY ACT OF 1974

65. The authority citation for part 191 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 5103, 40113, 40119, 44701–44702, 44705- 44706, 44901–44907, 44913–44914, 44932, 44935–44936, 46105.

PART 198—AVIATION INSURANCE

66. The authority citation for part 198 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44301–44310; 49 CFR 1.47(b).

Issued in Washington, DC on December 20, 1995.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

[FR Doc. 95–31291 Filed 12–27–95; 8:45 am]

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Thursday
December 28, 1995

Part V

Department of Housing and Urban Development

Small cities Community Development Block Grant Program for Fiscal Year 1996; Section 108 Loan Guarantee Program for Small Communities in New York State; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

[Docket No. FR–4004–N–01]

Notice of Funding Availability for: the HUD-Administered Small Cities Community Development Block Grant (CDBG) Program—Fiscal Year 1996; and the Section 108 Loan Guarantee Program for Small Communities in New York State

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of Funding Availability (NOFA) for Fiscal Year (FY) 1996.

SUMMARY: This Notice of Funding Availability (NOFA) announces the availability of approximately $50,000,000 in FY 1996 funding for the HUD-administered Small Cities Program in New York State under the Community Development Block Grant (CDBG) Program and the availability of approximately $200,000,000—$250,000,000 in FY 1996 funding under the Section 108 Loan Guarantee program for small cities in New York State. Amounts available under the Section 108 Loan Guarantee program are not awarded competitively and are not rated under the criteria of this NOFA. The Section 108 Loan Guarantee Program is not subject to the HUD Reform Act.

The funds announced in this Notice provide small communities and counties in New York State with a great opportunity to propose programs that focus on creating or expanding job opportunities, addressing housing needs, or meeting local public facilities needs. HUD encourages communities to propose programs that are creative and innovative in addressing the needs of their community. A community may propose a program that is ''single purpose'' in nature addressing only a particular area of need or that community may propose to undertake a more comprehensive strategy that deals comprehensively with the problems of a particular area, for example. HUD has increased the maximum grant amount for a Single Purpose grant to $600,000 and for a Comprehensive grant to $1,200,000. Communities that have a comprehensive strategy requiring a multi-year commitment may submit a comprehensive, multi-year application for up to a three-year period with a maximum grant of up to $5,000,000. Note that because last year's multi-year limit was $2,700,000, previous recipients of a two or three-year commitment may wish to submit a new multi-year application in order to ''trade-up'' to the higher three-year amount. If a community chooses to trade-up, they can start a new three-year cycle with FY 1996 representing the first year.

IMPORTANT: Regardless of the option a community wishes to pursue, all FY 1995 recipients of multi-year funding commitments who wish to receive their second year funds should submit an abbreviated request (see the Application Kit for details) for the approved FY 1996 funding increment in order for HUD to award these funds to you.

Finally, HUD is encouraging applications from joint applicants. Some activities, such as economic development revolving loans funds, may be administratively impractical for some very small communities to carry out on their own. However, several small cities together could put together a joint economic development revolving loan fund administered at one central point and achieve economies of scale that make such a program financially feasible. Such a program coupled with Section 108 Loan Guarantee funds, for example, could result in a regional approach to the economic development needs of an entire region.

Note: The Congress has not yet enacted a FY 1996 appropriation for HUD. However, HUD is publishing this notice in order to give potential applicants adequate time to prepare applications. The estimate of the amount of funds available for this program is based on the level of funding available for FY 1995. HUD is not bound by the estimate set forth in this notice.

DATES: Applications are due by March 13, 1996. Application kits may be obtained from and must be submitted to either HUD's New York or Buffalo Office. Applications, if mailed, must be postmarked no later than midnight on March 13, 1996. If an application is hand-delivered to the New York or the Buffalo Office, the application must be delivered to the appropriate office by no later than 4:00 p.m. on the deadline date. Application kits will be made available by a date that affords applicants no fewer than 30 days to respond to this NOFA. For further information on obtaining and submitting applications, please see Section II of this NOFA.

The above-stated application deadline is firm as to date and hour. In the interest of fairness to all competing applicants, the Department will treat as ineligible for consideration any application that is not received by 4:00 p.m. on, or postmarked by, March 13, 1996. Applicants should take this procedure into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays or other delivery-related problems.

FOR FURTHER INFORMATION CONTACT: Stephen Rhodeside, State and Small Cities Division, Office of Community Planning and Development, Department of Housing and Urban Development, Room 7184, 451 Seventh Street SW, Washington, DC 20410. Telephone (202) 708–1322 (voice) or (202) 708–2565 (TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act Statement

The information collection requirements related to this CDBG program have been approved by the Office of Management and Budget (OMB) and have been assigned OMB approval number 2506–0020.

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I. Purpose and Substantive Description

A. Authority and Background

1. Authority. Title I, Housing and Community Development Act of 1974 (42 U.S.C. 5301–5320); 24 CFR part 570, subpart F.

2. Background. Title I of the Housing and Community Development Act of 1974 authorizes the Community Development Block Grant (CDBG) Program. Section 106 of Title I permits the States to elect to assume the administrative responsibility for the CDBG Program for nonentitled areas within their jurisdiction. Section 106 provides that HUD will administer the CDBG Program for nonentitled areas within any State that does not elect to assume the administrative responsibility for the program. Subpart F of 24 CFR part 570 sets out the requirements for HUD's administration of the CDBG Program in nonentitled areas (Small Cities Program). This NOFA supplements subpart F of 24 CFR part 570, which sets out the requirements applicable to the CDBG Program in nonentitled areas.

In accordance with 24 CFR 570.420(e) and 570.420(h)(3), and with the requirements of section 102 of the Housing and Urban Development Reform Act of 1989 (HUD Reform Act), HUD is issuing this NOFA for New York State's Small Cities Program for Fiscal Year (FY) 1996 to announce the allocation of funds for Single Purpose and Comprehensive grants, and to establish the deadline for filing grant applications. The NOFA explains how HUD will apply the regulatory threshold requirements for funding eligibility, and the selection criteria for rating and scoring applications for Comprehensive grants and for scoring projects in applications for Single Purpose grants.

The Department has issued final regulations at 24 CFR 570.420–32 which govern the HUD-administered Small Cities program in New York. These regulations modify the HUD-administered Small Cities program to allow for multi-year plans.

The multi-year plan competition permits the Department to select multi-year plans of two or three years in a competition that will allow the first year to be funded. The Department intends to fund future years of the plan on a non-competitive basis, pursuant to acceptable performance, submission of an acceptable application and certifications and the provision of adequate appropriations for the HUD-administered Small Cities program.

Other information about the Small Cities Program will be provided in the application kit, which will be made available to applicants by HUD's New York Office and Buffalo Office.

3. *Other Program Requirements.*

a. *Abbreviated Consolidated Plan.* Each jurisdiction that applies for funds under this NOFA must have submitted a Consolidated Plan, as provided at 24 CFR part 91. A jurisdiction that does not expect to be a participating jurisdiction in the HOME program under 24 CFR part 92, may submit an abbreviated consolidated plan that is appropriate to the types and amounts of assistance sought from HUD. (See 24 CFR 91.235.) Any applicant that plans to undertake a housing activity with funds under this NOFA needs to prepare and submit, at a minimum, an abbreviated consolidated plan that is appropriate to the types and amounts of housing assistance sought under this NOFA. Even if the community's Small Cities application is approved, HUD must also approve the consolidated plan before the community may receive Small Cities funding. Further, that applicant must also include a certification that the housing activities in its CDBG Small Cities application are consistent with the consolidated plan. For an applicant seeking funds under this NOFA to address non-housing community development needs, it needs to prepare an abbreviated consolidated plan that describes the jurisdiction's priority non-housing community development needs eligible for assistance under the CDBG program by eligibility category, reflecting the needs of families for each type of activity, as appropriate, in terms of dollar amounts estimated to meet the priority need for the type of activity (see 24 CFR 91.236(c)(2)). The abbreviated Consolidated Plan is subject to the same citizen participation requirements as is the jurisdiction's Small Cities CDBG application. Both must meet the citizen participation requirements before they may be submitted to HUD. (See 24 CFR 570.431) A Section 108 Loan Guarantee application would also have to meet these requirements if the jurisdiction submits one to HUD for consideration.

If possible, applicants should endeavor to submit the abbreviated consolidated plan in advance of the Small Cities application due date. The latest time at which the abbreviated consolidated plan will be accepted by HUD for the HUD-administered Small Cities Program in New York will be the application due date for the Small Cities application. Failure to submit the abbreviated consolidated plan by the due date is not a curable technical deficiency. Questions regarding the abbreviated consolidated plan should be directed to the appropriate HUD field office.

Any application that is fundable, but does not have an approved consolidated plan will receive a conditional approval subject to HUD's approval of the abbreviated consolidated plan. Unfortunately, if HUD is unable to approve the abbreviated consolidated plan within a reasonable period of time, but not less than 60 days from the date

that the conditional approval is announced, HUD will have no choice but to rescind the award. In such event the funding will be awarded to the highest rated fundable applicant that did not receive funding under this competition.

b. *Section 3.* Assistance provided under this NOFA is subject to the requirements of section 3 of the Housing and Urban Development Act of 1968, and the implementing regulations in 24 CFR part 135, as amended by an interim rule published on June 30, 1994 (59 FR 33866). One of the purposes of this NOFA, which is consistent with section 3, is to give, to the greatest extent feasible and consistent with Federal, State, and local laws and regulations, job training, employment and other contracting opportunities generated from certain HUD financial assistance to low- and very low-income persons. Public entities awarded funds under this NOFA that intend to use the funds for housing rehabilitation, housing construction, or other public construction must comply with the applicable requirements set forth in the regulations published on June 30, 1994.

4. Accountability in the Provision of HUD Assistance: Documentation and Public Access Requirements; Applicant/Recipient Disclosures. HUD has promulgated a final rule to implement section 102 of the Department of Housing and Urban Development Reform Act of 1989 (HUD Reform Act). The final rule is codified at 24 CFR part 12. Section 102 contains a number of provisions that are designed to ensure greater accountability and integrity in the provision of certain types of assistance administered by HUD. (See also Section II.D. of this NOFA.) On January 16, 1992, HUD published at 57 FR 1942, additional information that gave the public (including applicants for, and recipients of, HUD assistance) further information on the implementation of section 102. The documentation, public access, and applicant and recipient disclosure requirements of section 102 are applicable to assistance awarded under this NOFA as follows:

a. *HUD Responsibilities.*

(1) *Documentation and Public Access.* HUD will ensure that documentation and other information regarding each application submitted pursuant to this NOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a five-year period beginning not less than 30 days after the award of the assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. In addition, HUD will include the recipients of assistance pursuant to this NOFA in its quarterly Federal Register notice of all recipients of HUD assistance awarded on a competitive basis. (See 24 CFR 12.14(a) and 12.16(b), and the notice published in the Federal Register on January 16, 1992 (57 FR 1942), for further information on these requirements.)

(2) *Disclosures.* HUD will make available to the public for five years all applicant disclosure reports (HUD Form 2880) submitted in connection with this NOFA. Update reports (also Form 2880) will be made available along with the applicant disclosure reports, but in no case for a period of less than three years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. (See 24 CFR subpart C, and the notice published in the Federal Register on January 16, 1992 (57 FR 1942), for further information on these disclosure requirements.)

b. *Units of General Local Government Responsibilities.* Units of general local government awarded assistance under this NOFA are subject to the provisions of either paragraph b(1), *or* paragraph (b)(2) *and* (b)(3). For units of local government awarded assistance under this NOFA which in turn make the assistance available on a NON-COMPETITIVE BASIS for a specific project or activity to a subrecipient, paragraph b(1) applies. For units of local government awarded assistance under this NOFA, which in turn make the assistance available on a COMPETITIVE BASIS for a specific project or activity to a subrecipient, paragraphs b(2) *and* (3) apply.

(1) *Disclosures.* The units of general local government receiving assistance under this NOFA must make all applicant disclosure reports available to the public for three years. Required update reports must be made available along with the applicant disclosure reports, but in no case for a period less than three years. Each unit of general local government may use HUD Form 2880 to collect the disclosures, or may develop its own form. (See 24 CFR 12 subpart C, and the notice published in the Federal Register on January 16, 1992 (57 FR 1942) for further information on these disclosure requirements.)

(2) *Documentation and Public Access.* The recipient unit of general local government must ensure that documentation and other information regarding each application submitted to the recipient by a subrecipient applicant are adequate to indicate the basis upon which assistance was provided or denied. The unit of general local government must make this material, including any letters of support, available for public inspection for a five-year period beginning not less than 30 days after the award of the assistance. Unit of general local government recipients must also notify the public of the subrecipients of the assistance. Each recipient will develop documentation, public access, and notification procedures for its programs. (See 24 CFR 12.14(b) and 12.16(c), and the notice published in the Federal Register on January 16, 1992 (57 FR 1942) for more information on these documentation and public access requirements.)

(3) *Disclosures.* Units of general local government receiving assistance under this NOFA must make all applicant disclosure reports available to the public for five years. Required update reports must be made available along with the applicant disclosure reports, but in no case for a period less than three years. Each unit of general local government may use HUD Form 2880 to collect the disclosures, or may develop its own form. (See 24 CFR subpart C, and the notice published in the Federal Register on January 16, 1992 (57 FR 1942) for further information on these disclosure requirements.)

B. Allocation Amounts

1. Total Available Funding. The nonentitlement CDBG funds for New York State for FY 1996 total approximately $50,000,000. Approximately $43,900,000 is allocated for distribution to eligible units of general local government within the jurisdiction of HUD's Buffalo Office. Approximately $6,100,000 is allocated for distribution to eligible units of general local government within the jurisdiction of HUD's New York Office. HUD has the option to revise these allocations in order to assure a competitive distribution of funds.

Note: The Congress has not yet enacted a FY 1996 appropriation for HUD. However, HUD is publishing this notice in order to give potential applicants adequate time to prepare applications. The estimate of the amount of funds available for this program is based on the level of funding available for FY 1995. HUD is not bound by the estimate set forth in this notice.

2. Imminent Threats. All imminent threat projects must meet the national objective of benefitting low-and moderate-income persons. The

Department may elect to set aside up to 15% of the Fiscal Year 1996 allocation for imminent threat projects. These funds will be available until the rating and ranking process for funds distributed under this NOFA is completed.

C. Eligibility

1. Eligible Applicants. Eligible applicants are units of general local government in New York State, excluding: metropolitan cities, urban counties, units of government which are participating in urban counties or metropolitan cities even if only part of the participating unit of government is located in the urban county or metropolitan city, and Indian tribes eligible for assistance under section 106 of the HCD Act. Applications may be submitted individually or jointly.

2. Previous grantees. Eligible applicants, which previously have been awarded Small Cities Program CDBG grants, are also subject to an evaluation of capacity and performance. Numerical thresholds for drawdown of funds have been established to assist HUD in evaluating a grantee's progress in implementing its program activities. (These standards apply to all CDBG Program grants received by the community.) An additional threshold established this year relates to the submission of annual Performance Assessment Reports (PARs) which are due annually for each grant which a local government has received. Failure to submit a PAR is not a curable technical deficiency. Applicants generally will be determined to have performed adequately in the area(s) where the thresholds are met. Where a threshold has not been met, HUD will evaluate the documentation of any mitigating factors, particularly with respect to actions taken by the applicant to accelerate the implementation of its program activities.

3. Eligible Activities and National Objectives. Eligible activities under the Small Cities CDBG Program are those identified in subpart C of 24 CFR part 570. Each activity must meet one of the national objectives (i.e. benefit to low- and moderate-income persons, elimination of slums or blighting conditions, or meeting imminent threats to the health and safety of the community), and each grant must meet the requirements for compliance with the primary objective of principally benefitting low- and moderate-income persons, as required under the provisions of § 570.200(a)(2) and (3) and § 570.208. The principal benefit requirement under the CDBG program is 70 percent. The method of calculating the use of these funds for compliance with the 70 percent overall benefit requirement is set forth in § 570.200(a)(3)(i) through (v).

4. Environmental Review Requirement. The HUD environmental review procedures contained in 24 CFR part 58 apply to this program. Under part 58, grantees assume all of the responsibilities for environmental review, decision-making and action pursuant to the National Environmental Policy Act of 1969 and the other provisions of law specified by the Secretary in 24 CFR part 58 that would apply to the Secretary were he to undertake such projects as Federal projects.

D. Types of Grants

1. Comprehensive Grants

a. *General.* Comprehensive grants are available to fund projects which meet the following criteria:

(1) Address a substantial portion of the identified community development needs within a defined area or areas;

(2) Involve two or more activities related to each other that will be carried out in a coordinated manner;

(3) Have a beneficial impact within a reasonable period of time.

HUD may make an exception to the requirement that all activities must be carried out in a defined area or areas if the applicant can demonstrate that the comprehensive strategy is a reasonable means of addressing identified needs.

If an application for a Comprehensive grant does not meet the requirements of the Comprehensive Grant Program, HUD will rate the proposal as a Single Purpose grant.

b. *Grant Limits and Funding Requirements.* The maximum grant for a Comprehensive grant is $1,200,000 (but see the grant limitations under multi-year plans as well, below). Grant funds requested must be sufficient, either by themselves or in combination with funds from other sources (including any Section 108 Loan Guarantee resources requested in conjunction with a Small Cities application under this NOFA), to complete the project within a reasonable amount of time. If other sources of funds are to be used with respect to a project, the source of those funds should be identified and the level of commitment indicated.

2. Single Purpose Grants

a. *General.* Single Purpose grants are designed to address and resolve a specific community development need. A Single Purpose grant may consist of more than one project. A project may consist of one activity or a set of activities. Each project must address community development needs in one of the following problem areas:

—Housing
—Public Facilities
—Economic Development

Each project will be rated against all other projects addressing the same problem area, according to the criteria outlined below. It should be noted that each project within an application will be given a separate impact rating, if each one is clearly designated by the applicant as a separate and distinct project (i.e. separate Needs Description, Community Development Activities, Impact Description and Program Schedule forms have been filled out, indicating project names). In some cases, it may be to the applicant's advantage to designate separate projects for activities that can ''stand on their own'' in terms of meeting the described need, especially where a particular project would tend to weaken the impact rating of the other activities, if they were rated as a whole, as has been the case with some economic development and housing projects. If, however, the projects tend to meet impact criteria to the same extent, or the weaker element is only a small portion of the overall project, there is no discernable benefit in designating separate projects.

b. *Grant Limits and Funding Requirements.* The maximum annual grant for a Single Purpose grant is $600,000, except that counties may apply for up to $900,000 in Single Purpose funds. The maximum amount for Single Purpose grant applications made jointly by units of general local government will be $900,000. If other sources of funds are to be used with respect to a project, the source of those funds must be identified and the level of commitment indicated.

3. Distribution of Funds Between Comprehensive Grants and Single Purpose Grants

Through the grant award process, of the total amounts of assistance announced in this NOFA, up to 25 percent of that aggregate amount may be made available for Comprehensive grants and up to 75 percent of that aggregate amount may be made available for Single Purpose Grants.

4. Applications With Multiple Projects

If an application contains more than one project, each project will be rated separately for program impact. Applicants should note that regardless of the number of projects, the total grant amount cannot exceed the limits

identified in Section I.D.1.b and I.D.2.b. of this NOFA.

5. Multi-year Plans

a. *General.* Multi-year plan grants are available to fund projects that will have a substantial and comprehensive effect on meeting the grantees identified community development needs. It is envisioned that the large majority of multi-year plan projects will address a defined area or areas, but grantees may apply for grants for activities that will affect the grantees entire jurisdiction.

Multi-year plans may be for two or three years. The action plan for each year of the multi-year plan must be a viable project on its own. The multiyear plans will be rated competitively against each other. Multi-year plans that are selected will be funded for the first year of the plan. HUD intends to fund succeeding years of the plan on a non-competitive basis, subject to acceptable performance, submission of an acceptable application and certifications, and the provision of adequate appropriations for the HUD-administered Small Cities Program. HUD reserves the right to lower the amount of funds for succeeding years if nonentitled areas are not in compliance with performance requirements and applicable regulations.

b. *Grant Limits and Funding Requirements.* The maximum annual grant for a multi-year plan is $1,200,000. The maximum funding for implementing an entire multi-year plan is $3,100,000 for a two year multi-year plan, and $5,000,000 for a three year multi-year plan. Grant funds requested must be sufficient, either by themselves or in combination with funds from other sources, (including any Section 108 Loan Guarantee resources requested in conjunction with a Small Cities application under this NOFA) to complete the project within a reasonable amount of time. If other sources of funds are to be used with respect to a project, the source of those funds should be identified and the level of commitment indicated.

c. *Previously Funded Multi-year Commitments.* An applicant that received a multi-year commitment in FY 1995 was limited to $900,000 in the first year; $1,800,000 for a two year plan and $2,700,000 for a three year multi-year plan. Because the maximum amounts established for this year are significantly higher than the amounts provided for in FY 1995, a recipient of a multi-year commitment in FY 1995 may elect to either: retain its original FY 1995 multi-year funding level commitment; or, submit a new application for up to an additional three year multi-year commitment up to the new FY 1996 higher grant amounts. A new application does not necessarily have to be for the same project that was funded in the FY 1995 application, although it may be. And similarly, a new application may expand upon the scope of the project that was approved in FY 1995, or the application may be any combination of the above. An applicant with a previous FY 1995 multi-year commitment that wishes to ''trade-up'' by submitting a FY 1996 application for a higher grant amount, a new three-year period or different scope of activities, may do so without jeopardizing its FY 1995 multi-year commitment. Recipients choosing to ''trade-up'' may do so with the understanding that if the new multi-year application is not competitive, HUD will still recognize its previous FY 1995 multi-year commitment and provide funds consistent with that approval PROVIDED THAT the community submits an abbreviated application request that delineates an action plan for the original second increment, proper certifications and provided that last year's performance was satisfactory. Under these circumstances, the community cannot lose.

E. Selection Criteria/Ranking Factors and Final Selection

1. General

Complete applications received from eligible applicants by the application due date are rated and scored by HUD. Regardless of the type of grant sought (Single Purpose or Comprehensive), applications are rated and scored against four factors. These four factors are discussed in more detail in subsection 3 of this Section E. Previous grantees of Small Cities Program CDBG grants also undergo a performance evaluation. The criteria for determining adequacy of performance are discussed in subsection 2 of this Section E.

2. Performance Evaluation

As noted in Section C of this NOFA, previous grantees of Small Cities Program CDBG grants are subject to an evaluation of performance and capacity to undertake the proposed program. For purposes of making performance evaluations, HUD will use any information available as of the application due date. Performance also will be evaluated using information which may be available already to HUD, including previously submitted performance reports, site visit reports, audits, monitoring reports and annual in-house reviews. Grantees may be requested to submit additional information, if generally available facts raise a question as to capacity to undertake the proposed program. No grants will be made to an applicant that does not have the capacity to undertake the proposed program. A performance determination will be made by evaluation of the following areas:

a. *Community Development Activities.* The following thresholds for performance in expending CDBG funds have been established for FY 1996 and pertain to all Single Purpose and Comprehensive Grants:

FY 1990 and earlier—Grants must be closed out
FY 1991—Grant funds 100% expended
FY 1992—Grant funds 75% expended
FY 1993—Grant funds 30% expended
FY 1994—Recipients must be on target with respect to the latest Small Cities Program Schedule received by HUD

Note: These standards will be used as benchmarks in judging program performance, but will not be the sole basis for determining whether the applicant is ineligible for a grant due to a lack of capacity to carry out the proposed project or program. Any applicant that fails to meet the percentages specified above may wish to provide updated data to HUD, either in conjunction with the application submission or under separate cover, but in no case will data received by HUD after the application due date be accepted.

b. *Compliance with Applicable Laws and Regulations.* An applicant will be considered to have performed inadequately if the applicant:

(1) Has not substantially complied with the laws, regulations, and Executive Orders applicable to the CDBG Program, including applicable civil rights laws as may be evidenced by: an outstanding finding of civil rights noncompliance, unless the applicant demonstrates that it is operating in compliance with a HUD-approved compliance agreement designed to correct the area(s) of noncompliance; an adjudication of a civil rights violation in a civil action brought against it by a private individual, unless the applicant demonstrates that it is operating in compliance with a court order designed to correct the area(s) of noncompliance; a deferral of Federal funding based upon civil rights violations; a pending civil rights suit brought against it by the Department of Justice; or an unresolved charge of discrimination issued against it by the Secretary under section 810(g) of the Fair Housing Act, as implemented by 24 CFR 103.400;

(2) Has not resolved or attempted to resolve findings made as a result of HUD monitoring; or

(3) Has not resolved or attempted to resolve audit findings. An applicant will

be ineligible for a grant where the inadequate performance in compliance with applicable laws and regulations evidences a lack of capacity to carry out the proposed project or program. An application also will not be accepted from a unit of general local government which has an outstanding audit finding or monetary obligation for any HUD program. Additionally, applications will not be accepted from any entity which proposes an activity in a unit of general local government that has an outstanding audit finding or monetary obligation for any HUD program. The Director of the Community Planning and Development Division of the HUD field office may provide waivers to this prohibition, but in no instance will a waiver be provided where funds are due HUD, unless a satisfactory arrangement for repayment of the debt has been made.

c. *Performance Assessment Reports.* Under 24 CFR 570.507, Small Cities CDBG grantees are required to submit Performance Assessment Reports (PARs) annually on the date when the grant was originally executed. For an application for FY 1996 funds to be considered for funding, the applicant must be current in its submission of Performance Assessment Reports. Failure to submit a PAR is not a curable technical deficiency under Section V of this NOFA.

3. Four Factor Rating

As noted in subsections 1 and 3 of this Section E, all applications are rated and scored against four factors. These four factors are:

— Need based on absolute number of persons in poverty;
— Need based on the percent of persons in poverty;
— Program Impact; and
— Outstanding performance in fair housing and equal opportunity.

A maximum of 600 points is possible under this system with the maximum points for each factor being:

Need — absolute number of persons in poverty.	75 points.
Need — percent of persons in poverty.	75 points.
Program Impact	400 points.
Outstanding performance — FHEO	
Provision of fair housing choice.	20 points.
Fair Housing Programs ...	20 points.
Equal opportunity employment.	10 points.
Total	600 points.

Each of the four factors is outlined below. All points for each factor are rounded to the nearest whole number. Applicants should note that there is a distinct difference in the methods used to evaluate Program Impact for Single Purpose grants versus Program Impact for Comprehensive grants. These differences are more fully discussed below.

a. *Need — Absolute number of persons in poverty.* HUD uses 1990 census data to determine the absolute number of persons in poverty residing within the applicant unit of general local government. Comprehensive and Single Purpose grant applicants are grouped and rated separately for this factor. Applicants which are county governments are rated separately from all other applicants. Applicants in each group are compared in terms of the number of persons whose incomes are below the poverty level. Individual scores are obtained by dividing each applicant's absolute number of persons in poverty by the greatest number of persons in poverty of any applicant and multiplying by 75.

b. *Need — Percent of persons in poverty.* HUD uses 1990 census data to determine the percent of persons in poverty residing within the applicant unit of general local government. Comprehensive and Single Purpose grant applicants are grouped and rated separately for this factor. Applicants in each group are compared in terms of the percentage of their population below the poverty level. Individual scores are obtained by dividing each applicant's percentage of persons in poverty by the highest percentage of persons in poverty of any applicant and multiplying by 75.

c. Program Impact — General. In evaluating program impact, HUD will consider:

— Extent and seriousness of the identified needs;
— Results to be achieved;
—Number of beneficiaries, given the type of program;
—Nature of the benefit;
—Additional actions that may be necessary to fully resolve the need;
—Previous coordinated actions taken by the applicant to address the need;
—Environmental considerations;
—Whether displacement will be involved and what steps will be taken to minimize displacement and to mitigate its adverse effects or related hardships; and
—Where appropriate, housing site selection standards.

Assessments are done on a comparative basis and, as a result, it is important that each applicant present information in a detailed and uniform manner.

In addressing Program Impact criteria, applicants should adhere to the following general guidelines for quantification. Where appropriate, absolute and percentage figures should be used to describe the extent of community development needs and the impact of the proposed program. This includes, but is not limited to, appropriate units of measure (e.g., number of housing units or structures, linear feet of pipe, pounds per square inch, etc.), and costs per unit of measure. These quantification guidelines apply to the description of need, the nature of proposed activities and the extent to which the proposed program will address the identified need.

Appropriate documentation should be provided to support the degree of need described in the application. Basically, the sources for all statements and conclusions relating to community needs should be included in the application or incorporated by reference. Examples of appropriate documentation include planning studies, letters from public agencies, newspaper articles, photographs and survey data.

Generally, the most effective documentation is that which specifically addresses the subject matter and has a high degree of credibility. Applicants which intend to conduct surveys to obtain data are advised to contact the appropriate HUD office prior to conducting the survey for a determination as to whether the survey methodology is statistically acceptable.

There are a number of program design factors related to feasibility which can alter significantly the award of impact points. Accordingly, it is imperative that applicants provide adequate documentation in addressing these factors. Common feasibility issues include site control, availability of other funding sources, validity of cost estimates, and status of financial commitments as well as evidence of the status of regulatory agency review and approval.

Past productivity and administrative performance of prior grantees will be taken into consideration when reviewing the overall feasibility of the program. Overall program design, administration and guidelines are other feasibility issues that should be articulated and presented in the application, since they are critical in assessing the effectiveness and impact of the proposed program.

(1) *Program Impact—Single Purpose Grants.* Each project will be rated against other projects addressing the same problem area, so that, for example,

housing projects only will be compared with other housing projects, according to the criteria outlined below. It should be noted that each project within an application will be given a separate impact rating, if each one is clearly designated by the applicant as a separate and distinct project (i.e. separate Needs Descriptions, Community Development Activities, and Impact Description and Program Schedule forms have been filled out, indicating separate project names).

In some cases, it may be to the applicant's advantage to designate separate projects for activities that can ''stand on their own'' in terms of meeting the described need, especially where a particular project would tend to weaken the impact rating of the other activities, if they were all related as a whole, as has been the case with some economic development projects. If, however, the projects tend to meet the impact criteria to the same extent, or the weaker element is only a small portion of the overall program, there is no discernable benefit in designating separate projects.

Applicants should bear in mind that the impact of the proposed project will be judged by persons who may not be familiar with the particular community. Accordingly, individual projects will be rated according to how well the application demonstrates in specific, measurable terms, the extent to which the impact criteria are met. General statements of need and impact alone will not be sufficient to obtain a favorable rating.

(a) *Program Impact—Single Purpose—Housing.* There are three distinct types of Single Purpose Housing projects: Housing Rehabilitation, Creation of New Housing and Direct Homeownership Assistance. Separate rating criteria are provided for each type of project.

(i) *Housing Rehabilitation.*

Needs. Each application should provide information on the total number of units in the project area, the number that are substandard, and the number of substandard units occupied by low- and moderate-income households. The purpose of this information is to establish the relative severity of housing conditions within the designated project area compared to other housing rehabilitation applications. The application also should describe the date and methodology of any surveys used to obtain the information, including an explicit and detailed definition of ''substandard''.

Surveys of Housing Conditions. Surveys of housing conditions serve several purposes in evaluating applications for housing rehabilitation activities. These include establishing the seriousness of need for such assistance in the project area, providing a basis for estimating overall budgetary needs, and providing an indication of the marketability of the project.

Project Design and Feasibility. The application should describe the project in sufficient detail to allow the reviewer to assess its feasibility and its probable impact on the conditions described. It also should describe project requirements in such a way that regulatory and policy concerns will be addressed.

In reviewing applications from grantees with prior housing rehabilitation projects, reasonableness of cost-per-unit, stated in the application, will be compared against the grantee's actual past performance. All applications should provide documentation to justify the cost-per-unit estimates, particularly grantees where past performance does not support the estimates in the applications.

It should be noted that HUD encourages communities to design projects supplementing CDBG rehabilitation funds with private funds wherever feasible and appropriate, especially in the case of rental units and housing not occupied by lower income persons. In such cases, the CDBG subsidy should be as low as possible, while retaining sufficient incentive to attract local participants. On the other hand, projects designed for low income homeowners should not require private contributions at a level that puts the project out of reach of potential participants.

Where the creation of new units is proposed through conversion, the application should document the need for additional units based on vacancy rates, waiting lists, and other pertinent information. The proposed project clearly must support, or result in, additional units for low- and moderate-income persons. The units may result from the rehabilitation of currently vacant structures, conversion of non-residential structure for residential use, or new construction projects for which the proposed project will provide non-construction assistance.

Where the proposed project involves the use of Federally assisted housing, the applicant must identify and document the current commitment status of the Federal assistance. Lack of a firm financial commitment for assistance may adversely affect project impact. Applicants should address issues of site control and marketability, in addition to addressing feasibility from the standpoint of market financing.

The impact of the proposed project will be based on the degree of need, the number of units to be created, overall feasibility and the nature and cost of the proposed activities.

For projects consisting of more than one activity, the activity that directly addresses the need must represent at least the majority of funds requested. Other activities must be incidental to and in support of the principal activity. For example, public improvements included in a rehabilitation project that addresses housing need must: be a relatively small amount in terms of funds requested; clearly be in support of the housing objective; and demonstrate a positive and direct link to the national objective.

For incidental activities claiming benefit to low- and moderate-income persons on an area basis, the application must document that at least 51 percent of the residents of the service area meet the low- and moderate-income requirement. Funds should not be requested for activities that are not incidental to, and in support of the principal activity.

Scoring. Individual projects often vary in the extent to which they meet the criteria outlined above. Accordingly, it is difficult to define precisely those combinations of characteristics which constitute, for example, ''maximum'' versus ''substantial'' impact. Not all projects receiving a particular rating will match all the criteria point-by-point, in the same manner. The objective for non-target area projects, in as much as they are sparsely populated, only should be to assist low- and moderate-income persons. Accordingly, the following standard will be used for rating housing rehabilitation projects:

MAXIMUM (up to 400 Points)

1. Severe need is shown in the project area, in terms of the proportion of units that are substandard and the extent of disrepair in the units.

2. The project would bring all, or almost all, of the units in the project area up to standard.

3. There are no feasibility questions, such as availability of other resources, marketability, or appropriateness of project design, which would hinder the timely completion of the project as proposed.

4. Benefits a large number of persons when compared to other housing projects.

5. Significantly supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

SUBSTANTIAL (up to 300 Points)

1. Serious need is shown.
2. Project would bring most of the units in the area up to standard.
3. There are no major feasibility questions.
4. Benefits a substantial number of persons.
5. Substantially supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

MODERATE (up to 200 Points)

1. Serious need is shown, but is not as well documented as in other applications.
2. Project would bring units up to standard, but not to the same extent as other applications.
3. There may be some minor feasibility questions.
4. Benefits a significant number of persons.
5. Moderately supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

MINIMAL (up to 100 Points)

1. Some need is evident, but it is not serious compared to other applications, or is not well documented.
2. Project may bring most units up to standard, but not to same extent as in other applications.
3. There are serious feasibility questions.
4. Benefits a small number of persons.
5. Minimally supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

INSIGNIFICANT (0 Points)

1. Very little need has been demonstrated.
2. Project would not rehabilitate most units.
3. There are serious feasibility questions.
4. Benefits a very small number of persons.
5. Does not support the strategic plan of a designated Empowerment Zone or Enterprise Community.

(ii) *Creation of New Housing.* CDBG funds may be used to support the construction of new housing units, and, in certain circumstances, to finance the actual cost of constructing new units. New construction may be carried out by an eligible non-profit entity pursuant to 24 CFR 570.204, or as last resort housing. Support of new construction could include activities such as the acquisition and/or clearance of land, the provision of infrastructure, or the payment of certain planning costs.

Where the creation of new units is proposed, the application should document the need for additional units based on vacancy rates, waiting lists, and other pertinent information. The proposed project clearly must support, or result in, additional units for low- and moderate-income persons. The units may result from new construction projects for which the proposed project will provide non-construction assistance.

Where the proposed project involves the use of Federally assisted housing, the applicant must identify and document the current commitment status of the Federal assistance. Lack of a firm financial commitment for assistance may adversely affect project impact. Applicants should address issues of site control and marketability, in addition to addressing feasibility from the standpoint of market financing.

The impact of the proposed project will be based on the degree of need, the number of units to be created, overall feasibility and the nature and cost of the proposed activities.

Scoring. Individual projects often vary in the extent to which they meet the criteria outlined above. Accordingly, it is difficult to define precisely those combinations of characteristics which constitute, for example, ''maximum'' versus ''substantial'' impact. Not all projects receiving a particular rating will match all the criteria point-by-point, in the same manner. Accordingly, the following standard will be used for rating projects supporting new housing construction:

MAXIMUM (up to 400 Points)

1. Severe need for new housing affordable to low- and moderate-income persons is shown in the project area.

2. Project would create a large number of new housing units affordable to low- and moderate-income persons.

3. There are no feasibility questions, such as availability of other resources, marketability, or appropriateness of project design, which would hinder the timely completion of the project as proposed.

4. Benefits a large number of persons when compared to other new housing projects.

5. Project would affirmatively further fair housing choice by resulting in the spatial deconcentration of minorities throughout the community, or would provide spatial deconcentration of low- and moderate-income households if there are no areas of minority concentration.

6. Significantly supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

SUBSTANTIAL (up to 300 Points)

1. Serious need for new units affordable to low- and moderate-income persons is shown.
2. Project would create a substantial number of new housing units.
3. There are no major feasibility questions.
4. Benefits a substantial number of persons.
5. Project would affirmatively further fair housing choice through significant efforts toward the spatial deconcentration of minorities throughout the community, or would provide significant efforts toward spatial deconcentration of low- and moderate-income households if there are no areas of minority concentration.
6. Substantially supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

MODERATE (up to 200 Points)

1. Serious need is shown, but is not as well documented as in other applications.
2. Project would create new units but not a substantial number.
3. There may be some minor feasibility questions.
4. Benefits a significant number of persons.
5. Project would have some effect of affirmatively furthering fair housing choice by encouraging spatial deconcentration of minorities throughout the community, or would encourage spatial deconcentration of low- and moderate-income households if there are no areas of minority concentration.
6. Moderately supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

MINIMAL (up to 100 Points)

1. Some need is evident, but it is not serious compared to other applications, or is not well documented.
2. Project will create a few new units but not as many as in other applications.
3. There are serious feasibility questions.
4. Benefits a small number of persons.
5. Project would minimally affirmatively further fair housing choice by encouraging spatial deconcentration of minorities throughout the community, or would encourage spatial deconcentration of low- and moderate-income households if there are no areas of minority concentration.
6. Minimally supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

INSIGNIFICANT (0 Points)

1. Very little need has been demonstrated.

2. Project would not provide for new units.

3. There are serious feasibility questions.

4. Benefits a very small number of persons.

5. Project would have no effect of affirmatively furthering fair housing choice through the spatial deconcentration of minorities throughout the community, or would not encourage spatial deconcentration of low- and moderate-income households if there are no areas of minority concentration.

6. Does not support the strategic plan of a designated Empowerment Zone or Enterprise Community.

(iii) *Direct Homeownership Assistance.* Homeownership activities are defined as activities which would promote homeownership within the applicant jurisdiction, focusing particularly on aiding low- and moderate-income persons in becoming homeowners. While declining to identify any particular type of proposed project as superior, HUD is identifying several criteria which must be addressed within the project design, in order for the application to receive the maximum project impact.

Applications must include a well developed description of homeownership needs in the applicant jurisdiction, focusing particularly on the needs of low- and moderate-income persons. The description also should include, if applicable, any alternative approaches which have been considered in meeting homeownership needs. Project feasibility must be addressed as part of the application.

The application must demonstrate that the proposed project would make effective use of all available funds. This would include any local, State or other Federal funds which would be utilized by the proposed project. If other such funds are included as part of the proposed project, the applicant must demonstrate that such funds are committed and truly available for the project.

Any efforts which would affirmatively further fair housing, by promoting homeownership among minorities as well as homeownership throughout the community, must be outlined in the application.

The application must explain how the project would benefit low- and moderate-income homebuyers, particularly focusing on first-time and minority homebuyers. The application also should address any homeownership counseling services, including counseling pertaining to Federal, State, and local fair housing laws and requirements, which would be provided to persons selected to participate in the proposed project. Finally, the application should describe how the project would utilize public/private partnerships to promote homeownership, particularly in the sense that private sector financing would be accessible, as necessary, to project participants to complement available public sector funds, including CDBG money.

HUD will review each application which meets the threshold against the following criteria:

MAXIMUM (up to 400 Points)

1. Project design is appropriate to meet demonstrated homeownership need and alternative approaches to meeting the need are shown to have been considered. Additionally, there are no feasibility questions regarding the implementation and execution of the proposed project according to the schedule.

2. The application documents serious homeownership needs in the community and the proposed project would make effective use of available funds.

3. The proposed project would affirmatively further fair housing by including initiatives to reach out to potential minority homeowners and by promoting homeownership opportunities throughout the community.

4. The proposed project would target first-time homebuyers.

5. The proposed project would provide homeownership counseling to project participants.

6. The proposed project would complement other Federal, State or local programs which promote homeownership.

7. The proposed project would utilize public/private partnerships in attempting to promote homeownership, particularly in regard to participation by local financial institutions.

8. Significantly supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

SUBSTANTIAL (up to 300 Points)

1. Project design demonstrates a workable approach to homeownership assistance needs, and there are no major feasibility questions regarding implementation of the proposed project.

2. Substantial homeownership needs are documented by the application, and the proposed project would make effective use of available funds.

3. The proposed project would affirmatively further fair housing by promoting homeownership opportunities throughout the community.

4. The proposed project would encourage homeownership among first-time homebuyers.

5. The proposed project would encourage local financial institutions to lend to assisted homebuyers.

6. Substantially supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

MODERATE (up to 200 Points)

1. The proposed project has potential to meet homeownership needs in the community, and there are minor feasibility questions regarding implementation.

2. Homeownership needs in the community are documented, but not as well as in other applications.

3. The proposed project would include efforts to affirmatively further fair housing through homeownership.

4. The proposed project would educate and inform citizens of homeownership assistance available through the project.

5. The proposed project would not include private sector involvement.

6. Moderately supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

MINIMAL (up to 100 Points)

1. There are serious feasibility questions regarding the implementation and execution of the proposed project.

2. The proposed project would have little impact upon homeownership needs in the community.

3. The proposed project would contribute minimally to fair housing in the community.

4. The proposed project would marginally aid first-time homebuyers versus all homebuyers.

5. Minimally supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

INSIGNIFICANT (0 Points)

1. The proposed project has major feasibility questions which would inhibit its implementation and execution.

2. The proposed project does not address identified homeownership needs in the community.

3. The proposed project would not actively affirmatively further fair housing.

4. The proposed project would be of little benefit to first time homebuyers.

5. Does not support the strategic plan of a designated Empowerment Zone or Enterprise Community.

(b) *Program Impact—Single Purpose—Public Facilities Affecting*

Public Health and Safety. In the case of public facility projects, documentation of the problem by outside, third-party sources is of primary importance. In the case of water and sewer projects, documentation from public agencies is particularly helpful, especially where such agencies have pinpointed the exact cause of the problem and have recommended courses of action which would eliminate the problem. Such supporting documentation should be as up-to-date as possible: the older the supporting material, the more doubt arises that the need is current and immediate. Applicants also should be sure to indicate how the project would address public health and safety needs and conditions. Quantification also is essential in describing needs. Documentation from those affected should be included.

In order to show that the project is likely to impact upon the problem, the following items should be covered:

(1) Total project costs. Total project costs should be documented by qualified third party estimates, and be as recent as possible.

(2) Source of other funds. To the extent that CDBG funds will not cover all costs, the source of other funds should be identified and committed. If local funds are to be used, the applicant should show both the willingness and the ability to provide the funds.

(3) How the project will solve the problem. The applicant should demonstrate that the project will completely solve the problem and, if applicable, the applicant should address whether the proposal would be satisfactory to other State/local agencies which have jurisdiction over the problem.

(4) Cost effectiveness of the proposal. The applicant should address whether the proposal is the most cost effective and efficient among the possible alternatives considered.

(5) Reasonableness of service area. The applicant should address whether the service area claimed for the project is reasonable, in view of the nature of the proposed project, and if not, the applicant should address what effect a more realistic appraisal would have on overall benefit to low- and moderate-income persons.

(6) Project impact on public health and safety; and

(7) Other applicable feasibility issues have been addressed. Individual projects often vary in the extent to which they meet the criteria outlined above. Therefore, it is difficult to define precisely those combinations of characteristics which constitute, for example, ''maximum'' versus ''substantial'' impact. Not all applications receiving a particular rating will match point-for-point all the criteria in the same way. The following standards will be applied:

MAXIMUM (up to 400 Points)

1. Need is serious, current and requires prompt attention.
2. Program would resolve the problem completely, either through funds requested or with the support of other resources already committed.
3. No other obstacles to timely and effective implementation of the program exist.
4. Benefits a large number of persons when compared to other public facility projects.
5. Demonstrates that the applicant has considered and, as appropriate, will use alternative cost effective methods or material in the execution of the project.
6. Public health and safety concerns are fully resolved by the project.
7. Project would significantly address serious deficiencies in accessibility for disabled persons and/or provide a substantial increase in the number of public facilities accessible to disabled persons.
8. Significantly supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

SUBSTANTIAL (up to 300 Points)

1. Serious need is shown.
2. Program would resolve the problem completely.
3. There are no major feasibility questions.
4. Benefits a substantial number of persons.
5. There is evidence that efforts have been made to minimize project costs through use of alternative methods and materials, as appropriate.
6. Public health and safety concerns are substantially resolved by the project.
7. Project would substantially address serious deficiencies in accessibility for disabled persons and/or provide a significant increase in the number of public facilities accessible to disabled persons.
8. Substantially supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

MODERATE (up to 200 Points)

1. Serious need is shown, but is not as serious or well documented as other applications.
2. Program may not meet the need as completely as in some other applications.
3. There may be some questions relative to feasibility.
4. Benefits a significant number of persons.
5. There is evidence that efforts have been made to minimize project costs.
6. Public health and safety concerns are partially met by the project.
7. Project would somewhat address serious deficiencies in accessibility for disabled persons and/or provide some increase in the number of public facilities accessible to disabled persons.
8. Moderately supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

MINIMAL (up to 100 Points)

1. Some need is evident, but is not serious.
2. Only a portion of the need would be met or the problem would not be resolved completely.
3. There are serious feasibility questions.
4. Benefits only a small number of persons.
5. There is little evidence that efforts have been made to minimize costs.
6. Public health and safety concerns are minimally addressed by the project.
7. Project would minimally address serious deficiencies in accessibility for disabled persons and/or provide a minimal increase in the number of public facilities accessible to disabled persons.
8. Minimally supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

INSIGNIFICANT (0 Points)

1. No clear need has been demonstrated.
2. Program is not appropriate to meeting described needs, or there is serious doubt that there would be much impact on needs.
3. There are major feasibility questions.
4. Benefits a very small number of people.
5. There is no evidence that efforts have been made to minimize project costs.
6. Public health and safety needs are not addressed by the project.
7. Project would not address serious deficiencies in accessibility for disabled persons and/or would not provide an increase in the number of public facilities accessible to disabled persons.
8. Project does not support the strategic plan of a designated Empowerment Zone or Enterprise Community.

(c) *Program Impact—Single Purpose—Economic Development Projects.* As discussed earlier in this section of the NOFA, each individual Single Purpose project will receive a separate impact rating. Applicants whose proposed economic development program will

include multiple proposals should determine the most appropriate form of submission. This determination will require a choice as to either the incorporation of all proposals into a single project or the submission of separate projects for each proposal (each transaction will be considered a separate project). The single project format presents an ''all or nothing'' situation. In determining the appropriate submission format, applicants should consider the ability of a transaction to rate well on its own, based on the magnitude of employment impact, size of the financial transaction and the other factors discussed in this section.

The submission of proposals as separate projects must be clearly designated by the applicant with individual Needs Descriptions, Community Development Activities, Impact Descriptions and Program Schedule forms, including an appropriate name for each project on HUD Form 4124.1.

Section 807(c)(3) of the 1992 Act provides that it is the sense of Congress that each grantee should devote one percent of its grant for the purpose of providing assistance under section 105(a)(23) of the HCD Act to facilitate economic development through commercial microenterprises. A microenterprise is defined as a commercial enterprise with five or fewer employees, one or more of whom owns the enterprise. This should be considered in developing an economic development application.

It is noted that in accordance with section 806 of the 1992 Act, the Department published on January 5, 1995, a final rule relating to evaluation and selection of Economic Development activities by grantees.

In addition to the standard submission requirements, to receive maximum points, Small Cities applicants must submit information that demonstrates that CDBG funds are needed for the proposed project or activity. HUD will evaluate this material as part of its Eligibility Review *prior to considering an application for funding* in the FY 1996 competition. The following is a discussion of some of the factors HUD will consider in assessing projects in these key areas:

(i) *The Appropriate Determination.* HUD requires that economic development activities undertaken with CDBG funds be appropriate to carry out an economic development project. Applicants should attempt to demonstrate that each economic development project has a reasonable likelihood of success.

Applicants must document the financial analysis of the project's need for assistance, as well as public benefit factors that were considered in making its determination that assistance is appropriate. The applicant is expected to provide clear documentation on how the decision was reached.

The written documentation of the financial analysis of the project's need should use the following steps:

1. *Reasonableness of Proposed Costs.*—The applicant must review each project cost element and determine that the cost is reasonable and consistent with third-party, fair-market prices for that cost element. The general principle is that the level of CDBG assistance cannot be adequately determined if the project costs are understated or inflated.

2. *Commitment of Other Sources of Funds.* The applicant shall review all projected sources of funds necessary to complete the project and shall verify that all sources (in particular private debt and equity financing) have been firmly committed to the extent practicable, and are available to be invested in the project. Verification means ascertaining that: the source of funds is committed; that the terms and conditions of the committed funds are known; and the source has the capacity to deliver.

3. *No Substitution of CDBG Funds for Private Sources of Funds.* The applicant shall financially underwrite the project and ensure to the extent possible that CDBG funds are not being substituted for available private debt financing or equity capital. The analysis must be tailored to the type of project being assisted (i.e. real estate, user project, capital equipment, working capital, etc.). Real estate projects require different financial analysis than working capital or machinery and equipment projects. Applicants should ensure that both a significant equity commitment by the for-profit business exists, and that the level of certainty of the end use of the property or project is sufficient to ensure the achievement of national objectives within a reasonable period of time.

4. *Establishment of CDBG Financing Terms.* The amount of CDBG assistance provided to a for-profit business ideally should be limited to the amount, with appropriate repayment terms, sufficient to go forward without substituting CDBG funds for available private debt or cash equity. The applicant should structure its repayment terms so that the business is allowed a reasonable rate of return on invested equity, considering the level of risk of the project. It should be remembered that equity funds generally should bear the greatest risk of all funds invested in a project.

5. *Assessing Public Benefit.* The extent of public benefit expected to be derived from the economic development project must be assessed. The applicant's activities must meet the public benefit standards found at 24 CFR 570.209(b).

(ii) *CDBG Assistance Must Minimize Business and Job Displacement.* Each applicant will evaluate the potential of each economic development project for causing displacement of existing businesses and lost jobs in the neighborhood where the project is proposed to be located. When the grantee concludes that the potential exists to cause displacement, given the size, scope or nature of the business, then the grantee must, to the extent practicable, take steps to minimize such displacement. The project file must document the grantee's review conclusions and, if applicable, the steps the grantee will take to minimize displacement.

(iii) *Section 105(a)(17) Requirements.* Section 105 (a)(17) of the HCD Act requires that an activity assisted under that section achieve one of the following criteria:

(1) Creates or retains jobs for low- and moderate-income persons (note that a project which meets the national objective of principally benefitting low- and moderate-income persons by creating or retaining jobs, 51 percent of which are for low- and moderate-income persons, will be deemed to have met this criterion without any additional documentation);

(2) Prevents or eliminates slums or blight (note that a project which meets the national objective of aiding in the prevention or elimination of slums or blight on an area basis will be deemed to have met this criterion without any additional documentation);

(3) Meets an urgent need (note that a project which meets the national objective of meeting community development needs having a particular urgency will be deemed to have met this criterion without any additional documentation);

(4) Creates or retains businesses owned by community residents;

(5) Assists businesses that provide goods or services needed by and affordable to low- and moderate-income residents;

(6) Provides technical assistance to promote any of the activities under (1) through (5) of this subsection.

(iv) *National Objectives.* As previously stated in this NOFA, all CDBG-assisted activities must address one of the three broad national

objectives. Since economic development projects usually result in new employment or the retention of existing jobs, these activities most likely would be categorized as principally benefitting low- and moderate-income persons in this manner. Such projects will be considered to benefit low- and moderate-income persons where the criteria of 24 CFR 570.208(a)(4) are met. HUD will consider an activity to qualify under this provision where the activity involves jobs at least 51 percent of which are taken by or made available to such persons, or retained by such persons. The extent to which the proposed project will directly address employment opportunities for low- and moderate-income persons in the applicant jurisdiction will be a primary factor in HUD's assessment of the proposed program.

In determining whether the person is a low- and moderate-income person for these activities, it is the person's family income at the time the CDBG assistance is provided that is determinative. When making judgments concerning whether an individual qualifies as a low- and moderate-income person, both family size and the income of the entire family must be considered. This consideration is necessary because a low- and moderate-income person is defined as a member of a low- and moderate-income family. The 1992 Act amends the HCD Act by stating that a person may be presumed to be a low- and moderate-income person if the employee resides in a census tract where not less than 70 percent of the residents are low- and moderate-income persons. See 24 CFR § 570.208(a)(4) for more information on this subject. HUD will also accept a written certification by a person of his or her family income and size to establish low- and moderate-income status. The certification may simply state that the person's family income is below that required to be low- and moderate-income in that area. The form for such certification must include a statement that the information is subject to verification. The application must contain adequate documentation to explain fully, and to support, the process that will be used to ensure that project(s) comply with the low- and moderate-income employment requirements. The documentation must be sufficient to show that the process has been developed and that program participants have agreed to adhere to that process.

(v) *Application Requirements.* To the extent feasible, the material listed below should be submitted for economic development projects. The material should be submitted for *each proposed activity* (e.g., each loan will be considered a separate activity), whether the proposed activity is presented as a separate project or as part of a project involving multiple activities. Since economic development projects are rated against each other, the more completely these submission requirements are met, the greater the potential exists for enhancing the impact score of the project.

1. A letter from each appropriate developmental entity which includes at least the following information:

a. A detailed physical description of the project with a schedule of events and maps or drawings as appropriate.

b. The estimated costs for the project, including any working capital requirements.

c. A discussion of all financing sources, including the need for CDBG, the terms of the CDBG assistance, and the proposed lien structure. The amount, source and nature of any equity investment(s) must also be provided as well as a commitment to invest the equity.

d. A discussion of employment impact which includes a schedule of newly created positions. The schedule should identify the number, salary and skill level of each permanent position to be created. If jobs are made available to low- and moderate-income persons, the applicant must also demonstrate and document how persons from low- and moderate-income households will be accorded first consideration for employment opportunities.

e. A discussion of all appropriate feasibility issues including, but not limited to: site control, zoning, public approvals and permits, impact fees, corporate authorizations, infrastructure, environment and relocation.

f. An analysis and summary of market and other data which supports the anticipated success of the project.

2. A development budget showing all costs for the project, including professional fees and working capital.

3. Documentation to support project costs. Documentation generally should be from a third party source and be consistent with the following guidelines:

a. Acquisition costs should be supported by an appraisal.

b. Construction/renovation costs should be certified by an architect, engineer or contractor. Use of Federal Prevailing Wage Rates should be cited where applicable.

c. Machinery and equipment costs should be supported by vendor quotes.

d. Soft costs (e.g., legal, accounting, title insurance) need be substantiated only where such costs are anticipated to be abnormally high.

4. Letters from all financing sources discussing (at a minimum) the amount and terms of the proposed financing, and the current status of the application for funding.

5. Historical financial data of the development entity, preferably for the last three years. This information may be submitted under separate cover with confidentiality requested. It is recognized that historical financial data may be unavailable or inappropriate for some projects (e.g., start-up companies and real estate transactions).

6. A two to five-year cash flow pro forma with accompanying notes citing basic assumptions.

7. The applicant's assessment of the project's consistency with the CDBG program eligibility appropriate standards and with the national objectives requirements.

(vi) *Review Criteria.* In evaluating and rating economic development projects, HUD will analyze the following factors:

1. *Employment:* The extent to which the proposed project will directly address employment opportunities for low- and moderate-income persons in the applicant's jurisdiction will be a primary factor in HUD's assessment of program impact. Applicants are reminded that for an activity to be consistent with the statutory objective of low- and moderate-income benefit, as a result of the creation or retention of jobs, at least 51 percent of created or retained employment opportunities must be held by, or made available to, persons from low- and moderate-income families. Applicants must fully document and describe employment benefits. In addition, applicants should address the following issues:

a. All employment data must be expressed in terms of full-time equivalents (FTEs). Only permanent jobs may be counted, and applicants must take into account such factors as seasonal and part-time employment. A seasonal job may be considered permanent if the season is long enough to be considered the person's principal occupation; permanent part-time jobs must be converted to the full-time equivalent.

b. The amount of CDBG assistance required to produce each full-time equivalent job will affect the impact assessment by HUD. Lower CDBG costs per job are preferable to higher CDBG costs per job. Such assessments of impact will be done on a comparative basis among all projects submitted, rather than by comparison to a given standard.

c. The use of CDBG funds to assist a business with transferring to a different community will generally be considered as having *no* employment impact. Exceptions to this rule may include an expansion to the business as a result of, or concurrent with, the transfer; or if the business can demonstrate that it is infeasible to continue operations at the current site. If the applicant proposes to assist in a transfer of operations based on an exception to the general rule, HUD should be contacted early in the planning process to discuss the viability of such a proposal. Failure to do so could result in the application receiving 0 impact points.

d. Applicants are encouraged to use CDBG funds for projects that provide as many jobs as possible for individuals that are currently receiving public assistance. Providing employment to recipients of public assistance will help break the cycle of dependency and empower low-income citizens to take control of their lives.

2. *Feasibility.* A high-impact rating will not be given to projects that are likely to encounter feasibility issues which would hinder the timely completion of the project. Such issues include, but are not limited to: site control, zoning, public approvals and permits, infrastructure, environment, and relocation. Applicants should address these and any other applicable issues and provide documentation where appropriate.

Applicants *also must demonstrate* the reasonable likelihood of the project's success, from both a financial and employment standpoint. An analysis or market data, which indicates an inordinate risk in the undertaking of the project, will affect the overall rating of program impact.

3. *Leverage.* Leverage is defined as the amount of private debt and equity to be invested as a direct result of the CDBG-funded activity. Projects which fully conform with those requirements by providing the maximum feasible level of private investment will be considered as having appropriate leverage. The extent of firm commitments for private financing will be reviewed as well as the amount of equity investment. The project will be reviewed to determine whether CDBG funds are replacing private sources of funds. In order to receive maximum impact CDBG funds may not replace private financing, CDBG assistance must be limited to the amount necessary to fund the project without replacing CDBG funds for private funds, and equity funds should bear the greatest risk in the project.

4. *Taxes.* While not a primary factor in the evaluation of impact, projects which will augment the applicant's tax base may have a positive effect on the rating of program impact. It is recognized, however, that good projects do not always result in increased tax revenues due to their nature.

5. *Repayment.* Where CDBG repayments are to be made in some manner to the applicant, the proposed use of those repayments for economic development purposes will be considered.

6. *Cost Reasonableness.* In order to receive a rating greater than the minimal, the costs must be reasonable, i.e., not inflated.

7. *Base Closures.* The Department recognizes that communities facing the loss of a military base may need a well-planned economic development project to help alleviate the effect of the base closure. Well-planned projects that will help successfully alleviate the economic impact of base closures will tend to have a high impact and rate well in the competition.

8. *Empowerment Zones/Enterprise Communities.* The Department is supportive of using funds from this NOFA to support projects in designated Empowerment Zones and Enterprise Communities. A project that significantly supports the strategic plan of a designated Empowerment Zone or Enterprise Community will receive a maximum impact score provided that the other factors for maximum impact are met.

(vii) *Scoring.* Individual projects often vary in the extent to which they meet the criteria outlined above. It is, therefore, difficult to precisely define those combinations of characteristics which constitute, for example, ''maximum'' versus ''substantial'' impact. Not all applications receiving a ''maximum'' rating will match all the criteria, point by point, in the same manner. The following standards will be applied:

MAXIMUM (up to 400 Points)

1. The analysis of market and other risk data provides reasonable assurance that the project will be successful.

2. The project will have a direct and positive impact on employment opportunities for persons from low- and moderate-income households, and the extent of that impact compares favorably with that of other applicants.

3. All appropriate feasibility issues have been addressed (including the submission of firm private financing commitments) and there is reasonable assurance that the project will be completed in a timely manner.

4. The Public Benefits, consistent with 24 CFR § 570.209(b), to be derived from the project are considerable relative to other proposals.

5. The infusion of CDBG funds will leverage a substantial investment of private and other dollars.

6. The project costs are reasonable (i.e. not inflated).

7. CDBG funds will not replace private financing, CDBG assistance will be limited to the amount necessary to fund the project without replacing CDBG funds for private funds, and equity funds will bear the greatest risk in the project.

8. Project significantly supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

SUBSTANTIAL (up to 300 Points)

The criteria for Maximum (400 Points) is met, with either of the following exceptions:

1. While the project will have a direct and positive impact on employment opportunities for persons from low- and moderate-income households, the extent of that impact is less than that demonstrated by applicants receiving the maximum rating.

2. While there are no *major* feasibility problems, there are feasibility issues which have not been fully addressed and/or may have a negative effect on timely implementation of the project. However, overall success of the project appears achievable.

In addition:

3. The Public Benefits derived from this project will be greater than that received by the majority of applicants.

4. CDBG funds will leverage more private and/or other public dollars than the majority of projects in the competition.

5. The project costs are reasonable (i.e. not inflated).

6. CDBG funds will not replace private financing, CDBG assistance will be limited to the amount necessary to fund the project without replacing CDBG funds for private funds, and equity funds will bear as great a risk as other project funds.

7. Project significantly supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

MODERATE (up to 200 Points)

The project presents at least one of the following deficiencies which would affect the appropriateness of CDBG funding:

1. An analysis of the project indicates that the likelihood of the availability of other required financing is questionable.

2. There is a major feasibility issue which is likely to affect completion of the project.

3. The analysis of market and other risk data indicates a likelihood that the project will not create a significant employment impact.

4. The number of employment positions to be created is significantly low and/or the CDBG cost per employment position is significantly high in relation to other applications.

In addition:

5. There will be some Public Benefits resulting from this project.

6. CDBG dollars will leverage a moderate amount of private and/or other public funds relative to other projects.

7. The project costs are reasonable (i.e. not inflated).

8. Project moderately supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

MINIMAL (up to 100 Points)

The project presents at least one of the following serious deficiencies which would affect the appropriateness of CDBG funding:

1. An analysis of the project indicates that other required financing is unlikely to be available.

2. There will be few, if any, Public Benefits resulting from this project.

3. CDBG dollars will leverage little private and/or other public investment in the project.

4. Project minimally supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

INSIGNIFICANT (0 Points)

The activity presents at least one of the following serious deficiencies which indicates the inappropriateness of CDBG funding:

1. It is clear that the activity cannot be accomplished based on any combination of the following factors:

(1) Major feasibility issues.

(2) Inordinate risk.

(3) Unavailability of required financing.

2. The activity will not have a direct impact on employment opportunities for persons from low- and moderate-income households.

3. The completion of the project will result in no Public Benefits or will be detrimental to the community.

4. No other investment will be triggered by the use of CDBG funds for this activity.

5. Project does not support the strategic plan of a designated Empowerment Zone or Enterprise Community.

(2) *Program Impact—Comprehensive Program Grants.* Comprehensive programs must address a substantial portion of the identifiable community development needs of a defined area(s). The extent to which activities are coordinated will be a major consideration in the evaluation of program impact. In defining an appropriate area for comprehensive treatment, applicants should consider the severity of condition within the area and the resources to be provided. The impact is greatest where community development needs will be substantially addressed over a reasonable period of time. Exceptions to the requirement that activities be concentrated within a defined area or areas may be made if the applicant can demonstrate that the proposed program represents a reasonable means of addressing the identified needs.

HUD will assess the impact of the program for each of the four program design criteria selected, based on the factors described below. Applicants must describe fully the extent to which the program will address each criterion selected. HUD will compare all programs which address a particular criterion. The best proposal for that criterion will be the standard by which all others will be judged, although that proposal will not necessarily be awarded a significant impact.

Assignment of Program Impact points for a Comprehensive Grant application is a two-step process. First, the potential of the proposed program of activities to achieve the results intended by each selected criterion when considered in relation to other communities selecting the same criterion is assessed. A numerical value is assigned, based on the following:

The results would have insignificant impact—0 Points

The results would have minimal impact—2 Points

The results would have a moderate impact—4 Points

The results would have a maximum impact—8 points

After each of the four criteria selected by an applicant is rated and a value assigned, the values are summed. A minimum of 12 points will be required at this stage in order for the application to be eligible for further consideration. A score of less than 12 points indicates that the proposed activities would have insufficient impact to warrant funding.

Following this process, the actual points for impact are determined by dividing each applicant's Program Impact Score by the highest Program Impact Score achieved by any applicant and multiplying the result by 400.

Listed below are the ten design criteria and the standards which HUD has developed to evaluate each criterion. The applicant must select and address four of the criteria. In addition to these standards, the Submission Requirements and Review Criteria for Economic Development Projects under the Single Purpose Program apply in determining the eligibility and rating for economic development proposals that are a part of a Comprehensive Program. It is particularly important that applicants fully address the economic development criteria should Criteria 5 and 6 be selected.

(a) *Criterion 1—Supports Comprehensive Neighborhood Conservation, Stabilization, Revitalization, New Housing Construction or Promotes Homeownership.* The applicant must describe the degree to which the identified needs of a defined area or areas will be addressed in a coordinated manner. In defining an area or areas, applicants should examine carefully the extent of needs and the resources available to address those needs. Where an area has not been defined, the applicant should describe fully the appropriateness of implementing activities on a community-wide basis.

In evaluating the impact of the proposed program, HUD will examine the following factors:

—Nature and severity of neighborhood needs.

—Extent to which needs will be addressed.

—Amount of funds required to implement neighborhood activities.

—Extent to which activities are coordinated to address housing, public facility and economic development needs. Program impact will be the greatest where a substantial portion of the needs within a defined area will be met.

—Extent to which the project promotes fair housing choice in homeownership among protected classes.

—Extent to which the project supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

The strongest consideration for housing rehabilitation programs is given to those applicants which have designed their housing programs by taking into account both structural conditions and appropriate financing mechanisms. The proposed program should be structured in a way to be marketable, given income and structural characteristics of the neighborhood area. The physical needs of residential or mixed use properties must be well stated and documented in terms of substandardness. Applicants

will be expected to maximize the leveraging of private funds, encourage the participation of local financial institutions, and develop realistic program guidelines. Private funds available from financial lending sources should be established. If leveraging is infeasible, the applicant must fully document that fact. The most effective housing programs will be those which will address a substantial portion of the identified needs, while maximizing the impact of Federal funds.

For those programs that will support the construction of new residential units, project feasibility will be critical. While the extent of need and number of units to be created will be a primary consideration in evaluating the impact, issues of site control, marketability and assurance of private financing must be addressed, and must be documented.

Homeownership activities will be reviewed in terms of: how effectively the program would meet homeownership needs identified in the community; and the extent to which they would make effective use of available funds.

Public service activities also may be considered in conjunction with other activities under this criterion. Again, any such activities would need to meet demonstrated needs within the community.

The impact of public improvement activities will be assessed primarily on the documented severity of the need and the extent to which the proposed program will address that need. Those needs which directly affect the public safety and welfare will be considered the most severe.

Economic development activities also will be evaluated by the extent to which they will alleviate the identified problems. However, the assessed impact for these activities is often diminished due to feasibility concerns.

In addition to quantifying the extent of the anticipated improvements, applicants must demonstrate that the proposed activities can be carried out—that is, documentation with respect to private participation in such activities must be thorough. Letters of only general interest, by either property owners or other private sector participants, do not necessarily ensure their participation in the program. Some degree of assurance of participation should be presented.

Review Criteria and Submission requirements for Housing described under the Single Purpose Program apply in evaluating and rating housing proposals that are a part of a Comprehensive Program.

(b) *Criterion 2—Provides Housing Choice within the Community either Outside Areas with Concentrations of Minorities and Low- and Moderate-Income Persons or in a Neighborhood which is Experiencing Revitalization and Substantial Displacement as a Result of Private Reinvestment, by Enabling Low- and Moderate-Income Persons to Remain in their Neighborhood.* If a proposed program provides housing choice within the community outside areas with concentrations of minorities and low- and moderate-income persons, the application must document that there are existing areas which do, in fact, contain concentrations of low- and moderate-income families and minorities. The proposed program, if implemented, must result in additional housing assistance being provided in areas of non-concentration. Communities with no minorities or minority concentrations may receive impact points where opportunities are provided outside areas of low- and moderate-income concentration. The degree of impact will be based upon the severity of needs, the number of units to be provided, and the nature and cost of the activities.

In a neighborhood which is experiencing revitalization and substantial displacement as a result of private reinvestment, the applicant must provide a detailed description of the revitalization efforts within the neighborhood, the amount of displacement of low- and moderate-income persons, and the manner in which the implementation of the proposed program will enable displacees to remain in the neighborhood. The degree of needs, nature and cost of activities, and percentage of needs to be addressed will be evaluated to determine program impact.

(c) *Criterion 3—Supports the Expansion of Housing for Low- and Moderate-Income Persons by Providing Additional Housing Units Not Previously Available.* The proposed program clearly must support, or result in, additional units for low- and moderate-income persons. The units may result from the rehabilitation of currently vacant structures, conversion of non-residential structures to residential use, or new construction projects for which the proposed program will provide non-construction or construction assistance. Where the proposed project involves the use of Federally assisted housing, the applicant must identify and document the current commitment status of the Federal assistance. Lack of a firm financial commitment for assistance may adversely affect program impact. Applicants should address the areas of site control and marketability, in addition to addressing feasibility from the standpoint of project financing. Consideration will not be given to proposed programs which will rehabilitate occupied units or displace current occupants. The impact of the proposed programs will be based upon the degree of needs, the number of units to be created, and the nature and cost of the proposed activities.

(d) *Criterion 4—Addresses a Serious Deficiency in a Community's Public Facilities.* Consideration will be given to the extent of deficiencies, and their relative seriousness, of the identified need. The following factors will be considered:

—Documentation of the seriousness of deficiencies. Appropriate documentation should be provided to substantiate the degree of seriousness. Those deficiencies which directly affect the public safety and welfare will be considered most severe.
—The nature and cost of the proposed activities in relation to the percentage of need to be addressed.
—The extent to which the proposed program will address a variety of deficiencies in public facilities within a defined area.
—Coordination with other activities within the defined area.
—The degree to which the application addresses such feasibility issues, including but not limited to, the validity of cost estimates by qualified sources, the availability of other funds, site control, and environmental constraints.
—The number of persons to benefit.
—The extent to which the project addresses serious deficiencies in accessibility requirements and/or expands the number of accessible public facilities.
—Extent to which the project supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

(e) *Criterion 5—Expands or Retains Employment Opportunities.* Consideration will be given to proposed programs that will result in the creation of new jobs or retention of existing employment opportunities. The following factors will be considered:

—The number of jobs to be created or retained in relation to the identified needs. Documentation should be provided to substantiate the number and type (permanent or seasonal, full or part-time) of job claimed. Letters from local development agencies or

expected participants which express more than general interest would be appropriate. With respect to job retention, evidence should be provided to demonstrate that without the proposed program, existing jobs would be lost. The applicant also must address the potential impact of job loss on the community.

—The extent to which CDBG funds are used to leverage private commitments. If leveraging is proposed, applicants should analyze the actual amount of additional funds required to make the project financially feasible. In designing a program to assist existing business expansion or retention, or to encourage new business development, applicants must address whether CDBG funds will be used for infrastructure, land assemblage or other financial incentives. These factors may be important considerations for a firm deciding where to locate and whether to expand or reduce the scope of its operation. CDBG funds may be more effectively used as a loan rather than a grant. In this regard, the CDBG funds would generate additional program resources through loan repayments to the community. It is considered especially advantageous if a revolving loan fund is established and repayments continue to be used to expand or retain employment opportunities.

—The relationship of the activity to other projects being implemented within the defined area.

—The number of persons to benefit.

—Particular attention will be given to the extent to which the Review Criteria and Submission Requirements for Economic Development Projects are addressed (see Single Purpose Program Criteria).

—Extent to which the project supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

—Extent to which the project results in the employment of persons on public assistance.

(f) *Criterion 6—Attracts or Retains Businesses which Provide Essential Services.* Consideration will be given to proposed programs which will address the attraction or retention of businesses commonly associated with neighborhood needs (corner grocery stores, dry cleaners, pharmacies, etc.). The applicant must describe clearly the nature and anticipated impact of activities. Documentation in the form of letters from existing or new potential businesses offering a commitment to the program should be included. (Letters of only general interest by property owners do not necessarily ensure their participation in the program, or their willingness to secure debt if private lending is proposed). The following factors will be considered:

—The impact of the proposed program in relation to the identifiable neighborhood needs. The extent of area stability must be documented. In describing the needs of a business district or neighborhood commercial area, such factors as overall structural conditions, business turnovers, and vacancy rates over a period of time should be clearly presented. The formulation of a commercial revitalization program must be based on a thorough assessment of local needs and a realistic program design. An important consideration is whether the proposed program is designed to be marketable given income characteristics, local business condition, etc. The condition of supporting public facilities and improvements and their influence on the business environment must be established. If public improvements are proposed in connection with economic expansion or retention, applicants must address the extent to which the lack of these improvements impact on business.

—Attraction/retention must be fully documented by the applicant. With respect to business retention, evidence should be provided to demonstrate clearly and objectively that without the proposed CDBG Program, existing retail/commercial businesses would curtail their operations. The applicant also must document and address the potential impact of the business loss on the community and/or target area. HUD would accept as examples of clear and objective evidence a notice issued by the business to affected employees, a public announcement by the business, or financial records provided by the business that clearly indicate the need for closing or moving all or portions of the business out of the area.

—The amount of private funds to be leveraged. If leveraging is proposed, applicants should analyze the actual amount of private or public funds needed to make the project financially feasible. In this regard, the establishment of a revolving loan fund, in which repayments would continue to be used to attract or retain businesses providing essential services, would be considered a positive factor.

—The relationship of the activity to a comprehensive approach to meeting the overall needs of the neighborhood area.

—The impact of the proposed program in utilizing minority, women-owned, and project area businesses.

—Extent to which the project supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

—Extent to which the project results in the employment of persons on public assistance.

(g) *Criterion 7—Removes Slums or Blighting Conditions.* Consideration will be given to proposed programs which will have a direct impact on the removal of slums or blighting conditions. Appropriate areas may include, but are not limited to, deteriorated residential or commercial structures, inappropriate land uses, or blighting conditions, such as repeated flooding and drainage problems or serious deficiencies in public facilities. Applicants should be aware that slum and blight activities can be carried out under the national objective of benefit to low- and moderate-income persons. If an applicant elects to qualify the activity on this basis, the degree of low- and moderate-income benefit must be demonstrated by the applicant.

Where residential or commercial rehabilitation activities are proposed as preventing or eliminating blighting conditions, the application must clearly document the number, type, and condition of deteriorating or deteriorated buildings in the designated target area. Detailed conditions of the physical condition of buildings or structures would be appropriate to establish the extent of substandard and blighting conditions. For rehabilitation of residential structures to be designed as eliminating blight and addressing an area's deterioration, the buildings must be considered substandard under local definition.

When an area is determined to be blighted, there must be a substantial number of deteriorated or dilapidated buildings, or the public improvements throughout the area must be in a state of deterioration. The proposed CDBG program or project must be designed to eliminate or address a substantial portion of the identified blighting conditions or physical decay. CDBG assistance for facilities or structures which are in good repair and show no real signs of deterioration would not score well under this criterion. For instance, minor facade improvements to a commercial building alone would not indicate that a building is in poor

condition. However, assistance to a commercial area which consists of deteriorating businesses, storefronts in serious need of rehabilitation, a high vacancy factor, and public improvements, such as parking areas and parking access improvements which are in need of physical upgrading, would have a direct impact on eliminating blighting conditions. Public improvements that are so deteriorated that they constitute a genuine threat to the continued viability of an area by discouraging private investment necessary to maintain properties may also be considered a blighting influence. The following factors will be considered:

—Extent and documented seriousness of conditions/needs. References to engineering studies, surveys or letters from appropriate local agencies should be included.

—Impact of the proposed program in relation to providing long-term permanent solutions to alleviate the identified need. Short-term or superficial improvements will not be considered to have a significant impact.

—Coordination with other projects and activities which will address needs within the defined area.

—Nature of any proposed re-use: degree of commitment for re-use.

—Extent to which the project supports the strategic plan of a designated Empowerment Zone or Enterprise Community.

(h) *Criterion 8—Resolves a Serious Threat to Health or Safety*. The applicant must describe the condition which poses a threat to public health and safety. A serious threat refers to a situation which demands immediate attention. This may be a condition that has just occurred or a condition which, though long standing, has intensified to become an immediate danger.

Applicants should be aware that imminent threat/urgent need activities can be carried out under the national objective of benefit to low- and moderate-income persons. If an applicant elects to qualify the activity on this basis, the degree of low- and moderate-income benefit must be demonstrated by the applicant. Consideration will be given to the following:

—The extent to which a serious threat to health or safety is documented, or of recent origin, or which recently became urgent. Documentation should include the identification of the existing conditions by appropriate agencies.

—The extent to which the serious threat will be resolved.

—The submission of documentation which demonstrates that other financial resources are insufficient or unavailable to resolve such needs.

—The degree to which the application addresses issues such as the validity of cost estimates by qualified sources; the availability of other funds; site control and environmental conditions; or other public body approvals.

—The number of persons to benefit, as well as the number of individuals actually threatened.

Note: This criterion is generally more restrictive than Criterion 4. The existing condition must pose a serious and immediate threat to the health or welfare of the target population.

(i) *Criterion 9—Supports Other Federal or State Programs Being Undertaken in the Community or Deals With the Adverse Impact of Another Recent Federal or State Action. The Other Federal or State Program or Action Must Be of Substantial Size or Impact in the Community in Relation to the Proposed Program*. The application must contain a complete description of the Federal or State Program(s) (excluding other CDBG Programs) which currently are underway, or a complete description of the adverse impact of a recent Federal or State action (e.g. the closing of a military base). A Federal or State Program or action not yet initiated will be considered only where the application provides documentation establishing the certainty of, and the approximate commencement date of, the described Program or action.

The proposed CDBG Program must demonstrate clearly the magnitude of the effect of the Federal or State Program or action on the community. The degree to which the proposed CDBG Program will support the Federal or State Program, and/or the extent to which the adverse impact of Federal or State action will be mitigated, also must be demonstrated.

In addition to the above, the nature and costs of the proposed activities will be considered in determining the degree of impact.

(j) *Criterion 10—Supports Energy Production or Conservation*. This criterion will be judged, and points will be awarded, based upon the community's ability to demonstrate that the proposed program will support energy production or conservation. Applicants are urged to develop innovative approaches toward addressing energy needs with Small Cities CDBG funds. Energy considerations can be a factor in most activities proposed by smaller communities. Attention should focus on new methods of producing energy or conserving energy where possible. In developing and evaluating proposals, there are a number of energy aspects to consider. The following factors will be considered:

—Cost efficiency—Relationship of dollar amount to benefits to be derived. The applicant must document estimates of energy costs which are to be saved as a result of the proposed program. The proposed program should make maximum use of non-CDBG resources as well as CDBG funds. Appropriate documentation must be provided to ensure that the proposal is economically feasible.

—The extent to which the proposed program will support other programs currently aimed at addressing energy production or conservation needs of the community. From a management standpoint, proposed projects should be consistent with needs or objectives of any plan for energy management or conservation. Applicants should pursue the availability of other resources from Federal or State energy related programs. The degree of commitment of other resources should be established. State energy offices, private as well as municipally-owned utility companies, and home heating oil companies may be appropriate entities to be involved in the development and planning of proposals.

—The application should address whether the project is based on appropriate technology, materials and methods to maximize energy conservation. Engineering reports or studies would be appropriate evidence to support the overall feasibility of the project. The conversion of existing facilities, where appropriate, rather than proposing new construction may be more economical.

—While housing rehabilitation programs which include weatherization/winterization components will be considered, they generally will not be presumed as addressing a severe need unless unique conditions are specifically identified and cost savings are properly documented.

d. *Fair Housing and Equal Opportunity Evaluation*. Documentation for the 50 points for these items is the responsibility of the applicant. Claims of outstanding performance must be based upon actual accomplishments.

Clear, precise documentation will be required. Maps must have a census tract or block numbering area (BNA), and they must be in accordance with the 1990 Census data. Additionally, maps must identify the locations of areas with minorities by census tract or BNA. If there are no minority areas, state so on the map. Only population data from the 1990 Census will be acceptable for purposes of this section.

Please note that a ''minority'' is a person belonging to, or culturally identified as, a member of any one of the following racial/ethnic categories: Black, Hispanic, Asian or Pacific Islander, and American Indian or Alaskan Native. For the purposes of this section, the separate category—''women'' —is not considered a minority.

Counties claiming points under this criterion must use county-wide statistics (excluding entitlement communities). In the case of joint applications, points will be awarded based on the performance of the lead entity only.

The following factors will be used to judge outstanding performance in these areas. Please note that the criteria are the same for Comprehensive and Single Purpose applicants, and that points for outstanding performance may be claimed under each criterion:

(1) *Housing Achievements* (40 points total). (a) 20 Points—Provision of Assisted Housing—Providing assisted housing for low- and moderate-income families, located in a manner which provides housing choice in areas outside of minority, or low- and moderate-income concentrations.

Points will be awarded where both of the following criteria are met:

(i) More than one-third of the housing assistance provided by the applicant in the last five (5) years (excluding Section 8 existing and housing assistance provided in place) has been in Census Tracts (CT) or Block Numbering Areas (BNA) having a percentage of minority population which is less than the minority population in the community as a whole; and

(ii) With regard to the Section 8 Existing Program, a community must show the location (CT or BNA) of its currently occupied family units by race/ethnicity. Points will be awarded if more than one-half of the minority assisted families occupy units in areas which have a lower percentage of minority population than that of the community as a whole.

A community with no minorities must show the extent to which its assisted housing is located outside areas of concentrations of low- and moderate-income persons. In order to receive points under this criteria, applicants should follow the process outlined in (i) and (ii) above, substituting low- and moderate-income persons and families for minority persons or families. Applicants addressing the first criterion must use a map indicating the location of all assisted housing and a narrative which indicates the number of units and the type of assisted housing. The map also must show the general location of low- and moderate-income households and minority households, giving the numbers and percentages for both.

To qualify as housing assistance provided, the units being claimed must be part of a project located outside minority or lower income concentrated areas which has, at a minimum, received a firm commitment from the funding agency.

(iii) Points also may be awarded for efforts which enable low- and moderate-income persons to remain in their neighborhood when such neighborhoods are experiencing revitalization and substantial displacement as a result of private reinvestment. Applicants requesting points under this criterion would not need to meet the requirements of (a) and (b) in order to receive points. Points will be awarded where more than one half of the families displaced were able to remain in their original neighborhood through the assistance of the applicant. Applicants must show that:

—The neighborhood experienced revitalization;
—The amount of displacement was substantial;
—Displacement was caused by private reinvestment;
—Low- and moderate-income persons were permitted to remain in the neighborhood as a result of action taken by the applicant.

If the community is inhabited predominantly by persons who are members of minority and/or low-income groups, points will be awarded where there is a balanced distribution of assisted housing throughout the community.

(b) 20 Points—Implementation of a HUD-approved New Horizons Fair Housing Assistance Project or a Fair Housing Strategy that is equivalent in scope to a New Horizons Project.

The applicant must demonstrate that it is implementing a HUD-approved New Horizons Fair Housing Assistance Project or demonstrate participation in a HUD-approved county/State/regional New Horizons Project; or that the applicant is implementing a fair housing strategy that is equivalent in scope to a New Horizons Project. If the applicant is implementing a New Horizons Project, it must include:

—The date it was approved (by HUD); and
—Those actions taken to implement the plan.

If the applicant is implementing an equivalent fair housing strategy, it must include:

—The strategy being implemented;
—Those actions taken to implement the strategy.

Please note that a fair housing strategy must include the four elements of a New Horizons Project in order to be considered equivalent in scope:

—Local compliance activities;
—Educational programs to enhance the clarity and understanding of the community's fair housing policy. For communities with few or no minorities, this should include publication in the surrounding communities of the applicant's policy of fair housing for minorities and the disabled;
—Assistance to minority families; and
—Special programs (e.g. utilization of Community Housing Resource Board (CHRB) Programs, efforts to encourage local realtors to enter into voluntary agreements to encourage equal access to financial institutions, etc.).

The fair housing strategy must include goals for each of the above elements. The date of adoption or development of the strategy should be indicated, as well as the date proposed activities will be or have been implemented.

(2) *Entrepreneurial Efforts and Local Equal Employment.* The Department encourages the use of minority contracting, although it will not be used as an evaluation factor in this NOFA.

(3) *Equal Opportunity Employment.* 10 points- Under this factor, the applicant must document that its percentage of minority, permanent full-time employees is greater than the percentage of minorities within the county or the community, whichever is higher. Applicants with no full-time employees may claim points based on part-time employment provided that they document that the only permanent employment is on a part-time basis.

4. Final Selection. The total points received by a project for all of the selection factors are added, and the project is ranked against all other projects from all applications, regardless of the problem areas in which the projects were rated. The highest ranked projects will be funded to the extent funds are available. Applicants will receive a single grant in the amount of

the project or projects applied for which were ranked high enough to be funded. In the case of ties at the funding line, HUD will use the following criteria in order to break ties:

—The project receiving the highest program impact rating will be funded;
—If tied projects have the same program impact rating, the project having the highest combined score on the needs factors will be funded;
—If tied projects have the same program impact ratings and equal needs factor scores, the project having the highest score on the percent of persons in poverty needs factor will be funded; and
—If tied projects have the same program impact ratings, equal needs factor scores, and an equal percent of persons in poverty needs factor score, the application having the most outstanding performance in fair housing and equal opportunity will be funded.

As soon as possible after the rating and ranking process has been completed, HUD will notify all applicants regarding their rating scores and funding status. Thereafter, applicants may contact HUD to discuss scores or any aspects of the selection process.

II. Application and Funding Award Process

A. Obtaining Applications

All nonentitled communities in New York State may obtain application kits through HUD's New York or Buffalo Offices. The addresses for HUD's Buffalo and New York offices are:

Department of Housing and Urban Development, Office of Community Planning and Development, Attention: Small Cities Coordinator, 26 Federal Plaza, New York, NY 10278–0068, Telephone (212) 264–6500

Department of Housing and Urban Development, Community Planning and Development Division, Attention: Small Cities Coordinator, 465 Main Street, Lafayette Court, Buffalo, NY 14203, Telephone (716) 846–5768

B. Submitting Applications

A final application must be submitted to HUD no later than March 13, 1996. A final application includes an original and two photocopies. In accordance with HUD's regulation at 24 CFR 570.443(a)(1), final applications may be mailed, and if they are received after the deadline, must be postmarked no later than midnight, March 13, 1996. If an application is hand-delivered to the New York or Buffalo Offices, the application must be delivered by 4:00 p.m. on the application deadline date. Applicants in New York, in the counties of Sullivan, Ulster, Putnam, and in non-participating jurisdictions in the urban counties of Dutchess, Orange, Rockland, Westchester, Nassau, and Suffolk should submit applications to the New York Office. All other nonentitled communities in New York State should submit their applications to the Buffalo Office. Applications must be submitted to the HUD office at the address listed above in Section A.

The above-stated application deadline is firm as to *date* and *hour*. In the interest of fairness to all competing applicants, the Department will treat as *ineligible for consideration* any application that is not received on, or postmarked by March 13, 1996. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays or other delivery-related problems.

C. The Application

1. Application Requirements

An application for the Small Cities Program CDBG Grants is made by the submission of:

(a) a completed HUD Form 4124, including HUD Forms 4124.1 through 4124.6 and all appropriate supporting material;

(b) a completed Standard Form 424;

(c) a signed copy of certifications required under the CDBG Program, including, but not limited to the Drug-Free Workplace Certification, and the Certification Regarding Lobbying pursuant to section 319 of the Department of Interior Appropriations Act for Fiscal Year 1990 (31 U.S.C. 1352), generally prohibiting use of appropriated funds, and, if applicable, Disclosure of Lobbying Activities (SF–LLL);

(d) Form HUD–2880, Applicant/Recipient Disclosure/Update Report, as required under subpart C of 24 CFR part 12, Accountability in the Provision of HUD Assistance; and if applicable,

(e) Abbreviated Consolidated Plan.

2. Streamlined Application Requirements for Certain Applicants

Applications submitted under the Fiscal Year 1995 NOFA but not selected for funding will automatically be reactivated for consideration under this NOFA, unless the applicant notifies the Department in writing by March 13, 1996 that the applicant does not wish the prior application to be considered in the Fiscal Year 1996 competition. Applications which are reactivated may be updated, amended or supplemented by the applicant provided that such amendment or supplementation is received no later than the due date for applications under this NOFA. If there is no significant change in the application involving new activities or alteration of proposed activities that will significantly change the scope, location or objectives of the proposed activities or beneficiaries, there will be no further citizen participation requirement to keep the application active for a succeeding round or competition.

Applicants with activities approved for funding under the Fiscal Year 1995 NOFA are eligible for additional funding for those activities under this NOFA. Applicants seeking additional funding for activities selected for funding under the Fiscal Year 1995 NOFA may notify the Department in writing by March 13, 1996 that they wish to seek additional funding for those activities. Such applicants may incorporate by reference the application materials in the applicant's Fiscal Year 1994 application, and may provide material to update or supplement the prior application.

All applicants are free to submit an entirely new application in place of a previous application should they so desire.

D. Funding Award Process

In accordance with section 102 of the Reform Act and HUD's regulation at 24 CFR 12.16, HUD will notify the public by notice published in the Federal Register of all award decisions made by HUD under this competition. In accordance with the requirements of section 102 of the Reform Act and HUD's regulations at 24 CFR part 12, HUD also will ensure that documentation and other information regarding each application submitted under this notice of funding availability is sufficient to indicate the basis upon which assistance was provided or denied. Additionally, in accordance with § 12.14(b) of these regulations, HUD will make this material available for public inspection for a period of five years, beginning not less than 30 calendar days after the date on which assistance is provided.

III. Technical Assistance

Prior to the application deadline, the Buffalo Office will provide technical assistance on request to individual applicants, including explaining and responding to questions regarding program regulations, and defining terms in the application package. In addition,

HUD will conduct informational meetings around the State to discuss the Small Cities Program, and will conduct application workshops in conjunction with these meetings. Please contact the Buffalo Office for further information regarding these meetings. Application kits will be available at these meetings, as well as from the HUD offices previously identified in Section II of this NOFA, and will also be available at the informational meetings. In order to ensure that the application deadline is met, it is strongly suggested that applicants begin preparing their applications immediately and not wait for the informational meetings.

In order to be considered for funding, complete applications (an original and two photocopies of the entire application) must be physically received by the appropriate HUD office on March 13, 1996 by 4:00 p.m. or, if mailed, postmarked no later than midnight, March 13, 1996. Applications must be delivered or mailed to the appropriate HUD office at the address indicated in Section II.

IV. Checklist of Application Submission Requirements

The following checklist is intended to aid applicants in determining whether their application is complete:

Application Completeness Checklist

Applicant: _____

Comprehensive Grant_____

Single Purpose Grant_____

Multiyear _____

Amount Requested $_____

1. Is amount of funds requested within established maximum?

2. Part I—Needs Description (HUD Form 4124.1).

(a) Single Purpose Grants

i—Program Area

_____Housing

_____Target Area

_____Non-target Area

_____Public Facilities

_____Economic Development (If an ''appropriate'' analysis is required but is not included, the application cannot be rated.)

ii—Is description of community development needs included in application?

(b) Comprehensive Grants

i—Have four design criteria been selected and discussed in application?

ii—Is description of community development needs included in application?

(c) Multiyear

i—Is the plan for two or three years?

ii—Does the action plan for each year present a viable project on its own?

3. Part II—Community Development Activities (HUD Form 4124.2).

(a) Has national objective been identified for each activity?

(b) Will 70 percent of grant funds primarily benefit low- and moderate-income persons? (If not, the application cannot be rated.)

4. Part III—Impact Description (HUD Form 4124.3).

5. Part IV—Outstanding Performance (HUD Form 4124.4).

6. Part V—Program Schedule (HUD Form 4124.5).

7. Part VI—Maps.

(a) Location of proposed activities. (Applicants must show the boundaries of the defined area or areas.)

(b) Location of areas with minorities by census tract. (If there are no minority areas, state so on the map.)

(c) Housing conditions if project involves housing rehabilitation. (Number and location of each standard and substandard unit should be clearly identified.)

8. (a) Is Standard Form 424 complete?

Yes No

(b) Is original signature on at least one copy?

Yes No

9. Is Certification signed with original signature?

Yes No

10. Has the abbreviated Consolidated Plan been prepared and submitted to HUD (or included with this application)?

11. Form HUD–2880, Application/Recipient Disclosure/Update Report, as required under subpart C of 24 CFR part 12.

V. Corrections to Deficient Applications

Under no circumstances will HUD accept from the applicant unsolicited information regarding the application after the application deadline has passed.

HUD may advise applicants of technical deficiencies in applications and permit them to be corrected. A technical deficiency would be an error or oversight which, if corrected, would not alter, in either a positive or negative fashion, the review and rating of the application. Examples of curable technical deficiencies would be a failure to submit the proper certifications or failure to submit an application containing an original signature by an authorized official. Situations not considered curable would be, for example, a failure to submit program impact descriptions.

HUD will notify applicants in writing of any curable technical deficiencies in applications. Applicants will have 14 calendar days from the date of HUD's correspondence to reply and correct the deficiency. If the deficiency is not corrected within this time period, HUD will reject the application as incomplete.

Applicants should note that if an abbreviated Consolidated Plan is not submitted, the failure to submit it in a timely manner is not considered a curable deficiency.

VI. Other Matters

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations at 24 CFR part 50, implementing section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) at the time of development of the FY 1993 NOFA for this program. Because no substantive programmatic changes have been made, that Finding remains applicable to this NOFA and is available for public inspection and copying between 7:30 am and 5:30 pm weekdays at the Office of the Rules Docket Clerk, 451 Seventh Street, SW, Room 10276, Washington, DC 20410.

Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that this NOFA will not have substantial, direct effects on States, on their political subdivisions, or on their relationship with the Federal Government, or on the distribution of power and responsibilities between them and other levels of government. While the NOFA will provide financial assistance to the Small Cities Program of New York State, none of its provisions will have an effect on the relationship between the Federal Government and New York State, or the State's political subdivisions.

Family

The General Counsel, as the Designated Official for Executive Order 12606, *The Family*, has determined that the policies announced in this NOFA would not have the potential for significant impact on family formation, maintenance and general well-being within the meaning of the Order. No significant change in existing HUD policies and programs will result from issuance of this NOFA, as those policies and programs relate to family concerns.

Accountability in the Provision of HUD Assistance

See Section I.A.4 of this NOFA.

Prohibition Against Lobbying Activities

The use of funds awarded under this NOFA is subject to the disclosure requirements and prohibitions of section 319 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990 (31 U.S.C. 1352) and the implementing regulations at 24 CFR part 87. These authorities prohibit recipients of Federal contracts, grants, or loans from using appropriated funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with a specific contract, grant, or loan. The prohibition also covers the awarding of contracts, grants, cooperative agreements, or loans unless the recipient has made an acceptable certification regarding lobbying. Under 24 CFR part 87, applicants, recipients, and subrecipients of assistance exceeding $100,000 must certify that no Federal funds have been or will be spent on lobbying activities in connection with the assistance.

Indian Housing Authorities (IHAs) established by an Indian tribe as a result of the exercise of the tribe's sovereign power are excluded from coverage of the Byrd Amendment, but IHAs established under State law are not excluded from the statute's coverage.

Prohibition Against Advance Information on Funding Decisions

Section 103 of the Reform Act proscribes the communication of certain information by HUD employees to persons not authorized to receive that information during the selection process for the award of assistance that entails a competition for its distribution. HUD's regulations implementing section 103 are codified at 24 CFR part 4. In accordance with the requirements of section 103, HUD employees involved in the review of applications and in the making of funding decisions under a competitive funding process are restrained by 24 CFR part 4 from providing advance information to any person (other than an authorized employee of HUD) concerning funding decisions, or from otherwise giving any applicant an unfair competitive advantage.

Persons who apply for assistance in this competition should confine their inquiries to the subject areas permitted by 24 CFR part 4. Applicants who have questions should contact the HUD Office of Ethics (202) 708–3815 (voice/TDD). (This is not a toll-free number.)

Dated: December 18, 1995.

Andrew Cuomo,

Assistant Secretary for Community Planning and Development.

[FR Doc. 95–31383 Filed 12–27–95; 8:45 am]

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The rules and proposed rules in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

Rules Going Into Effect Today

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Beef promotion and research:
- Federal regulatory review; published 11-28-95

Pork promotion, research, and consumer information; published 11-28-95

Soybean promotion, research, and consumer information:
- Federal regulatory review; published 11-28-95

PERSONNEL MANAGEMENT OFFICE

Prevailing rate systems; published 11-28-95

TRANSPORTATION DEPARTMENT

Coast Guard

Drawbridge operations:
- Massachusetts; published 11-28-95

Merchant marine officers and seamen:
- Commercial vessel personnel--
  - Chemical drug and alcohol testing programs; implementation dates delay; published 12-28-95

Organization, functions, and authority delegations:
- Fifth and Eighth District Marine Inspection and Captain of Port zone boundaries; published 12-28-95

Ports and waterways safety:
- Tampa Bay, FL; regulated navigation area; published 11-28-95

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness standards:
- Special conditions--
  - Hamilton Standard model 247F propeller; published 11-28-95

Authority citations revision; published 12-28-95

Comments Due Next Week

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Milk marketing orders:
- New York-New Jersey; comments due by 1-3-96; published 12-4-95

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Plant-related quarantine, domestic:
- Pine shoot beetle and raw pine materials; comments due by 1-2-96; published 11-3-95

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery management councils; hearings:
- Gulf of Mexico--
  - King and Spanish mackerel, cobia and dolphin; comments due by 1-5-96; published 12-5-95

COMMERCE DEPARTMENT

Patent and Trademark Office

Patent and trademark cases:
- Communications with agency; mailing addresses, etc.; comments due by 1-2-96; published 11-2-95

DEFENSE DEPARTMENT

Federal Acquisition Regulation (FAR):
- Contracting by negotiation; competitive range; comments due by 1-5-96; published 11-6-95
- Contractor responsibility determinations; use of commercial sources of supplier information
  - Correction; comments due by 1-2-96; published 12-7-95

ENERGY DEPARTMENT

Federal regulatory review
- Electric and hybrid vehicle and methane transportation research; comments due by 1-4-96; published 12-5-95
- Electric and hybrid vehicle and methane transportation research; CFR parts removed; comments due by 1-4-96; published 12-5-95

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Practice and procedure:
- Hydroelectric projects; relicensing procedures; rulemaking petition; comments due by 1-5-96; published 11-8-95

ENVIRONMENTAL PROTECTION AGENCY

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
- Deltamethrin; comments due by 1-2-96; published 11-30-95
- Imidacloprid; comments due by 1-5-96; published 12-6-95
- Tebuthiuron; comments due by 1-5-96; published 12-6-95

Superfund program:
- National oil and hazardous substances contingency plan--
  - National priorities list update; comments due by 1-2-96; published 11-30-95

FEDERAL COMMUNICATIONS COMMISSION

Radio stations; table of assignments:
- Kentucky; comments due by 1-5-96; published 11-24-95

GENERAL SERVICES ADMINISTRATION

Federal Acquisition Regulation (FAR):

Contractor responsibility determinations; use of commercial sources of supplier information

Correction; comments due by 1-2-96; published 12-7-95

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Food additives:

Polymers--

Pyromellitic dianhydride; comments due by 1-2-96; published 12-1-95

Medical devices:

Cigarettes and smokeless tobacco products; restriction of sale and distribution to protect children and adolescents

Brief statements on cigarette advertisements; findings; comments due by 1-2-96; published 12-1-95

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Community development block grants:

Community development work study program; comments due by 1-5-96; published 11-6-95

INTERIOR DEPARTMENT

Indian Affairs Bureau

Land and water:

Navajo partitioned land grazing regulations; comments due by 1-2-96; published 11-1-95

INTERIOR DEPARTMENT

Minerals Management Service

Royalty management:

Federal leases; natural gas valuation regulations; amendments; comments due by 1-5-96; published 11-6-95

INTERIOR DEPARTMENT

Surface Mining Reclamation and Enforcement Office

Permanent program and abandoned mine land reclamation plan submissions:

Illinois; comments due by 1-4-96; published 12-5-95

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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Contractor responsibility determinations; use of commercial sources of supplier information; comments due by 1-2-96; published 11-3-95

Correction; comments due by 1-2-96; published 12-7-95

NATIONAL CREDIT UNION ADMINISTRATION

Credit unions:

Organization and operations—

Supervisory committee audits and verifications; comments due by 1-2-96; published 11-2-95

POSTAL SERVICE

International Mail Manual:

International package consignment service implementation; comments due by 1-2-96; published 12-1-95

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Washington; comments due by 1-2-96; published 11-1-95

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Federal Aviation Administration

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Airbus; comments due by 1-2-96; published 11-3-95

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Eurocopter Deutschland GmbH; comments due by 1-2-96; published 11-2-95

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McDonnell Douglas; comments due by 1-2-96; published 11-3-95

Societe Nationale Industrielle Aerospatiale and Eurocopter France; comments due by 1-2-96; published 11-1-95

Societe Nationale Industrielle Aerospatiale et al.; comments due by 1-2-96; published 11-2-95

Class D airspace; comments due by 1-5-96; published 11-9-95

Class E airspace; comments due by 1-5-96; published 12-6-95

TRANSPORTATION DEPARTMENT

Federal Highway Administration

Right-of-way and environment:

Highway right-of-way programs administration; regulatory review and comment request; comments due by 1-5-96; published 11-6-95

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National Highway Traffic Safety Administration

Motor vehicle safety standards:

Fuel system integrity--

Compressed natural gas fuel containers; comments due by 1-2-96; published 11-16-95

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–523–6641. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as ''slip laws'') from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–2470).

H.R. 325/P.L. 104–70

To amend the Clean Air Act to provide for an optional provision for the reduction of work-related vehicle trips and miles travelled in ozone nonattainment areas designated as severe, and for other purposes. (Dec. 23, 1995; 109 Stat. 773)

H.R. 1240/P.L. 104–71

Sex Crimes Against Children Prevention Act of 1995 (Dec. 23, 1995; 109 Stat. 774)

S. 1465/P.L. 104–72

To extend au pair programs. (Dec. 23, 1995; 109 Stat. 776)

H.R. 1747/P.L. 104–73

Federally Supported Health Centers Assistance Act of 1995 (Dec. 26, 1995; 109 Stat. 777)

H.R. 2336/P.L. 104–74

To amend the Doug Barnard, Jr.—1996 Atlanta Centennial Olympic Games Commemorative Coin Act, and for other purposes. (Dec. 26, 1995; 109 Stat. 784)

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