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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

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3. The important elements of typical Federal Register documents.
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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 330

RIN 3206–AH26

Career Transition Assistance for Surplus and Displaced Federal Employees

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations to implement the President's memorandum of September 12, 1995, that requires Federal agencies to develop career transition assistance programs to help their employees affected by downsizing obtain other employment. The regulations require agencies to provide transition assistance services and give hiring priority to surplus and displaced employees.

DATES: Interim regulations are effective on December 29, 1995. Agencies will draft and effect their Agency Career Transition Assistance Plan, including provisions to give selection priority to their surplus and displaced employees, as soon as possible, but no later than February 29, 1996, unless an extension is requested and approved by OPM. A new program providing selection priority for displaced employees on an interagency basis—the Interagency Career Transition Assistance Plan—will go into effect on February 29, 1996, at which time the operation of the current OPM Interagency Placement Program will be suspended. These special plans will operate through September 30, 1999, unless further extended because of severe downsizing. Written comments will be considered if received no later than February 27, 1996.

ADDRESSES: Send or deliver written comments to Leonard R. Klein, Associate Director for Employment, Office of Personnel Management, Room 6F08, 1900 E Street NW., Washington, DC 20415–0001.

FOR FURTHER INFORMATION CONTACT: Diane Bohling or Ed McHugh, 202–606–0960, FAX 202–606–2329.

SUPPLEMENTARY INFORMATION: On September 12, 1995, the President issued a memorandum entitled ''Career Transition Assistance for Federal Employees'' that directs Federal agencies to establish career transition assistance programs to help their surplus and displaced workers find other jobs as the Federal Government undergoes downsizing and restructuring. As set forth in the memorandum, such programs are to be developed in partnership with labor and management, and follow guidance and regulations provided by the Office of Personnel Management (OPM).

OPM is issuing the following regulations which were developed in cooperation with representatives from the Interagency Advisory Group and employee unions. These regulations provide the framework for implementing the President's directive.

The goal of the Presidential directive is to maximize employment opportunities for displaced workers, both within and outside the Federal Government. Under these regulations, Federal agencies are required to draft and effect Agency Career Transition Assistance Plans as soon as possible, but no later than February 29, 1996 (unless an extension is requested and approved by OPM) to provide career transition services to their surplus and displaced employees, and give special selection priority to these workers. These regulations set minimum standards for these plans, which can be supplemented at the agency's discretion.

Agency plans will have three components: (1) Policies to provide their surplus and displaced employees with career transition services such as skills assessment, resume preparation, counselling and job search assistance; (2) policies and procedures for selecting their own well-qualified surplus or displaced agency employees who apply for agency vacancies in the local commuting area, before any other candidate from within or outside the agency; and (3) operation of the agency's Reemployment Priority List (RPL) under subpart B of 5 CFR 330. These plans will operate through September 30, 1999, unless further extended because of severe downsizing. Because the Department of Defense already has an effective program in operation to provide selection priority to surplus and displaced employees within the Department—the Priority Placement Program—the requirement described in 2 above does not apply to the Department of Defense. The Department of Defense is subject to the other elements of these regulations, and the Reemployment Priority List under Subpart B of 5 CFR 330, and its employees are eligible for the benefits provided by these programs.

Traditionally, the Federal Government has relied on referrals from centralized inventories as the mechanism to place surplus and displaced workers in jobs in other agencies. Although the program currently used to do this, the OPM Interagency Placement Program, is automated and provides quick and efficient referrals, it has placed very few workers. An OPM review of the system shows that candidates frequently decline job offers that come through the referral process or simply do not respond to job availability inquiries even though they had previously registered for such assistance. Many other displaced workers simply fail to register for the program.

Because of the severe downsizing expected over the next few years, the Presidential memorandum and these implementing regulations take a new approach to helping surplus and displaced workers find other jobs—individual employee empowerment. Workers affected by downsizing are given the tools and resources to seek out other Federal employment and the right to be hired when they apply and are well-qualified. Many experts have suggested that the key to successful career transition is individual initiative. If individual workers have the power to find, apply, and exercise selection priority for specific vacancies in which they themselves are interested, it is believed that this would motivate and reinforce an employee's self interest in finding other employment. The skills, resources, and initiative that employees develop in this process can be used equally to find Federal vacancies or jobs in the private sector. This latter aspect is particularly important since Federal

hiring is expected to be very limited in the foreseeable future.

During the expected period of severe downsizing, these regulations may restrict the flexibility that agencies have to hire candidates. Current statutory requirements, which include providing hiring preference to veterans, are not affected by these regulations. The regulations also do not affect existing collective bargaining agreements. The parties to such agreements, however, are free to renegotiate those provisions that may be affected. When current agreements expire, new agreements must adhere to these regulations. With the switch to the individual employee empowerment concept contained in these regulations, the Interagency Placement Program (IPP) is being suspended. Employees who are enrolled in the IPP at the time of its suspension (February 29, 1996) will be eligible for the Interagency Career Transition Assistance Plan (ICTAP), and will be notified of their rights and benefits under the new program. The new regulations also provide ICTAP eligibility to several other categories of employees who were formerly eligible for the Interagency Placement Program including employees separated because of a compensable injury whose compensation is subsequently terminated, disability retirees whose disability annuity has been terminated, certain Military Reserve and National Guard technicians who become eligible for a special disability annuity, and employees who were separated because they declined a transfer of function or directed reassignment to another commuting area. As a result, former subparts G and H which provided placement eligibility for these special categories of employees have been merged into the revised subpart G which is set forth in these regulations.

OPM will monitor Agency and Interagency Career Transition Assistance Plans, and will prepare periodic progress reports. OPM will make every effort to obtain data from agencies through the existing Central Personnel Data File. To assist agencies and employees in implementing Career Transition Assistance Plans, OPM's Workforce Restructuring Office has set up a clearinghouse containing both private sector and Federal career transition materials (call 202–606–0960 for additional information) and a special forum on OPM's MAINSTREET computer-based bulletin board to provide information and handle inquiries about the new regulations (with modem dial 202–606–4800 and select the Career Transition forum). OPM also has a cadre of experienced career transition specialists available for on-site assistance. Comprehensive information on worldwide Federal job opportunities is available from OPM by phone (912–757–3000; 912–744–2299 for TDD) or electronic bulletin board (912–757–3100).

Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking because it would be contrary to the public interest to delay access to benefits. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists to waive the delay in the effective date and make this amendment effective in less than 30 days. The delay in the effective date is being waived to give effect to the benefits extended by the amended provisions at the earliest practicable date.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only Federal employees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 330

Armed forces reserves, Government employees.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM is amending part 330 of title 5, Code of Federal Regulations, as follows:

PART 330—RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL)

1. The authority citation for part 330 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302; E.O. 10577, 3 CFR 1954–58 Comp., p. 218; § 330.102 also issued under 5 U.S.C. 3327; subpart B also issued under 5 U.S.C. 3315 and 8151; § 330.401 also issued under 5 U.S.C. 3310; subpart H also issued under 5 U.S.C. 8337(h) and 8457(b); subpart I also issued under sec. 4432 of Pub. Law 102–484.

2. Section 330.301 is revised to read as follows:

§ 330.301 Coverage.

(a) This subpart covers the Interagency Placement Program for employees who will be displaced or who have been separated from their Federal jobs as a result of agency work force reductions, compensable on-the-job injury, discontinued service retirement, or disability retirement. Agencies have the primary responsibility for providing placement assistance to their surplus and displaced employees, and for administering career transition assistance programs. OPM supplements these agency efforts by administering the Interagency Placement Program which gives surplus or displaced employees priority referral to positions in other agencies.

(b) The applicability of this subpart is suspended from February 29, 1996 through September 30, 1999. In the interim, placement assistance will be provided in accordance with subparts B, F, and G of this part. OPM may extend this date if it determines that the Federal Government is still experiencing an emergency downsizing situation.

3. Subpart F is redesignated as subpart J and a new subpart F is added to read as follows:

Subpart F—Agency Career Transition Assistance Plans (CTAP) for Local Surplus and Displaced Employees

Sec.

330.601 Purpose.
330.602 Agency plans.
330.603 Duration.
330.604 Definitions.
330.605 Eligibility.
330.606 Order of selection for filing vacancies from within the agency.
330.607 Agency notification responsibilities.
330.608 Application and selection.
330.609 Qualification reviews.
330.610 Reporting.
330.611 Oversight.

Authority: Presidential memorandum dated September 12, 1995, entitled ''Career Transition Assistance for Federal Employees''.

§ 330.601 Purpose.

(a) This subpart implements the President's memorandum of September 12, 1995, to establish agency career transition assistance plans for Federal employees during a period of severe Federal downsizing. It is the policy of the United States Government to provide services to help surplus and displaced Federal employees take charge of their own careers and find other job offers, either within the Federal Government or in the private sector.

(b) The regulations in this subpart set forth minimum criteria for agency career transition assistance plans. Consistent with the regulations, agencies may supplement these provisions to expand

career transition opportunities to their surplus and displaced workers at their discretion.

(c) Sections 330.602(a)(2) and 330.604 through 330.609 do not apply to the Department of Defense Priority Placement Program.

(d) The provisions in this subpart do not alter any existing negotiated agreements in effect as of December 29, 1995. New agreements will be subject to the provisions set forth in this part.

§ 330.602 Agency plans.

(a) Each agency will establish a career transition assistance plan (CTAP) to actively assist its surplus and displaced employees make effective transitions to other employment. Agencies will draft and effect their plans by February 29, 1996, unless an extension is requested and approved by OPM. A copy of the draft plan and any additional modified plans will be sent to OPM as approved by the agency/department head or deputy or undersecretary. An agency plan will include:

(1) Policies to provide career transition services to all surplus and displaced agency employees, including those in the excepted service and Senior Executive Service, which address the following:

(i) Types of career transition services to be provided by the agency;

(ii) Use of excused absence for employees to use the services and facilities;

(iii) Employee use of services or facilities after separation;

(iv) Training to be provided to employees, managers, supervisors, and union representatives on the use of services;

(v) Retraining to be provided to employees;

(vi) Access to services by employees, including those in field offices and remote sites and those with disabilities;

(vii) Availability of resource information on other forms of Federal, state, and local assistance which are available to support career transition for employees with disabilities; and

(viii) Role of employee assistance programs in providing services;

(2) Policies to provide special selection priority to well-qualified surplus or displaced agency employees who apply for agency vacancies in the local commuting area, before selecting any other candidate from either within or outside the agency, and agency procedures for reviewing qualification issues;

(3) Operation of the agency's Reemployment Priority-List under subpart B of 5 CFR part 330.

(b) To the extent practicable, agency CTAPs shall be developed in partnership with management and employees' union representatives.

§ 330.603 Duration.

This subpart will expire on September 30, 1999, unless the Office of Personnel Management extends the program based on its determination that the Federal Government is still experiencing an emergency downsizing situation.

§ 330.604 Definitions.

For purposes of this subpart:

(a) *Agency* means an Executive Department, a Government corporation, and an independent establishment as cited in 5 U.S.C. 105.

(b) *Displaced employee* means a current agency employee serving under an appointment in the competitive service, in tenure group I or II, who has received a specific reduction in force (RIF) separation notice.

(c) *Eligible employee* means a surplus or displaced employee who meets the conditions set forth in § 330.605(a).

(d) *Local commuting area* means the geographic area that usually constitutes one area for employment purposes as determined by the agency. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

(e) *Special selection priority* means the priority that eligible employees have for selection to vacancies over any other candidate.

(f) *Surplus employee* means a current agency employee serving under an appointment in the competitive service, in tenure group I or II, who has received a Certification of Expected Separation or other certification issued by the agency which identifies the employee as being in a surplus organization or occupation.

(g) *Vacancy* means a competitive service position lasting 90 days or more, including extensions, which the agency is filling, regardless of whether the agency issues a specific vacancy announcement.

(h) *Well-qualified employee* means an eligible employee who satisfies the criteria in either paragraphs (h)(1) or (h)(2) of this section as determined and consistently applied by the agency:

(1)(i) Meets the qualification standard and eligibility requirements for the position, including any medical qualifications, and minimum educational and experience requirements;

(ii) Meets all selective factors where applicable. Meets appropriate quality rating factor levels as determined by the agency. Selective and quality ranking factors cannot be so restrictive that they run counter to the goal of placing displaced employees. In the absence of selective and quality ranking factors, selecting officials will document the job-related reason(s) the eligible employee is or is not considered to be well qualified;

(iii) Is physically qualified, with reasonable accommodation where appropriate, to perform the essential duties of the position;

(iv) Meets any special qualifying condition(s) that OPM has approved for the position; and

(v) Is able to satisfactorily perform the duties of the position upon entry; or

(2) Is rated by the agency to be above minimally qualified candidates in accordance with the agency's specific selection process.

§ 330.605 Eligibility.

(a) To be eligible for the special selection priority, an individual must meet all of the following conditions:

(1) Is a surplus or displaced employee as defined in § 330.604(b) and (f);

(2) Has a current performance rating of record of at least fully successful or equivalent;

(3) Applies for a vacancy that is at or below the grade level from which the employee may be or is being separated, that does not have a greater promotion potential than the position from which the employee may be or is being separated;

(4) Occupies a position in the same local commuting area of the vacancy;

(5) Files an application for a specific vacancy within the timeframes established by the agency; and

(6) Is determined by the agency to be well-qualified for the specific vacancy.

(b) *Eligibility for special selection priority begins* on the date the agency issues the RIF separation notice, Certification of Expected Separation, or other certification identifying the employee as being in a surplus organization or occupation, whichever is earliest.

(c) *Eligibility expires on the earliest of:*

(1) The RIF separation date;

(2) Cancellation of the RIF separation notice, Certification of Expected Separation, or other certification identifying the employee as surplus; or

(3) When an eligible employee receives a career, career-conditional, or excepted appointment without time limit in any agency.

§ 330.606 Order of selection for filling vacancies from within the agency.

(a) Except as provided in paragraph (b) of this section, when filling a vacancy, an agency must select an

employee eligible under its Career Transition Assistance Plan before selecting any other candidate from within or outside the agency, unless doing so would cause another employee to be separated by reduction in force.

(b) The following actions are not covered under this subpart:

(1) Placement of an agency employee through reassignment, change to lower grade, or promotion, when no employees eligible under this subpart apply;

(2) Reemployment of a former agency employee exercising regulatory or statutory reemployment rights;

(3) Position changes resulting from reclassification actions;

(4) Temporary appointments of under 90 days (including extensions);

(5) Exchange of positions between or among agency employees, when the actions involve no increase in grade or promotion potential;

(6) Conversion of an employee on an excepted appointment which confers eligibility for noncompetitive conversion into the competitive service;

(7) Placement activities under part 351 of this chapter;

(8) Placement of an employee into a new position as a result of a reorganization, when the former position ceases to exist, and no actual vacancy results;

(9) Placements made under the Intergovernmental Personnel Act (IPA) as provided in part 334 of this chapter where they are for critical situations where the failure to make the assignment would substantially harm Federal interests, such as providing training for State takeover of a Federal program;

(10) The filling of a position through an excepted appointment;

(11) Details;

(12) Time-limited promotions of under 90 days;

(13) Noncompetitive movement of surplus or displaced employees;

(14) Movement of excepted service employees within an agency;

(15) A placement under 5 U.S.C. 8337 or 8451 to allow continued employment of an employee who has become unable to provide useful and efficient service in his or her current position because of a medical condition;

(16) A placement that is a ''reasonable offer'' as defined in 5 U.S.C. 8336(d) AND 8414(b);

(17) Career ladder promotions; and

(18) Recall of seasonal employees from nonpay status.

§ 330.607 Agency notification responsibilities.

(a) At the time it issues a specific RIF separation notice, Certification of Expected Separation, or other certification that identifies an employee as being likely to be separated by RIF, an agency must give each of its eligible employees information about the special selection priority available to them under the agency's Career Transition Assistance Plan.

(b) Agencies must take reasonable steps to ensure eligible employees are notified of all vacancies the agency is filling and what is required for them to be determined as well-qualified for the vacancies.

§ 330.608 Application and selection.

(a) *Application.* (1) To receive this special selection priority, an eligible employee must apply for a specific agency vacancy in the same local commuting area as the position the employee occupies within the prescribed time frames, attach the appropriate proof of eligibility as described in paragraph (a)(2) of the section, and be determined well-qualified by the agency for the specific vacancy.

(2) *Proof of eligibility.* Employees may submit the following as proof of eligibility for the special selection priority:

(i) RIF separation notice;

(ii) Certification of Expected Separation; or

(iii) Other agency certification identifying the employee as being in a surplus organization or occupation.

(b) *Selection.* An agency may decide the specific order of selection of its eligible employees within the provisions set forth in § 330.606(a) (e.g., the agency may decide to select displaced employees before surplus employees or may select surplus and/or displaced employees from within a particular component of the agency before selecting surplus and/or displaced employees from another component of the agency).

(c) An agency cannot select any other candidates from within or outside the agency if eligible agency employees are available for the vacancy or vacancies.

(d) If two or more eligible employees apply for a vacancy and are determined to be well-qualified, any of these eligible employees may be selected.

(e) If no eligible employees apply or none is deemed well-qualified, the agency may select another agency employee without regard to this subpart.

§ 330.609 Qualification reviews.

Agencies will ensure that a documented review is conducted whenever an otherwise eligible employee is determined to be not well-qualified.

§ 330.610 Reporting.

(a) Each agency shall submit an annual report covering each fiscal year activity under this subpart to OPM no later than December 31 of each year, beginning December 31, 1996.

(b) Each report will include the following:

(1) Number of employees identified by the agency as surplus and displaced during that fiscal year;

(2) Number of selections of eligible employees under the agency CTAP, or in the case of the Department of Defense, under its Priority Placement Program; and

(3) The name, title, and telephone number of the agency official responsible for the report.

(c) Reports should be addressed to: U.S. Office of Personnel Management, Workforce Restructuring Office, Employment Service, Room 6504, Washington, DC 20415.

§ 330.611 Oversight.

OPM provides advice and assistance to agencies in implementing their Career Transition Assistance Programs. OPM is also responsible for oversight of agency CTAPs and may conduct reviews of the plans at any time.

4. Subpart H is removed and reserved and subpart G is revised to read as follows:

Subpart G—Interagency Career Transition Assistance Plan for Displaced Employees

Sec.

330.701 Purpose
330.702 Duration.
330.703 Definitions.
330.704 Eligibility.
330.705 Order of selection in filling vacancies from outside the agency's workforce.
330.706 Agency notification requirements.
330.707 Application and selection.
330.708 Qualification reviews.
330.709 Reporting.
330.710 Oversight.

Authority: Presidential memorandum dated September 12, 1995, entitled ''Career Transition Assistance for Federal Employees''.

Subpart G—Interagency Career Transition Assistance Plan for Displaced Employees

§ 330.701 Purpose.

(a) This subpart implements the President's memorandum of September 12, 1995, to establish a special interagency career transition assistance program for Federal employees during a period of severe Federal downsizing.

(b) This subpart is effective February 29, 1996.

(c) Nothing in this subpart negates an agency's responsibilities for reemploying displaced employees as defined in § 330.703(b).

(d) The provisions of the Reemployment Priority List (RPL) set forth in subpart B of this part will remain in effect during the period of severe Federal downsizing. When an agency considers candidates from outside the agency for vacancies, registrants in an agency's RPL have priority for selection over employees eligible under this subpart in accordance with § 330.705.

§ 330.702 Duration.

This subpart will expire on September 30, 1999, unless the Office of Personnel Management extends the program based on its determination that the Federal Government is still experiencing an emergency downsizing situation.

§ 330.703 Definitions.

For the purposes of this subpart:

(a) *Agency* has the meaning given in § 330.604(a).

(b) *Displaced employee* means:

(1) A current or former career or career-conditional competitive service employee, in tenure group I or II, who has received a specific RIF separation notice;

(2) A former career or career-conditional employee who was separated because of a compensable injury as provided under the provisions of subchapter I of chapter 81 of title 5, United States Code, whose compensation has been terminated and whose former agency is unable to place the individual as required by part 353;

(3) A former career or career-conditional competitive service employee, in tenure group I or II, who retired with a disability under sections 8337 or 8451 of title 5, United States Code, whose disability annuity has been or is being terminated;

(4) A former career or career-conditional competitive service employee, in tenure group I or II, in receipt of a RIF separation notice who retired on the effective date of the reduction in force or under the discontinued service retirement option;

(5) A former career or career-conditional competitive service employee, in tenure group I or II, who is separated because he/she declined a transfer of function or directed reassignment to another commuting area; and

(6) A former Military Reserve Technician or National Guard Technician who is receiving a special disability retirement annuity from OPM under section 8337(h) or 8456 of title 5, United States Code.

(c) *Eligible employee* means a displaced employee who meets the conditions set forth in § 330.704(a).

(d) *Local commuting area* has the meaning given in § 330.604(d) of subpart F.

(e) *Special selection priority* has the meaning given in § 330.604(e) of subpart F.

(f) *Vacancy* has the meaning given in § 330.604(g) of subpart F.

(g) *Well-qualified employee* has the meaning given in § 330.604(h) of subpart F.

§ 330.704 Eligibility.

(a) To be eligible for the special selection priority, an individual must meet all of the following conditions:

(1) Is a displaced employee as defined in § 330.703(b).

(2) Has a current (or a last) performance rating of record of at least fully successful or equivalent (except for those eligible under § 330.703 (b)(2), (b)(3), and (b)(6));

(3) Applies for a vacancy at or below the grade level from which the employee has been or is being separated, that does not have a greater promotion potential than the position from which the employee has been or is being separated;

(4) Occupies or was displaced from a position in the same local commuting area of the vacancy;

(5) Files an application for a specific vacancy within the timeframes established by the agency; and

(6) Is determined by the agency to be well-qualified for the specific position.

(b) *Eligibility for special selection priority begins:*

(1) On the date the agency issues the RIF separation notice;

(2) On the date an agency certifies that it can not place an employee eligible under § 330.703(b)(2);

(3) On the date an employee eligible under § 330.703(b)(3) is notified that his or her disability annuity has been or is being terminated;

(4) On the date an employee under § 330.703(b)(5) declines the transfer of function or reassignment outside the commuting area; or

(5) On the date the National Guard Bureau or Military Department certifies that an employee under § 330.703(b)(6) has retired under 5 U.S.C. 8337(h) or 8456.

(c) *Eligibility expires:*

(1) 1 year after separation, except for those employees separated on or after September 12, 1995, and prior to February 29, 1996. For these employees, eligibility expires February 28, 1997;

(2) February 28, 1997, for those candidates who were registered in OPM's Interagency Placement Program (IPP) on or before February 15, 1996 and received a letter from OPM informing them of the demise of the IPP;

(3) 1 year after an agency certifies that an individual under § 330.703(b)(2) cannot be placed;

(4) 1 year after an individual under § 330.703(b)(3) receives notification that his/her disability annuity has been or will be terminated;

(5) When the employee receives a career, career-conditional, or excepted appointment without time limit in any agency;

(6) When the employee no longer meets the eligibility requirements set forth in paragraph (a) of this section (e.g., the employee is no longer being separated by RIF or separates by resignation or non-discontinued service retirement prior to the RIF effective date); or

(7) With a specific agency, upon declination of an official offer to the employee by that agency.

§ 330.705 Order of selection in filling vacancies from outside the agency's workforce.

(a) Except as provided in paragraph (c) of this section, when filling a vacancy from outside the agency's workforce an agency must select:

(1) Current or former agency employees eligible under the agency's Reemployment Priority List described in subpart B, then;

(2) At the agency's option, any other former employee displaced from the agency (under appropriate selection procedures), then;

(3) Current or former Federal employees displaced from other agencies eligible under this subpart; and then

(4) Any other candidate (under appropriate selection procedures) (optional).

(b) The following actions are subject to this order of selection and are covered under this subpart:

(1) Competitive appointments (e.g., from registers and direct-hire);

(2) Noncompetitive appointments (e.g., the types listed in part 315, subpart F, of this chapter);

(3) Movement between agencies (e.g., transfer), except as provided for in paragraph (b)(9) of this section or part 351 of this chapter;

(4) Reinstatements (except as provided for in paragraph (a)(2) of this section); and

(5) Time-limited appointments of 90 days or more to the competitive service.

(c) The following actions are not covered under this subpart:

(1) Selections from an agency's internal Career Transition Assistance Plan or Reemployment Priority List as described in subparts F and B of this part respectively or any other internal

agency movement of current agency employees;

(2) Appointments of 10 point veterans;

(3) Reemployment of former agency employees who have regulatory or statutory reemployment rights;

(4) Temporary appointments of under 90 days (including extensions);

(5) An action taken under part 351 of this chapter;

(6) The filling of a position by an excepted appointment;

(7) Conversions of employees on excepted appointments that confer eligibility for noncompetitive conversion into the competitive service; and

(8) Noncompetitive movement of displaced employees between agencies or employees moved as a result of reorganization or transfer of function.

(9) Placement of injured workers receiving workers' compensation benefits.

§ 330.706 Agency notification requirements.

(a) At the time it issues specific RIF separation notices, an agency must give its employees information about their eligibility for the special interagency selection priority.

(b) Agencies are required to report all vacancies to OPM when accepting applications from outside the agency (including applications for temporary positions lasting 90 or more days).

(c) In addition, agencies shall provide OPM an electronic file of complete vacancy announcements or recruiting bulletins for all positions reported.

(d) *Content.* Notice to OPM of job announcements must include the position title, tenure, location, pay plan and grade (or pay rate) of the vacant position; application deadline; and other information specified by OPM. In addition, agencies are required to provide OPM with an electronic file of the complete vacancy announcement or recruiting bulletin, which must include the qualifications required, equal opportunity provisions and, when applicable, veterans' preference provisions.

§ 330.707 Application and selection.

(a) *Application.* (1) To receive this special selection priority, eligible employees must apply directly to agencies for specific vacancies in the local commuting area within the prescribed time frames, attach the appropriate proof of eligibility as described in paragraph (a)(2) of this section, and be determined well-qualified by the agency for the specific position.

(2) *Proof of eligibility.* Employees may submit the following as proof of eligibility for the special selection priority:

(i) RIF separation notice;

(ii) Documentation showing that they were separated as a result of declining a transfer of function or directed reassignment to another commuting area;

(iii) Official certification from an agency stating that its agency cannot place an individual whose injury compensation has been or is being terminated;

(iv) Official notification from OPM that an individual's disability annuity has been or is being terminated; or

(v) Official notification from the Military Department or National Guard Bureau that the employee has retired under 5 U.S.C. 8337(h) or 8456.

(b) *Selection.* In making selections, an agency will adhere to the overall order of selection set forth in § 330.705. In addition, the following apply:

(1) An agency cannot select another candidate from outside the agency if eligible employees are available for the vacancy or vacancies.

(2) If two or more eligible employees apply for a vacancy and are determined to be well-qualified, any of these eligible employees may be selected.

(3) If no eligible employees apply or none is deemed well-qualified, the agency may select another candidate without regard to this subpart. (This flexibility does not apply to selections made from the agency's Reemployment Priority List as described in subpart B of this part.)

(c) An agency may select a candidate from its Career Transition Assistance Plan or Reemployment Priority List, as described in subparts F and B of this part respectively, or another current agency employee (if no eligible employees are available through its CTAP or RPL) at any time.

§ 330.708 Qualification reviews.

Agencies will ensure that a documented review is conducted whenever otherwise eligible employees are found to be not well-qualified.

§ 330.709 Reporting.

(a) Each agency shall submit an annual report covering each fiscal year activity under this subpart to OPM no later than December 31 of each year, beginning December 31, 1996.

(b) Each report will include data specified in § 330.610 of subpart F, and will also include information on:

(1) The number of eligible employees determined to be not well-qualified;

(2) The number of selections of eligible employees from other Federal agencies;

(3) The number of selections of other employees from other Federal agencies who are not displaced; and

(4) The number of selections from outside the Federal Government.

§ 330.710 Oversight.

OPM is responsible for oversight of the Interagency Career Transition Assistance Plan for Local Displaced Employees and may conduct reviews of agency activity at any time.

[FR Doc. 95–31382 Filed 12–28–95; 8:45 am]

BILLING CODE 6325–01–M

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5 CFR Parts 531, 550, 551, 610, and 630

RIN 3206–AH23

Format Changes in Compensation Regulations

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to revise the format of certain regulatory provisions in title 5, Code of Federal Regulations, relating to Federal employees' compensation so that all definitions of terms are listed in alphabetical order, consistent with the format preferred by the Office of the Federal Register.

EFFECTIVE DATE: December 29, 1995.

FOR FURTHER INFORMATION CONTACT: Mary Ann Ashford, (202) 606–2858 or FAX: (202) 606–0824.

SUPPLEMENTARY INFORMATION: Most of OPM's compensation regulations list definitional terms in alphabetical order without any letter or number designation, consistent with the format preferred by the Office of the Federal Register. However, in several sections of the regulations, letter or number designations continue to be used, and the definitions are not necessarily listed in alphabetical order. This format can make it difficult for the reader to readily locate a particular definition. OPM is revising these definitions so that all such listings are organized in alphabetical order without letter or number designations. With this change, all sections listing compensation definitions will have a consistent format, and it will be easier for users of the regulations to locate information. The regulations also include revisions in certain cross references made necessary because of the deletion of the former paragraph designations.

Because the changes do not involve rulemaking, the changes are final and become effective immediately.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they apply only to Federal agencies and employees.

List of Subjects in 5 CFR Parts 531, 550, 551, 610, and 630

Administrative practice and procedure, Claims, Government employees, Law enforcement officers, Holidays, and Wages.

Office of Personnel Management.

Lorraine A. Green,

Deputy Director.

Accordingly, OPM is amending parts 531, 550, 551, 610, and 630 of title 5 of the Code of Federal Regulations as follows:

PART 531—PAY UNDER THE GENERAL SCHEDULE

1. The authority citation for part 531 is revised to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316;

Subpart A also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101–509, 104 Stat. 1462; and E.O. 12786, 56 FR 67453, 3 CFR, 1991 Comp., p. 376;

Subpart B also issued under 5 U.S.C. 5303(g), 5333, 5334(a), and 7701(b)(2);

Subpart C also issued under 5 U.S.C. 5304, 5305, and 5553; sections 302 and 404 of FEPCA, Pub. L. 101–509, 104 Stat. 1462 and 1466; and section 3(7) of Pub. L. 102–378, 106 Stat. 1356;

Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2);

Subpart E also issued under 5 U.S.C. 5336;

Subpart F also issued under 5 U.S.C. 5304, 5305(g)(1), and 5553; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682.

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart A—Premium Pay

2. The authority citation for subpart A of part 550 is revised to read as follows:

Authority: 5 U.S.C. 5304 note, 5305 note, 5541(2)(iv), 5548, and 6101(c); E.O. 12748, 3 CFR, 1991 Comp., p. 316.

Subpart E—Pay From More Than One Position

3. The authority citation for subpart E of part 550 continues to read as follows:

Authority: 5 U.S.C. 5533.

Subpart F—Reduction-in-Retired-Pay Provision of the Dual Pay Statute

4. The authority citation for subpart F of part 550 continues to read as follows:

Authority: 5 U.S.C. 5532.

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

5. The authority citation for part 551 continues to read as follows:

Authority: 5 U.S.C. 5542(c); Sec. 4(f) of the Fair Labor Standards Act of 1938, as amended by Pub. L. 93–259, 88 Stat. 55 (29 U.S.C. 204f).

PART 610—HOURS OF DUTY

Subpart A—Weekly and Daily Scheduling of Work

6. The authority citation for subpart A of part 610 continues to read as follows:

Authority: 5 U.S.C. 6101; sec. 1(1) of E.O. 11228, 3 CFR, 1964–1965 Comp., p. 317.

Subpart B—Holidays

7. The authority citation for subpart B of part 610 continues to read as follows:

Authority: 5 U.S.C. 6101; sec. 1(1) of E.O. 11228, 3 CFR, 1964–1965 Comp., p. 317.

Subpart C—Administrative Dismissals of Daily, Hourly, and Piecework Employees

8. The authority citation for subpart C of part 610 continues to read as follows:

Authority: 5 U.S.C. 6104; E.O. 10552, 3 CFR, 1954–1958 Comp., p. 201.

PART 630—ABSENCE AND LEAVE

9. The authority citation for part 630 is revised to read as follows:

Authority: 5 U.S.C. 6311; § 630.301 also issued under Pub. L. 103–356, 108 Stat. 3410; § 630.303 also issued under 5 U.S.C. 6133(a); § § 630.306 and 630.308 also issued under 5 U.S.C. 6403(d)(3), Pub. L. 102–484, 106 Stat. 2722, and Pub. L. 103–337, 108 Stat. 2663; subpart D also issued under Pub. L. 103–329, 108 Stat. 2423; § 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H also issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332, Pub. L. 100–566, 102 Stat. 2834, and Pub. L. 103–103, 107 Stat. 1022; subpart J also issued under 5 U.S.C. 6362, Pub. L. 100–566, and Pub. L. 103–103; subpart K also issued under Pub. L. 102–25, 105 Stat. 92; and subpart L also issued under 5 U.S.C. 6387 and Pub. L. 103–3, 107 Stat. 23.

10. In §§ 531.202, 550.103, 550.502, 550.602, 551.102, 610.102, 610.303, 630.201, 630.601, 630.702 and 630.803 Remove designation from each definition and alphabetize. §§ 550.103, 550.171, 550.181, 550.185, 551.102, 551.103, 551.207, 610.202, 630.1202, 630.1211 [Amended].

11. In the list below, for each section indicated in the left column, remove the current reference and add the appropriate new reference, as indicated.

Sections	Remove	Add
550.103, definition of ''Law enforcement Officer''	''paragraph (t)(1), (2), or (3)''	''Paragraph (1), (2), or (3)''.
550.103, definition of ''Criminal investigator''	''paragraph (t) of this section''	''this section''.
550.171	550.103(o)	550.103.
550.181	550.103(u)	550.103.
550.185(a)	550.103(j)	550.103.
551.102, definition of ''Trainee''	''paragraph (d) of this section''	''this section''.
551.102, definition of ''Volunteer''	''paragraph (d) of this section''	''this section''.
551.103(b)(2)	551.102(f)	551.102.
551.103(b)(3)	551.102(g)	551.102.
551.207(b)	551.102(h)	551.102.
610.202(a)	610.102(c)	610.102
630.1202:		
Accrued leave	630.201(b)(1)	630.201.
Accumulated leave	630.201(b)(2)	630.201.
Administrative workweek	610.102(a)	610.102.
Regularly scheduled	610.102(g)	610.102.

Sections	Remove	Add
Regulatory scheduled administrative work-week	610.102(b)	610.102.
Tour of duty	610.102(h)	610.102.
630.1211(b)(1)	550.103(j)	550.103.

[FR Doc. 95–31381 Filed 12–28–95; 8:45 am]
BILLING CODE 6325–01–M

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Parts 2421, 2422, and 2429

Meaning of Terms as Used in This Subchapter; Representation Proceedings; Miscellaneous and General Requirements

AGENCY: Federal Labor Relations Authority.

ACTION: Final rules.

SUMMARY: The Federal Labor Relations Authority is amending its regulations governing representation proceedings and related provisions of other regulations that define or reference provisions of the representation regulations. These amendments will streamline the regulations and make the regulations more flexible in addressing the representational concerns of agencies, labor organizations, and individuals.

EFFECTIVE DATE: March 15, 1996.

FOR FURTHER INFORMATION CONTACT: Solly Thomas, Executive Director, Federal Labor Relations Authority, 607 14th Street, N.W., Washington, D.C. 20424–0001.

SUPPLEMENTARY INFORMATION:

Transition Rules and Regulations

Part 2422 of the regulations of the Federal Labor Relations Authority governs representation proceedings. Several terms involved in representation proceedings and used in Part 2422 are defined in certain sections of Part 2421 of the regulations of the Federal Labor Relations Authority. Additionally, there are references in Part 2429 of the regulations to specific sections in Part 2422. The current definitions and regulations will continue to govern all representation cases currently pending before the Federal Labor Relations Authority and those for which representation petitions are filed before March 15, 1996.

Notice and Opportunity to Comment

The Federal Labor Relations Authority proposed revision to its regulations regarding the meaning of certain terms used in Subchapter C (Part 2421) and representation proceedings (Part 2422). The proposed revision was for the purpose of streamlining the regulations and making the rules more flexible in addressing the representational concerns of agencies, labor organizations, and individuals. The proposed rules were published in the Federal Register for notice and comment on August 4, 1995. Customer views were solicited via a focus group meeting on August 29, 1995, and formal written comments were submitted by both agencies and labor organizations. All comments have been considered and many comments have prompted substantive revisions to the proposed rule. Any such revision is noted in the section-by-section analysis.

Section-by-Section Analysis

The following sectional analysis reflects revisions to the proposed changes to Part 2421—Meaning of Terms As Used in This Subchapter and Part 2422—Representation Proceedings. Following this analysis, conforming amendments to Part 2429—Miscellaneous and General Requirements are briefly explained.

Part 2421

Section 2421.11

The proposed definition of ''party'' has been narrowed to clarify that it does not include an individual in those instances referenced in subsection (b).

Section 2421.18

Final rule is same as proposed rule.

Section 2421.19

The order of reference to agency or activity has been reversed.

Section 2421.20

Final rule is same as proposed rule.

Section 2421.21

The proposed definition has been narrowed to clarify that those parties ''affected by issues raised'' in a petition include agencies, activities or labor organizations, but not bargaining units.

Section 2421.22

Final rule is same as proposed rule.

Part 2422

Section 2422.1

The final sentence in proposed subsection (a)(2) has been redesignated as subsection (3) to clarify that the showing of interest requirement pertains to all petitions filed under subsection (a). One commenter questioned whether any purposes for which petitions could have been filed have been eliminated by the consolidation of the former separate petitions into a single petition. As noted in the supplementary information accompanying the proposed rule, all functions of the former separate petitions are incorporated into the single petition.

Section 2422.2

Several commenters objected to the fact that, unlike the current regulations, the proposed regulation did not specify the purposes for which listed entities may file petitions. For example, under current practice, labor organizations can file petitions for eligibility for dues allotment; individuals can file petitions seeking an election to determine if employees in a unit no longer wish to be represented; agencies can file petitions based upon good faith doubt as to the continued appropriateness of a currently recognized labor organization to represent an existing unit; and, petitions to consolidate existing units can be filed by an agency, a labor organization, or both may file jointly. Agreeing with the commenters that the proposed regulation could lead to confusion, the final regulation has been revised to clarify which entities have standing to file which representation petitions. The order of reference to agency or activity has been reversed.

Section 2422.3

The order of reference to agency or activity in subsections (a)(1) and (a)(2) has been reversed.

Section 2422.4

The proposed rule offered two options concerning the service of supporting documentation. Under Option 1, supporting documentation, with the exception of showings of interest, would be served on all affected parties. Under Option 2, supporting documentation, with the exception of showings of interest, challenges to showings of

interest, challenges to the status of a labor organization, and objections to elections, would be served. Some commenters favored option 1, one commenter favored option 2, and one commenter disagreed with both options, recommending broader service of everything except challenges to the validity of a showing of interest, which would be served only upon the specific entities involved in the challenge. In response to comments concerning options 1 and 2, the final rule adopts a compromise position as a rule that is in the best interest of both the parties and the representation process. Under this rule all documentation, except showings of interest, material that supports challenges to the validity of the showing of interest, and documentation which supports election objections, will be served on all parties affected by issues raised in the filing. A superfluous introductory phrase which was included in both options of the proposed regulation has been deleted.

Section 2422.5

Final rule is same as proposed rule.

Section 2422.6

Comments have prompted several modifications to subsection (a) of the proposed regulation. First, one commenter noted that the phrase ''interested parties'' is vague and could be construed too broadly. Accordingly, the title of the subsection has been amended to simply refer to ''parties.'' Second, in response to a comment noting that parties affected by issues raised in a petition should be provided notification whether or not the filer identified them as being affected, and a comment noting that the obligations on the Regional Director are unclear, a second sentence has been added clarifying the obligations of the Regional Director vis-a-vis other parties. In subsection (b)(2) of the final rule, ''(s)'' was added to the word ''unit'' in recognition of the fact that more than one unit may be affected by issues raised in the petition.

Section 2422.7

In subsection (a) the phrase ''distribute copies of a notice'' has been inserted for additional clarity between the phrase ''and/or'' and the word ''in.'' For the same reasons referenced in the preceding section, the phrase ''interested parties'' has been deleted from the final rule.

Section 2422.8

One commenter noted that as drafted, the proposed regulation inferred in subsection (a) that cross-petitions could be filed only for the purpose of seeking an election. The subsection has been revised to correct this misimpression. Several commenters objected to subsection (b) of the proposed regulation permitting intervention and cross petitions to be filed until the close of the hearing. Recognizing that such belated filings could be disruptive to the representation process, the final rule revises the subsection to require, absent a showing of good cause, that such filings be submitted before the hearing opens. Also in subsection (b), the phrase ''and/or filed with and submitted to'' was changed in the final rule to ''and filed with either.'' In subsection (d), the word ''intervention'' has been deleted from the title and the phrase ''a party'' has been substituted for the phrase ''an intervenor.'' Lastly, in response to comment, proposed subsection (e) has been subdivided into two separate subsections. The revised and final subsection (e) provides the circumstances under which an employing agency will be considered a party; subsection (f) indicates the evidence an agency or activity must submit to intervene in a representation proceeding.

Section 2422.9

Final rule is same as proposed rule.

Section 2422.10

For consistency with other provisions of the rules, the phrase ''submitted to'' is changed in subsection (b) of the final rule to the phrase ''filed with.'' Subsection (c) of the proposed rule has been revised to bring it into conformity with the revisions made to section 2422.8(b). As a result, challenges to the validity of a showing of interest, like requests to intervene and cross-petitions, must, absent good cause, be filed before the hearing opens.

Section 2422.11

Subsection (b) of the proposed rule has been revised to bring it into conformity with the revisions made to section 2422.8(b) and section 2422.10(c). Accordingly, challenges to the status of a labor organization, like requests to intervene, cross-petitions, and validity challenges, must, absent good cause, be filed before the hearing opens.

Section 2422.12

The second sentence in subsection (b) has been broadened to clarify that the certification bar applies during the statutory period of agency head review referenced in subsection (c). The phrase ''signed and dated'' or ''has been signed and dated'' in subsections (b),(d), and (e), has been changed to ''is in effect.'' As proposed, the regulations conditioned the various bars on the presence of a ''signed and dated'' agreement and did not take into account that an agreement can take effect through methods other than execution, e.g., 5 U.S.C. 7114(c)(3). For the same reason, the phrase ''and signed'' has been deleted from subsection (g). Also in subsection (g) the phrase ''more than,'' before the phrase ''sixty (60) days,'' has been changed in the final rule to ''prior to,'' in order to clarify that the referenced 60 day time period does not apply to the duration of the extension. Subsection (e) has been modified to apply only to situations where the collective bargaining agreement has a term of more than three (3) years. The word ''days'' after the number ''(105)'' has also been deleted from subsection (e). One commenter noted that unlike the prior regulations, the revised rules do not provide specific guidance concerning the timeliness of petitions seeking to consolidate bargaining units. The general guidance concerning timeliness, contained in various subsections within this section of the final rules, will apply, as appropriate, in consolidation situations.

Section 2422.13

Final rule is same as proposed rule.

Section 2422.14

One commenter questioned whether the reference in proposed subsection (a) to ''another petition'' referred to another petition being filed by the same party or to a petition filed by any other party. The phrase is intended to refer to the latter, i.e., no petition, regardless of who filed it, would be considered timely during the period in question. Also in subsection (a), the phrase ''agency or'' has been added in the final rule before the word ''activity,'' for consistency of reference with other parts of the rule. Another commenter noted the inconsistency between proposed subsections (b) and (c). In response to this comment, the final rule amends subsection (b) to treat petitioners seeking an election somewhat like the proposed rule treated incumbents, i.e., petitions to represent the same unit, or a subdivision thereof, are prohibited for 6 months if not withdrawn within the time constraints described in subsection (b). However, the final rule does not treat withdrawals by petitioners the same as withdrawals by incumbents. In the former situation, the purpose of the bar is to discourage an election petitioner's dilatory withdrawal because such action will inconvenience all concerned. In the latter, the purpose of

the bar is to prevent an incumbent from totally avoiding the possible effect of a bar by withdrawing prior to an election. As a result, unlike a petitioner seeking an election, an incumbent may not avoid the effect of an election bar by filing a timely withdrawal. The titles to subsection (b) and (c) have been abbreviated.

Section 2422.15

One commenter noted that by locating the cooperation requirement as a subsection in a section addressing the duty to furnish information, the regulation suggested that providing information was the primary component of the cooperation obligation. Agreeing with this point, the title of the section has been broadened and proposed subsection (c) has been rewritten to specifically articulate the duty of all parties to cooperate.

Section 2422.16

One commenter suggested that the ''method of election,'' i.e., typically mail or manual balloting, be listed as a procedural determination that the Regional Director could make. This suggestion has been incorporated into subsection (b) of the final rule. The word ''an'' has been deleted before the word ''Election'' in subsection (b) of the final rule. In subsection (c)(2) the word ''the'' before the phrase ''unit appropriateness'' has been omitted from the final rule. A minor punctuation change has been made in subsection (c) of the final rule.

Section 2422.17

The title of the section has been expanded to include a reference to the prehearing conference. One commenter noted that the section's use of the phrase ''employees and interested parties'' was vague and could be construed too broadly. Accordingly, subsection (b) has been revised to refer to ''affected parties.'' It was also noted that the notice of hearing does not identify issues or establish prehearing dates; as a result, the final sentence in subsection (b) has been added to reflect that notice of these matters will be separate. The revisions to subsection (c) make it consistent with the changes made to final subsection (b). A commenter noted that the title and body of proposed subsection (d) were inconsistent. The title and body of subsection (d) have been revised to indicate that there is no interlocutory appeal of a Regional Director's decision of whether to hold a hearing.

Section 2422.18

Final rule is same as proposed rule.

Section 2422.19

Subsection (c)(2) of proposed rule has been deleted to bring this section of the final rule into conformity with revisions made to section 2422.8(b).

Section 2422.20

In subsection (b) of the final rule the word ''copy'' is changed for clarification purposes to ''copies,'' and the word ''between'' is changed to ''between/among.''

Section 2422.21

Subsection (a) of this proposed section offered two options. Option 1 followed current regulations. Option 2 specifically authorized a Hearing Officer to make recommendations on the record on any issue. All commenters addressing this section favored option 2. Record recommendations would advise the parties of the Hearing Officer's views and could facilitate resolution of questions under consideration. Moreover, the Hearing Officer's recommendations could be helpful to the Regional Director in resolving certain issues. As a result, the final rule incorporates option 2. The final rule includes minor changes, substituting an ''and'' for a comma and substituting the word ''Duties'' for the word ''Duty'' in the title of subsection (a).

Section 2422.22

Final rule is same as proposed rule.

Section 2422.23

Subsection (a) has been revised to clarify that the Regional Director will decide whether to conduct or supervise the election and agencies are obliged to assist as specified. In subsection (b) of the final rule the word ''distributed'' has been added between the phrases ''and/or'' and ''in a manner,'' for the sake of consistency with a similar change in § 2422.7(a) of the final rule. In subsection (e), the word ''procedures,'' which was inadvertently included, has been deleted, and the word ''with'' has been substituted for the word ''to'' before the phrase ''the Authority.'' The final rule reframes subsection (h)(2) & (3) in positive terminology to reflect who can, rather than who cannot, serve as an observer. Subsection (h)(2)(i) has been revised to incorporate the statutory terminology contained in 5 U.S.C. 7103(a) (10) & (11). One commenter recommended that proposed subsection (h)(3) be revised to prevent union officials from acting as observers for labor organizations. This suggestions has been adopted in part and is reflected in subsection (h)(3)(ii).

Section 2422.24

In subsection (b) of the final rule, parentheses were placed around the letter ''s'' in the word ''ballots'' in the phrase ''unresolved challenged ballots,'' for the sake of consistency with other references to ballots in the subsection.

Section 2422.25

A minor grammatical change was made in subsection (b) of the final rule.

Section 2422.26

Subsection (a) has been clarified to reflect that only a party may file an objection to an election. One commenter objected to the requirement that objections must be ''received by'' the Regional Director within 5 days of the furnishing of the tally of ballots and recommended that the Authority retain the ''postmarked by'' rule. The final rule adopts the ''received by'' rule as preferable because it allows the Regional Director to certify election results after a fixed period if no objections are lodged. The ''postmark'' rule would require the Regional Director to delay acting for some uncertain period of time after 5 days have passed in order to provide timely posted objections—if there are any—an opportunity to arrive. Note that pursuant to 5 CFR 2429.21(a), intermediate Saturdays, Sundays, and Federal legal holidays are excluded from the 5-day period.

Section 2422.27

The order of subsections (c) and (d) has been reversed for clarification purposes. One commenter questioned whether the opportunity for a hearing, provided for under the previous regulations, would continue. The revised final regulations do not discontinue the opportunity for a hearing on challenged ballots.

Section 2422.28

Final rule is same as proposed rule.

Section 2422.29

Final rule is same as proposed rule.

Section 2422.30

One commenter noted that as proposed, subsection (c)—in conjunction with sections 2422.8(b), 2422.10(c), and 2422.11(c)—extends the time period for filing interventions, cross petitions, and challenges until after the Regional Director has directed an election or approved an election agreement. This would be disruptive of the representation process. Accordingly, the final subsection (c) has been revised to include directing an election or approving an election agreement.

Section 2422.31

Language in the current regulation (5 CFR 2422.17(b)) has been added to subsection (b) of the final rule. Subsection (c) of the proposed regulation offered two options for when the Authority would grant an application for revi ew of a Regional Director's decision. Option 1 retained the current grounds for review with minor editorial changes. Option 2 specified that, in addition to satisfying one or more of those grounds, a party seeking review was obliged to assert and establish that the Authority's decision would have a substantial impact on labor-management relations law unless the Authority determines, in its discretion, that extraordinary circumstances exist to grant review. Option 1 was the overwhelming preference of those commenting on this subsection. The final rule adopts a modified version of option 1. An error in phraseology in subsection (f) has been corrected.

Section 2422.32

An incorrect reference in proposed subsection (a)(2) has been revised to refer to section 2422.31(e). The ''Revocations'' subsection, mistakenly identified as subsection (c), has been redesignated as subsection (b).

Section 2422.33

Final rule is same as proposed rule.

Section 2422.34

Several commenters noted and objected to subsection (a) of the proposed regulation changing current law by requiring the fulfillment of representational and bargaining obligations during periods when there is a ''question concerning representation.'' The commenters are correct that this subsection is, in some respects, a change from current law. This revision is intended to allow more flexibility during such periods through the exercise of bargaining and representational obligations. As such, the modification of the law enhances both government efficiency and federal sector labor relations. Proposed subsection (b) has been amended by adding statutory references which define the term ''employee'' and provide for which employees may be included within a unit. The inclusion of this phrase is intended to clarify that subsection (b) only trumps subsection (a) to the extent that subsection (b) allows parties to take action based on unit status of individuals.

Part 2429

Changes to Part 2429 are required as a result of the different section numbers in the revised Part 2422.

Section 2429.21

In subsection (a), in discussing how time will be computed in various bar situations, there are two references to sections 2422.3 (c) and (d). In the revised regulations, the bars to which this section refers will be located in section 2422.12 (c), (d), (e), and (f). In subsection (b), the filing of a representation petition is listed as an exception to the ''postmark date'' rule and reference is made to section 2422.2. Because the revised regulations have numerous sections dealing with such filings, the reference is changed to Part 2422.

Section 2429.22

The revised regulations address applications for review of a Regional Director Decision and Order in section 2422.31. Accordingly, the reference to section 2422.17 is changed to section 2422.31.

List of Subjects

5 CFR Part 2421

Government employees, Labor-management relations.

5 CFR Part 2422

Administrative practice and procedure, Government employees, Labor unions.

5 CFR Part 2429

Administrative practice and procedure, Government employees, Labor-management relations.

For the reasons set forth in the preamble, the Federal Labor Relations Authority amends Parts 2421, 2422, and 2429 of its regulations as follows:

PART 2421—MEANING OF TERMS AS USED IN THIS SUBCHAPTER

1. The authority citation for Part 2421 continues to read as follows:

Authority: 5 U.S.C. 7134.

2. Section 2421.11 is revised to read as follows:

§ 2421.11 Party.

Party means:

(a) Any labor organization, employing agency or activity or individual filing a charge, petition, or request;

(b) Any labor organization or agency or activity

(1) Named as

(i) A charged party in a charge,

(ii) A respondent in a complaint, or

(iii) An employing agency or activity or an incumbent labor organization in a petition;

(2) Whose intervention in a proceeding has been permitted or directed by the Authority; or

(3) Who participated as a party

(i) In a matter that was decided by an agency head under 5 U.S.C. 7117, or

(ii) In a matter where the award of an arbitrator was issued; and

(c) The General Counsel, or the General Counsel's designated representative, in appropriate proceedings.

3. Sections 2421.18 through 2421.22 are added to read as follows:

§ 2421.18 Petitioner.

Petitioner means the party filing a petition under Part 2422 of this Subchapter.

§ 2421.19 Eligibility period.

Eligibility period means the payroll period during which an employee must be in an employment status with an agency or activity in order to be eligible to vote in a representation election under Part 2422 of this Subchapter.

§ 2421.20 Election agreement.

Election agreement means an agreement under Part 2422 of this Subchapter signed by all the parties, and approved by the Regional Director, concerning the details and procedures of a representation election in an appropriate unit.

§ 2421.21 Affected by issues raised.

The phrase *affected by issues raised,* as used in Part 2422, should be construed broadly to include parties and other labor organizations, or agencies or activities that have a connection to employees affected by, or questions presented in, a proceeding.

§ 2421.22 Determinative challenged ballots.

Determinative challenged ballots are challenges that are unresolved prior to the tally and sufficient in number after the tally to affect the results of the election.

4. Part 2422 is revised to read as follows:

PART 2422—REPRESENTATION PROCEEDINGS

Sec.
2422.1 Purposes of a petition.
2422.2 Standing to file a petition.
2422.3 Contents of a petition.
2422.4 Service requirements.
2422.5 Filing petitions.
2422.6 Notification of filing.
2422.7 Posting notice of filing of a petition.
2422.8 Intervention and cross-petitions.

2422.9 Adequacy of showing of interest.
2422.10 Validity of showing of interest.
2422.11 Challenge to the status of a labor organization.
2422.12 Timeliness of petitions seeking an election.
2422.13 Resolution of issues raised by a petition.
2422.14 Effect of withdrawal/dismissal.
2422.15 Duty to furnish information and cooperate.
2422.16 Election agreements or directed elections.
2422.17 Notice of hearing and prehearing conference.
2422.18 Hearing Procedures.
2422.19 Motions.
2422.20 Rights of parties at a hearing.
2422.21 Duties and powers of the Hearing Officer.
2422.22 Objections to the conduct of the hearing.
2422.23 Election procedures.
2422.24 Challenged ballots.
2422.25 Tally of ballots.
2422.26 Objections to the election.
2422.27 Determinative challenged ballots and objections.
2422.28 Runoff elections.
2422.29 Inconclusive elections.
2422.30 Regional Director investigations, notices of hearings, actions and Decisions and Orders.
2422.31 Application for review of a Regional Director Decision and Order.
2422.32 Certifications and revocations.
2422.33 Relief obtainable under Part 2423.
2422.34 Rights and obligations during the pendency of representation proceedings.

Authority: 5 U.S.C. 7134.

§ 2422.1 Purposes of a petition.

A petition may be filed for the following purposes:

(a) *Elections or Eligibility for dues allotment.* To request:

(1) (i) An election to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, and/or

(ii) A determination of eligibility for dues allotment in an appropriate unit without an exclusive representative; or

(2) an election to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative.

(3) Petitions under this subsection must be accompanied by an appropriate showing of interest.

(b) *Clarification or Amendment.* To clarify, and/or amend:

(1) A recognition or certification then in effect; and/or

(2) Any other matter relating to representation.

(c) *Consolidation.* To consolidate two or more units, with or without an election, in an agency and for which a labor organization is the exclusive representative.

§ 2422.2 Standing to file a petition.

A representation petition may be filed by: an individual; a labor organization; two or more labor organizations acting as a joint-petitioner; an individual acting on behalf of any employee(s); an agency or activity; or a combination of the above: *Provided, however,* that

(a) only a labor organization has standing to file a petition pursuant to section 2422.1(a)(1);

(b) only an individual has standing to file a petition pursuant to section 2422.1(a)(2); and

(c) only an agency or a labor organization may file a petition pursuant to section 2422.1(b) or (c).

§ 2422.3 Contents of a petition.

(a) *What to file.* A petition must be filed on a form prescribed by the Authority and contain the following information:

(1) The name and mailing address for each agency or activity affected by issues raised in the petition, including street number, city, state and zip code.

(2) The name, mailing address and work telephone number of the contact person for each agency or activity affected by issues raised in the petition.

(3) The name and mailing address for each labor organization affected by issues raised in the petition, including street number, city, state and zip code. If a labor organization is affiliated with a national organization, the local designation and the national affiliation should both be included. If a labor organization is an exclusive representative of any of the employees affected by issues raised in the petition, the date of the recognition or certification and the date any collective bargaining agreement covering the unit will expire or when the most recent agreement did expire should be included, if known.

(4) The name, mailing address and work telephone number of the contact person for each labor organization affected by issues raised in the petition.

(5) The name and mailing address for the petitioner, including street number, city, state and zip code. If a labor organization petitioner is affiliated with a national organization, the local designation and the national affiliation should both be included.

(6) A description of the unit(s) affected by issues raised in the petition. The description should generally indicate the geographic locations and the classifications of the employees included (or sought to be included) in, and excluded (or sought to be excluded) from, the unit.

(7) The approximate number of employees in the unit(s) affected by issues raised in the petition.

(8) A clear and concise statement of the issues raised by the petition and the results the petitioner seeks.

(9) A declaration by the person signing the petition, under the penalties of the Criminal Code (18 U.S.C. 1001), that the contents of the petition are true and correct to the best of the person's knowledge and belief.

(10) The signature, title, mailing address and telephone number of the person filing the petition.

(b) *Compliance with 5 U.S.C. 7111(e).* A labor organization/petitioner complies with 5 U.S.C. 7111(e) by submitting to the agency or activity and to the Department of Labor a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives. By signing the petition form, the labor organization/petitioner certifies that it has submitted these documents to the activity or agency and to the Department of Labor.

(c) *Showing of interest supporting a representation petition.* When filing a petition requiring a showing of interest, the petitioner must:

(1) So indicate on the petition form;

(2) Submit with the petition a showing of interest of not less than thirty percent (30%) of the employees in the unit involved in the petition; and

(3) Include an alphabetical list of the names constituting the showing of interest.

(d) *Petition seeking dues allotment.* When there is no exclusive representative, a petition seeking certification for dues allotment shall be accompanied by a showing of membership in the petitioner of not less than ten percent (10%) of the employees in the unit claimed to be appropriate. An alphabetical list of names constituting the showing of membership must be submitted.

§ 2422.4 Service requirements.

Every petition, motion, brief, request, challenge, written objection, or application for review shall be served on all parties affected by issues raised in the filing. The service shall include all documentation in support thereof, with the exception of a showing of interest, evidence supporting challenges to the validity of a showing of interest, and evidence supporting objections to an election. The filer must submit a written statement of service to the Regional Director.

§ 2422.5 Filing petitions.

(a) *Where to file.* Petitions must be filed with the Regional Director for the

region in which the unit or employee(s) affected by issues raised in the petition are located. If the unit(s) or employees are located in two or more regions of the Authority, the petitions must be filed with the Regional Director for the region in which the headquarters of the agency or activity is located.

(b) *Number of copies.* An original and two (2) copies of the petition and the accompanying material must be filed with the Regional Director.

(c) *Date of filing.* A petition is filed when it is received by the appropriate Regional Director.

§ 2422.6 Notification of filing.

(a) *Notification to parties.* After a petition is filed, the Regional Director will notify any labor organization, agency or activity that the parties have identified as being affected by issues raised by the petition, that a petition has been filed with the Regional Director. The Regional Director will also make reasonable efforts to identify and notify any other party affected by the issues raised by the petition.

(b) *Contents of the notification.* The notification will inform the labor organization, agency or activity of:

(1) The name of the petitioner;

(2) The description of the unit(s) or employees affected by issues raised in the petition; and,

(3) A statement that all affected parties should advise the Regional Director in writing of their interest in the issues raised in the petition.

§ 2422.7 Posting notice of filing of a petition.

(a) *Posting notice of petition.* When appropriate, the Regional Director, after the filing of a representation petition, will direct the agency or activity to post copies of a notice to all employees in places where notices are normally posted for the employees affected by issues raised in the petition and/or distribute copies of a notice in a manner by which notices are normally distributed.

(b) *Contents of notice.* The notice shall advise affected employees about the petition.

(c) *Duration of notice.* The notice should be conspicuously posted for a period of ten (10) days and not be altered, defaced, or covered by other material.

§ 2422.8 Intervention and cross-petitions.

(a) *Cross-petitions.* A cross-petition is a petition which involves any employees in a unit covered by a pending representation petition. Cross-petitions must be filed in accordance with this subpart.

(b) *Intervention requests and cross-petitions.* A request to intervene and a cross-petition, accompanied by any necessary showing of interest, must be submitted in writing and filed with either the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension. If no hearing is held, a request to intervene and a cross-petition must be filed prior to action being taken pursuant to § 2422.30.

(c) *Labor organization intervention requests.* Except for incumbent intervenors, a labor organization seeking to intervene shall submit a statement that it has complied with 5 U.S.C. 7111(e) and one of the following:

(1) A showing of interest of ten percent (10%) or more of the employees in the unit covered by a petition seeking an election, with an alphabetical list of the names of the employees constituting the showing of interest; or

(2) A current or recently expired collective bargaining agreement covering any of the employees in the unit affected by issues raised in the petition; or

(3) Evidence that it is or was, prior to a reorganization, the recognized or certified exclusive representative of any of the employees affected by issues raised in the petition.

(d) *Incumbent.* An incumbent exclusive representative, without regard to the requirements of paragraph (c) of this section, will be considered a party in any representation proceeding raising issues that affect employees the incumbent represents, unless it serves the Regional Director with a written disclaimer of any representation interest in the claimed unit.

(e) *Employing agency.* An agency or activity will be considered a party if any of its employees are affected by issues raised in the petition.

(f) *Agency or activity intervention.* An agency or activity seeking to intervene in any representation proceeding must submit evidence that one or more employees of the agency or activity may be affected by issues raised in the petition.

§ 2422.9 Adequacy of showing of interest.

(a) *Adequacy.* Adequacy of a showing of interest refers to the percentage of employees in the unit involved as required by §§ 2422.3 (c) and (d) and 2422.8(c)(1).

(b) *Regional Director investigation and Decision and Order.* The Regional Director will conduct such investigation as deemed appropriate. A Regional Director's determination that the showing of interest is adequate is final and binding and not subject to collateral attack at a representation hearing or on appeal to the Authority. If the Regional Director determines that a showing of interest is inadequate, the Regional Director will issue a Decision and Order dismissing the petition, or denying a request for intervention.

§ 2422.10 Validity of showing of interest.

(a) *Validity.* Validity questions are raised by challenges to a showing of interest on grounds other than adequacy.

(b) *Validity challenge.* The Regional Director or any party may challenge the validity of a showing of interest.

(c) *When and where validity challenges may be filed.* Party challenges to the validity of a showing of interest must be in writing and filed with the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension. If no hearing is held, challenges to the validity of a showing of interest must be filed prior to action being taken pursuant to § 2422.30.

(d) *Contents of validity challenges.* Challenges to the validity of a showing of interest must be supported with evidence.

(e) *Regional Director investigation and Decision and Order.* The Regional Director will conduct such investigation as deemed appropriate. The Regional Director's determination that a showing of interest is valid is final and binding and is not subject to collateral attack or appeal to the Authority. If the Regional Director finds that the showing of interest is not valid, the Regional Director will issue a Decision and Order dismissing the petition or denying the request to intervene.

§ 2422.11 Challenge to the status of a labor organization.

(a) *Basis of challenge to labor organization status.* The only basis on which a challenge to the status of a labor organization may be made is compliance with 5 U.S.C. 7103(a)(4).

(b) *Format and time for filing a challenge.* Any party filing a challenge to the status of a labor organization involved in the processing of a petition must do so in writing to the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension. If no hearing is held, challenges must be filed prior to action being taken pursuant to § 2422.30.

§ 2422.12 Timeliness of petitions seeking an election.

(a) *Election bar.* Where there is no certified exclusive representative, a

petition seeking an election will not be considered timely if filed within twelve (12) months of a valid election involving the same unit or a subdivision of the same unit.

(b) *Certification bar.* Where there is a certified exclusive representative of employees, a petition seeking an election will not be considered timely if filed within twelve (12) months after the certification of the exclusive representative of the employees in an appropriate unit. If a collective bargaining agreement covering the claimed unit is pending agency head review under 5 U.S.C. 7114(c) or is in effect, paragraphs (c), (d), or (e) of this section apply.

(c) *Bar during 5 U.S.C. 7114(c) agency head review.* A petition seeking an election will not be considered timely if filed during the period of agency head review under 5 U.S.C. 7114(c). This bar expires upon either the passage of thirty (30) days absent agency head action, or upon the date of any timely agency head action.

(d) *Contract bar where the contract is for three (3) years or less.* Where a collective bargaining agreement is in effect covering the claimed unit and has a term of three (3) years or less from the date it became effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the agreement.

(e) *Contract bar where the contract is for more than three (3) years.* Where a collective bargaining agreement is in effect covering the claimed unit and has a term of more than three (3) years from the date it became effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the initial three (3) year period, and any time after the expiration of the initial three (3) year period.

(f) *Unusual circumstances.* A petition seeking an election or a determination relating to representation matters may be filed at any time when unusual circumstances exist that substantially affect the unit or majority representation.

(g) *Premature extension.* Where a collective bargaining agreement with a term of three (3) years or less has been extended prior to sixty (60) days before its expiration date, the extension will not serve as a basis for dismissal of a petition seeking an election filed in accordance with this section.

(h) *Contract requirements.* Collective bargaining agreements, including agreements that go into effect under 5 U.S.C. 7114(c) and those that automatically renew without further action by the parties, do not constitute a bar to a petition seeking an election under this section unless a clear and unambiguous effective date, renewal date where applicable, duration, and termination date are ascertainable from the agreement and relevant accompanying documentation.

§ 2422.13 Resolution of issues raised by a petition.

(a) *Meetings prior to filing a representation petition.* All parties affected by the representation issues that may be raised in a petition are encouraged to meet prior to the filing of the petition to discuss their interests and narrow and resolve the issues. If requested by all parties a representative of the appropriate Regional Office will participate in these meetings.

(b) *Meetings to narrow and resolve the issues after the petition is filed.* After a petition is filed, the Regional Director may require all affected parties to meet to narrow and resolve the issues raised in the petition.

§ 2422.14 Effect of withdrawal/dismissal.

(a) *Withdrawal/dismissal less than sixty (60) days before contract expiration.* When a petition seeking an election that has been timely filed is withdrawn by the petitioner or dismissed by the Regional Director less than sixty (60) days prior to the expiration of an existing agreement between the incumbent exclusive representative and the agency or activity or any time after the expiration of the agreement, another petition seeking an election will not be considered timely if filed within a ninety (90) day period from either:

(1) The date the withdrawal is approved; or

(2) The date the petition is dismissed by the Regional Director when no application for review is filed with the Authority; or

(3) The date the Authority rules on an application for review. Other pending petitions that have been timely filed under this Part will continue to be processed.

(b) *Withdrawal by petitioner.* A petitioner who submits a withdrawal request for a petition seeking an election that is received by the Regional Director after the notice of hearing issues or after approval of an election agreement, whichever occurs first, will be barred from filing another petition seeking an election for the same unit or any subdivision of the unit for six (6) months from the date of the approval of the withdrawal by the Regional Director.

(c) *Withdrawal by incumbent.* When an election is not held because the incumbent disclaims any representation interest in a unit, a petition by the incumbent seeking an election involving the same unit or a subdivision of the same unit will not be considered timely if filed within six (6) months of cancellation of the election.

§ 2422.15 Duty to furnish information and cooperate.

(a) *Relevant information.* After a petition is filed, all parties must, upon request of the Regional Director, furnish the Regional Director and serve all parties affected by issues raised in the petition with information concerning parties, issues, and agreements raised in or affected by the petition.

(b) *Inclusions and exclusions.* After a petition seeking an election is filed, the Regional Director may direct the agency or activity to furnish the Regional Director and all parties affected by issues raised in the petition with a current alphabetized list of employees and job classifications included in and/or excluded from the existing or claimed unit affected by issues raised in the petition.

(c) *Cooperation.* All parties are required to cooperate in every aspect of the representation process. This obligation includes cooperating fully with the Regional Director, submitting all required and requested information, and participating in prehearing conferences and hearings. The failure to cooperate in the representation process may result in the Regional Director taking appropriate action, including dismissal of the petition or denial of intervention.

§ 2422.16 Election agreements or directed elections.

(a) *Election agreements.* Parties are encouraged to enter into election agreements.

(b) *Regional Director directed election.* If the parties are unable to agree on procedural matters, specifically, the eligibility period, method of election, dates, hours, or locations of the election, the Regional Director will decide election procedures and issue a Direction of Election, without prejudice to the rights of a party to file objections to the procedural conduct of the election.

(c) *Opportunity for a hearing.* Before directing an election, the Regional Director shall provide affected parties an opportunity for a hearing on other than procedural matters, and thereafter may:

(1) Issue a Decision and Order; or

(2) If there are no questions regarding unit appropriateness, issue a Direction

of Election without a Decision and Order.

(d) *Challenges or objections to a directed election.* A Direction of Election issued under this section will be issued without prejudice to the right of a party to file a challenge to the eligibility of any person participating in the election and/or objections to the election.

§ 2422.17 Notice of hearing and prehearing conference.

(a) *Purpose of notice of a hearing.* The Regional Director may issue a notice of hearing involving any issues raised in the petition.

(b) *Contents.* The notice of hearing will advise affected parties about the hearing. The Regional Director will also notify affected parties of the issues raised in the petition and establish a date for the prehearing conference.

(c) *Prehearing conference.* A prehearing conference will be conducted by the Hearing Officer, either by meeting or teleconference. All parties must participate in a prehearing conference and be prepared to fully discuss, narrow and resolve the issues set forth in the notification of the prehearing conference.

(d) *No interlocutory appeal of hearing determination.* A Regional Director's determination of whether to issue a notice of hearing is not appealable to the Authority.

§ 2422.18 Hearing procedures.

(a) *Purpose of a hearing.* Representation hearings are considered investigatory and not adversarial. The purpose of the hearing is to develop a full and complete record of relevant and material facts.

(b) *Conduct of hearing.* Hearings will be open to the public unless otherwise ordered by the Hearing Officer. There is no burden of proof, with the exception of proceedings on objections to elections as provided for in § 2422.27(b). Formal rules of evidence do not apply.

(c) *Hearing officer.* Hearings will be conducted by a Hearing Officer appointed by the Regional Director. Another Hearing Officer may be substituted for the presiding Hearing Officer at any time.

(d) *Transcript.* An official reporter will make the official transcript of the hearing. Copies of the official transcript may be examined in the appropriate Regional Office during normal working hours. Requests by parties to purchase copies of the official transcript should be made to the official hearing reporter.

§ 2422.19 Motions.

(a) *Purpose of a motion.* Subsequent to the issuance of a Notice of Hearing in a representation proceeding, a party seeking a ruling, an order, or relief must do so by filing or raising a motion stating the order or relief sought and the grounds therefor. Challenges and other filings referenced in other sections of this subpart may, in the discretion of the Regional Director or Hearing Officer, be treated as a motion.

(b) *Prehearing motions.* Prehearing motions must be filed in writing with the Regional Director. Any response must be filed with the Regional Director within five (5) days after service of the motion. The Regional Director may rule on the motion or refer the motion to the Hearing Officer.

(c) *Motions made at the hearing.* During the hearing, motions will be made to the Hearing Officer and may be oral on the record, unless otherwise required in this subpart to be in writing. Responses may be oral on the record or in writing, but, absent permission of the Hearing Officer, must be provided before the hearing closes. When appropriate, the Hearing Officer will rule on motions made at the hearing or referred to the Hearing Officer by the Regional Director.

(d) *Posthearing motions.* Motions made after the hearing closes must be filed in writing with the Regional Director. Any response to a posthearing motion must be filed with the Regional Director within five (5) days after service of the motion.

§ 2422.20 Rights of parties at a hearing.

(a) *Rights.* A party at a hearing will have the right:

(1) To appear in person or by a representative;

(2) To examine and cross-examine witnesses; and

(3) To introduce into the record relevant evidence.

(b) *Documentary evidence and stipulations.* Parties must submit two (2) copies of documentary evidence to the Hearing Officer and copies to all other parties. Stipulations of fact between/among the parties may be introduced into evidence.

(c) *Oral argument.* Parties will be entitled to a reasonable period prior to the close of the hearing for oral argument. Presentation of a closing oral argument does not preclude a party from filing a brief under paragraph (d) of this section.

(d) *Briefs.* A party will be afforded an opportunity to file a brief with the Regional Director.

(1) An original and two (2) copies of a brief must be filed with the Regional Director within thirty (30) days from the close of the hearing.

(2) A written request for an extension of time to file a brief must be filed with and received by the Regional Director no later than five (5) days before the date the brief is due.

(3) No reply brief may be filed without permission of the Regional Director.

§ 2422.21 Duties and powers of the Hearing Officer.

(a) *Duties of the Hearing Officer.* The Hearing Officer will receive evidence and inquire fully into the relevant and material facts concerning the matters that are the subject of the hearing, and may make recommendations on the record to the Regional Director.

(b) *Powers of the Hearing Officer.* During the period a case is assigned to a Hearing Officer by the Regional Director and prior to the close of the hearing, the Hearing Officer may take any action necessary to schedule, conduct, continue, control, and regulate the hearing, including ruling on motions when appropriate.

§ 2422.22 Objections to the conduct of the hearing.

(a) *Objections.* Objections are oral or written complaints concerning the conduct of a hearing.

(b) *Exceptions to rulings.* There are automatic exceptions to all adverse rulings.

§ 2422.23 Election procedures.

(a) *Regional Director conducts or supervises election.* The Regional Director will decide to conduct or supervise the election. In supervised elections, agencies will perform all acts as specified in the Election Agreement or Direction of Election.

(b) *Notice of election.* Prior to the election a notice of election, prepared by the Regional Director, will be posted by the activity in places where notices to employees are customarily posted and/or distributed in a manner by which notices are normally distributed. The notice of election will contain the details and procedures of the election, including the appropriate unit, the eligibility period, the date(s), hour(s) and location(s) of the election, a sample ballot, and the effect of the vote.

(c) *Sample ballot.* The reproduction of any document purporting to be a copy of the official ballot that suggests either directly or indirectly to employees that the Authority endorses a particular choice in the election may constitute grounds for setting aside an election if objections are filed under § 2422.26.

(d) *Secret ballot.* All elections will be by secret ballot.

(e) *Intervenor withdrawal from ballot.* When two or more labor organizations

are included as choices in an election, an intervening labor organization may, prior to the approval of an election agreement or before the direction of an election, file a written request with the Regional Director to remove its name from the ballot. If the request is not received prior to the approval of an election agreement or before the direction of an election, unless the parties and the Regional Director agree otherwise, the intervening labor organization will remain on the ballot. The Regional Director's decision on the request is final and not subject to the filing of an application for review with the Authority.

(f) *Incumbent withdrawal from ballot in an election to decertify an incumbent representative.* When there is no intervening labor organization, an election to decertify an incumbent exclusive representative will not be held if the incumbent provides the Regional Director with a written disclaimer of any representation interest in the unit. When there is an intervenor, an election will be held if the intervening labor organization proffers a thirty percent (30%) showing of interest within the time period established by the Regional Director.

(g) *Petitioner withdraws from ballot in an election.* When there is no intervening labor organization, an election will not be held if the petitioner provides the Regional Director with a written request to withdraw the petition. When there is an intervenor, an election will be held if the intervening labor organization proffers a thirty percent (30%) showing of interest within the time period established by the Regional Director.

(h) *Observers.* All parties are entitled to representation at the polling location(s) by observers of their own selection subject to the Regional Director's approval.

(1) Parties desiring to name observers must file in writing with the Regional Director a request for specifically named observers at least fifteen (15) days prior to an election. The Regional Director may grant an extension of time for filing a request for specifically named observers for good cause where a party requests such an extension or on the Regional Director's own motion. The request must name and identify the observers requested.

(2) An agency or activity may use as its observers any employees who are not eligible to vote in the election, except:

(i) Supervisors or management officials;

(ii) Employees who have any official connection with any of the labor organizations involved; or

(iii) Non-employees of the Federal government.

(3) A labor organization may use as its observers any employees eligible to vote in the election, except:

(i) Employees on leave without pay status who are working for the labor organization involved; or

(ii) Employees who hold an elected office in the union.

(4) Objections to a request for specific observers must be filed with the Regional Director stating the reasons in support within five (5) days after service of the request.

(5) The Regional Director's ruling on requests for and objections to observers is final and binding and is not subject to the filing of an application for review with the Authority.

§ 2422.24 Challenged ballots.

(a) *Filing challenges.* A party or the Regional Director may, for good cause, challenge the eligibility of any person to participate in the election prior to the employee voting.

(b) *Challenged ballot procedure.* An individual whose eligibility to vote is in dispute will be given the opportunity to vote a challenged ballot. If the parties and the Region are unable to resolve the challenged ballot(s) prior to the tally of ballots, the unresolved challenged ballot(s) will be impounded and preserved until a determination can be made, if necessary, by the Regional Director.

§ 2422.25 Tally of ballots.

(a) *Tallying the ballots.* When the election is concluded, the Regional Director will tally the ballots.

(b) *Service of the tally.* When the tally is completed, the Regional Director will serve the tally of ballots on the parties in accordance with the election agreement or direction of election.

(c) *Valid ballots cast.* Representation will be determined by the majority of the valid ballots cast.

§ 2422.26 Objections to the election.

(a) *Filing objections to the election.* Objections to the procedural conduct of the election or to conduct that may have improperly affected the results of the election may be filed by any party. Objections must be filed and received by the Regional Director within five (5) days after the tally of ballots has been served. Any objections must be timely regardless of whether the challenged ballots are sufficient in number to affect the results of the election. The objections must be supported by clear and concise reasons. An original and two (2) copies of the objections must be received by the Regional Director.

(b) *Supporting evidence.* The objecting party must file with the Regional Director evidence, including signed statements, documents and other materials supporting the objections within ten (10) days after the objections are filed.

§ 2422.27 Determinative challenged ballots and objections.

(a) *Investigation.* The Regional Director will investigate objections and/or determinative challenged ballots that are sufficient in number to affect the results of the election.

(b) *Burden of proof.* A party filing objections to the election bears the burden of proof by a preponderance of the evidence concerning those objections. However, no party bears the burden of proof on challenged ballots.

(c) *Regional Director Action.* After investigation, the Regional Director will take appropriate action consistent with § 2422.30.

(d) *Consolidated hearing on objections and/or determinative challenged ballots and an unfair labor practice hearing.* When appropriate, and in accordance with § 2422.33, objections and/or determinative challenged ballots may be consolidated with an unfair labor practice hearing. Such consolidated hearings will be conducted by an Administrative Law Judge. Exceptions and related submissions must be filed with the Authority and the Authority will issue a decision in accordance with Part 2423 of this chapter, except for the following:

(1) Sections 2423.18 and 2423.19(j) of this Subchapter concerning the burden of proof and settlement conferences are not applicable;

(2) The Administrative Law Judge may not recommend remedial action to be taken or notices to be posted as provided by § 2423.26(a) of this Subchapter; and,

(3) References to ''charge'' and ''complaint'' in § 2423.26(b) of this chapter will be omitted.

§ 2422.28 Runoff elections.

(a) *When a runoff may be held.* A runoff election is required in an election involving at least three (3) choices, one of which is ''no union'' or ''neither,'' when no choice receives a majority of the valid ballots cast. However, a runoff may not be held until the Regional Director has ruled on objections to the election and determinative challenged ballots.

(b) *Eligibility.* Employees who were eligible to vote in the original election and who are also eligible on the date of the runoff election may vote in the runoff election.

(c) *Ballot.* The ballot in the runoff election will provide for a selection between the two choices receiving the largest and second largest number of votes in the election.

§ 2422.29 Inconclusive elections.

(a) *Inconclusive elections.* An inconclusive election is one where challenged ballots are not sufficient to affect the outcome of the election and one of the following occurs:

(1) The ballot provides for at least three (3) choices, one of which is ''no union'' or ''neither'' and the votes are equally divided; or

(2) The ballot provides for at least three (3) choices, the choice receiving the highest number of votes does not receive a majority, and at least two other choices receive the next highest and same number of votes; or

(3) When a runoff ballot provides for a choice between two labor organizations and results in the votes being equally divided; or

(4) When the Regional Director determines that there have been significant procedural irregularities.

(b) *Eligibility to vote in a rerun election.* A current payroll period will be used to determine eligibility to vote in a rerun election.

(c) *Ballot.* If the Regional Director determines that the election is inconclusive, the election will be rerun with all the choices that appeared on the original ballot.

(d) *Number of reruns.* There will be only one rerun of an inconclusive election. If the rerun results in another inconclusive election, the tally of ballots will indicate a majority of valid ballots has not been cast for any choice and a certification of results will be issued. If necessary, a runoff may be held when an original election is rerun.

§ 2422.30 Regional Director investigations, notices of hearings, actions, and Decisions and Orders.

(a) *Regional Director investigation.* The Regional Director will make such investigation of the petition and any other matter as the Regional Director deems necessary.

(b) *Regional Director notice of hearing.* The Regional Director will issue a notice of hearing to inquire into any matter about which a material issue of fact exists, and any time there is reasonable cause to believe a question exists regarding unit appropriateness.

(c) *Regional Director action and Decision and Order.* After investigation and/or hearing, when a hearing has been ordered, the Regional Director will resolve the matter in dispute and, when appropriate, direct an election or approve an election agreement, or issue a Decision and Order.

(d) *Appeal of Regional Director Decision and Order.* A party may file with the Authority an application for review of a Regional Director Decision and Order.

(e) *Contents of the Record.* When no hearing has been conducted all material submitted to and considered by the Regional Director during the investigation becomes a part of the record. When a hearing has been conducted, the transcript and all material entered into evidence, including any posthearing briefs, become a part of the record.

§ 2422.31 Application for review of a Regional Director Decision and Order.

(a) *Filing an application for review.* A party must file an application for review with the Authority within sixty (60) days of the Regional Director's Decision and Order. The sixty (60) day time limit provided for in 5 U.S.C. 7105(f) may not be extended or waived.

(b) *Contents.* An application for review must be sufficient to enable the Authority to rule on the application without recourse to the record; however, the Authority may, in its discretion, examine the record in evaluating the application. An application must specify the matters and rulings to which exception(s) is taken, include a summary of evidence relating to any issue raised in the application, and make specific reference to page citations in the transcript if a hearing was held. An application may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director.

(c) *Review.* The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:

(1) The decision raises an issue for which there is an absence of precedent;

(2) Established law or policy warrants reconsideration; or,

(3) There is a genuine issue over whether the Regional Director has:

(i) Failed to apply established law;

(ii) Committed a prejudicial procedural error;

(iii) Committed a clear and prejudicial error concerning a substantial factual matter.

(d) *Opposition.* A party may file with the Authority an opposition to an application for review within ten (10) days after the party is served with the application. A copy must be served on the Regional Director and all other parties and a statement of service must be filed with the Authority.

(e) *Regional Director Decision and Order becomes the Authority's action.* A Decision and Order of a Regional Director becomes the action of the Authority when:

(1) No application for review is filed with the Authority within sixty (60) days after the date of the Regional Director's Decision and Order; or

(2) A timely application for review is filed with the Authority and the Authority does not undertake to grant review of the Regional Director's Decision and Order within sixty (60) days of the filing of the application; or

(3) The Authority denies an application for review of the Regional Director's Decision and Order.

(f) *Authority grant of review and stay.* The Authority may rule on the issue(s) in an application for review in its order granting the application for review. Neither filing nor granting an application for review shall stay any action ordered by the Regional Director unless specifically ordered by the Authority.

(g) *Briefs if review is granted.* If the Authority does not rule on the issue(s) in the application for review in its order granting review, the Authority may, in its discretion, afford the parties an opportunity to file briefs. The briefs will be limited to the issue(s) referenced in the Authority's order granting review.

§ 2422.32 Certifications and revocations.

(a) *Certifications.* The Regional Director will issue an appropriate certification when:

(1) After an election, runoff, or rerun,

(i) No objections are filed or challenged ballots are not determinative, or

(ii) Objections and determinative challenged ballots are decided and resolved; or

(2) The Regional Director issues a Decision and Order requiring a certification and the Decision and Order becomes the action of the Authority under § 2422.31(e) or the Authority otherwise directs the issuance of a certification.

(b) *Revocations.* Without prejudice to any rights and obligations which may exist under the Statute, the Regional Director will revoke a recognition or certification, as appropriate, and provide a written statement of reasons when:

(1) An incumbent exclusive representative files, during a representation proceeding, a disclaimer of any representational interest in the unit; or

(2) Due to a substantial change in the character and scope of the unit, the unit is no longer appropriate and an election is not warranted.

§ 2422.33 Relief obtainable under Part 2423.

Remedial relief that was or could have been obtained as a result of a motion, objection, or challenge filed or raised under this subpart, may not be the basis for similar relief if filed or raised as an unfair labor practice under Part 2423 of this Chapter: *Provided, however,* that related matters may be consolidated for hearing as noted in § 2422.27(d) of this subpart.

§ 2422.34 Rights and obligations during the pendency of representation proceedings.

(a) *Existing recognitions, agreements, and obligations under the Statute.* During the pendency of any representation proceeding, parties are obligated to maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining agreements, and fulfill all other representational and bargaining responsibilities under the Statute.

(b) *Unit status of individual employees.* Notwithstanding paragraph (a) of this section and except as otherwise prohibited by law, a party may take action based on its position regarding the bargaining unit status of individual employees, pursuant to 5 U.S.C. 7103(a)(2), 7112 (b) and (c): *Provided, however,* that its actions may be challenged, reviewed, and remedied where appropriate.

PART 2429—MISCELLANEOUS AND GENERAL REQUIREMENTS

5. The authority citation for Part 2429 continues to read as follows:

Authority: 5 U.S.C. 7134; § 2429.18 also issued under 28 U.S.C. 2112(a).

6. Section 2429.21 is amended by revising paragraphs (a) and (b) to read as follows:

§ 2429.21 Computation of time for filing papers.

(a) In computing any period of time prescribed by or allowed by this subchapter, except in agreement bar situations described in § 2422.12 (c), (d), (e), and (f) of this subchapter, and except as to the filing of exceptions to an arbitrator's award under § 2425.1 of this subchapter, the day of the act, event, or default from or after which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or a Federal legal holiday in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or a Federal legal holiday. *Provided, however,* in agreement bar situations described in § 2422.12 (c), (d), (e), and (f), if the 60th day prior to the expiration date of an agreement falls on Saturday, Sunday, or a Federal legal holiday, a petition, to be timely, must be filed by the close of business on the last official workday preceding the 60th day. When the period of time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computations.

(b) Except when filing an unfair labor practice charge pursuant to § 2423.6 of this subchapter, a representation petition pursuant to Part 2422 of this subchapter, and a request for an extension of time pursuant to § 2429.23(a) of this part, when this subchapter requires the filing of any paper with the Authority, the General Counsel, a Regional Director, or an Administrative Law Judge, the date of filing shall be determined by the date of mailing indicated by the postmark date. If no postmark date is evident on the mailing, it shall be presumed to have been mailed 5 days prior to receipt. If the filing is by personal delivery, it shall be considered filed on the date it is received by the Authority or the officer or agent designated to receive such matter.

7. Section 2429.22 is revised to read as follows:

§ 2429.22 Additional time after service by mail.

Except as to the filing of an application for review to a Regional Director's Decision and Order under § 2422.31 of this subchapter, whenever a party has the right or is required to do some act pursuant to this subchapter within a prescribed period after service of a notice or other paper upon such party, and the notice or paper is served on such party by mail, five (5) days shall be added to the prescribed period: *Provided, however,* That five (5) days shall not be added in any instance where an extension of time has been granted.

Dated: December 22, 1995.

Solly Thomas,

Executive Director, Federal Labor Relations Authority.

[FR Doc. 95–31413 Filed 12–28–95; 8:45 am]

BILLING CODE 6727–01–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Farm Service Agency

Natural Resources Conservation Service

Rural Business-Cooperative Service

Rural Housing Service

Rural Utilities Service

7 CFR Parts 1, 11, 12, 400, 614, 620, 623, 631, 632, 634, 663, 701, 702, 752, 780, 781, and 1900

National Appeals Division Rules of Procedure

AGENCY: Office of the Secretary, National Appeals Division, USDA.

ACTION: Interim final rule.

SUMMARY: On May 22, 1995 (60 FR 27044), the National Appeals Division (NAD) in the Office of the Secretary published a proposed rule to implement Title II, Subtitle H, of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. 103–354, 7 U.S.C. 6991 *et seq.*, by setting forth procedures for program participant appeals of adverse decisions by United States Department of Agriculture (USDA) agency officials to NAD. The deadline for receipt of comments was June 21, 1995. On June 28, 1995 (60 FR 32922) the Office of the Secretary published an extension of the deadline for receipt of comments until July 6, 1995. From the period May 22 to July 6, 1995, forty-six timely public comments were received in response to the proposed rulemaking. Based on these comments, including concerns regarding the need for an additional comment period on the proposed rules and the need for a comment period on USDA agency conforming rules, but mindful of the immediate need for published rules, the Secretary now issues these rules on an interim final basis. These rules also include conforming changes to the former appeal rules of USDA agencies whose adverse decisions are now subject to NAD review.

DATES: Part 11 of this interim rule is effective January 16, 1996. With the exception of § 11.9, part 11 of this rule is applicable as to agency adverse decisions and NAD appeals for which hearings have not been held. Section 11.9 of this interim rule is applicable immediately as to all pending requests for Director review and is applicable retroactively to all requests for Director

review made on or after October 20, 1994.

Amendments made by this interim rule to all other parts of title 7 of the *Code of Federal Regulations* are effective January 16, 1996 and are applicable on January 16, 1996 as to any adverse technical determinations or decisions made by an applicable agency.

Written comments via letter, facsimile, or Internet are invited from interested individuals and organizations, and must be received on or before March 28, 1996.

ADDRESSES: Comments should be sent to L. Benjamin Young, Jr., Office of the General Counsel, Research and Operations Division, AgBox 1415, United States Department of Agriculture, Washington, DC 20250–1415; fax number: 202/720–5837; Internet: hqdoma-in.lawpo.young@sies.wsc.ag.gov.

FOR FURTHER INFORMATION CONTACT: L. Benjamin Young, Jr. at the above address or 202/720–4076.

SUPPLEMENTARY INFORMATION:

Classification

This rule has been reviewed under E.O. 12866, and it has been determined that it is not a ''significant regulatory action'' rule because it will not have an annual effect on the economy of $100 million or more or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule will not create any serious inconsistencies or otherwise interfere with actions taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof, and does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in E.O. 12866.

Regulatory Flexibility Act

USDA certifies that this rule will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Pub. L. 96–534, as amended (5 U.S.C. 601 *et seq.*).

Paperwork Reduction Act

USDA has determined that the provisions of the Paperwork Reduction Act, as amended, 44 U.S.C., chapter 35, do not apply to any collections of information contained in this rule because any such collections of information are made during the conduct of administrative action taken by an agency against specific individuals or entities. 5 CFR 1320.4(a)(2).

Background and Purpose

On December 27, 1994 (*see* 59 FR 66,517), the Secretary of Agriculture noticed that the NAD was established pursuant to Title II, Subtitle H of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Public Law No. 103–354, 7 U.S.C. 6991 *et seq.* (''the Act''). NAD was assigned responsibility for all administrative appeals formerly handled by the National Appeals Division of the former Agricultural Stabilization and Conservation Service (ASCS) and by the National Appeals Staff of the former Farmers Home Administration (FmHA), appeals arising from decisions of the former Rural Development Administration (RDA) and the former Soil Conservation Service (SCS), appeals arising from decisions of the successor agencies to the foregoing agencies established by the Secretary, appeals arising from decisions of the Commodity Credit Corporation (CCC) and the Federal Crop Insurance Corporation (FCIC), and such other administrative appeals arising from decisions of agencies and offices of USDA as may in the future be assigned by the Secretary.

This rule sets forth the jurisdiction of the NAD, and the procedures appellants and agencies must follow upon appeal of adverse decisions by covered USDA program ''participants'' as defined in detail in the new 7 CFR part 11. In addition, since the Act changes existing formal administrative appeals procedures for some agencies while allowing participants a choice of pursuing informal appeals with an agency first or appealing directly to NAD, this rule also makes conforming amendments to the existing appeal procedures of the USDA agencies whose adverse decisions will be appealable to NAD under the new 7 CFR part 11.

For the purposes of convenience, this preamble and the changes to USDA regulations are divided as follows:

Item	Subject	Contact
I	Authentication of Records	B. Young 202/720–4076.
II	NAD Rules of Procedure	B. Young 202/720–4076.
III	Natural Resources Conservation Service (NRCS) Appeal Rules	S. Penn 202/720–6521.
IV	Commodity Credit Corporation (CCC), Federal Crop Insurance Corporation (FCIC), and Farm Service Agency (FSA) Appeal Rules.	A. Grundeman 202/720–4591.
V	Rural Business-Cooperative Service (RBS), Rural Housing Service (RHS), and Rural Utilities Service (RUS) Appeal Rules.	A. Grundeman 202/720–4591.

I. Authentication of Records

This rule amends the provisions of USDA regulations regarding authentication of official records to provide that the Director of NAD may authenticate documents in NAD records for USDA.

II. NAD Rules of Procedure

Forty-six timely comments were received by July 6, 1995 in response to the requests for comment on the proposed NAD rule. In response to these comments, a number of changes have been made to the rules; however, USDA has opted not to publish the revised rules for an additional comment period. USDA does recognize the need for further public comment on these rules. USDA therefore is issuing this rule on an interim final basis for three specific reasons.

First, a tension exists between the desire of Congress and the USDA to make this a farmer-friendly appeals process and the necessity of establishing an appeals procedure that comports with due process and results in determinations that will withstand scrutiny in the Federal courts. At the same time, it is important that the appeals procedure allow for ease of administration by NAD in a time of scarce and decreasing Federal resources. These problems are reflected in disagreements among the commenters as to how some of the most detailed procedures should be implemented. These tensions should not be resolved presumptively in a final rule. Therefore, promulgation of an interim rule will allow USDA to receive more feedback

and make adjustments with the aid of experience.

Second, several commenters expressed concern over the fact that conforming amendments to individual agency appeal rules were not published with the proposed rule. Additionally, these conforming amendments will result in more substantive changes to agency rules than originally were anticipated by USDA at the time the proposed rules were published. For example, FSA now has decided to combine appeal procedures for the former ASCS, the former FmHA, and FCIC programs that it now administers under the Act. These new agency appeal procedures will set forth how participants may use the ''informal hearings'' option provided in section 275 of the Act.

Third, legislative changes may occur during consideration of the Farm Bill in 1996 that will necessitate changes to the NAD rules of procedure. By publishing this as an interim rule, the USDA establishes a process for current operations while leaving the rulemaking door open for timely adoption of rules necessary to implement possible legislative changes.

The following explanation is given for those sections of the proposed rule that were heavily commented on or appeared to be misunderstood:

§ 11.1 Definitions.

Adverse decision. Two commenters noted problems with the proposed definition of ''adverse decision'' with respect to such decisions resulting from a failure of the agency to act. The proposed rule had by definition provided that an adverse decision results when an agency failed to act or make a decision within timeframes prescribed by agency program regulations. The two commenters noted that in some cases statutes prescribed timeframes and that in others the regulations prescribed no timeframes. In the latter case, one of the commenters suggested that USDA use a ''reasonable'' time in the absence of a prescribed timeframe. The amended definition provides that an adverse decision results when an agency fails to act within prescribed statutory or regulatory timeframes, or, in the case where there are no such timeframes specified, within a reasonable time.

Agency. All former and current agencies of the USDA whose adverse decisions are covered by this part have been added in response to a comment noting the lack of parallel treatment between inclusion of old and new agency names and the need to assist individuals unfamiliar with the new names.

USDA also has added language to cover certain programs administered by RUS because, as one commenter correctly noted, they are former programs of RDA that by definition in the Act are covered by NAD. This is accomplished by excluding from NAD purview all RUS programs authorized under the Rural Electrification Act and the Rural Telephone Bank Act.

Agency record, case record, and hearing record. Seven commenters had questions regarding the definitions of ''agency record,'' ''case record,'' and ''hearing record.'' These definitions were carefully nested within one another in order to construe the language of the Act in a logical manner.

Section 278(c) of the Act requires that NAD determinations be made ''based on information from the case record, laws applicable to the matter at issue, and applicable regulations published in the Federal Register.'' Section 277(a) of the Act, however, also makes reference to the fact that the Director and the Hearing Officer are to have access to the ''case record'' of an adverse decision upon initial filing of an appeal. Section 278(b) also makes reference to the ''case record'' that the Director must review as well as the record from the hearing. Clearly, the ''case record'' in the latter two provisions cannot be the same ''case record'' referred to in section 278(c), or else NAD determinations would have to be made without reference to the record developed in the hearing itself.

USDA faced the task of construing these seemingly contradictory statutory provisions in a complementary manner. This was done by creating a definitional framework based upon section 271(4) of the Act that defines ''case record'' to include ''all the materials maintained by the Secretary related to an adverse decision.'' As in most cases where the Secretary is named in a statute, ''Secretary'' here is interpreted to mean not the person of the Secretary but rather the Secretary and all subordinate officials of USDA to whom the Secretary has delegated statutory authority. Construed in this manner, ''case record'' includes any and all materials held by USDA that relate to an adverse decision at any given moment during the administrative appeal process. What the term ''case record'' includes when used in the statute thus changes based upon the level of the appeal process in which it is used.

For purposes of clarity in the rule, a new term needed to be created to distinguish the ''case record'' presented by the agency to the Hearing Officer, the record developed by the Hearing Officer in the hearing (sec. 278(b)) and eventually forwarded to the Director, and the ''case record'' upon which the determination is based. This is accomplished in the rule by defining documents furnished by the agency to the Hearing Officer upon the initial filing of the appeal as the ''agency record'' that by rule is deemed admitted as evidence in the hearing, by defining evidence presented at the hearing, the transcript of the hearing itself, and post-hearing submissions as the ''hearing record,'' and finally by explicitly incorporating both the ''agency record'' and the ''hearing record'' into the definition of ''case record'' upon which NAD determinations are made. ''Case record'' construed in this fashion also includes ''the request for review, and such other arguments or information as may be accepted by the Director'' (sec. 278(b)) in the Director review phase of NAD appeals because they would be included as materials maintained by the Secretary.

Director. Three commenters objected to the proposed rule definition and other provisions that would allow the Director to delegate the authority of the Director to subordinate individuals within NAD. The primary rationale for the objections was that this would mean that someone without the credentials and qualifications required by the statute for the Director would be exercising the statutory authority of the Director.

USDA rejected changing this provision for two reasons. First, even though the authority for certain actions may be delegated, such actions are still taken in the name of the Director. The Director, in other words, still exercises the final authority. Second, given the anticipated volume of appeals to be filed with NAD, it is not practical or efficient to require that the Director personally perform all actions specified for the Director by name in the Act.

Division. One commenter suggested that the proposed rule was in error in specifying that the Division was established by this part instead of the Act itself. Section 272(a) of the Act provides that ''[t]he Secretary shall establish'' NAD, not that the NAD ''is established.'' Therefore, action by the Secretary was required to establish NAD.

Equitable relief. Two commenters suggested that the proposed rule definition of equitable relief needed to be better defined. USDA chose not to define equitable relief further because the meaning of such relief varies from program to program covered under these rules, depending on the language of the program statutes. The guiding intent

behind the drafting of these rules was to ensure that they were written as broadly and flexibly as possible so that they do not need to be amended each time an agency amends its substantive program regulations.

Ex parte communication. One commenter suggested this definition needed to include post-hearing requests for Director review and requests regarding the appealability of adverse decisions. The definition here was changed to include an oral or written communication ''to any officer or employee of the Division.'' As explained below, further changes were made regarding *ex parte* communications to ensure that the prohibition on such communications covered all NAD proceedings and employees.

Implement. Three comments were received suggesting changes to this definition. In combination with § 11.11 of the rule, USDA feels that this language reflects the statutory definition and need not be changed.

Participant. One commenter suggested that, rather than defining ''participant'' by listing programs and statutes under which an individual may not bring an appeal before NAD, a separate list of non-appealable decisions should be added to the regulation. This approach was considered, as was listing the programs from which adverse decisions could be appealed to NAD, but the statutory language did not support these approaches. ''Adverse decision'' is defined too broadly in the statute to limit by regulation. Further, nonappealability of decisions is limited only to matters of general applicability under section 272(d) of the Act. Conversely, Congress explicitly gave the Secretary authority to define ''participant'' (sec. 271(9)) and therefore the approach reflected in the rule was chosen.

Seven substantive comments were made regarding the definition of ''participant'' in the proposed rule. Two commenters suggested that the definition should be expanded to include the requirement that, for certain guaranteed loan programs of the former Farmers Home Administration (FmHA), both the applicant/borrower and the lender should be required to appeal jointly. Since any decision to deny a guaranteed loan would affect both the applicant/borrower and the lender, USDA agrees that both parties must appeal any such adverse decision and the rule has been revised to reflect this requirement. However, only the lender will be able to appeal the denial or reduction of a final loss payment to that lender.

One commenter expressed concern that the language ''right to participate in'' did not clearly include an applicant. Therefore, USDA has added ''who has applied for'' to the definition.

One commenter suggested that the wording of the definition technically could exclude someone from appealing to NAD if, for example, they had filed a tort claim against USDA. As a ''participant'' in a tort claim, they would not be included as a ''participant'' for purposes of a NAD appeal. To clarify that this is not the case, USDA has amended the introductory phrase before the list of programs to read: ''The term does not include persons whose claim(s) arise under:''.

Finally, three comments were received from representatives of reinsured companies, that is, crop insurance companies whose insurance contracts with producers are reinsured by the FCIC. The reinsured companies objected to the language including participants affected by decisions of reinsured companies in the definition of ''participants.'' As originally proposed, the language would have allowed participants to appeal reinsured company decisions to NAD.

The reinsured companies objected to this language on several grounds. First, they noted that while FCIC was included in the definition of ''agency'' in section 271(1) of the Act, reinsured companies were not. Thus, the proposed rule attempted to include private companies as government agencies contrary to the language of the Act. Second, the reinsured companies argued that promulgation of this language by USDA in the final rule would breach the terms of the Standard Reinsurance Agreements between USDA and the reinsured companies, as well as alter the legal terms of reinsured company policies with thousands of insureds. Third, the number of policy decisions made by reinsured companies that would be open to appeal to NAD under the proposed language would overwhelm NAD with thousands of appeals. Finally, the reinsured companies argued that the intent of the Act in including FCIC in the definition of ''agency'' was to provide appeal rights for participants in crop insurance programs for a narrow range of decisions still committed to FCIC after crop insurance reform, i.e., decisions regarding yield and coverage that are based on FCIC actuarial data or decisions where an individual is found ineligible to participate in the Federal crop insurance program.

In response to these comments, USDA has dropped decisions of reinsured companies as decisions that participants may appeal under this part. The exclusion of disputes between reinsured companies and FCIC from the definition of participant in the final rule also means that all disputes between reinsured companies and FCIC likewise are excluded from the jurisdiction of NAD. Contract disputes between reinsured companies and FCIC will be appealable to the USDA Board of Contract Appeals as provided in its rules. Non-contract related decisions of FCIC that are adverse to reinsured companies may be settled with the agency or by resort to legal action in a court of competent jurisdiction.

Additional definitions. Two commenters suggested that a definition for ''mediation'' be added. The use of mediation or other forms of alternative dispute resolution (ADR) by program participants is a matter of choice for the participants themselves. Since the type of mediation or ADR used by a participant and the agency is not a jurisdictional issue for purposes of determining whether an appeal is properly before NAD, NAD has no control over whatever means the participant and agency employ. Accordingly, USDA has declined to attempt to define mediation or ADR for purposes of this part.

§ 11.2 General statement.

No comments were received in response to this section. USDA has made two changes to this section upon further review. First, language has been added to reflect the statutory provision that NAD, although independent, is subject to the general supervision and policy direction of the Secretary. Second, a statement has been added to make clear that exhaustion of the procedures for Hearing Officer review of an adverse decision under this part is required before a program participant may seek judicial review of an adverse decision. This additional language does not deprive participants of their right to seek review under any judicial exceptions to required exhaustion of administrative procedures.

§ 11.3 Applicability.

Six commenters generally contended that the NAD appeal procedures should apply to appeals arising after October 13, 1994, and not October 20, 1994 as specified in the proposed rule. The commenters' rationale for the October 13 date is that the Act was effective as of that date. One commenter also discussed the legal ability of the Department to make the rule effective retroactively.

USDA has decided to delete the effective date subsection from this

section because it inaccurately indicated an intent to make this entire rule retroactive. Instead, the effective date of this rule is appropriately set forth in the **EFFECTIVE DATE** section of this Federal Register document.

Two additional changes have been made to this section. First, wetland or highly erodible land determinations have been added to the list of examples of agency adverse decisions to clarify that these decisions are included.

Second, a new subsection has been added to address confusion, reflected in some comments, that exists over the jurisdiction of NAD over agency programs. NAD Hearing Officers are not administrative law judges. NAD has no jurisdiction over questions of law or the appropriateness of agency regulations. It simply decides the factual matter of whether an agency complied with such laws and regulations in rendering an adverse decision. The limitation added here makes clear that NAD may not be used by program participants for the purpose of challenging the validity of USDA regulations issued pursuant to statutory authority.

§ 11.4 Inapplicability of other laws and regulations.

Section 277 of the Act provides an elaborate appeals scheme for particular programs of USDA, including provisions for hearings, the issuance of subpoenas, and even *ex parte* communications. Section 277(a)(2)(A) of the Act in fact explicitly incorporates the definition of an *ex parte* communication from the Administrative Procedure Act (APA) (5 U.S.C. 551(14)) as if the APA stands outside of, and is not applicable to, NAD proceedings. In view of this statutory language, and in the absence of Congressional intent otherwise, USDA has concluded that the provisions of the APA generally applicable to agency adjudications (5 U.S.C. 554, 555, 556, 557, & 3105) do not apply to NAD proceedings. Furthermore, because NAD proceedings are not required to be conducted under 5 U.S.C. 554, USDA also concludes the Equal Access to Justice Act, 5 U.S.C. 504, does not apply to NAD proceedings. *Ardestani* v. *I.N.S.*, 112 S.Ct. 515, 519 (1991).

Another issue is the applicability of the Federal Rules of Evidence to NAD proceedings. Congress intended that these proceedings be farmer-friendly so that farmers would not be required to hire attorneys to use the NAD appeal process. Therefore, USDA concluded that the Federal Rules of Evidence should not apply to NAD proceedings.

One commenter suggested USDA also should eliminate any ambiguity with respect to the applicability of the Federal Rules of Civil Procedure, which was referred to in one respect in what was § 11.7(a)(2)(vi) of the proposed rule. The situation with respect to the Rules of Evidence, however, is unique in that attempts have been made in NAD hearings to apply the Federal Rules of Evidence as generally accepted rules of evidence, necessitating an explicit statement of policy in the rules. The same problems have not arisen with respect to the Federal Rules of Civil Procedure; therefore, USDA does not feel that it is necessary to state explicitly that those rules do not apply.

§ 11.5 Informal agency hearings and exhaustion.

This section of the proposed rule drew 29 comments, more than any other. Some comments suggested that the exhaustion requirement for FSA county committees was contrary to statute, while others were concerned because the section did not provide for exhaustion to the FSA state committee. A number of commenters were confused by the sequence of events for informal hearings, mediation, and NAD appeals outlined in this section. Providers of mediation services particularly were concerned that all appellants be notified of mediation rights, and that mediation occur at the lowest level of the appeal process. A number of commenters expressed concern about the inconsistent use of the terms ''informal hearings,'' ''informal appeal,'' and ''informal review.''

With respect to the comments regarding agency notice of adverse decisions and appeal rights, USDA has determined to handle such notice outside the parameters of this rule. As a matter of Department policy, agencies will be expected to notify participants of their appeal rights and their right to choose mediation or ADR, where available, when they issue an adverse decision.

In light of the other comments, this section has been revised significantly. Only the term ''informal review'' will be used throughout the section. Given this consistent use, USDA finds it unnecessary to define this term.

Before appealing to NAD, participants may elect to request an informal review of an adverse decision by the agency. However, in the case of adverse decisions made by officials under the authority of FSA county and area committees, participants will be required to undergo informal review before the county or area committee before appealing the adverse decision to NAD. After receiving the mandatory informal review by the county or area committee, the participant then may seek informal review of that decision by the State committee or appeal directly to NAD. For purposes of this section, USDA interprets a decision at each level of agency informal review as a new adverse decision for purposes of calculating the timeliness of a participant's appeal to NAD under § 11.6 of the rules.

When a participant requests such mediation, the 30-day period within which the participant may request a hearing under § 11.6(b)(1) will stop running until such time as the mediation or ADR is concluded. Unlike with informal review, however, the conclusion of mediation is not viewed as a new agency adverse decision. At that point, the participant will have the balance of the 30-day period to appeal to NAD, or to seek informal review as outlined above. The 30-day period will function in effect as a statute of limitations; it will be up to the agency, not NAD, to raise the jurisdictional issue before NAD as to the fact that a participant's appeal is untimely.

Treatment of mediation or ADR in this manner means that the conclusion of mediation or ADR will not be treated as an adverse decision. Conversely, as indicated above, a decision at each level of the informal review process will be treated as an adverse decision for determining when the 30-day period for an appeal to NAD begins to run.

Example

A FSA program participant receives an adverse decision from a county executive director. He cannot appeal to NAD. He must first pursue an informal review with the county committee. The county committee upholds the original adverse decision. Program participant now has three choices: (1) Within 30 days, choose mediation or ADR; (2) Within 30 days, appeal to NAD; or (3) Within the lesser of 30 days, or the time period specified in FSA informal review regulations, request an informal review by the State Committee. Participant chooses mediation after 10 days. Mediation fails. Participant has the balance of 20 days (i.e., 30 days minus 10 days) to appeal to NAD after the conclusion of mediation or he may request review by the State Committee in accordance with FSA regulations. If he appeals to NAD, the agency bears the burden of proving untimeliness of the appeal to NAD, i.e., if the participant took 25 days, 5 days in excess of his remaining 20, to appeal to NAD, the agency must demonstrate this to NAD. If he requests an informal review by the State Committee, the participant will have 30 days to appeal any adverse decision made by the State Committee to NAD.

§ 11.6 Director review of agency determination of appealability and right of participants to Division hearing.

USDA has revised the format of this section so that it follows the logical progression from a Director determination of appealability, where made necessary because of an agency determination that an adverse decision is not appealable, to the appeal itself.

Section 11.6(a) (§ 11.6(b) in the proposed rule) provides the rules for requesting Director review of the determination of appealability. Two commenters suggested that the proposed language that the Director use ''any information he determines necessary'' in making a determination was too broad. These commenters felt the information to be considered should be defined, and that the allowance of any information the Director deemed necessary made the process appear secretive if the *ex parte* prohibition did not apply to this stage of the appeal process.

USDA has revised this subsection to reflect the language of the statute and not specify anything regarding what information the Director may or may not use.

Two commenters desired changes in the references to Deputy and Associate Directors to reflect titles currently used in the NAD internal structure. USDA has substituted ''subordinate official other than a Hearing Officer'' in the place of Deputy and Associate Directors to preserve the flexibility of the Director to organize NAD internally without reference to regulatorily defined titles. This change also responds to a comment that requests that the Director be allowed to delegate this responsibility as far down as possible to accomplish such a mission efficiently. Hearing Officers were excluded from such delegation because the delegation of such authority down to Hearing Officers facially contradicted the statute and could represent a potential conflict of interest for Hearing Officers who must justify resource requirements based on the burden of their caseload.

USDA rejected comments suggesting that this delegation is improper under the statute, or that participants should be given the right to challenge the credentials of the subordinate reviewing official. Nothing in the statute requires that the Director personally must review every request for a determination of appealability that may be filed. The Director, as in the case of any agency official, remains ultimately responsible for any decision undertaken by a subordinate. Therefore, USDA sees no reason why this statute should be read any differently than any other statute where, absent a specific statutory prohibition, USDA and other executive branch agencies have allowed for delegation of decision-making authority by officials whose qualifications have been set by statute.

With respect to this subsection as proposed, two commenters also expressed concern that it did not specify the timing for filing an appeal once the Director reversed an agency determination that an adverse decision was not appealable. USDA added language in what is now subsection (b) to specify that the 30 days for appeal of adverse decisions shall run from the date the participant receives notice of the adverse decision or receives notice of the Director's determination that an adverse decision is appealable.

Subsection (b) (§ 11.6(c) in the proposed rule) provides rules for appealing adverse decisions to NAD. In addition to the change noted above, two additional changes were made to this section. First, seven commenters suggested that it is inappropriate in any circumstances to apply a ''should have known'' standard as a deadline for appeals in cases of agency inaction. They argued that this shifted the burden from the agency to the participant for policing the agency's failure to follow its own regulations; one commenter argued that the agency remained in continuing violation for failure to act within its own deadlines.

USDA disagrees with these commenters. A failure to act by the agency at some point becomes ripe for appeal and the statute clearly also provides that at a point past 30 days from an adverse decision an appellant loses the right of appeal. USDA finds no intention on the part of Congress to extend a participant's right of appeal indefinitely, particularly when agency regulations define a specified period in which a decision is to be made. However, to add flexibility to the ''should have known'' standard in the latter situation, USDA has changed the regulation to require that a participant must request a hearing within 30 days after the participant ''reasonably'' should have known that the agency had not acted within the timeframes specified by program regulations.

The second change made to the proposed rule regarding the request for a hearing is to require a participant to send a copy of the request for a hearing to the agency, and allow a participant the option to send a copy of the adverse decision being appealed to the agency as well. In either case, failure of the participant to send such copies to the agency is not jurisdictional and therefore will not be grounds for dismissal of an appeal.

Agency officials often make many decisions a year with respect to some individual participants. In such cases, it is not always immediately apparent which decision a participant has appealed at a given time. USDA adds this provision to promote efficiency in the appeals process by encouraging full airings of appeals before the Hearing Officer. Sending the agency a copy of the decision will discourage agency requests for Director review because the agency did not have adequate notice of the appeal or the decision that was being appealed.

With respect to the language in the proposed § 11.9(c), several other comments were rejected. Two commenters suggested that, since the ''should have known'' standard is being used, participants should not be required to exhaust administrative remedies prior to judicial review when appeals are taken from cases where agencies have failed to act. The statement added to § 11.2 and discussed above makes clear that USDA considers exhaustion of an appeal to the Hearing Officer mandatory prior to seeking judicial review, regardless of the basis for the appeal.

One commenter suggested that the regulation should state clearly that a decision becomes final after the 30-day time period for requesting a hearing is missed and that this timeframe may not be waived. USDA believes such a provision unnecessary; if a participant does not request the hearing within 30 days, the participant will not be allowed to have a hearing. USDA considers the 30-day requirement for filing an appeal to be jurisdictional in nature; thus, NAD has no authority under the Act to hear an appeal unless filed within the 30-day time period as required.

On the other hand, USDA does not view the requirements of section 274 of the Act to be jurisdictional for NAD. That section requires an agency to provide participants with written notice of the adverse decision and appeal rights within 10 working days of the adverse decision. One commenter suggested that the proposed rule be revised to state that the 30-day timeframe for requesting a hearing does not begin to run until the participant receives complete appeal rights, presumably as provided for in section 274. While section 274 of the Act places a requirement on agencies, it has no bearing on the authority of NAD to hear an appeal by a participant. To read section 274 literally as suggested also would mean conversely that a participant achieves no standing to

appeal an adverse decision to NAD until the participant receives a notice of appeal rights. USDA therefore rejects this comment and instead determines that the time period for requesting an appeal begins to run on ''the date on which the participant first received notice of the adverse decision'' as provided in section 276(b) of the Act.

New subsection (c) retains language from the proposed subsection (a) regarding the requirement for participants to authorize representation by others in writing to USDA. Eight commenters addressed both this specific requirement and the requirement in other parts of this subsection that a participant must ''personally'' request a Director determination of appealability and an appeal to a Hearing Officer.

The intention behind this requirement is to ensure that participants are fully aware of the implications of actions being taken on their behalf in the appeals process. By requiring that they personally sign requests for Director review of appealability, requests for hearing, and requests for Director review of Hearing Officer determinations (§ 11.9(a)), participants will be taking personal responsibility for such actions when represented by another. Authorized representatives also will be required to keep participants informed in order to get their signature authorizing proceeding to each new phase of a NAD appeal. USDA's concern is to ensure that participants are giving informed consent to the decisions undertaken in their behalf by their representatives, and, by requiring execution of a declaration of representation, that NAD is assured that purported representatives are who they actually claim to be. While USDA could curb potential abuses by licensed attorneys by complaints to state bars, USDA has no check on the actions of representatives who are not attorneys other than through provisions such as those promulgated here. The burdens imposed on participants and representatives are light—the language for the declaration can be obtained from NAD and signed documents can be submitted by mail or by facsimile transmission.

Finally, four commenters felt that it was inappropriate for an appellant to state why the adverse decision is wrong because it was too early in the process to state a position or it may lead some participants to think that they need an attorney to bring an appeal. USDA disagrees. The word ''wrong'' was used here precisely to avoid any requirement that a participant state why a decision was ''erroneous'' or ''did not conform to published law or regulation'' or similar language. Those latter variations could be interpreted as legalistic, but USDA believes that at this initial stage the participant at least can tell NAD what is wrong with the decision that causes one to appeal it. This initial position is not binding, but rather provides NAD with a little bit more information that will allow for efficient administration of appeals. For example, if a participant feels discriminated against in the administration of a program, a statement to this effect at this stage may allow NAD to direct that person to the appropriate forum of USDA for consideration of civil rights complaints.

§ 11.7 Ex parte communications.

The proposed rule included a paragraph on *ex parte* communications in § 11.7(a) under the section regarding Division hearings. Two commenters expressed concerns in response to this proposed paragraph, the proposed definition of *ex parte* communication, and the proposed subsection on Director review of agency determinations of nonappealability, suggesting that the *ex parte* prohibition should apply to more than just the hearing phase of the NAD appeal process. One of these commenters also noted that the *ex parte* prohibition also should apply to all employees of the Division.

Initially, USDA drafted the proposed regulation in parallel to the statute that stated the *ex parte* prohibition in the section of the Act on hearings. After reviewing the comments and the statutory language, and in order to foster a perception of fairness and equal treatment in the NAD appeals process, USDA has determined to apply the *ex parte* prohibition from the point at which the appeal is filed under section § 11.6(b) through the issuance of a final determination by the Director under § 11.9.

To do this, a new § 11.7 was created to make clear that the *ex parte* prohibition applies to more than just the hearing phase of the NAD process, and that it applies to any officer or employee of the Division. However, USDA rejected the comment that suggested that the *ex parte* prohibition apply to requests for Director review of appealability. The Director should be entitled to greater flexibility in contacting the agency and the USDA Office of the General Counsel to obtain information useful in making determinations as to whether particular adverse decisions are matters of general applicability. Additionally, the *ex parte* prohibition does not apply to Director reconsideration under § 11.11 unless the Director decides to grant the request for reconsideration.

§ 11.8 Division hearings.

Proposed § 11.7 has been renumbered § 11.8. The majority of comments on this section involved the perceived onerous burden on appellants of virtually requiring verbatim transcripts of hearings, the allegedly unreasonable time deadlines that could be set more flexibly by the Hearing Officer, the requirements for sending various notices to the appellant, the need for allowing good cause exceptions for absences, the need for actual documents to be submitted to Hearing Officers to make the hearing more efficient, the need to stress telephone hearings, the wisdom of continuing current NAD practice of telephonic pre-hearing conferences, the need to give additional parties the right to participate in the appeal, the need to reduce or waive the perceived unreasonable requirement that the requesting party pay for costs of witness travel and subsistence fees, and the ambiguity of the use of the word ''personally.''

A number of changes have been made in response to comments and upon further reflection by USDA. The changes, or rejection of comments, are described below:

—Proposed § 11.7(a)(1) (now § 11.8(a)(1)) is revised to require the agency to provide the appellant a copy of the agency record upon request of the appellant; this requirement is a restatement of that requirement already included in the proposed rule at § 11.7(b)(1) that also has been amended as § 11.8(b)(1) in the final rule to require that such record be furnished to the appellant within 10 days of agency receipt of request for the record rather than ''promptly'' as proposed;

—A Hearing Officer will be required to obtain the concurrence of the Director prior to issuing a subpoena;

—Comments suggesting that an appellant have access to his or her entire file under this part were rejected, but the definition of ''agency record'' was expanded above;

—The requirement that a request for subpoena be submitted 14 days ahead of the hearing was retained but a requirement that such a subpoena must be issued 7 days prior to the hearing was added;

—Parties requesting a subpoena will have to pay only the ''reasonable'' travel and subsistence costs of a witness; USDA rejected all comments suggesting that the requirement that a party pay for all witnesses subpoenaed be deleted or that USDA should pay for such witnesses where the appellant was unable to pay;

USDA also limited its payment for the costs associated with the appearance of a USDA employee to such situations where an employee's role as a witness arises out of his or her performance of official duties;

—The requirement for submission of certain documents to the Hearing Officer 28 days prior to the hearing is deleted; instead, the Hearing Officer may set a ''reasonable'' deadline for submission of such documents;

—The required pre-hearing submission of documents is limited to those documents not contained in the agency record that the appellant plans on introducing at the hearing;

—The amount of time for the Hearing Officer's notice of the date, time, and place of the hearing is reduced from 21 days to 14 days prior to the hearing, and the Hearing Officer also may take into account the convenience of the agency in picking a hearing site;

—A pre-hearing conference will be required and will be conducted by telephone unless otherwise agreed to by all parties and the Hearing Officer;

—The notice of the right to obtain the official record shall go to all parties, and all parties shall have the same participation rights in the actual hearing;

—The text of the proposed paragraph § 11.7(c)(4)(iii) is deleted and replaced with new text in § 11.8(c)(5)(iii) that makes a tape recording by the Division the official record of the proceeding unless a party requests a verbatim transcript, in which case that party must furnish a certified copy of the transcript to the Hearing Officer for the purpose of constituting the official record and must allow other parties to purchase that transcript from the transcription service;

—The authority of the Hearing Officer to cancel a hearing in the absence of a party is limited to such cases where the absent party fails to appear without good cause;

—The ability of the Hearing Officer to add additional evidence to the record in the absence of a party at a hearing is clarified;

—The section clarifies that a notice of determination must be sent by the Hearing Officer to the individual participant appealing the adverse decision, i.e. the ''named'' appellant, as well as the authorized representative of that person; and

—The Hearing Officer shall send, with the notice of determination, a copy of the procedures for a request for filing for Director review under § 11.9.

§ 11.9 Director review of determinations of Hearing Officers.

Fifteen commenters submitted comments on this section, which appeared as § 11.8 in the proposed rule. Some of these comments, such as those objecting to the use of the word ''personally,'' the request for the procedures of this section to be sent to the appellant with the Hearing Officer notice of determination, and the extension of the *ex parte* prohibition to Director review, have been handled as described above.

One comment suggesting that the agency head be allowed to delegate his or her authority to request Director review was rejected. On this point, USDA's position is that an agency request for Director review should only be exercised where the Hearing Officer has issued a determination that clearly is not supported by a preponderance of the evidence or is contrary to law. To avoid flooding NAD with agency requests for review, retaining the agency head, or the person acting in such capacity, as the only person allowed to request review assures that only the most meritorious and serious NAD decisions will be forwarded by an agency for Director review.

A number of comments concerned the perceptions that all parties are not able to respond to requests for Director review, that the Director is not addressing all arguments in the rush to meet the statutory deadlines for issuing determinations, and that no provision is made for how new evidence introduced at this stage is to be handled. In response to these concerns, a number of changes were made.

First, a request for Director review shall include specific reasons why the appellant believes the Hearing Officer's determination is wrong. Given the limited time period for agency response and the limited time period for Director review, the appellant should be required to do something more than simply submit a copy of the Hearing Officer's determination with a note saying that they appeal. As explained above, the term ''wrong'' is used specifically to avoid legalistic connotations. USDA simply asks that appellants express in their own terms what they find wrong with determinations. However, agencies here are held to a higher standard in order to assure efficient use of NAD resources. Agencies in their requests must state specific reasons why the determination of the Hearing Officer is erroneous, including citation of statutes or regulations that the agency believes the determination violates.

Second, USDA has added language requiring that a party seeking Director review of the Hearing Officer's determination submit a copy of the request for review simultaneously to all other parties to the appeal. A new subsection also provides those non-submitting parties 5 days from receipt of the request for Director review to submit written responses to the request. Added language makes clear that the Director may consider such responses in reaching a determination. However, if new evidence is submitted in such a request, new language authorizes the Director to remand all or a portion of the determination to the Hearing Officer for consideration of that new evidence. USDA rejected the comment that such a remanded determination should go back to a new Hearing Officer. The Hearing Officer making the original determination has the best knowledge of the case to make an efficient consideration of new evidence in the absence of some credible evidence of personal bias.

Third, the deadlines set by the Act for the Director to issue a final determination or to remand to the Hearing Officer may be unrealistic at any given time because of caseload or the complexities of a particular appeal. Although USDA believes the failure to meet these deadlines does not deprive the Director of jurisdiction to reach a determination or issue a remand order, it fully intends to follow such deadlines to the extent possible in order to deliver fairly considered determinations of the Director that will withstand judicial review. Hastily rendered determinations that fail to develop an adequate decision for judicial review do not benefit either USDA or appellants. Therefore, while USDA has added no provision affirmatively authorizing the Director to extend the period for issuance of determinations, USDA recognizes that it may be necessary for the Director to do so in individual cases in order to facilitate a fair and equitable resolution of the appeal. Equitable, in this sense, refers to equal participation in and consideration of parties' submissions in the Director review process.

Finally, the Director will review the determination of the Hearing Officer to determine whether the Hearing Officer's determination is supported by substantial evidence. If any additional information submitted in the Director review process is used as a basis for the Director's final determination, the Director shall note the reasons for use of such new information in the final determination.

With respect to this section, one commenter also suggested that if a Hearing Officer does not have the power to reverse a denial of equitable relief (in

effect, to award equitable relief) then this part should provide a shortcut past the Hearing Officer to the Director. The position of USDA is that the statute provides the Director with authority in appropriate cases to award equitable relief, and that no different procedural steps are required to implement that authority. However, a record developed by a Hearing Officer is necessary for the Director to determine whether such relief is appropriate.

§ 11.10 Basis for determinations.

One commenter cited this section (proposed § 11.9) as the appropriate place for stating that NAD is bound by prior findings of fact by an agency or NAD with respect to a particular appellant in another matter. While it is not the intention of USDA to implement NAD as part of a formal legal system based on large bodies of caselaw, USDA agrees that a Hearing Officer should not issue a contrary factual determination regarding the same appellant in a different matter where that factual determination was directly addressed in the other matter.

Two commenters suggested in essence that the basis of determinations should be limited to issues raised by the decision of the agency and that the Hearing Officer or Director may not decide adversely to the appellant on issues not decided adversely to the appellant by the agency. USDA finds nothing in the statute to support anything other than a *de novo* review of agency decisions by NAD. The parties or NAD may raise any new issue as long as it conforms to the facts and law and regulations.

Four commenters expressed concern that the language ''generally applicable interpretations'' in what is now § 11.10(b) of the rule would make agency handbooks, manuals, and directives binding in a way that permits wholesale violations of the Act. These commenters point to section 278(c) of the Act that the commenters assert was enacted specifically to prevent agencies from using such materials by reference only to statutes and ''regulations published in the Federal Register'' as the basis for NAD determinations.

USDA uses this language here to make clear again that NAD is not a forum for appellants to challenge agency statutes, regulations, or the generally applicable interpretations of those statutes and regulations. Some generally applicable interpretations actually may have been published once as a notice in the Federal Register, others may be based on caselaw interpreting a particular program provision in a particular Federal court jurisdiction or state court jurisdiction for programs in which state law is the applicable law. Still other generally applicable statements may be based on the previous advice of the Office of the General Counsel regarding a statute or regulation that constitutes the official legal position of USDA. In any of these described cases, for example, NAD could not ignore the generally applicable statements and base its determinations on legal interpretations that it is not authorized by the Act to make.

§ 11.11 Reconsideration of Hearing Officer or Director determinations.

Upon further review, USDA has determined that the Director has limited inherent authority to reconsider final determinations of the Director even though provisions for such authority have not been specifically stated in the Act. Therefore, this new section sets forth standards for reconsideration of a Director's final determination.

§ 11.12 Effective date and implementation of final determinations of the Division.

Several commenters suggested that this section needed more clarification as to the applicable dates, or, alternatively, that the Hearing Officer or Director should state what those dates are in the final determination. USDA finds further amendment of this section unnecessary at this time, given the variety of programs appealable to NAD and the responsibility of agencies for implementation of NAD and program decisions.

It is the position of USDA with respect to implementation, however, that: (1) Implementation of a NAD decision only requires an agency to move to the next step of agency consideration of a benefit or application; (2) in keeping with the language of the Act, the applicable date of the decision is the date of the decision of the body from which the NAD appeal is brought; and (3) agencies, in accord with their regulations, may consider changes in the condition of the participant in the implementation of any NAD final determination.

§ 11.13 Judicial review.

Two commenters suggested that appeals arising from an agency's failure to act should be excluded from this exhaustion requirement. USDA finds no support in the Act for such an exception. One commenter also suggested an amendment to include judicially recognized exceptions to the administrative exhaustion requirement. Since those exceptions are part of common law, and are thus changeable and subject to conflicting judicial interpretation, USDA finds inappropriate the addition of such exceptions to the regulation.

§ 11.14 Filing of appeals and computation of time.

Two commenters expressed concerns that individuals residing in different time zones would have less time to appeal if Eastern time was used as a defining time for submission of filings required by this rule. In response, USDA has changed the deadline to 5:00 p.m. local time at the office of the Division to which the filing is submitted. Common practice now is for NAD or the agency, in its notice of appeal rights, to specify regional NAD offices where documents are to be submitted. USDA's change in this provision is acknowledgement of that practice and permits flexibility. However, USDA does not think that this permits participants on the East Coast to evade the purposes of this rule by filing documents with West Coast NAD offices in order to meet the 5:00 p.m. deadline.

III. Natural Resources Conservation Service (NRCS) Appeal Rules

This portion of the interim-final rule sets forth the regulations for the handling of program participant requests for mediation or informal hearings of adverse technical determinations and decisions made by NRCS officials. Specifically, this rule amends part 614 to implement section 275 of the Act which requires NRCS to afford participants the opportunity for an informal hearing or mediation (where available), when requested, before they file an appeal of adverse decisions with NAD.

These procedures are applicable to requests for mediation or informal hearings within the following program areas:

(1) Highly erodible land conservation.
(2) Wetland Conservation.
(3) Wetland Technical determinations, including wetland technical determinations made by NRCS officials not related to a request for USDA program benefits.
(4) Conservation Reserve Program.
(5) Wetlands Reserve Program.
(6) Great Plains Conservation Program.
(7) Rural Abandoned Mine Program.
(8) Colorado River Basin Salinity Control Program.
(9) Resource Conservation and Development Program.
(10) Emergency Wetland Reserve Program.
(11) Agricultural Water Quality Incentives Program.
(12) Environmental Easement Program.

(13) Forestry Incentives Program.

(14) Water Bank Program.

(15) Long term cost-sharing agreements under Public Law 83–566 and Public Law 78–534 watershed projects.

(16) Any other program which subsequently incorporates these procedures through reference to this part within its program regulations.

Part 614 as revised establishes two major categories of decisions made by NRCS officials for which landowners and participants may seek reconsideration or appeal: 1) those technical determinations of NRCS officials that may be appealed to NAD after appeal to the FSA county or area committees established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C 590h(b)(5)); and 2) other decisions made by NRCS.

The current regulations in 7 CFR part 614 were published as a final rule on July 24, 1986, pursuant to Title XII of the Food Security Act of 1985, P.L. 99–198, 16 U.S.C. 3801 *et seq.* (Title XII). Those regulations set forth the procedures under which an owner or operator could seek reconsideration of, or appeal from, certain decisions made by NRCS officials regarding eligibility for participation in the Conservation Reserve Program, as authorized by Subtitle D of Title XII, or regarding the applicability of the compliance requirements of the highly erodible land and wetland conservation provisions of subtitles B and C of title XII, respectively.

The Reorganization Act specified that, until such time as an adverse decision is referred to the NAD for consideration, FSA county or area committees established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C 590h(b)(5)) would have jurisdiction over any appeal resulting from adverse technical determinations made under Title XII, including an adverse decision involving technical determinations made by NRCS. Thus the subject matter of the current part 614 has been incorporated into subpart B of the revised part 614 which sets forth the informal appeal process for appeals of title XII technical determinations made by NRCS to FSA county committees as required by the Reorganization Act.

Subpart C of the revised part 614 consolidates appeal procedures for all other existing NRCS programs in part 614. Appeals for the following additional programs are now also covered by part 614: 7 CFR Part 623, Emergency Wetland Reserve Program; 7 CFR Part 631, Great Plains Conservation Program; 7 CFR Part 632, Rural Abandoned Mine Program; 7 CFR Part 634, Rural Clean Water Program; 7 CFR Part 663, Wellton-Mohawk Irrigation Improvement Program, and 7 CFR Part 702, Colorado River Basin Salinity Control Program; 7 CFR Part 701 subpart-Forestry Incentives Program; and 7 CFR Part 752, Water Bank program.

Subpart A of part 614 includes general provisions applicable to informal appeals under both subparts B and C.

Appeal provisions for 7 CFR parts 12, 620, 623, 631, 632, 634, 663, 701, 702, and 752 are revised to make reference to part 614 for NRCS appeal procedures.

IV. Commodity Credit Corporation (CCC), Federal Crop Insurance Corporation (FCIC), and Farm Service Agency (FSA) Appeal Rules

The interim final rule makes amendments to 7 CFR parts 400 and 780 to maintain and revise the informal appeals process for adverse decisions of the FSA regarding Federal crop insurance, CCC, and FSA programs. The procedures for appeals under both parts will be consolidated in part 780. The revised part 780 sets forth regulations for requesting informal hearings or mediation in accordance with section 275 of the Act.

Part 780 includes procedures for the handling of appeals of NRCS technical determinations to FSA county and area committees.

Part 780 also includes procedures for the mandatory appeal of certain FSA adverse decisions to such committees as required by 7 CFR 11.5(a) of the NAD rules of procedure.

This rule also amends part 781 to conform the hearing procedures to that of part 780.

V. Rural Housing Service (RHS), Rural Business-Cooperative Service (RBS), and Rural Utilities Service (RUS) Appeal Rules

7 CFR part 1900, subpart B currently contains rules for appeals of decisions of the former Farmers Home Administration (FmHA). Either by the Act or by delegation of the Secretary, the FmHA programs covered by part 1900, subpart B were divided among RHS, RBS, and RUS. This rule amends part 1900, subpart B to set forth rules for requesting informal appeals or mediation of adverse decisions concerning direct loans, loan guarantees, and grants under the following programs: RUS Water and Waste Disposal Facility Loans and Grants Program, RHS Housing and Community Facilities Loan Programs, and RBS Loan, Grant, and Guarantee Programs and the Intermediary Relending Program.

List of Subjects

7 CFR Part 1

Administrative practice and procedure, Agriculture, Reporting and recordkeeping requirements.

7 CFR Part 11

Administrative practice and procedure, Agriculture, Agricultural commodities, Crop insurance, Ex parte communications, Farmers, Federal aid programs, Guaranteed loans, Insured loans, Loan programs, Price support programs, Soil conservation.

7 CFR Part 12

Administrative practice and procedure, Agriculture, Soil conservation, Wetlands.

7 CFR Part 400

Administrative practice and procedure, Agriculture, Agricultural commodities, Crop insurance.

7 CFR Part 614

Administrative practice and procedure, Agriculture, Soil conservation, Wetlands.

7 CFR Part 620

Administrative practice and procedure, Agriculture, Soil conservation, Wetlands.

7 CFR Part 623

Administrative practice and procedure, Agriculture, Soil conservation, Wetlands.

7 CFR Part 631

Administrative practice and procedure, Agriculture, Soil conservation.

7 CFR Part 632

Administrative practice and procedure, Mines, Rural areas, Soil conservation.

7 CFR Part 634

Administrative practice and procedure, Agriculture, Soil conservation, Water resources, Water pollution control.

7 CFR Part 663

Administrative practice and procedure, Irrigation, Soil conservation, Water resources.

7 CFR Part 701

Administrative practice and procedure, Agriculture, Environmental protection, Forests and forest products, Soil conservation, Wetlands.

7 CFR Part 702

Administrative practice and procedure, Agriculture, Soil conservation, Water resources.

7 CFR Part 752

Administrative practice and procedure, Agriculture, Soil Conservation, Water bank program, Water resources.

7 CFR Part 780

Administrative practice and procedure, Agriculture, Agricultural commodities, Crop insurance, Ex parte communications, Farmers, Federal aid programs, Loan programs, Price support programs, Soil conservation, Wetlands.

7 CFR Part 781

Administrative practice and procedure, Agriculture, Farmers.

7 CFR Part 1900

Administrative practice and procedure, Agriculture, Business, Community development, Farmers, Federal aid programs, Guaranteed loans, Housing, Insured loans, Loan programs, Rural areas, Utilities.

For the reasons set out in the preamble, Title 7 of the Code of Federal Regulations is amended as set forth below:

PART 1—ADMINISTRATIVE REGULATIONS

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

Authority: 5 U.S.C. 301 and 552. Appendix A also issued under 7 U.S.C. 2244; 31 U.S.C. 9701, and 7 CFR 2.75(a)(6)(xiii).

2. Section 1.20 is revised to read as follows:

§ 1.20 Authentication.

When a request is received for an authenticated copy of a document which the agency determines to make available to the requesting party, the agency shall cause a correct copy to be prepared and sent to the Office of the General Counsel which shall certify the same and cause the seal of the Department to be affixed, except that the Hearing Clerk in the Office of Administrative Law Judges may authenticate copies of documents in the records of the Hearing Clerk and that the Director of the National Appeals Division may authenticate copies of documents in the records of the National Appeals Division.

PART 11—NATIONAL APPEALS DIVISION RULES OF PROCEDURE

Part 11 is added to read as follows:

PART 11—NATIONAL APPEALS DIVISION RULES OF PROCEDURE

Sec.
11.1 Definitions.
11.2 General statement.
11.3 Applicability.
11.4 Inapplicability of other laws and regulations.
11.5 Informal review of adverse decisions.
11.6 Director review of agency determination of appealability and right of participants to Division hearing.
11.7 *Ex parte* communications.
11.8 Division hearings.
11.9 Director review of determinations of Hearing Officers.
11.10 Basis for determinations.
11.11 Reconsideration of Director determinations.
11.12 Effective date and implementation of final determinations of the Division.
11.13 Judicial review.
11.14 Filing of appeals and computation of time.

Authority: 5 U.S.C. 301; Title II, Subtitle H, Pub. L. 103–354, 108 Stat. 3228 (7 U.S.C. 6991 *et seq.*); Reorganization Plan No. 2 of 1953 (5 U.S.C. App.).

§ 11.1 Definitions.

For purposes of this part:

Adverse decision means an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations. The term does not include a decision over which the Board of Contract Appeals has jurisdiction.

Agency means:

(1) The Agricultural Stabilization and Conservation Service (ASCS);

(2) The Commodity Credit Corporation (CCC);

(3) The Farm Service Agency (FSA);

(4) The Farmers Home Administration (FmHA);

(5) The Federal Crop Insurance Corporation (FCIC);

(6) The Natural Resources Conservation Service (NRCS);

(7) The Rural Business-Cooperative Service (RBS);

(8) The Rural Development Administration (RDA);

(9) The Rural Housing Service (RHS);

(10) The Rural Utilities Service (RUS) (but not for programs authorized by the Rural Electrification Act of 1936 and the Rural Telephone Bank Act, 7 U.S.C. 901 *et seq.*);

(11) The Soil Conservation Service (SCS);

(12) A State, county, or area committee established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)(5)); and

(13) Any successor agency to the above-named agencies, and any other agency or office of the Department which the Secretary may designate.

Agency record means all the materials maintained by an agency related to an adverse decision which are submitted to the Division by an agency for consideration in connection with an appeal under this part, including all materials prepared or reviewed by the agency during its consideration and decision-making process, but shall not include records or information not related to the adverse decision at issue. All materials contained in the agency record submitted to the Division shall be deemed admitted as evidence for purposes of a hearing or a record review under § 11.8.

Agency representative means any person, whether or not an attorney, who is authorized to represent the agency in an administrative appeal under this part.

Appeal means a written request by a participant asking for review by the National Appeals Division of an adverse decision under this part.

Appellant means any participant who appeals an adverse decision in accordance with this part. Unless separately set forth in this part, the term ''appellant'' includes an authorized representative.

Authorized representative means any person, whether or not an attorney, who is authorized in writing by a participant, consistent with § 11.6(c), to act for the participant in an administrative appeal under this part. The authorized representative may act on behalf of the participant except when the provisions of this part require action by the participant or appellant personally.

Case record means all the materials maintained by the Secretary related to an adverse decision. The case record includes both the agency record and the hearing record.

Days means calendar days unless otherwise specified.

Department means the United States Department of Agriculture (USDA).

Director means the Director of the Division or a designee of the Director.

Division means the National Appeals Division established by this part.

Equitable relief means relief which is authorized under section 326 of the Food and Agriculture Act of 1962 (7 U.S.C. 1339a) and other laws administered by the agency.

Ex parte communication means an oral or written communication to any officer or employee of the Division with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports, or inquiries on Division procedure, in reference to any matter or proceeding connected with the appeal involved.

Hearing, except with respect to § 11.5, means a proceeding before the Division to afford a participant the opportunity to present testimony or documentary evidence or both in order to have a previous determination reversed and to show why an adverse determination was in error.

Hearing Officer means an individual employed by the Division who conducts the hearing and determines appeals of adverse decisions by any agency.

Hearing record means all documents, evidence, and other materials generated in relation to a hearing under § 11.8.

Implement means the taking of action by an agency of the Department in order fully and promptly to effectuate a final determination of the Division.

Participant means any individual or entity who has applied for, or whose right to participate in or receive, a payment, loan, loan guarantee, or other benefit in accordance with any program of an agency to which the regulations in this part apply is affected by a decision of such agency. With respect to guaranteed loans made by FSA, both the borrower and the lender jointly must appeal an adverse decision except that the denial or reduction of a final loss payment to a lender shall be appealed by the lender only. The term does not include persons whose claim(s) arise under:

(1) Programs subject to various proceedings provided for in 7 CFR part 1;

(2) Programs governed by Federal contracting laws and regulations (appealable under other rules and to other forums, including to the Department's Board of Contract Appeals under 7 CFR part 24);

(3) The Freedom of Information Act (appealable under 7 CFR part 1, subpart A);

(4) Suspension and debarment disputes, including, but not limited to, those falling within the scope of 7 CFR parts 1407 and 3017;

(5) Export programs administered by the Commodity Credit Corporation;

(6) Disputes between reinsured companies and the Federal Crop Insurance Corporation;

(7) Tenant grievances or appeals prosecutable under the provisions of 7 CFR part 1944, subpart L, under the multi-family housing program carried out by RHS;

(8) Personnel, equal employment opportunity, and other similar disputes with any agency or office of the Department which arise out of the employment relationship;

(9) The Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, or the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. 3721; or

(10) Discrimination complaints prosecutable under the nondiscrimination regulations at 7 CFR parts 15, 15a, 15b, and 15e.

Record review means an appeal considered by the Hearing Officer in which the Hearing Officer's determination is based on the agency record and other information submitted by the appellant and the agency, including information submitted by affidavit or declaration.

Secretary means the Secretary of Agriculture.

§ 11.2 General statement.

(a) This part sets forth procedures for proceedings before the National Appeals Division within the Department. The Division is an organization within the Department, subject to the general supervision of and policy direction by the Secretary, which is independent from all other agencies and offices of the Department, including Department officials at the state and local level. The Director of the Division reports directly to the Secretary of Agriculture. The authority of the Hearing Officers and the Director of the Division, and the administrative appeal procedures which must be followed by program participants who desire to appeal an adverse decision and by the agency which issued the adverse decision, are included in this part.

(b) Pursuant to section 212(e) of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Public Law 103–354 (the Act), 7 U.S.C. 6912(e), program participants shall seek review of an adverse decision before a Hearing Officer of the Division, and may seek further review by the Director, under the provisions of this part prior to seeking judicial review.

§ 11.3 Applicability.

(a) *Subject matter.* The regulations contained in this part are applicable to adverse decisions made by an agency, including, for example, those with respect to:

(1) Denial of participation in, or receipt of benefits under, any program of an agency;

(2) Compliance with program requirements;

(3) The making or amount of payments or other program benefits to a participant in any program of an agency; and

(4) A determination that a parcel of land is a wetland or highly erodible land.

(b) *Limitation.* The procedures contained in this part may not be used to seek review of statutes or USDA regulations issued under Federal law.

§ 11.4 Inapplicability of other laws and regulations.

The provisions of the Administrative Procedure Act generally applicable to agency adjudications (5 U.S.C. 554, 555, 556, 557, & 3105) are not applicable to proceedings under this part. The Equal Access to Justice Act, as amended, 5 U.S.C. 504, does not apply to these proceedings. The Federal Rules of Evidence, 28 U.S.C. App., shall not apply to these proceedings.

§ 11.5 Informal review of adverse decisions.

(a) *Required informal review of FSA adverse decisions.* A participant must seek an informal review of an adverse decision issued at the field service office level by an officer or employee of FSA, or by any employee of a county or area committee established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590h(b)(5), before NAD will accept an appeal of an FSA adverse decision. Such informal review shall be done by the county or area committee with responsibility for the adverse decision at issue. The procedures for requesting such an informal review before FSA are found in 7 CFR part 780. After receiving a decision upon review by a county or area committee, a participant may seek further informal review by the State FSA committee or may appeal directly to NAD under § 11.6(b).

(b) *Optional informal review.* With respect to adverse decisions issued at the State office level of FSA and adverse decisions of all other agencies, a participant may request an agency informal review of an adverse decision of that agency prior to appealing to NAD. Procedures for requesting such an informal review are found at 7 CFR part 780 (FSA), 7 CFR part 614 (NRCS), 7 CFR part 1900, subpart B (RUS), 7 CFR part 1900, subpart B (RBS), and 7 CFR part 1900, subpart B (RHS).

(c) *Mediation.* A participant also shall have the right to utilize any available alternative dispute resolution (ADR) or mediation program, including any mediation program available under title

V of the Agriculture Credit Act of 1987, 7 U.S.C. 5101 *et seq.*, in order to attempt to seek resolution of an adverse decision of an agency prior to a NAD hearing. If a participant:

(1) Requests mediation or ADR prior to filing an appeal with NAD, the participant stops the running of the 30-day period during which a participant may appeal to NAD under § 11.6(b)(1), and will have the balance of days remaining in that period to appeal to NAD once mediation or ADR has concluded.

(2) Requests mediation or ADR after having filed an appeal to NAD under § 11.6(b), but before the hearing, the participant will be deemed to have waived his right to have a hearing within 45 days under § 11.8(c)(1) but shall have the right to have a hearing within 45 days after conclusion of mediation or ADR.

§ 11.6 Director review of agency determination of appealability and right of participants to Division hearing.

(a) *Director review of agency determination of appealability.* (1) Not later than 30 days after the date on which a participant receives a determination from an agency that an agency decision is not appealable, the participant must submit a written request to the Director to review the determination in order to obtain such review by the Director.

(2) The Director shall determine whether the decision is adverse to the individual participant and thus appealable or is a matter of general applicability and thus not subject to appeal, and will issue a final determination notice that upholds or reverses the determination of the agency. This final determination is not appealable. If the Director reverses the determination of the agency, the Director will notify the participant and the agency of that decision and inform the participant of his or her right to proceed with an appeal.

(3) The Director may delegate his or her authority to conduct a review under this subsection to any subordinate official of the Division other than a Hearing Officer. In any case in which such review is conducted by such a subordinate official, the subordinate official's determination shall be considered to be the determination of the Director and shall be final and not appealable.

(b) *Appeals of adverse decisions.* (1) To obtain a hearing under § 11.8, a participant personally must request such hearing not later than 30 days after the date on which the participant first received notice of the adverse decision or after the date on which the participant receives notice of the Director's determination that a decision is appealable. In the case of the failure of an agency to act on the request or right of a recipient, a participant personally must request such hearing not later than 30 days after the participant knew or reasonably should have known that the agency had not acted within the timeframes specified by agency program regulations, or, where such regulations specify no timeframes, not later than 30 days after the participant reasonably should have known of the agency's failure to act.

(2) A request for a hearing shall be in writing and personally signed by the participant, and shall include a copy of the adverse decision to be reviewed, if available, along with a brief statement of the participant's reasons for believing that the decision, or the agency's failure to act, was wrong. The participant also shall send a copy of the request for a hearing to the agency, and may send a copy of the adverse decision to be reviewed to the agency, but failure to do either will not constitute grounds for dismissal of the appeal. Instead of a hearing, the participant may request a record review.

(c) If a participant is represented by an authorized representative, the authorized representative must file a declaration with NAD, executed in accordance with 28 U.S.C. 1746, stating that the participant has duly authorized the declarant in writing to represent the participant for purposes of a specified adverse decision or decisions, and attach a copy of the written authorization to the declaration.

§ 11.7 Ex parte communications.

(a)(1) At no time between the filing of an appeal and the issuance of a final determination under this part shall any officer or employee of the Division engage in *ex parte* communications regarding the merits of the appeal with any person having any interest in the appeal pending before the Division, including any person in an advocacy or investigative capacity. This prohibition does not apply to:

(i) Discussions of procedural matters related to an appeal; or

(ii) Discussions of the merits of the appeal where all parties to the appeal have been given notice and an opportunity to participate.

(2) In the case of a communication described in paragraph (a)(1)(ii) of this section, a memorandum of any such discussion shall be included in the hearing record.

(b) No interested person shall make or knowingly cause to be made to any officer or employee of the Division an *ex parte* communication relevant to the merits of the appeal.

(c) If any officer or employee of the Division receives an *ex parte* communication in violation of this section, the one who receives the communication shall place in the hearing record:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communications; and

(3) All written responses to such communications, and memoranda stating the substance of any oral responses thereto.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section the Hearing Officer or Director may, to the extent consistent with the interests of justice and the policy of the underlying program, require the party to show cause why such party's claim or interest in the appeal should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

§ 11.8 Division hearings.

(a) *General rules.* (1) The Director, the Hearing Officer, and the appellant shall have access to the agency record of any adverse decision appealed to the Division for a hearing. Upon request by the appellant, the agency shall provide the appellant a copy of the agency record.

(2) The Director and Hearing Officer shall have the authority to administer oaths and affirmations, and to require, by subpoena, the attendance of witnesses and the production of evidence. A Hearing Officer shall obtain the concurrence of the Director prior to issuing a subpoena.

(i) A subpoena requiring the production of evidence may be requested and issued at any time while the case is pending before the Division.

(ii) An appellant or an agency, acting through any appropriate official, may request the issuance of a subpoena requiring the attendance of a witness by submitting such a request in writing at least 14 days before the scheduled date of a hearing. The Director or Hearing Officer shall issue a subpoena at least 7 days prior to the scheduled date of a hearing.

(iii) A subpoena shall be issued only if the Director or a Hearing Officer determines that:

(A) For a subpoena of documents, the appellant or the agency has established that production of documentary evidence is necessary and is reasonably calculated to lead to information which would affect the final determination or

is necessary to fully present the case before the Division; or

(B) For a subpoena of a witness, the appellant or the agency has established that either a representative of the Department or a private individual possesses information that is pertinent and necessary for disclosure of all relevant facts which could impact the final determination, that the information cannot be obtained except through testimony of the person, and that the testimony cannot be obtained absent issuance of a subpoena.

(iv) The party requesting issuance of a subpoena shall arrange for service. Service of a subpoena upon a person named therein may be made by registered or certified mail, or in person. Personal service shall be made by personal delivery of a copy of the subpoena to the person named therein by any person who is not a party and who is not less than 18 years of age. Proof of service shall be made by filing with the Hearing Officer or Director who issued the subpoena a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service in person or by return receipts for certified or registered mail.

(v) A party who requests that a subpoena be issued shall be responsible for the payment of any reasonable travel and subsistence costs incurred by the witness in connection with his or her appearance and any fees of a person who serves the subpoena in person. The Department shall pay the costs associated with the appearance of a Department employee whose role as a witness arises out of his or her performance of official duties, regardless of which party requested the subpoena. The failure to make payment of such charges on demand may be deemed by the Hearing Officer or Director as sufficient ground for striking the testimony of the witness and the evidence the witness has produced.

(vi) If a person refuses to obey a subpoena, the Director, acting through the Office of the General Counsel of the Department and the Department of Justice, may apply to the United States District Court in the jurisdiction where that person resides to have the subpoena enforced as provided in the Federal Rules of Civil Procedure (28 U.S.C. App.).

(3) Testimony required by subpoena pursuant to paragraph (a)(2) of this section may, at the discretion of the Director or a Hearing Officer, be presented at the hearing either in person or telephonically.

(b) *Hearing procedures applicable to both record review and hearings.* (1) Upon the filing of an appeal under this part of an adverse decision by any agency, the agency promptly shall provide the Division with a copy of the agency record. If requested by the appellant prior to the hearing, a copy of such agency record shall be provided to the appellant by the agency within 10 days of receipt of the request by the agency.

(2) The Director shall assign the appeal to a Hearing Officer and shall notify the appellant and agency of such assignment. The notice also shall advise the appellant and the agency of the documents required to be submitted under paragraph (c)(2) of this section, and notify the appellant of the option of having a hearing by telephone.

(3) The Hearing Officer will receive evidence into the hearing record without regard to whether the evidence was known to the agency officer, employee, or committee making the adverse decision at the time the adverse decision was made.

(c) *Procedures applicable only to hearings.* (1) Upon a timely request for a hearing under § 11.6(b), an appellant has the right to have a hearing by the Division on any adverse decision within 45 days after the date of receipt of the request for the hearing by the Division.

(2) The Hearing Officer shall set a reasonable deadline for submission of the following documents:

(i) By the appellant:

(A) A short statement of why the decision is wrong;

(B) A copy of any document not in the agency record that the appellant anticipates introducing at the hearing; and

(C) A list of anticipated witnesses and brief descriptions of the evidence such witnesses will offer.

(ii) By the agency:

(A) A copy of the adverse decision challenged by the appellant;

(B) A written explanation of the agency's position, including the regulatory or statutory basis therefor;

(C) A copy of any document not in the agency record that the agency anticipates introducing at the hearing; and

(D) A list of anticipated witnesses and brief descriptions of the evidence such witnesses will offer.

(3) Not less than 14 days prior to the hearing, the Division must provide the appellant, the authorized representative, and the agency a notice of hearing specifying the date, time, and place of the hearing. The hearing will be held in the State of residence of the appellant, as determined by the Hearing Officer, or at a location that is otherwise convenient to the appellant, the agency, and the Division. The notice also shall notify all parties of the right to obtain an official record of the hearing.

(4) Pre-hearing conference. Whenever appropriate, the Hearing Officer shall hold a pre-hearing conference in order to attempt to resolve the dispute or to narrow the issues involved. Such pre-hearing conference shall be held by telephone unless the Hearing Officer and all parties agree to hold such conference in person.

(5) Conduct of the hearing. (i) A hearing before a Hearing Officer will be in person unless the appellant agrees to a hearing by telephone.

(ii) The hearing will be conducted by the Hearing Officer in the manner determined by the Division most likely to obtain the facts relevant to the matter or matters at issue. The Hearing Officer will allow the presentation of evidence at the hearing by any party without regard to whether the evidence was known to the officer, employee, or committee of the agency making the adverse decision at the time the adverse decision was made. The Hearing Officer may confine the presentation of facts and evidence to pertinent matters and exclude irrelevant, immaterial, or unduly repetitious evidence, information, or questions. Any party shall have the opportunity to present oral and documentary evidence, oral testimony of witnesses, and arguments in support of the party's position; controvert evidence relied on by any other party; and question all witnesses. When appropriate, agency witnesses requested by the appellant will be made available at the hearing. Any evidence may be received by the Hearing Officer without regard to whether that evidence could be admitted in judicial proceedings.

(iii) An official record shall be made of the proceedings of every hearing. This record will be made by an official tape recording by the Division. In addition, either party may request that a verbatim transcript be made of the hearing proceedings and that such transcript shall be made the official record of the hearing. The party requesting a verbatim transcript shall pay for the transcription service, shall provide a certified copy of the transcript to the Hearing Officer free of charge, and shall allow any other party desiring to purchase a copy of the transcript to order it from the transcription service.

(6) Absence of parties. (i) If at the time scheduled for the hearing either the appellant or the agency representative is absent, and no appearance is made on behalf of such absent party, or no arrangements have been made for rescheduling the hearing, the Hearing

Officer has the option to cancel the hearing unless the absent party has good cause for the failure to appear. If the Hearing Officer elects to cancel the hearing, the Hearing Officer may:

(A) Treat the appeal as a record review and issue a determination based on the agency record as submitted by the agency and the hearing record developed prior to the hearing date;

(B) Accept evidence into the hearing record submitted by any party present at the hearing, and then issue a determination; or

(C) Dismiss the appeal.

(ii) When a hearing is cancelled due to the absence of a party, the Hearing Officer will add to the hearing record any additional evidence submitted by any party present, provide a copy of such evidence to the absent party or parties, and allow the absent party or parties 10 days to provide a response to such additional evidence for inclusion in the hearing record.

(iii) Where an absent party has demonstrated good cause for the failure to appear, the Hearing Officer shall reschedule the hearing unless all parties agree to proceed without a hearing.

(7) Post-hearing procedure. The Hearing Officer will leave the hearing record open after the hearing for 10 days, or for such other period of time as the Hearing Officer shall establish, to allow the submission of information by the appellant or the agency, to the extent necessary to respond to new facts, information, arguments, or evidence presented or raised at the hearing. Any such new information will be added by the Hearing Officer to the hearing record and sent to the other party or parties by the submitter of the information. The Hearing Officer, in his or her discretion, may permit the other party or parties to respond to this post-hearing submission.

(d) *Interlocutory review.* Interlocutory review by the Director of rulings of a Hearing Officer are not permitted under the procedures of this part.

(e) *Burden of proof.* The appellant has the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence.

(f) *Timing of issuance of determination.* The Hearing Officer will issue a notice of the determination on the appeal to the named appellant, the authorized representative, and the agency not later than 30 days after a hearing or the closing date of the hearing record in cases in which the Hearing Officer receives additional evidence from the agency or appellant after a hearing. In the case of a record review, the Hearing Officer will issue a notice of determination within 45 days of receipt of the appellant's request for a record review. Upon the Hearing Officer's request, the Director may establish an earlier or later deadline. A notice of determination shall be accompanied by a copy of the procedures for filing a request for Director review under § 11.9. If the determination is not appealed to the Director for review under § 11.9, the notice provided by the Hearing Officer shall be considered to be a notice of a final determination under this part.

§ 11.9 Director review of determinations of Hearing Officers.

(a) *Requests for Director review.* (1) Not later than 30 days after the date on which an appellant receives the determination of a Hearing Officer under § 11.8, the appellant must submit a written request, signed personally by the named appellant, to the Director to review the determination in order to be entitled to such review by the Director. Such request shall include specific reasons why the appellant believes the determination is wrong.

(2) Not later than 15 business days after the date on which an agency receives the determination of a Hearing Officer under § 11.8, the head of the agency may make a written request that the Director review the determination. Such request shall include specific reasons why the agency believes the determination is wrong, including citations of statutes or regulations that the agency believes the determination violates. Any such request may be made by the head of an agency only, or by a person acting in such capacity, but not by any subordinate officer of such agency.

(3) A copy of a request for Director review submitted under this paragraph (a) shall be provided simultaneously by the submitter to each party to the appeal.

(b) *Notification of parties.* The Director promptly shall notify all parties of receipt of a request for review.

(c) *Responses to request for Director review.* Other parties to an appeal may submit written responses to a request for Director review within 5 business days from the date of receipt of a copy of the request for review.

(d) *Determination of Director.* (1) The Director will conduct a review of the determination of the Hearing Officer using the agency record, the hearing record, the request for review, any responses submitted under paragraph (c) of this section, and such other arguments or information as may be accepted by the Director, in order to determine whether the decision of the Hearing Officer is supported by substantial evidence. Based on such review, the Director will issue a final determination notice that upholds, reverses, or modifies the determination of the Hearing Officer. The Director's determination upon review of a Hearing Officer's decision shall be considered to be the final determination under this part and shall not be appealable. However, if the Director determines that the hearing record is inadequate or that new evidence has been submitted, the Director may remand all or a portion of the determination to the Hearing Officer for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing.

(2) The Director will complete the review and either issue a final determination or remand the determination not later than—

(i) 10 business days after receipt of the request for review, in the case of a request by the head of an agency; or

(ii) 30 business days after receipt of the request for review, in the case of a request by an appellant.

(3) In any case or any category of cases, the Director may delegate his or her authority to conduct a review under this section to any Deputy or Associate Directors of the Division. In any case in which such review is conducted by a Deputy or Associate Director under authority delegated by the Director, the Deputy or Associate Director's determination shall be considered to be the determination of the Director under this part and shall be final and not appealable.

(e) *Equitable relief.* In reaching a decision on an appeal, the Director shall have the authority to grant equitable relief under this part in the same manner and to the same extent as such authority is provided an agency under applicable laws and regulations.

§ 11.10 Basis for determinations.

(a) In making a determination, the Hearing Officers and the Director are not bound by previous findings of facts on which the agency's adverse decision was based.

(b) In making a determination on the appeal, Hearing Officers and the Director shall ensure that the decision is consistent with the laws and regulations of the agency, and with the generally applicable interpretations of such laws and regulations.

(c) All determinations of the Hearing Officers and the Director must be based on information from the case record, laws applicable to the matter at issue, and applicable regulations published in the Federal Register and in effect on the date of the adverse decision or the date on which the acts that gave rise to the

adverse decision occurred, whichever date is appropriate under the applicable agency program laws and regulations.

§ 11.11 Reconsideration of Director determinations.

(a) Reconsideration of a determination of the Director may be requested by the appellant or the agency within 10 days of receipt of the determination. The Director will not consider any request for reconsideration that does not contain a detailed statement of a material error of fact made in the determination, or a detailed explanation of how the determination is contrary to statute or regulation, which would justify reversal or modification of the determination.

(b) The Director shall issue a notice to all parties as to whether a request for reconsideration meets the criteria in paragraph (a) of this section. If the request for reconsideration meets such criteria, the Director shall include a copy of the request for reconsideration in the notice to the non-requesting parties to the appeal. The non-requesting parties shall have 5 days from receipt of such notice from the Director to file a response to the request for reconsideration with the Director.

(c) The Director shall issue a decision on the request for reconsideration within 5 days of receipt of responses from the non-requesting parties. If the Director's decision upon reconsideration reverses or modifies the final determination of the Director rendered under § 11.9(d), the Director's decision on reconsideration will become the final determination of the Director under § 11.9(d) for purposes of this part.

§ 11.12 Effective date and implementation of final determinations of the Division.

(a) On the return of a case to an agency pursuant to the final determination of the Division, the head of the agency shall implement the final determination not later than 30 days after the effective date of the notice of the final determination.

(b) A final determination will be effective as of the date of filing of an application, the date of the transaction or event in question, or the date of the original adverse decision, whichever is applicable under the applicable agency program statutes or regulations.

§ 11.13 Judicial review.

(a) A final determination of the Division shall be reviewable and enforceable by any United States District Court of competent jurisdiction in accordance with chapter 7 of title 5, United States Code.

(b) An appellant may not seek judicial review of any agency adverse decision appealable under this part without receiving a final determination from the Division pursuant to the procedures of this part.

§ 11.14 Filing of appeals and computation of time.

(a) An appeal, a request for Director review, or any other document will be considered ''filed'' when delivered in writing to the Division, when postmarked, or when a complete facsimile copy is received by the Division.

(b) Whenever the final date for any requirement of this part falls on a Saturday, Sunday, Federal holiday, or other day on which the Division is not open for the transaction of business during normal working hours, the time for filing will be extended to the close of business on the next working day.

(c) The time for filing an appeal, a request for Director review, or any other document expires at 5:00 p.m. local time at the office of the Division to which the filing is submitted on the last day on which such filing may be made.

PART 12—HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION

1. The authority citation for part 12 continues to read as follows:

Authority: 16 U.S.C. 3801 *et seq.*

2. Section 12.12 is revised to read as follows:

§ 12.12 Appeals.

Any person who has been or who would be denied program benefits in accordance with § 12.4 as the result of any determination made in accordance with the provisions of this part may obtain a review of such determination in accordance with the administrative appeals procedures of the agency which rendered such determination. Agency appeal procedures are contained in the Code of Federal Regulations as follows: FSA, 7 CFR part 780; NRCS, 7 CFR part 614; RHS, RBS, and RUS, 7 CFR part 1900, subpart B.

PART 400—GENERAL ADMINISTRATIVE REGULATIONS

1–2. Subpart J is revised to read as follows:

Subpart J—Appeal Procedure—Regulations

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

§ 400.90 Applicability.

Persons who are insured or believe they are insured under contracts of insurance issued under the Federal Crop Insurance Act must obtain appeal and reconsideration of decisions made under the provisions of this chapter in accordance with part 780 of this title.

PART 614—APPEAL PROCEDURES

1. Part 614 is revised to read as follows:

PART 614—APPEAL PROCEDURES

Subpart A—General Provisions

Sec.
614.1 Purpose and scope.
614.2 Definitions.
614.3 Applicability.
614.4 Reservation of authority.
614.5 Decisions not subject to appeal.

Subpart B—Appeals of Technical Determinations Related to the Conservation Title (Title XII) of the Food Security Act of 1985, as Amended

614.100 Applicability.
614.101 Notice of preliminary technical determinations.
614.102 Mediation of preliminary technical determinations.
614.103 Final determinations.
614.104 Appeals of technical determinations.

Subpart C—Appeals of Decision Related to Conservation Programs (non-Title XII)

614.200 Applicability.
614.201 Notice of final decisions.
614.202 Time frames for filing requests for informal hearings.
614.203 Mediation of adverse final decisions.
614.204 Appeals of adverse final decisions.

Authority: 5 U.S.C. 301, sections 226 and 275 of Pub. L. 103–354 (7 U.S.C. 6932 and 6995); 16 U.S.C. 3843(a).

Subpart A—General Provisions

§ 614.1 Purpose and scope.

This part sets forth the informal procedures under which a landowner or program participant may appeal adverse technical determinations or decisions made by officials of the Natural Resources Conservation Service (NRCS) or its successor agency.

§ 614.2 Definitions.

Adverse technical determination or decision includes, in addition to the definition of adverse decision in 7 CFR part 11, an NRCS technical determination or decision that affects the legal substantive status of the land, though it may not necessarily be adverse.

Chief means the Chief of NRCS. For the purposes of this part, the term ''Chief'' includes an official of NRCS national headquarters designated by the Chief to act for the Chief in making decisions under this part.

Conservation district means any district or unit of State or local government formed under State law or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such

district or unit of government may be referred to as a conservation district, soil conservation district, soil and water conservation district, natural resource district, land conservation committee, or a similar name.

County committee means a Farm Service Agency (FSA) county or area committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)).

Decision means a conclusion reached by an NRCS official based on applicable regulations and program instructions which relates to eligibility for program benefits, including a technical determination used as a basis for the decision.

Designated conservationist means the NRCS official, usually the district conservationist, whom the State Conservationist designates to be responsible for the program or compliance requirement to which this part is applicable.

Mediation means a process in which a neutral third party, the mediator, meets with the disputing parties (e.g., the landowner or program participant and the agency), facilitates discussions, and works with the parties to resolve their disputes, narrow areas of disagreement, and improve communications and relationships. A mediator has no authority to render a decision or determination.

Preliminary technical determination means the initial written technical determination provided to a client which will become final after 30 days unless the client takes action in accordance with § 614.101 to stay the preliminary technical determination from becoming final.

State Conservationist means the NRCS official in charge of NRCS operations within a State, as set forth in part 600 of this chapter.

Technical determination means a conclusion concerning the status and condition of the natural resources and cultural practices based on science and best professional judgment of natural resource professionals concerning the soils, water, air, plants, and animals.

Refer to 7 CFR 11.1 for other definitions applicable to appeals of adverse technical determinations and decisions covered by this part.

§ 614.3 Applicability.

(a) Appeals of adverse technical determinations and adverse decisions covered by this part are also governed by National Appeals Division (NAD) regulations at 7 CFR part 11.

(b) Decisions which are subject to this part include any decision under one or more NRCS programs; and technical determinations or decisions that affect the status of the land even though they may not affect the landowner's or program participant's eligibility for USDA program benefits.

(c) The failure of an official of NRCS to issue a technical determination or decision is subject to this part.

(d) Complaints involving discrimination in program delivery will be handled under the existing USDA civil rights rules and regulations.

(e) Appeals on contractual issues that are subject to the jurisdiction of the Agriculture Board of Contract Appeals are not appealable under the procedures within this part.

§ 614.4 Reservation of authority.

Nothing contained in the regulations of this part shall preclude the Secretary of Agriculture or the Chief from determining at any time any question arising under the programs to which the regulations of this part apply, or from reversing or modifying in writing, with sufficient reason given therefore, any technical determination or decision made by an NRCS official.

§ 614.5 Decisions not subject to appeal.

The following are examples of decisions which are not appealable:

(a) General program requirements that apply to all participants;

(b) Science-based formulas and criteria;

(c) Procedural decisions relating to administration of the programs; and

(d) Denials of assistance due to lack of funds or authority.

Subpart B—Appeals of Technical Determinations Related to the Conservation Title (Title XII) of the Food Security Act of 1985, as Amended

§ 614.100 Applicability.

The provisions of this subpart set forth the procedures under which a landowner or program participant may seek mediation of a preliminary technical determination or appeal from technical determinations made by NRCS officials on or after January 16, 1996 regarding technical determinations within the following programs:

(1) Highly Erodible Land Conservation;

(2) Wetland Conservation, including wetland technical determinations made by NRCS officials not related to a request for USDA program benefits;

(3) Conservation Reserve Program;

(4) Wetlands Reserve Program;

(5) Agricultural Water Quality Incentives Program; and

(6) Environmental Easement Program.

§ 614.101 Notice of preliminary technical determinations.

(a) All preliminary technical determinations related to programs provided for in § 614.100 shall be in writing and shall inform the landowner or program participant of the following:

(1) The preliminary technical determination will become final after 30 days if the landowner or program participant does not arrange with the designated conservationist for either or both of the following options:

(i) A field visit to the site to gather additional information and to discuss the facts concerning the preliminary technical determination, together with, at the option of the conservation district, a district representative; and

(ii) Mediation.

(2) Once the technical determination is final, the landowner or program participant may appeal the technical determination to the FSA county or area committee pursuant to 7 CFR part 780. Landowners or program participants wishing to appeal must exhaust any available appeal procedures through the FSA county committee prior to appealing to NAD. Judicial review is available only as specified in 7 CFR part 11.

(b) The document containing the preliminary technical determination shall be mailed or hand delivered to the landowner or program participant.

§ 614.102 Mediation of preliminary technical determinations.

(a)(1) Any dispute with respect to a preliminary technical determination related to the programs provided in § 614.100 shall, at the request of the landowner or program participant, be mediated:

(i) Through certified individuals in those States where a State mediation program certified by the United States Department of Agriculture (USDA) has been established. Conservation district officials in certified State Mediation Program States may become certified by the State and utilized for mediation, if they choose to participate.

(ii) In States with no certified mediation program in effect, through mediation by a qualified representative of a local conservation district, if a local conservation district chooses to participate. Upon mutual agreement of the parties, other individuals may serve as mediators.

(2) Upon receiving a request for mediation, NRCS shall notify other USDA and Federal agencies, as appropriate.

(b) The parties shall have not more than 30 days to reach an agreement following a mediation session. The

mediator shall notify the designated conservationist in writing at the end of this period whether the parties reached an agreement. Any agreement reached during, or as a result of, the mediation process shall conform to the statutory, regulatory, and manual provisions governing the program.

§ 614.103 Final determinations.

(a) Preliminary technical determinations shall become final:

(1) 30 days after receipt by the landowner or program participant of the notice of a preliminary technical determination issued pursuant to § 614.101, unless a field visit or mediation is requested;

(2) After the earlier of 30 days after the field visit provided for under § 614.101(a) or receipt by the landowner or program participant of a final determination from the designated conservationist; or

(3) 30 days after a mediation session if a mutual agreement has not been reached by the parties.

(b) The final technical determination shall set forth the decision, the basis for the decision, including all factors, technical criteria, and facts relied upon in making the decision, and shall inform the landowner or program participant of the procedure for requesting and pursuing further review.

§ 614.104 Appeals of technical determinations.

(a) Technical determinations related to the programs in § 614.100 may only be appealed, pursuant to the provisions of 7 CFR part 780, to the FSA county committee with jurisdiction.

(b) In cases where a field visit has not already been completed in accordance with § 614.101(a), a field visit shall be completed by the designated conservationist before the FSA county committee considers the appeal.

(c) If the FSA county committee hearing the appeal requests review of the technical determination by the applicable State Conservationist prior to issuing their decision, the State Conservationist may:

(1) Designate an appropriate NRCS official to gather any additional information necessary for review of the technical determination;

(2) Obtain additional oral and documentary evidence from any party with personal or expert knowledge about the facts under review; and

(3) Conduct a field visit to review and obtain additional information and to discuss the facts concerning the technical determination. The State Conservationist shall provide the applicable FSA county committee with a written technical determination, including all factors, technical criteria, and facts relied upon in making the technical determination.

(d) Any landowner or program participant who is adversely affected by a decision of the FSA county committee may appeal to NAD in accordance with 7 CFR part 11.

Subpart C—Appeals of Decisions Related to Conservation Programs (non-Title XII)

§ 614.200 Applicability.

The provisions of this subpart set forth the procedures under which a landowner or program participant may seek an informal hearing on adverse decisions made by NRCS officials (exclusive of those decisions that are appealable to the USDA Board of Contract Appeals) after January 16, 1996 in the following program areas:

(1) Great Plains Conservation Program;

(2) Rural Abandoned Mine Program;

(3) Emergency Watershed Projects;

(4) Rural Clean Water Program;

(5) Colorado River Basin Salinity Control Program;

(6) Forestry Incentive Program;

(7) Water Bank Program;

(8) Flood Prevention and Watershed Protection Programs;

(9) Any other program which subsequently incorporates these procedures through reference to this subpart within the program regulations.

§ 614.201 Notice of final decisions.

(a) All final decisions related to programs provided for in § 614.200 that are made by the designated conservationist shall be in writing and shall inform the landowner or program participant of their right to request any or all of the following:

(1) An informal hearing before NRCS;

(2) Mediation; or

(3) A hearing before NAD in accordance with 7 CFR part 11.

(b) The document containing the decision shall be mailed or hand delivered to the landowner or program participant.

§ 614.202 Time frames for filing requests for informal hearings.

(a) A request for an informal hearing before NRCS shall be filed within 30 days after written notice of the final decision, which is the subject of the request, is mailed or otherwise made available to the landowner or program participant. A request for an informal hearing shall be considered ''filed'' when personally delivered in writing to the appropriate reviewing authority or when the properly addressed request, postage paid, is postmarked.

(b) A request for appeal may be accepted and acted upon even though it is not filed within the time prescribed in paragraph (a) of this section if, in the judgment of the reviewing authority with whom such request is filed, the circumstances warrant such action.

§ 614.203 Mediation of adverse final decisions.

(a) Any dispute with respect to an adverse final decision related to the programs provided in § 614.200 shall, at the request of the landowner or program, be mediated:

(1) Through certified individual in those States where a State Mediation Program has been established. Conservation district officials in certified State Mediation Program States may become certified by the State and utilized for mediation, if they choose to participate.

(2) In States where no certified mediation program is in effect, through mediation by a qualified representative of a local conservation district, if a local conservation district chooses to participate. Upon mutual agreement of the parties, other individuals may serve as mediators.

(b)(1) The parties shall have not more than 30 days to reach an agreement following a mediation session. The mediator shall notify the designated conservationist in writing at the end of this period whether the parties reached an agreement.

(2) Any agreement reached during, or as a result of, the mediation process shall conform to the statutory, regulatory, and manual provisions governing the program.

(3) If the parties fail to reach an agreement within the specified period, the designated conservationist shall have up to 30 days after the conclusion of mediation to issue a final decision.

§ 614.204 Appeals of adverse final decisions.

(a) Any landowner or program participant, who is adversely affected by a decision made by a designated conservationist related to the programs in § 614.200, may appeal the decision to the State Conservationist in the applicable State for an informal hearing or to NAD in accordance with 7 CFR part 11.

(b) The State Conservationist may designate a NRCS official to gather information and conduct the informal hearing before making a decision.

(c) Any landowner or program participant who is adversely affected by a decision of the State Conservationist may appeal to NAD in accordance with 7 CFR part 11.

PART 620—WETLANDS RESERVE PROGRAM

1. The authority citation for part 620 continues to read as follows:

Authority: 16 U.S.C. 590a et seq., 3837 et seq.

2. Section 620.17(a) is revised to read as follows:

§ 620.17 Appeals.

(a) A person participating in the WRP may obtain review of any administrative determination concerning eligibility for participation utilizing the administrative appeal procedures in 7 CFR part 614, 7 CFR part 780, and 7 CFR part 11, as appropriate.

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PART 623—EMERGENCY WETLANDS RESERVE PROGRAM

1. The authority citation for part 623 continues to read as follows:

Authority: 16 U.S.C. 3837–3837f; Pub. L. 103–75, Chapter 1, 107 Stat. 739, 742.

2. Section 623.20 is revised to read as follows;

§ 623.20 Appeals.

A participant in the EWRP may obtain a review of any administrative determination concerning land eligibility, development of a WRPO, or any adverse determination under this part in accordance with the administrative appeal regulations provided in part 614 of this title.

PART 631—GREAT PLAINS CONSERVATION PROGRAM

1. The authority citation for part 631 continues to read as follows:

Authority: 16 U.S.C. 590p(b).

2. Section 631.13 is revised to read as follows:

§ 631.13 Disputes and appeals for matters other than contract violations.

Applicants or participants may appeal decisions regarding matters other than contract disputes under this part in accordance with part 614 of this title.

PART 632—RURAL ABANDONED MINE PROGRAM

1. The authority citation for part 632 continues to read as follows:

Authority: Sec. 406, Pub. L. 95–87; 91 Stat. 460 (30 U.S.C. 1236).

2. Section 632.40 is revised to read as follows:

§ 632.40 Appeals.

Land users may appeal decisions under this part in accordance with part 614 of this title.

PART 634—RURAL CLEAN WATER PROGRAM

1. The authority citation for part 634 continues to read as follows:

Authority: Sec. 35, Pub. L. 95–217, 91 Stat. 1579 (33 U.S.C. 1288).

2. Section 634.30 is revised to read as follows:

§ 634.30 Appeals in USDA administered projects.

The participant in a USDA-administered RCWP project may appeal decisions of the administering agency in accordance with part 614 of this title.

PART 663—WELLTON-MOHAWK IRRIGATION IMPROVEMENT PROGRAM

1. The authority citation for part 663 continues to read as follows:

Authority: Pub. L. 93–320, 88 Stat. 266 (43 U.S.C. 1571 et seq.); sec. 601, Pub. L. 72–212, 47 Stat. 417 (31 U.S.C. 686).

2. Section 663.17 is revised to read as follows:

§ 663.17 Appeals.

A decision under this part may be appealed by a cooperator in accordance part 614 of this title.

PART 701—CONSERVATION AND ENVIRONMENTAL PROGRAMS

1. The authority citation for part 701 continues to read as follows:

Authority: 16 U.S.C. 590d, 590g-590o, 590p(a), 590q, 1501–1510, 1606, 2101–2111, 2201–2205; 48 U.S.C. 1469d(c).

2. Section 701.76 is revised to read as follows:

§ 701.76 Appeals.

Any person may obtain review of determinations affecting participation in:

(a) The Forestry Incentive Program, in accordance with part 614 of this title; and

(b) All other programs within this part, in accordance with part 780 of this title.

PART 702—COLORADO RIVER BASIN SALINITY (CRSC) CONTROL PROGRAM

1. The authority citation for part 702 continues to read as follows:

Authority: Sec. 201, Pub. L. 93–320, 88 Stat. 271; Sec. 2, Pub. L. 98–569, 98 Stat. 2933 (43 U.S.C. 1592(c)).

2. Section 702.20 is revised to read as follows:

§ 702.20 Appeals.

The participant may obtain a review, in accordance with the provisions of 7 CFR part 614 and 7 CFR part 11, of any administrative decision made under the provisions of this part.

PART 752—WATER BANK PROGRAM

1. The authority citation for part 752 continues to read as follows:

Authority: Secs. 2–12, 84 Stat. 1468–1471, as amended (16 U.S.C. 1301–1311).

2. Section 752.28 is revised to read as follows:

§ 752.28 Appeals.

Any person may obtain review of determinations affecting participation in this program in accordance with part 614 of this title.

PART 780—APPEAL REGULATIONS

1. Part 780 is revised to read as follows:

PART 780—APPEAL REGULATIONS

Sec.
780.1 Definitions.
780.2 Applicability.
780.3–5 Reserved.
780.6 Mediation.
780.7 Reconsideration and appeals with the county and State committees and reconsideration with the regional service offices.
780.8 Time limitations for filing requests for reconsideration or appeal.
780.9 Appeals of NRCS technical determinations.
780.10 Other finality provisions.
780.11 Reservation of authority.

Authority: 5 U.S.C. 301; 15 U.S.C. 714b and 714c; 16 U.S.C. 590h.

§ 780.1 Definitions.

For purposes of this part:

1994 Act means the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Public Law 103–354).

Agency means FSA and its county and State committees and their personnel, CCC, NRCS, FCIC, and any other agency or office of the Department which the Secretary may designate, or any successor agency.

Appeal means a written request by a participant asking the next level reviewing authority to review a decision.

CCC means the Commodity Credit Corporation, a wholly owned Government corporation within the U.S. Department of Agriculture.

County committee means an FSA county or area committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)).

FCIC means the Federal Crop Insurance Corporation, a wholly owned Government corporation within the U.S. Department of Agriculture.

Final decision means the program decision rendered by the county or State committee or the FCIC Regional Service Office upon written request of the participant. A decision that is otherwise final shall remain final unless the decision is timely appealed to the State committee or NAD. A decision of FSA or FCIC made by personnel subordinate to the county committee is considered ''final'' for the purpose of appeal to NAD only after that decision has been appealed to the county committee under the provisions of this part.

FSA means the Farm Service Agency.

NAD means the National Appeals Division, established pursuant to the 1994 Act.

NAD regulations means the National Appeals Division (NAD) rules of procedure published by the Secretary at 7 CFR part 11 implementing title II, subtitle H of the 1994 Act.

NRCS means the Natural Resource Conservation Service of the United States Department of Agriculture, formerly the Soil Conservation Service.

Reconsideration is a subsequent consideration of a prior decision by the same reviewing authority.

Regional Service Office means the regional offices established by FSA and FCIC for the purpose of making determinations for private insurance companies reinsured by FCIC under the Federal Crop Insurance Act and for FSA for insurance contracts delivered through county FSA offices (including underwriting decisions), the applicability of provisions under chapter IV of 7 CFR, and decisions as to insurability and rating of acreage.

Reviewing authority means a person or committee assigned the responsibility of making a decision on the appeal filed by the participant in accordance with this part.

State committee means an FSA State committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)) including, where appropriate, the Director of the Caribbean Area FSA office for Puerto Rico and the Virgin Islands.

Technical determination of NRCS means a decision by NRCS concerning the status and condition of the natural resources based on science and on the best professional judgment of natural resource professionals within NRCS.

§ 780.2 Applicability.

(a)(1) Except as provided in other regulations, this part applies to decisions made under programs and by agencies, as set forth herein:

(i) Decisions in those domestic programs administered by the Farm Service Agency (FSA), and programs administered by FSA on behalf of the Commodity Credit Corporation (CCC) through State and county committees, which are generally set forth in chapters VII and XIV of this title;

(ii) Technical decisions made by the Natural Resources Conservation Service (NRCS) under title XII of the Food Security Act of 1985, as amended;

(iii) Decisions made by personnel of the Federal Crop Insurance Corporation (''FCIC'') or FSA with respect to contracts of insurance insured by FCIC and the noninsured crop disaster assistance program;

(iv) Decisions made by personnel of FCIC or FSA with respect to contracts of insurance provided by private insurance carriers and reinsured by FCIC under the provisions of the Federal Crop Insurance Act; and

(v) Other programs to which this part is made applicable by individual program regulations.

(2) For covered programs, this part is applicable to any decision made by FSA and its State and county committees, CCC, FCIC, the personnel and agents of FSA, FCIC, or CCC, and by the officials of NRCS (to the extent provided in § 780.9), except as otherwise may be provided in individual program requirements or by the Secretary.

(3) This part is not applicable to any decision:

(i) Made by FSA or FCIC with respect to any matter arising under the terms of the Standard Reinsurance Agreement between FCIC and any private insurance company reinsured by FCIC under the provisions of the Federal Crop Insurance Act, as amended; or

(ii) Made by any private insurance company with respect to any contract of insurance issued to any producer by the private insurance company and reinsured by FCIC under the provisions of the Federal Crop Insurance Act, as amended. Those insurance contracts are subject to dispute resolution through arbitration or mediation in accordance with the contract terms.

(b) With respect to matters identified in paragraph (a) of this section, participants may request reconsideration or appeal, under the provisions of this part, of decisions by an agency made with respect to:

(1) Denial of participation in a program;

(2) Compliance with program requirements;

(3) Issuance of payments or other program benefits to a participant in a program;

(4) Making payments or other benefits to an individual or entity who is not a participant in a program; or

(5) Technical determinations by NRCS.

(c) No reconsideration or appeal may be sought under this part of any general program provision or program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants.

(d) Mathematical formulas established under a statute or program regulations, and decisions based solely on the application of those formulas, are not appealable under this part.

(e) Only a participant may seek reconsideration or appeal under this part.

§ § 780.3–780.5 [Reserved]

§ 780.6 Mediation.

Participants have the right to seek mediation involving any decision appealed under this part in accordance with the provisions of section 282 of the 1994 Act, if the mediation program of the State where the participant's farming operation giving rise to the decision is located has been certified by the Secretary for the program involved in the agency decision. Any time limitation for review contained in this part will be stayed pending timely pursuit and completion of the mediation process.

§ 780.7 Reconsideration and appeals with the county and State committees and reconsideration with the regional service offices.

(a) A participant may appeal a decision of personnel subordinate to the county committee by filing with the county committee a written request for appeal that states the basis upon which the participant relies to show that:

(1) The decision was not proper and not made in accordance with applicable program policies; or

(2) All material facts were not properly considered in such decision.

(b) A participant may seek reconsideration of a final decision by a county committee or the Regional Service Office by filing a written request for reconsideration with the county committee or the Regional Service Office that states the basis upon which the participant relies to show that:

(1) The decision was not proper and not made in accordance with applicable program regulations; or

(2) All material facts were not properly considered in such decision.

(c) A participant may appeal a final decision by a county committee or the Regional Service Office to the State committee and request an informal hearing in connection therewith, by filing a written appeal with the State committee.

(d) A participant may seek reconsideration of a decision by a State committee, and request an informal hearing in connection therewith, by filing a written request for reconsideration with the State committee that states the basis upon which the participant relies to show that:

(1) The decision was not proper and not made in accordance with applicable program regulations; or

(2) All material facts were not properly considered in such decision.

(e) Nothing in this part prohibits a participant from filing an appeal of a final decision of the county committee or the Regional Service Office with NAD in accordance with the NAD regulations.

(f) This section does not apply to a technical determination by NRCS. Procedures regarding the appeal of a technical determination by NRCS are contained in § 780.9.

§ 780.8 Time limitations for filing requests for reconsideration or appeal.

(a) A request for reconsideration or an appeal of a decision shall be filed within 30 days after written notice of the decision which is the subject of the request is mailed or otherwise made available to the participant. A request for reconsideration or appeal shall be considered to have been ''filed'' when personally delivered in writing to the appropriate reviewing authority or when the properly addressed request, postage paid, is postmarked. A decision shall become final and non-reviewable unless reconsideration is timely sought or the decision is timely appealed.

(b) A request for reconsideration or appeal may be accepted and acted upon even though it is not filed within the time prescribed in paragraph (a) of this section if, in the judgment of the reviewing authority with whom such request is filed, the circumstances warrant such action.

§ 780.9 Appeals of NRCS technical determinations.

(a) Notwithstanding any other provision of this part, a technical determination of NRCS issued to a participant pursuant to Title XII of the Food Security Act of 1985, as amended, including wetland determinations, may be appealed to a county committee in accordance with the procedures in this part.

(b) If the county committee hears the appeal and agrees with the participant's appeal, the county committee shall refer the case with its findings to the NRCS State Conservationist to review the matter and review the technical determination. The County or State committee decision shall incorporate, and be based upon, the NRCS State Conservationist's technical determination.

§ 780.10 Other finality provisions.

The finality provisions contained in section 281 of the 1994 Act shall be applied to appeals under this part to the extent provided for in that section of the 1994 Act.

§ 780.11 Reservations of authority.

(a) Representatives of FSA, FCIC, and CCC may correct all errors in entering data on program contracts, loan agreements, and other program documents and the results of the computations or calculations made pursuant to the contract or agreement.

(b) Nothing contained in this part shall preclude the Secretary, or the Administrator of FSA, Executive Vice President of CCC, the Manager of FCIC, the Chief of NRCS, if applicable, or a designee, from determining at any time any question arising under the programs within their respective authority or from reversing or modifying any decision made by FSA or its county and State committees, FCIC, or CCC.

PART 781—DISCLOSURE OF FOREIGN INVESTMENT IN AGRICULTURAL LAND

1. The authority citation for part 781 continues to read as follows:

Authority: Sec. 1–10, 92 Stat. 1266 (7 U.S.C. 3501 *et seq.*).

2. In § 781.5 paragraphs (c), (d) and (e) are removed, paragraphs (f) through (h) are redesignated as paragraphs (d) through (f) respectively, and paragraph (b)(3) is revised and a new paragraph (c) is added to read as follows:

§ 781.5 Penalty review procedure.

* * * * *

(b) * * *

(3) A request for a hearing on the proposed penalty may be filed in accordance with part 780 of this title.

(c) After a final decision is issued pursuant to an appeal under part 780 of this title, the Administrator or Administrator's designee shall mail the foreign person a notice of the determination on appeal, stating whether a report must be filed or amended in compliance with § 781.3, the amount of the penalty (if any), and the date by which it must be paid. The foreign person shall file or amend the report as required by the Administrator. The penalty in the amount stated shall be paid by check or money order drawn to the Treasurer of the United States and shall be mailed to the United States Department of Agriculture, P.O. Box 2415, Washington, DC 20013. The Department is not responsible for the loss of currency sent through the mails.

* * * * *

PART 1900—GENERAL

1. The authority for part 1900 is revised to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989; 7 U.S.C. 6991, *et. seq.;* 42 U.S.C. 1480; Reorganization Plan No. 2 of 1953 (5 U.S.C. App.).

2–3. Subpart B is revised to read as follows:

Subpart B—Adverse Decisions and Administrative Appeals

1900.51 Definitions.
1900.52 General.
1900.53 Applicability.
1900.54 Effect on assistance pending appeal.
1900.55 Adverse action procedures.
1900.56 Non-appealable decisions.
1900.57 [Reserved].

* * * * *

§ 1900.51 Definitions.

Act means the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Public Law No. 103–354 (7 U.S.C. 6991 *et seq.*).

Agency means the Rural Utilities Service (RUS), the Rural Housing Service (RHS), and the Rural Business-Cooperative Development Service (RBS), or their successor agencies.

Refer to 7 CFR 11.1 for other definitions applicable to appeals of adverse decisions covered by this subpart.

§ 1900.52 General.

This subpart specifies procedures for use by USDA personnel and program participants to ensure that full and complete consideration is given to program participants who are affected by an agency adverse decision.

§ 1900.53 Applicability.

(a) Appeals of adverse decisions covered by this subpart will be governed by 7 CFR part 11.

(b) The provisions of this subpart apply to adverse decisions concerning direct loans, loan guarantees, and grants under the following programs: RUS Water and Waste Disposal Facility Loans and Grants Program; RHS Housing and Community Facilities Loan

Programs; RBS Loan, Grant, and Guarantee Programs and the Intermediary Relending Program; and determinations of the Rural Housing Trust 1987–1 Master Servicer.

(c) This subpart does not apply to decisions made by parties outside an agency even when those decisions are used as a basis for decisions falling within paragraph (b) of this section, for example: decisions by state governmental construction standards-setting agencies (which may determine whether RHS will finance certain houses); Davis-Bacon wage rates; flood plain determinations; archaeological and historical areas preservation requirements; and designations of areas inhabited by endangered species.

§ 1900.54 Effect on assistance pending appeal.

(a) Assistance will not be discontinued pending the outcome of an appeal of a complete or partial adverse decision.

(b) Notwithstanding the provisions of paragraph (a) of this section, administrative offsets initiated under subpart C of part 1951 will not be stayed pending the outcome of an appeal and any further review of the decision to initiate the offset.

§ 1900.55 Adverse action procedures.

(a) If an applicant, guaranteed lender, a holder, borrower or grantee is adversely affected by a decision covered by this subpart, the decision maker will inform the participant of the adverse decision and whether the adverse decision is appealable. A participant has the right to request the Director of NAD to review the agency's finding of nonappealability in accordance with 7 CFR 11.6(a). In cases where the adverse decision is based on both appealable and nonappealable actions, the adverse action is not appealable.

(b) A participant affected by an adverse decision of an agency is entitled under section 275 of the Act to an opportunity for a separate informal meeting with the agency before commencing an appeal to NAD under 7 CFR part 11.

(c) Participants also have the right under section 275 of the Act to seek mediation involving any adverse decision appealable under this subpart if the mediation program of the State in which the participant's farming operation giving rise to the decision is located has been certified by the Secretary for the program involved in the decision. An agency shall cooperate in such mediation. Any time limitation for appeal will be stayed pending completion of the mediation process (7 CFR 11.5(c)).

§ 1900.56 Non-appealable decisions.

The following are examples of decisions which are not appealable:

(a) Decisions which do not fall within the scope of this subpart as set out in § 1900.53.

(b) Decisions that do not meet the definition of an ''adverse decision'' under 7 CFR part 11.

(c) Decisions involving parties who do not meet the definition of ''participant'' under 7 CFR part 11.

(d) Decisions with subject matters not covered by 7 CFR part 11.

(e) Interest rates as set forth in agency procedures, except for appeals alleging application of an incorrect interest rate.

(f) The State RECD Director's refusal to request an administrative waiver provided for in agency program regulations.

(g) Denials of assistance due to lack of funds or authority to guarantee.

§ 1900.57 [Reserved]

Done at Washington, D.C., this 21st day of December, 1995.

Dan Glickman,

Secretary of Agriculture.

[FR Doc. 95–31397 Filed 12–28–95; 8:45 am]

BILLING CODE 3410–01–P

Agricultural Marketing Service

7 CFR Part 51

[Docket No. FV–95–303C]

Removal of U.S. Grade Standards and Other Selected Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Correction to interim final rule.

SUMMARY: This document contains a correction to the interim final rule published on December 4, 1995, (60 FR 62172–62181). The document concerned removal of U.S. grade standards and other selected regulations from the Code of Federal Regulations (CFR).

EFFECTIVE DATE: December 4, 1995.

FOR FURTHER INFORMATION CONTACT: Eric Forman, Deputy Director, Fruit and Vegetable Division, USDA, AMS, Room 2085–S, P.O. Box 96456, Washington, DC 20090–6456, telephone (202) 690–0262.

SUPPLEMENTARY INFORMATION:

Background

As published, the interim final rule removed most of the voluntary U.S. grade standards and other selected regulations covering a number of agricultural commodities (dairy products, tobacco, wool, mohair, fresh and processed fruits and vegetables, livestock, meats and meat products, eggs, and poultry and rabbit products). This includes all the standards except those which are currently in the rulemaking process, incorporated by reference in marketing orders/agreements appearing at 7 CFR Parts 900 through 999, or those used to implement government price support. Those grade standard regulations will continue to appear in the CFR. Standards for Applies (7 CFR 51.300–51.339), Applies for Processing (7 CFR 51.340–51.354), and Pears for Canning (7 CFR 51.1345–51.1374) should not have been removed because of requirements under the Export Apple and Pear Act (7 U.S.C. 581, et seq.).

Correction of Publication

1. Accordingly, in the December 4, 1995, publication, on page 62174 of the **SUPPLEMENTARY INFORMATION**, in the table titled ''Administered by the Fresh Products Branch, Fruit and Vegetable Division, 51.300–339, Subpart—United States Standards for Grades of Apples, 51.340–354, Subpart—United States Standards for Grades of Apples for Processing, and 51.1354–1374, Subpart—United States Standards for Pears for Canning, should not have been included. These three entities should have appeared in the table on page 62176 as standards that are being retained.

PART 51—[CORRECTED]

2. On page 62180, in the first column, under part 51, the first 5 lines in amendatory instruction 6 are corrected to read as follows:

6. In part 51, § 51.100, §§ 51.355 through 51.464, §§ 51.495 through 51.556, §§ 51.810 through 51.869, §§ 51.925 through 51.986, §§ 51.1030 through 51.1109, §§ 51.1375 through 51.1387, * * *

Dated: December 26, 1995.

Kenneth C. Clayton,

Acting Administrator.

[FR Doc. 95–31515 Filed 12–28–95; 8:45 am]

BILLING CODE 3410–02–M

Animal and Plant Health Inspection Service

9 CFR Part 78

[Docket No. 95–074–1]

Validated Brucellosis-Free States; Georgia

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the brucellosis regulations concerning the interstate movement of swine by adding Georgia to the list of validated brucellosis-free States. We have determined that Georgia meets the criteria for classification as a validated brucellosis-free State. This action relieves certain restrictions on the interstate movement of breeding swine from Georgia.

DATES: Interim rule effective December 29, 1995. Consideration will be given only to comments received on or before February 27, 1996.

ADDRESSES: Please send an original and three copies of your comments to Docket No. 95–074–1, Regulatory Analysis and Development, PPD, APHIS, suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 95–074–1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Dr. Arnold Taft, Senior Staff Veterinarian, National Animal Health Programs, VS, APHIS, suite 3B08, 4700 River Road Unit 43, Riverdale, MD 20737–1231, (301) 734–4916.

SUPPLEMENTARY INFORMATION:

Background

Brucellosis is a contagious disease affecting animals and man, caused by bacteria of the genus *Brucella.* The brucellosis regulations, contained in 9 CFR part 78 (referred to below as the regulations), prescribe conditions for the interstate movement of cattle, bison, and swine.

Under the swine brucellosis regulations, States, herds, and individual animals are classified according to their brucellosis status. Interstate movement requirements for swine are based upon the disease status of the individual animal or the herd or State from which the animal originates.

We are amending § 78.43 of the regulations, which lists validated brucellosis-free States, to include Georgia. A State may apply for validated brucellosis-free status when:

(1) Any herd found to have swine brucellosis during the 2-year qualification period preceding the application has been depopulated. More than one finding of a swine brucellosis-infected herd during the qualification period disqualifies the State from validation as brucellosis-free; and

(2) During the 2-year qualification period, the State has completed surveillance, annually, by either complete herd testing, market swine testing, or statistical analysis.

Breeding swine originating from a validated brucellosis-free State or herd may be moved interstate without having been tested with an official test for brucellosis within 30 days prior to interstate movement, which would otherwise be required.

After reviewing its brucellosis program records, we have concluded that Georgia meets the criteria for classification as a validated brucellosis-free State. Therefore, we are adding Georgia to the list of States in § 78.43. This action relieves certain restrictions on the interstate movement of breeding swine from Georgia.

Immediate Action

The Administrator of the Animal and Plant Health Inspection Service has determined that there is good cause for publishing this interim rule without prior opportunity for public comment. Immediate action is warranted to remove unnecessary restrictions on the interstate movement of swine from Georgia.

Because prior notice and other public procedures with respect to this action are impracticable and contrary to the public interest under these conditions, we find good cause under 5 U.S.C. 553 to make it effective upon publication in the Federal Register. We will consider comments that are received within 60 days of publication of this rule in the Federal Register. After the comment period closes, we will publish another document in the Federal Register. It will include a discussion of any comments we receive and any amendments we are making to the rule as a result of the comments.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review process required by Executive Order 12866.

This action removes the requirement that breeding swine be tested for brucellosis prior to movement interstate from Georgia.

Swine herd producers in Georgia are all small businesses (defined by the Small Business Administration as having annual gross receipts of less than $500,000). Currently, these small producers have about 50,000 adult swine tested annually for brucellosis. We are not able to determine exactly how many of these tests are performed for the purpose of certifying breeding swine for movement interstate, but we estimate the number to be very small.

Currently, swine are routinely tested for pseudorabies and swine brucellosis with the same blood sample at an approximate cost to the producer of $5 per blood sample. Even though the swine will no longer have to be tested for swine brucellosis to move interstate as a result of this change in the regulations, they will still need to be tested for pseudorabies. Therefore, this change in the regulations will not create or remove any costs for swine producers in Georgia.

We anticipate, therefore, that this action will have a minimal, if any, economic impact on swine herd producers in Georgia. The few small producers that do move breeder swine interstate will still have to pay for a pseudorabies test for the swine.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are in conflict with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping

requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 9 CFR Part 78

Animal diseases, Bison, Cattle, Hogs, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, 9 CFR part 78 is amended as follows:

PART 78—BRUCELLOSIS

1. The authority citation for part 78 continues to read as follows:

Authority: 21 U.S.C. 111–114a–1, 114g, 115, 117, 120, 121, 123–126, 134b, and 134f; 7 CFR 2.22, 2.80, and 371.2(d).

§ 78.43 [Amended]

2. Section 78.43 is amended by adding ''Georgia,'' immediately after ''Delaware,''.

Done in Washington, DC, this 19th day of December 1995.

Terry L. Medley,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 95–31415 Filed 12–28–95; 8:45 am]

BILLING CODE 3410–34–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Organization and Operations of Federal Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Approval of Information Collection Requirements.

SUMMARY: On June 3, 1994 (60 FR 29066), the National Credit Union Administration (NCUA) published a final Interpretive Ruling and Policy Statement 94–1-Chartering and Field of Membership Policy (IRPS 94–1) and a final amendment updating the rules and regulations on organizations and operations of Federal Credit Unions. At that time, Office of Management and Budget approval for IRPS 94–1 was pending and the preamble to the final rule stated that it would be published in the Federal Register upon receipt. The information collection requirements in the final rule have been approved by the Office of Management and Budget. The control number assigned for this rule is 3133–0015, approved for use through August 31, 1997.

EFFECTIVE DATE: December 29, 1995.

ADDRESSES: Becky Baker, Secretary of the Board, National Credit Union Administration Board, 1775 Duke Street, Alexandria, VA 22314–3428.

FOR FURTHER INFORMATION CONTACT: Michael McKenna, Attorney, Office of General Counsel (703) 518–6540, at the above address.

By the National Credit Union Administration Board on December 22, 1995.

Becky Baker,

Secretary of the Board.

[FR Doc. 95–31514 Filed 12–28–95; 8:45 am]

BILLING CODE 7535–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94–CE–28–AD; Amendment 39–9472; AD 95–26–13]

Airworthiness Directives; The New Piper Aircraft, Inc. (Formerly Piper Aircraft Corporation) PA28 and PA32 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes Airworthiness Directive (AD) 76–25–06, which currently requires replacing oil cooler hoses on The New Piper Aircraft, Inc. (Piper) Model PA28–140 airplanes, and inspecting for a minimum clearance between the oil cooler hose assemblies and the front exhaust stacks and adjusting if proper clearance is not obtained. This action maintains the clearance inspection and oil cooler hose replacements, requires this inspection and these replacements to be repetitive, and extends the applicability to include PA32 series and other PA28 series airplanes. It also provides the option of installing approved TSO–C53a, Type D oil cooler hose assemblies as terminating action for the repetitive inspection requirement. Numerous incidents/accidents caused by oil cooler hose rupture or failure on the affected airplanes prompted this action. The actions specified by this AD are intended to prevent these oil cooler hoses from failing or rupturing, which could result in engine stoppage and subsequent loss of control of the airplane.

EFFECTIVE DATE: February 5, 1996.

ADDRESSES: Information that relates to this AD may be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket 94–CE–28–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Ms. Juanita Craft-Lloyd, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, Campus Building, 1701 Columbia Avenue, suite 2–160, College Park, Georgia 30337–2748; telephone (404) 305–7373; facsimile (404) 305–7348.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to Piper Model PA28–140 airplanes was published in the Federal Register on March 8, 1995 (60 FR 12714). The action proposed to supersede AD 76–25–06, Amendment 39–2788, with a new AD that would retain the clearance inspection and oil cooler hose replacement for the Piper Model PA28–140 airplanes, and make the inspection and replacement repetitive for these airplanes as well as other PA28 series and the PA32 series airplanes. It would also provide the option of installing approved TSO–C53a, Type D oil cooler hose assemblies as terminating action for the repetitive inspection requirement.

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

One commenter states that the proposal should take into account that the affected airplanes could have oil cooler hose assemblies installed other than those manufactured from Piper. The FAA concurs and has changed the AD to reflect that the AD applies to airplanes with oil cooler hose assemblies that do not meet TSO–C53a, Type D requirements.

This same commenter points out that paragraph (b)(2) of the proposed AD contains the words ''oil cooler assembly'' when it should contain the words ''oil cooler hose assembly''. The FAA concurs and has changed paragraph (b)(2) of the AD to reflect the above-referenced language.

This commenter also believes that the cost of the oil cooler hoses is too low and that the FAA did not take into account that each airplane has two oil cooler hoses installed. The commenter states that the price of an oil cooler hose is between $122 and $279, and the FAA estimates $110. The FAA will change the economic paragraph of the final rule to incorporate the upper end of the price range for oil cooler hoses of $279 per hose with two oil cooler hoses per airplane ($558 per airplane for parts).

A commenter proposes that the FAA clarify whether the date used to determine the eight-year replacement

interval is the installation date, rubber cure date, or the pressure test date. The FAA will specify in the AD that the date used to determine the eight-year replacement interval is the installation date.

One commenter believes that the FAA should withdraw the notice of proposed rulemaking (NPRM) because a pilot can inspect these oil cooler hoses and, therefore, the action does not warrant the expense and record keeping required by AD action. Another commenter does not request that the AD be withdrawn, but requests that the FAA include the provision of allowing the pilot to inspect the oil cooler hoses. The FAA does not concur with either of these comments. Sections 43.3(g) and 43.7(f) of the Federal Aviation Regulations (14 CFR 43.3 and 14 CFR 43.7) contain the provision to allow a pilot to perform preventive maintenance and return the airplane to service. Part 43, Appendix A of the Federal Aviation Regulations (14 CFR, part 43, Appendix A) outlines what is considered preventive maintenance. Inspections of oil cooler hose assemblies are not authorized as preventive maintenance actions as detailed in the above-referenced portion of the regulations. The AD is unchanged as a result of these comments.

A commenter believes the NPRM should be withdrawn because the 20 reported incidents over a 19-year period with no damage reported do not justify repetitive 100-hour time-in-service (TIS) inspections and 8-year (or 1,000 hours TIS) repetitive oil cooler hose assembly replacements. The FAA does not concur. The FAA has received 26 incident/accident occurrences relating to oil cooler hose failure since 1985. In addition, 24 service difficulty reports (SDR) have been filed on this subject since 1987. The FAA has determined that oil cooler hoses that fail or rupture could result in engine stoppage and subsequent loss of control of the airplane. The AD is unchanged as a result of this comment.

Another commenter requests that the FAA withdraw the NPRM because the actions are the same as what is listed in the Piper service manuals. The commenter quotes the following from the FAA Airworthiness Directive Manual, FAA–AIR–M–8040.1:

> An AD should not be issued to assure the use of normal maintenance practices on a product where individual cases of improper maintenance or lack of maintenance have contributed to an unsafe condition. Corrective action in those instances should be taken through normal Flight Standards maintenance communication channels, such as General Alerts, Maintenance Bulletins, and Notices.

The FAA does not consider inspecting oil cooler hoses on the affected Piper PA28 and PA32 series airplanes a general maintenance action. The close proximity of the oil cooler hose assemblies to the exhaust stack causes the oil cooler hoses to rupture instead of developing leaks over time. A general maintenance action on oil cooler hoses would be to check for leaks; however, the service history of the affected airplanes is indicating ruptured oil cooler hoses. For this reason, the FAA has determined that the close proximity of the oil cooler hose assemblies to the exhaust stack require special inspections for the oil cooler hoses through AD action to prevent these hoses from failing or rupturing. The AD is unchanged as a result of this comment.

One other commenter (an owner of a Piper Model PA28R–201T airplane) recommends that the NPRM be withdrawn because no corrosion was found on this commenter's airplane oil cooler hoses when the tanks were removed and the hoses replaced. In addition, this owner operates the airplane away from seashores in a dry climate. For these reasons, this commenter believes the NPRM should be withdrawn. The FAA does not concur. AD's are issued based on a known ''unsafe condition that could exist or develop on airplanes of the same type design.'' In this instance, the owner operates a Piper Model PA28R–201T airplane, which is not affected by this AD because this particular model does not have external oil cooler hose assemblies. The AD is unchanged as a result of this comment.

One commenter feels that the FAA is inferring that Piper airplane operators are less competent than other operators by only writing the AD against certain Piper PA28 and PA32 series airplanes. The commenter states that every reciprocating engine-powered aircraft has oil lines and hoses and that the AD should be written against all such aircraft. The FAA does not concur. As stated in the NPRM, ''other airplane models have shown a history of oil cooler hose problems; however, most of these have been attributed to leaking oil cooler hoses instead of ruptured hoses or broken hoses as are detailed in the incident/accident reports of the affected PA28 and PA32 series airplanes. The close proximity of the oil cooler hose assemblies to the exhaust stacks in some of the affected airplanes contributes to the hazardous nature of these oil cooler hose failures.'' The AD is unchanged as a result of this comment.

A commenter states that Type D oil cooler hoses are less flexible than other hoses and, therefore, cannot always be interchanged. This commenter further explains that this less-flexible hose could kink during oil cooler hose installation or during flight because of in-service vibration. This could prevent oil passage and result in engine stoppage. The FAA concurs that these Type D oil cooler hoses are less flexible and could kink. The FAA is changing the AD to require a minimum bend radius of 6.5 inches on oil cooler hose assemblies incorporating 0.75-inch outer diameter hoses.

Another commenter requests that the FAA either delete the repetitive replacement requirement or have the replacement intervals coincide with every 10th annual inspection. The FAA does not concur. The close proximity of the oil cooler hose assemblies to the exhaust stacks causes the heat from the exhaust stacks to affect the life of the hoses. This also causes the hoses to rupture instead of leak. With this in mind, the FAA believes that repetitively inspecting the oil cooler hoses every 100 hours TIS and replacing all hoses every 8 years will accomplish the intent of eliminating the unsafe condition addressed in this action. The AD is unchanged as a result of this comment.

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for the wording change to limit the applicability to oil cooler hose assemblies that do not meet TSO–C53a, Type D requirements; the rewording of ''oil cooler assembly'' to ''oil cooler hose assembly'' in paragraph (b)(2) of the AD; the change in the economic paragraph to reflect more accurate oil cooler hose price information; the clarification that the replacement interval is based on the installation date; the addition of requiring a minimum bend radius of 6.5 inches on oil cooler hose assemblies requiring a 0.75-inch outer diameter hose; and minor editorial corrections. The FAA has determined that the minor addition, changes, corrections, and clarification will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

The replacement compliance time for this AD is presented in both hours TIS and calendar time with the prevalent compliance time being that which occurs first. Deterioration or failure of the oil cooler hose assemblies could

occur as a result of normal flight operation or as a result of time. Therefore, the FAA has determined that this dual replacement compliance time is needed to assure that the oil cooler hose assemblies are replaced before they deteriorate and rupture or fail.

The FAA estimates that 25,000 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 2 workhours (1 workhour per inspection and 1 workhour per replacement) per airplane to accomplish the required action, and that the average labor rate is approximately $60 an hour. Parts cost approximately $558 per airplane ($279 per oil cooler hose with two hoses per airplane). Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $16,950,000 or $678 per airplane. This figure does not take into the account the cost of repetitive inspections or repetitive replacements. The FAA has no way of determining the number of repetitive inspections or replacements each owner/operator would incur over the life of the airplane.

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Airworthiness Directive (AD) 76–25–06, Amendment 39–2788, and by adding a new AD to read as follows:

95–26–13 The New Piper Aircraft, Inc.: Amendment 39–9472; Docket No. 94–CE–28–AD; Supersedes AD 76–25–06, Amendment 39–2788.

Applicability: The following airplane models (all serial numbers), certificated in any category, that are equipped with oil cooler hose assemblies that do not meet TSO-C53a, Type D requirements:

PA28–140
PA28–180
PA28R–201
PA28–235
PA32S–300
PA32R–301(SP)
PA32–301T
PA28–150
PA28S–180
PA28–151
PA28–236
PA32–301
PA32R–301(HP)
PA28–160
PA28R–180
PA28–161
PA32–260
PA32R–300
PA32RT–300T
PA28S–160
PA28R–200
PA28–181
PA32–300
PA32RT–300
PA32R–301T

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

Compliance: Required as indicated in the body of this AD, unless already accomplished.

To prevent oil cooler hoses from failing or rupturing, which could result in engine stoppage and subsequent loss of control of the airplane, accomplish the following:

(a) Within the next 100 hours time-in-service (TIS) after the effective date of this AD, and thereafter at intervals not to exceed 100 hours TIS, inspect the oil cooler hoses to ensure that the hoses meet the criteria presented in the paragraphs below.

(1) For airplanes that have any oil cooler hose assembly mounted at the front or back of the airplane, or both, the fire sleeve of the hose should not be soaked with oil or have a brownish or whitish color, and there should be no evidence of deterioration as a result of heat, brittleness, or oil seepage. Prior to further flight, replace any hose that is soaked with oil, has a brownish or whitish color, or has evidence of deterioration.

(2) On airplanes that have any oil cooler hose assembly mounted in the front of the airplane, ensure that the following exists, and, prior to further flight, adjust accordingly:

(i) The hose passes underneath and behind the electrical ground cable and in front of the lower of the two engine mount struts when the hose is routed to the rear of the engine; and

(ii) The hose is tied to the engine mount strut and a clearance of at least 2 inches exists between the oil hose and exhaust stack.

Note 2: Figure 1 of this AD relates to the conditions specified in paragraphs (a)(2)(i) and (a)(2)(ii) of this AD.

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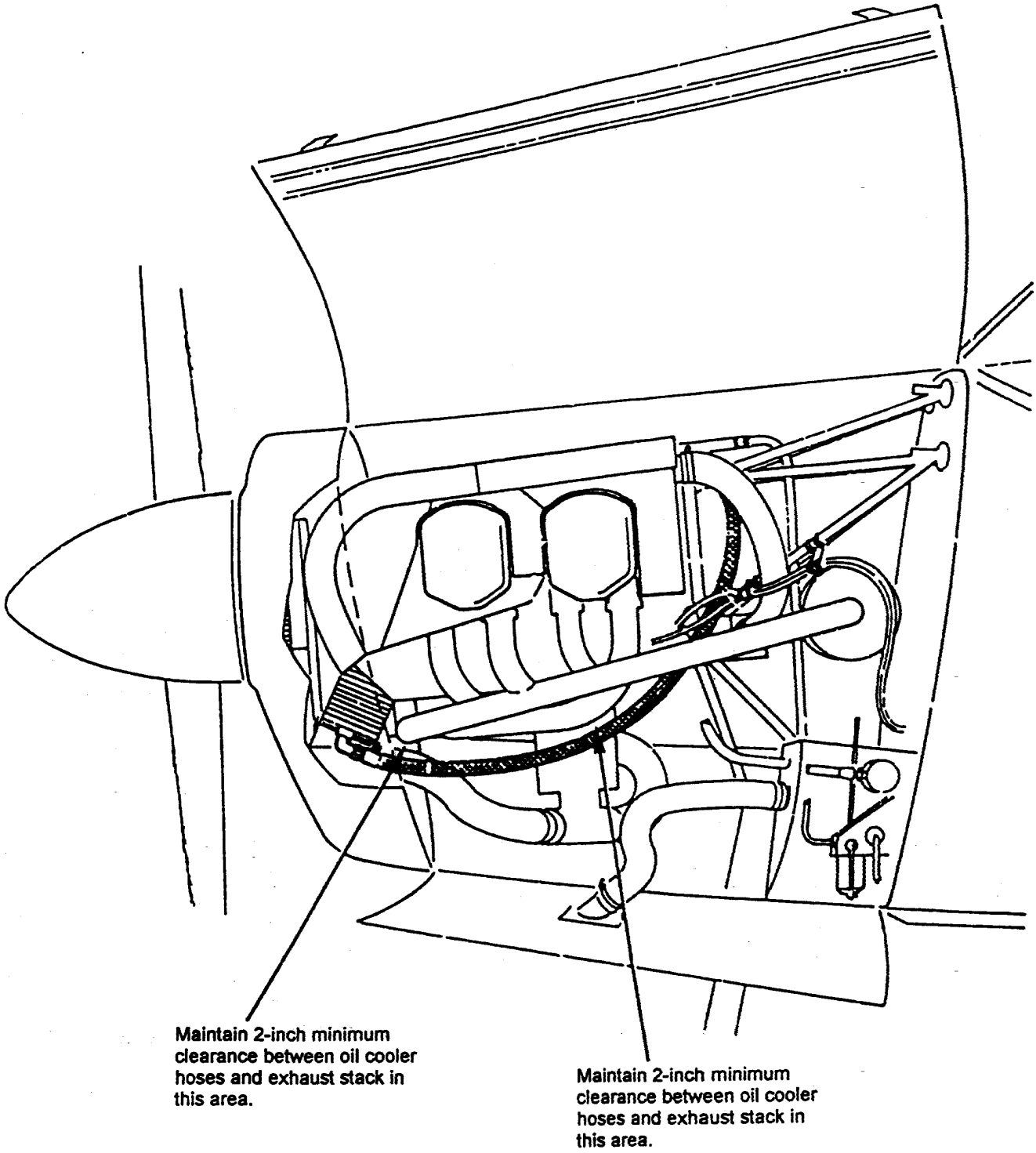

Figure 1

BILLING CODE 4910–13–C

(b) Upon the accumulation of 8 years or 1,000 hours TIS after installation of each oil cooler assembly, whichever occurs first, and thereafter every 8 years or 1,000 hours TIS (whichever occurs first), accomplish one of the following:

(1) Replace each oil cooler hose assembly with a part number specified in the APPLICABILITY section of this AD, and reinspect in accordance with paragraph (a) of this AD at intervals not to exceed 100 hours TIS; or

(2) Replace each oil cooler hose assembly with an approved TSO–C53a, Type D, hose assembly ensuring that there is a minimum of 2 inches between the oil cooler hoses and exhaust stacks (as applicable) upon installation. Ensure that there is a minimum bend radius of 6.5 inches on oil cooler assemblies incorporating 0.75-inch outer diameter hoses.

(c) The replacement specified in paragraph (b)(2) of this AD may be accomplished at any time prior to the 8-year or 1,000-hour compliance time as terminating action for the 100-hour TIS repetitive inspection requirement of this AD.

(d) After adjusting or installing oil cooler hoses, prior to further flight, run the engine for 5 minutes to ensure that there are no oil leaks and that the 2-inch clearance is maintained (as applicable) when the engine is warm. Prior to further flight, replace any leaking oil cooler hoses and adjust the clearance accordingly.

Note 3: Although not required by this AD, the FAA recommends that an oil cooler hose flexibility test be accomplished at each 100-hour TIS inspection interval. Oil cooler hose flexibility may be determined by gently lifting the hose in several places from the bottom of its downward arc to the oil cooler. If the oil cooler hose moves slightly either from side-to-side or upward with the hand at the center of an even arc, then some flexibility remains. If the oil cooler hose appears hardened or inflexible, replacement is recommended.

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

(f) An alternative method of compliance or adjustment of the initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Atlanta Aircraft Certification Office (ACO), Campus Building, 1701 Columbia Avenue, suite 2–160, College Park, Georgia 30337–2748. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta ACO.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Atlanta ACO.

Note 5: Alternative methods of compliance approved in accordance with AD 76–25–06 (superseded by this action) are not considered approved as alternative methods of compliance with this AD.

(g) Figure 1 of this AD may be obtained from the Atlanta ACO at the address specified in paragraph (f) of this AD. This document or any other information that relates to this AD may be inspected at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri.

(h) This amendment (39–9472) supersedes AD 76–25–06, Amendment 39–2788.

(i) This amendment (39–9472) becomes effective on February 5, 1996.

Issued in Kansas City, Missouri, on December 19, 1995.

Dwight A. Young,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 95–31351 Filed 12–28–95; 8:45 am]

BILLING CODE 4910–13–U

FEDERAL TRADE COMMISSION

16 CFR Parts 1, 2, 3, and 4

Rules of Practice Amendments; Correction

AGENCY: Federal Trade Commission.

ACTION: Correction to final regulations.

SUMMARY: This document contains a correction to the final regulations, which were published Friday, July 21, 1995 (60 FR 37746).

EFFECTIVE DATE: July 21, 1995.

FOR FURTHER INFORMATION CONTACT: Donald S. Clark, Secretary, Federal Trade Commission, Washington, DC 20580, 202–326–2514.

SUPPLEMENTARY INFORMATION:

Background

The Federal Trade Commission amended its Rules of Practice to adapt them to the Federal Trade Commission Act Amendments of 1994. This action conformed the Commission's Rules of Practice to certain statutory changes and provided guidance to the public.

Need for Correction

A correction to the final regulations published on July 21, 1995 is needed in order to ensure that the Code of Federal Regulations correctly sets forth the amended version of Section 4.7(f) of the Commission's Rules of Practice.

Correction of Publication

Therefore, the final rule published on July 21, 1995 (60 FR 37746) is corrected as follows:

On page 37748, third column, the first sentence of paragraph (f) in section 4.7 is corrected to read as follows:

§ 4.7 Ex parte communications.

* * * * *

(f) The prohibitions of paragraph (b) of this section do not apply to a communication occasioned by and concerning a nonadjudicative function of the Commission, including such functions as the initiation, conduct, or disposition of a separate investigation, the issuance of a complaint, or the initiation of a rulemaking or other proceeding, whether or not it involves a party already in an adjudicative proceeding; preparations for judicial review of a Commission order; a proceeding outside the scope of § 3.2, including a matter in state or federal court or before another governmental agency; a nonadjudicative function of the Commission, including but not limited to an obligation under § 4.11 or a communication with Congress; or the disposition of a consent settlement under § 3.25 concerning some or all of the charges involved in a complaint and executed by some or all respondents.

Donald S. Clark,

Secretary.

[FR Doc. 95–31489 Filed 12–28–95; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the General Counsel, Requirements Governing the Lobbying of HUD Personnel; Repeal of Section 13 of the Department of Housing and Urban Development Act

24 CFR Part 86

[Docket No. FR–4006–N–01]

AGENCY: Office of the General Counsel, HUD.

ACTION: Notification of status of regulations following repeal of statutory authority.

SUMMARY: This document advises the public that the Lobbying Disclosure Act of 1995 repealed section 13 of the Department of Housing and Urban Development Act. Section 13 established recordkeeping, reporting, and registration requirements governing attempts to influence HUD programs. It also placed limitations on the fees paid to consultants who are engaged to influence the award or allocation of the Department's financial assistance. Beginning on January 1, 1996, the public is no longer required to comply with section 13 and the HUD regulations in 24 CFR part 86 which implement section 13. Among other things, the public need not submit the annual reports due by January 10, 1996 under sections 13 (b)(1) and (c)(1). The public should be aware, however, that the Lobbying Disclosure Act of 1995 may impose new requirements on those

seeking to influence the Department's programs.

EFFECTIVE DATE: December 29, 1995.

FOR FURTHER INFORMATION CONTACT: Aaron Santa Anna, Assistant General Counsel, Ethics Law Division; Office of General Counsel; Room 2158; U.S. Department of Housing and Urban Development; 451 Seventh Street, SW; Washington, DC 20410–0500; telephone (202) 708–0836. Hearing or speech-impaired individuals may call HUD's TDD number (202) 708–0113, or 1–800–877–8399 (Federal Information Relay Service TDD). (Other than the ''800'' number, these are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: Section 112 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. 101–235, approved December 15, 1989, added a new section 13 to the Department of Housing and Urban Development Act, 42 U.S.C. 3531, *et seq.* Section 13 contained two principal features. The first established the standards under which:

—Persons that make expenditures to influence a HUD officer or employee in the award of financial assistance or the taking of a management action by the Department must keep records, and report to HUD, on the expenditures; and

—Persons that are engaged to influence a HUD officer or employee in the award of financial assistance or the taking of a management action by the Department must register with HUD, and report to HUD on their lobbying activities.

The second feature imposed limitations on the fees that may be paid to consultants who are engaged to influence the award or allocation of the Department's financial assistance. Section 13 is codified at 24 CFR part 86.

The Lobbying Disclosure Act of 1995 (Pub. L. 104–65, approved December 19, 1995) established government-wide lobbying procedures and requirements. Sections 11(b)(1) and 24(a) of the new law repealed Section 13, effective January 1, 1996.

The purpose of this document is to advise the public that beginning on January 1, 1996, the requirements of part 86 do not apply. The public should take special notice that the expenditure and registrant reports—due no later than January 10, 1996 under 24 CFR 86.20(c) and 86.25(c)—need not be submitted. Since the Lobbying Disclosure Act of 1995 contains new requirements governing lobbying agencies, including HUD, the public is advised to become familiar with the provisions of the new law.

The Department plans to issue a final rule removing part 86 in the near future.

Other Matters

A. Environmental Impact

This document is categorically excluded from the NEPA requirements of HUD regulations at 24 CFR 50.20(k), which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The notice involves internal administrative procedures whose content does not constitute a developmental decision nor affect the physical condition of project areas or building sites.

B. Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this document is procedural only, and does not have potential for significant impact on family-formation, maintenance, and general well-being, and, thus is not subject to review under the Order.

C. Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that this document is procedural only, and does 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 among the various levels of government.

List of Subjects in 24 CFR Part 86

Administrative practice and procedure, Lobbying (Government agencies), Reporting and recordkeeping requirements.

Dated: December 26, 1995.

Nelson A. Díaz,

General Counsel.

[FR Doc. 95–31542 Filed 12–28–95; 8:45 am]

BILLING CODE 4210–01–P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco, and Firearms

27 CFR Part 5

[T.D. ATF–369; Re: T.D. ATF–360, Notice Nos. 782, 780; 91F009P]

RIN 1512–AB22

Alteration of Class and Type: Vodka

AGENCY: Bureau of Alcohol, Tobacco, and Firearms (ATF), Department of the Treasury.

ACTION: Final rule, Treasury decision.

SUMMARY: This final rule amends the distilled spirits regulations to remove the requirement that on and after December 29, 1995, citric acid may be added to vodka in an amount not to exceed 300 milligrams per liter (300 ppm) without changing the product's designation as vodka. This amendment is being made in accordance with a Federal statutory requirement which, in pertinent part, prohibits the implementation of T.D. ATF–360 [59 FR 67216, Dec. 29, 1994].

EFFECTIVE DATE: This document is effective on December 29, 1995.

FOR FURTHER INFORMATION CONTACT: David W. Brokaw, Wine, Beer and Spirits Regulations Branch, (202) 927–8230.

SUPPLEMENTARY INFORMATION:

Background

Treasury decision ATF–360, amended the distilled spirits regulations, 27 CFR 5.23(a)(3) to authorize the use of a trace amount (defined as up to 300 milligrams per liter or 300 ppm) of critic acid in the production of vodka, without changing its designation as vodka. This level was intended to ensure that distiller may continue to use citric acid as a smoothing agent to correct objectionable tastes which might result from such things as the water used in reducing the proof, the charcoal used in distillation, or the glass in which packaged. This level was also intended to protect the integrity of the standard of identify for vodka, a product, which by definition, may not have any distinctive character, aroma, taste, or color. The requirements in T.D. ATF–360 were to be effective on or after December 29, 1995.

Public Law 104–52, 109 Stat. 468, Nov. 19, 1995

Section 528 of Public Law 104–52 states that, ''(n)o part of any appropriation made available in this Act shall be used to implement Bureau of Alcohol, Tobacco and Firearms Ruling T.D. ATF–360; Re: Notice Nos. 782, 780, 91F009P.'' The Conference Report accompanying Public Law 104–52, H.R. Rep. 104–291, Oct. 20, 1995, provides as follows: ''Although conferees agree with the Senate proposal that no part of any appropriation made available in this Act shall be used to implement the ATF and Treasury decision ATF–360 (59 FR 67216, 12/29/94), which limited the amount of citric acid that could be added to vodka to 300 parts per million (PPM), the conferees recognize the complex nature of the various issues surrounding any standard of identify

determination with respect to the labeling of vodka. Therefore, the ATF is directed to conduct a study, in consultation with industry members, to determine whether a more reasonable industry standard can be established that better balances the interests of the consumer, the industry, and the government.''

Accordingly, as a result of Public Law 104–52, ATF is amending 27 CFR § 5.23(a)(3) to remove the 300 ppm citric acid limitation requirement set by T.D. ATF–360 pending further study. During the pendency of such study, ATF will continue to allow the use of up to 1,000 ppm of citric acid in distilling vodka without changing its designation as ''vodka,'' subject to the applicable formula requirements.

Notice and Public Procedure

Because this final rule implements a specific Federal statutory requirement prescribed by section 528 of Public Law 104–52, and in view of the immediate need for guidance to the industry with respect to compliance with applicable regulations, it is found to be impractical and contrary to the public interest to issue this rule with notice and public procedure under 5 U.S.C. 553(b) or subject to the effective date limitation of 5 U.S.C. 553(d).

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to a final regulatory flexibility analysis (5 U.S.C. 604) are not applicable to this final rule because the agency was not required to publish a general notice of proposed rulemaking under 5 U.S.C. 553 or any other law.

Executive Order 12866

It has been determined that this regulation is not a significant regulatory action as defined in E.O. 12866 because (1) it will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlement, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1980, Public Law 96–511, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR Part 1320, do not apply to this final rule because no requirement to collect information is imposed.

Disclosure

Copies of the notices, the Treasury decision, and all comments are available for public inspection during normal business hours at: ATF Reading Room, Room 6300, 650 Massachusetts Avenue NW., Washington, DC.

Drafting Information: The principal author of this document is David W. Brokaw, Wine, Beer, and Spirits Regulations Branch, Bureau of Alcohol, Tobacco, and Firearms.

List of Subjects in 27 CFR Part 5

Advertising, Consumer protection, Customs duties and inspection, Imports, Labeling, Liquors, Packaging and Containers.

Authority and Issuance

27 CFR Part 5—Labeling and Advertising of Distilled Spirits, is amended as follows:

PART 5—LABELING AND ADVERTISING OF DISTILLED SPIRITS

Paragraph 1. The authority citation for 27 CFR part 5 continues to read as follows:

Authority: 26 U.S.C. 5301, 7805, 27 U.S.C. 205.

Par. 2 Section 5.23(a)(3)(iii) is revised to read as follows:

§ 5.23 Alterations of class and type

(a) *Additions.* * * *

* * * * *

(3) * * * (iii) any material whatsoever in the case of neutral spirits or straight whiskey, except that vodka may be treated with sugar in an amount not to exceed 2 grams per liter and a trace amount of citric acid.

* * * * *

Par. 3 Section 5.23(c)(2) is removed.

Signed: December 11, 1995.

Daniel R. Black,

Acting Director.

Approved: December 13, 1995.

Dennis M. O'Connell,

Acting Deputy Assistant Secretary (Regulatory, Tariff, & Trade Enforcement)

[FR Doc. 95–31505 Filed 12–28–95; 8:45 am]

BILLING CODE 4810–31–M

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 2607

RIN 1212–63

Disclosure and Amendment of Records Under the Privacy Act

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation is amending its regulations implementing the Privacy Act of 1974, as amended. This rule amends part 2607 to describe more accurately the exemption applicable to certain records maintained by the PBGC in view of changes to PBGC's Privacy Act systems of records and to increase the PBGC's standard copying fee.

EFFECTIVE DATE: January 29, 1996.

FOR FURTHER INFORMATION CONTACT: D. Bruce Campbell, Attorney, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4123 (202–326–4179 for TTY and TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: On November 15, 1995, the PBGC published in the Federal Register (60 FR 57372) a proposed rule amending part 2607 of it regulations implementing the Privacy Act of 1974, as amended (''Privacy Act'') (5 U.S.C. 552a). The PBGC received no comments during the comment period and this final rule amends the regulations as proposed.

The final rule increases the fee the PBGC charges for record copies furnished to individuals, from $0.10 to $0.15 per page, the same fee as the PBGC charges for copies furnished to individuals under the Freedom of Information Act. The amendment increases from $1.00 to $1.50 the threshold amount under which the agency does not assess a fee.

Because the PBGC is dividing an existing Privacy Act system of records into two systems of records, PBGC–5 (retitled Personnel Files—PBGC) and PBGC–12 (Personnel Security Investigation Records—PBGC), the final rule moves the exemption from certain provisions of the Privacy Act to PBGC–12.

E.O. 12866 and the Regulatory Flexibility Act

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

Based on fees assessed in the past, the PBGC estimates that the copying fee

increase under the final rule will raise the total amount of fees assessed annually by less than $1,000. In view of the small increase in anticipated costs, the PBGC certifies that the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), does not apply because the rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 29 CFR Part 2607

Privacy.

For the reasons set forth above, the PBGC is amending 29 CFR Part 2607 as follows:

PART 2607—DISCLOSURE AND AMENDMENT OF RECORDS UNDER THE PRIVACY ACT

1. The authority citation for Part 2607 continues to read as follows:

Authority: 5 U.S.C. 552a.

2. Paragraph (a) of § 2607.1 is amended by removing ''which'' and adding, in its place, ''that'' and by adding ''or her'' after ''his'' in the first sentence.

3. In § 2607.2, is amended by adding ''or her'' after ''his'' both times it appears.

4. Sections 2607.3 (a) and (c), 2607.4 (a) and (c), 2607.5(a), 2607.6(c), 2607.7 (b) and (c), and 2607.8 (b) and (c) and the introductory text of § 2607.9 are amended by adding ''or her'' after ''his'' and after ''him'' each time either ''his'' or ''him'' appears.

5. The second sentence of § 2607.3(b), the second sentence of § 2607.4(b), and the third sentence of § 2607.6(b) are amended by removing ''he'' and adding, in its place, ''the disclosure officer''.

6. Paragraph (d) of § 2607.4 is amended by adding ''or she'' after ''he''.

7. Paragraph (b) of § 2607.5 is amended by removing ''his choosing'' and adding, in its place, ''his or her choosing''; by removing ''he shall'' and adding, in its place, ''the requestor shall''; by removing ''he wishes'' and adding, in its place, ''he or she wishes''; by removing ''accompany him'' and adding, in its place ''accompany him or her''; by removing ''his record'' and adding, in its place, ''the record''; and by removing ''to him'' and adding, in its place, ''to him or her''.

8. Paragraph (d) of § 2607.8 is amended by removing ''If an individual requests'' and adding, in its place, ''To request''; by removing ''review, he'' and adding, in its place, ''review, an individual''; and by removing ''Counsel and he'' and adding, in its place, ''Counsel, who''.

9. Paragraph (a) of § 2607.9 is amended by removing ''$0.10'' and adding, in its place, ''$0.15'' in the first sentence and by removing ''$1.00'' and adding, in its place, ''$1.50'' in the second sentence.

10. In § 2607.10, the first paragraph is amended by adding ''Security Investigation'' after ''Personnel'' and by removing ''that the identity of the source would be held in confidence'' both times it appears and adding, in its place, ''of confidentiality''; and the second paragraph is amended by removing ''for employment'' and adding, in its place, ''and fitness for PBGC employment, access to information, and security clearances'' and by adding ''the'' before ''PBGC''.

Issued in Washington, DC this 26th day of December 1995.

Martin Slate,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 95–31526 Filed 12–28–95; 8:45 am]

BILLING CODE 7708–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 169a

[DoD Instruction 4100.33]

Commercial Activities Program Procedures

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Final rule.

SUMMARY: This part removes the requirement to place every DoD employee in a comparable position prior to converting a function with 10 full time equivalents or less to contract, sets maximum study times for cost comparisons, removes the requirement to make congressional reports only when Congress is in session, and makes minor administrative corrections. it also establishes procedures and criteria for use by DoD Components to determine whether DoD commercial activities should be performed by DoD personnel in-house or by contract with commercial sources.

EFFECTIVE DATE: June 12, 1995.

FOR FURTHER INFORMATION CONTACT: Earl DeHart, Program Manager, 400 Army/Navy Drive, Suite 206, Arlington, Virginia 22202–2884.

SUPPLEMENTARY INFORMATION: On January 4, 1995, the Department of Defense published a proposed amendment to 32 CFR part 169a in the Federal Register (60 FR 417) bringing DoD guidance on commercial activities up-to-date. No comments were received from the private sector. Some changes were recommended by DoD Components and most were incorporated. It has been certified that this final rule is not a significant regulatory action. The rule does not:

(1) Have an annual effect on the economy of $100 million or more adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; planned by another agency;

(2) Create a serious inconsistency or otherwise interfere with an action taken or

(3) Materially alter the budgetary impact of entitlements grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Further, it has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because the Services and Department agencies administering the rule will show a reduction in administrative costs and other burdens resulting from the simplification and clarification of direct conversion policies when this proposed rule is issued as a final rule. Finally, it has been certified that this proposed rule does not impose any additional reporting or record keeping requirements prohibited under the Paperwork Reduction Act of 1980.

List of Subjects in 32 CFR Part 169a

Armed forces, Government procurement.

Accordingly, 32 CFR Part 169a is amended as follows:

PART 169A—COMMERCIAL ACTIVITIES PROGRAM PROCEDURES

1. The authority citation for Part 169a continues to read as follows:

Authority: 5 U.S.C. 301 and 552.

2. Subpart B—Procedures is amended by adding a § 169a.19 to read as follows:

Subpart B—Procedures—[Amended]

§ 169a.19 Study limits.

No DoD funds shall be available to perform any cost study pursuant to the provisions of OMB Circular A–76 if the study being performed exceeds a period of 24 months after initiation of such study with respect to a single function activity or 48 months after initiation of such study for a multi-function activity.

3. Section 169a.21 is amended in paragraph (a) by removing ''DD–P&L

1540'' and adding in its place ''DD–A&T(A) 1540'', paragraph (b) by removing ''DD–P&L 1542'' and adding in its place ''DD–A&T(Q) 1542'', paragraph (c)(3) and the first sentence in paragraph (c)(5) by removing ''when in session'', paragraph (c)(3) by removing ''ASD(P&L)'' adding in its place ''ASD(ES)''; by revising paragraph (c) introductory text; and by adding a sentence at the end of paragraph (c)(2) to read as follows:

§ 169a.21 Reporting requirements.

* * * * *

(c) Congressional Data Reports on CA (Report Control Symbol DD–A&T(A&AR) 1949) and Reports on savings on Costs from Increased Use of DoD Civilian Personnel (Report Control Symbol DD–A&T(AR) 1950). To insure consistent application of the requirements stated in 10 U.S.C. 2461 and 2463, the following guidance is provided:

(2) * * * 10 U.S.C. 2463 applies to conversions from contract to in-house involving 50 or more contractor employees.

* * * * *

4. Appendix B to Part 169a is amended by revising sections A.1. and A.2., by removing section A.3. and redesignating sections A.4. and A.5. as A.3. and A.4., respectively, and in newly redesignated A.4. is by removing the word ''or'' the second time it appears and adding in its place ''of.''

Appendix B to Part 169a—[Amended]

Appendix B to Part 169a—Commercial Activities Inventory Report and Five-Year Review Schedule

* * * * *

A. * * *

1. Forward your inventory report before January 1 to the Director, Installations Management, 400 Army Navy Drive, Room 206, Arlington, VA 22202–2884. Use Report Control Symbol ''DD–A&T(A) 1540'' as your authority to collect this data.

2. Transmit by use of floppy diskette. Data files must be in American Standard Code Information Interchange text file format on a MicroSoft-Disk Operating System formatted 3.5 inch floppy diskette. Provide submissions in the Defense Utility Energy Reporting System format as specified below.

* * * * *

5. Appendix C to Part 169a is amended in sections C.6. and C.7.a.(4) by removing ''room 3E787'' and adding in its place ''room 3E813''; section C.8. removing ''Public Law 102–172'' and adding in its place ''Public Law 103–139''; by revising section B.4. adding section B.5. and a heading to section C.8. to read as follows:

Appendix C to Part 169a—[Amended]

Appendix C to Part 169a—Simplified Cost Comparison and Direct Conversion of CAs

* * * * *

B. * * *

4. The installation commander should attempt to place or retrain displaced DoD civilian employees by

a. Placing or retraining employees in available permanent vacant positions, or

b. Assigning displaced employees to valid temporary or over-hire positions in similar activities for gainful employment until permanent vacancies are available. The type of employee appointment (e.g., career, career-conditional, etc., or change from competitive to excepted service or vice versa) must not change, or

c. Where no vacancies exist or are projected, offer employees retraining opportunities under the Job Training Partnership Act or similar retraining programs for transitioning into the private sector.

5. The function to be directly converted does not include any DoD civilian positions that were as a result of DoD Component streamlining plans and/or were removed with buyout offers that satisfied Section 5 of the Federal Workforce Restructuring Act requirements.

C. * * *

8. Most Efficient and Cost-Effective Analysis for Contractor Performance of an Activity (Report Control Symbol DD–A&T(AR) 1951.* * *

6. Appendix D to Part 169a is amended by revising the second paragraph of the introductory text, by revising DoD Component code ''Y'' under the heading CAMIS ENTRY AND UPDATE INSTRUCTIONS, Part I, Section One, item [3] and by adding two new entries at the end of that item [3]; by revising items [4] and [5] under the heading CAMIS ENTRY AND UPDATE INSTRUCTIONS, Part I, Section One; by revising DoD Component code ''Y'' under the heading CAMIS ENTRY AND UPDATE INSTRUCTIONS, Part II, Section One, item [3] and by adding two new entries at the end of that item [3]; and by revising items [4] and [5] under the heading CAMIS ENTRY AND UPDATE INSTRUCTIONS, Part II, Section One, to read us follows:

Appendix D to Part 169a—[Amended]

Appendix D to Part 169a—Commercial Activities Management Information System (CAMIS)

* * * * *

On approval of a full cost comparison, a simplified cost comparison, or a direct conversion CA, the DoD Component shall create the initial entry using the data elements in part I for full cost comparisons and data elements in part II for all other conversions. Within 30 days of the end of each quarter the DoD Component shall submit a floppy diskette. Data files must be in American Standard Code Information Interchange text file format on a MicroSoft-Disk Operating System formatted 3.5 inch floppy diskette. Provide submissions in the Defense Utility Energy Reporting System format. The data shall be submitted in the Director, Installations Management (D,IM), 400 Army Navy Drive, Room 206, Arlington, VA 22202–2884 at least 60 days prior to the end of the quarter. The D,IM shall use the automated data to update the CAMIS. If the DoD Component is unable to provide data in an automated format, the D,IM shall provide quarterly printouts of cost comparison records (CCR) and conversion and/or comparison records (DCSCCR) that may be annotated and returned within 30 days of the end of each quarter to the D,IM. The D,IM then shall use the annotated printouts to update the CAMIS.

* * * * *

CAMIS Entry and Update Instructions

Part I * * *

Section One * * *

[3] * * *

Y—On Site Inspection Agency (OSIA)

2—* * *

3—* * *

4—Defense Technical Information Center (DTIC)

5—U.S. Army Corps of Engineers (USACE) Civil Works

[4] Command code. The code established by the DoD Component headquarters to identify the command responsible for operating the commercial activity undergoing cost comparison.

[5] Installation code. The code established by the DoD Component headquarters to identify the installation where the CA(s) under cost comparison is and/or are located physically. Two or more codes (for cost comparison packages encompassing more than one installation) should be separated by commas.

* * * * *

CAMIS Entry and Update Instructions

Part II * * *

Section One * * *

[3] * * *

Y—On Site Inspection Agency (OSIA)

2—* * *

3—* * *

4—Defense Technical Information Center (DTIC)

5—U.S. Army Corps of Engineers (USACE) Civil Works

[4] Command code. The code established by the DoD Component headquarters to identify the command responsible for operating the commercial activity undergoing cost comparison.

[5] Installation code. The code established by the DoD Component headquarters to identify the installation where the CA(s) under cost comparison is and/or are located physically. Two or more codes (for cost comparison packages encompassing more than one installation) should be separated by commas.

* * * * *

Dated: December 21, 1995.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 95–31346 Filed 12–28–95; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 05–95–086]

Special Local Regulations for Marine Events; New Year's Eve Fireworks; Delaware River, Philadelphia, PA

AGENCY: Coast Guard, DOT.

ACTION: Notice of implementation.

SUMMARY: This notice implements 33 CFR 100.509 for the New Year's Eve Fireworks Display. The display will be launched from barges anchored off Penns Landing, Delaware River, Philadelphia, Pennsylvania on December 31, 1995. The regulations in 33 CFR 100.509 are needed to control vessel traffic in the immediate vicinity of the event due to the confined nature of the waterway and expected spectator craft congestion during the event. The regulations restrict general navigation in the area for the safety of life and property on the navigable waters during the event.

EFFECTIVE DATES: The regulations in 33 CFR 100.509 are effective from 11 p.m., December 31, 1995 until 1:20 a.m., on January 1, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Phillips, Chief, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004 (804) 398–6204, or Commander, Coast Guard Group Philadelphia (215) 271–4825.

Drafting Information: The drafters of this notice are QM1 Gregory C. Garrison, project officer, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, and CDR T.R. Cahill, project attorney, Fifth Coast Guard District Legal Staff.

Discussion of Regulation

The Philadelphia Convention and Visitors Bureau submitted an application to hold a Neighbors in the New Year fireworks display. The display will be launched from barges anchored off Penns Landing, Delaware River, Philadelphia, Pennsylvania. Since many spectator vessels are expected to be in the area to watch the fireworks, the regulations in 33 CFR 100.509 are being implemented for this event. The fireworks will be launched from within the regulated area. The waterway will be closed during the display. Since the closure will not be for an extended period, commercial traffic should not be severely disrupted.

Dated: December 18, 1995.

W.J. Ecker,

Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. 95–31524 Filed 12–28–95; 8:45 am]

BILLING CODE 4910–14–M

33 CFR Part 100, 110, and 117

[CGD 05–95–085]

Special Local Regulations for Marine Events; New Year's Eve Celebration Fireworks; Norfolk Harbor, Elizabeth River, Norfolk and Portsmouth, VA

AGENCY: Coast Guard, DOT.

ACTION: Notice of implementation.

SUMMARY: This notice announces that 33 CFR 100.501 is in effect for the New Year's Eve Celebration Fireworks Display, an annual event held on December 31, 1995 and January 1, 1996. This regulation is necessary to control vessel traffic within the immediate vicinity of the event due to the confined nature of the waterway and the expected congestion at the time of the event. The regulations restrict general navigation in the area to provide for the safety of life and property on the navigable waters during the event.

EFFECTIVE DATES: These regulations are effective from 11 p.m., December 31, 1995 until 1:30 a.m., January 1, 1996. If inclement weather causes the postponement of the event, the regulations are effective from 6:30 p.m. until 8:30 p.m., on January 1, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Phillips, Chief, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004 (804) 398–6204.

SUPPLEMENTARY INFORMATION: .

Drafting Information: The drafters of this notice are QM1 Gregory C. Garrison, project officer, Boating Affairs Branch, Boating Safety Division, Fifth Coast Guard District, and CDR T.R. Cahill, project attorney, Fifth Coast Guard District Legal Staff.

Discussion of Rule

On December 31, 1995 and January 1, 1996, Norfolk Festevents, Ltd. will sponsor a New Year's Eve Celebration. As part of the celebration, a fireworks display will be launched from barges anchored in the Elizabeth River off Town Point Park. A large number of spectator vessels are expected. Therefore, to ensure safety of both participants and spectators, 33 CFR 100.501 will be in effect for the duration of the event. Under the provisions of 33 CFR 100.501, a vessel may not enter the regulated area unless it is registered as a participant with the event sponsor or it receives permission from the Coast Guard patrol commander. These restrictions will be in effect for a limited period and should not result in significant disruption of maritime traffic.

Additionally, 33 CFR 110.72aa and 33 CFR 117.1007(b) will be in effect while 33 CFR 100.501 is in effect. Section 110.72aa establishes special anchorages which may be used by spectator craft. Section 117.1007(b) provides that the draw of the Berkley Bridge shall remain closed from one hour prior to the scheduled event until one hour after the scheduled event unless the Coast Guard patrol commander allows it to be opened for passage of commercial traffic.

Dated: December 18, 1995.

W. J. Ecker,

Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. 95–31525 Filed 12–28–95; 8:45 am]

BILLING CODE 4910–14–M

33 CFR Part 165

[COTP Philadelphia, PA 95–087]

RIN 2115–AA97

Safety Zone Regulations: New Years Eve Fireworks: Delaware River, Philadelphia, PA

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary moving safety zone on the Delaware River between the Commodore Barry Bridge and Penn's Landing, Philadelphia, Pennsylvania during the transit of the Tug PURPLE HAYS with fireworks barges on December 31, 1995. This safety zone is needed to protect vessels, the port community and the environment from potential safety and environmental hazards associated with the transit of the Tug PURPLE HAYS with barges loaded with explosives. Entry into this zone is prohibited without permission from the Captain of the Port.

EFFECTIVE DATE: This rule is effective from 4 p.m. to 11 p.m., December 31, 1995.

FOR FURTHER INFORMATION CONTACT: LTJG S.J. Kelly, Project Officer at the Captain of the Port, Philadelphia, (215) 271–4909.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking (NPRM) was not published for this regulation and good cause exists for making it effective in less than 30 days after Federal Register publication. The Coast Guard was informed by the owner/operator of the Tug PURPLE HAYS on December 6, 1995 of the intended transit of the Tug PURPLE HAYS along the Delaware River between the Commodore Barry Bridge and Penn's Landing, Philadelphia, Pennsylvania. Publishing a NPRM and delaying the effective date would be contrary to the public interest, since immediate action is needed to protect the environment and vessel traffic against potential hazards associated with the transit of the Tug PURPLE HAYS and barges while loaded with fireworks.

Drafting Information: The drafters of this regulation are LTJG S.J. Kelly, project officer for the Captain of the Port, Philadelphia, and CDR. T.R. Cahill, Project Attorney, Fifth Coast Guard District Legal Staff.

Discussion of the Regulation: The circumstances requiring the regulation arise from the potential hazards associated with the transportation of fireworks on a barge in heavily trafficked areas of the Delaware River. The safety zone includes a specified area around the Tug PURPLE HAYS barges loaded with explosives while underway on the Delaware River between the Commodore Barry Bridge and Penn's Landing and while moored at Hay's Tug and Launch, Chester, PA. Performance Pyrotechnic Associates, Inc. submitted an application for a marine event to MSO/Group Philadelphia dated November 20, 1995, requesting permission to hold a fireworks display in conjunction with the New Years Eve Celebration. However, the Coast Guard was not notified of the exact circumstances surrounding the transport of explosive until December 10, 1995. This temporary safety zone is being established with transit of the barges. Additionally, as announced in a separate notice to be published in the Federal Register, special local regulations in 33 CFR 100.509 will be in effect during the fireworks display.

Regulatory Evaluation: This regulation 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 been exempted from review 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 proposal to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary.

Environment: The Coast Guard considered the environmental impact of this proposal and concluded that under section 2.B.2.e (34). of Commandant Instruction M16475.1B (as revised by 59 FR 38654; July 29, 1994), this rule is categorically excluded from further environmental documentation.

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

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

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Security measures, Vessels, Waterways.

Regulation

In consideration of the foregoing, Subpart C of Part 165 of Title 33, Code of Federal Regulations, is amended as follows:

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

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

2. A new § 165.T05–087 is added to read as follows:

§ 165.T05–087 Safety Zone: Delaware River, between Commodore Barry Bridge and Penn's Landing, Philadelphia, PA.

(a) *Location.* A safety zone is established for:

(1) All waters within an area which extends 500 yards on either side and 1000 yards ahead and astern of the Tug PURPLE HAYS and barges loaded with class 1.3 and 1.4 explosives while underway in the Delaware River, between the Commodore Barry Bridge and Penn's Landing, Philadelphia, PA.

(2) All waters within a 200 yard radius of the Tug PURPLE HAYS and barges loaded with class 1.3 and 1.4 explosives while moored at Hay's Tug and Launch in Chester, PA.

(b) *Effective Date.* This section is effective from 4 p.m. to 11 p.m. December 31, 1995. If the conditions requiring a safety zone terminate at an earlier date, the Captain of the Port, Philadelphia, may advise mariners by Broadcast Notice to Mariners that the safety zone will not be enforced.

(c) *Regulations:* The following regulations shall apply within the safety zone.

(1) No person or vessel may enter the safety zone without permission of the Captain of the Port or his designated representative.

(2) As a condition of entry into the safety zone, the COTP or his designated representative may order that each vessel:

(i) Maintain a continuous radio guard on channels 13 and 16 VHF–FM while underway;

(ii) Not overtake the Tug PURPLE HAYS while underway on the Delaware River;

(iii) Operate at a minimum no wake speed sufficient to maintain steerage while Tug PURPLE HAYS is moored at Hay's Tug and Launch, Chester, PA;

(iv) Proceed as directed or stop the vessel immediately when directed to do so by the Captain of the Port or by his designated representative.

(d) *Designated COTP Representative:* The designated representative of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port, Philadelphia, Pennsylvania to act on his behalf. The designated representative enforcing the safety zone may be contacted on VHF channels 13 & 16. The Captain of the Port of Philadelphia and the Command Duty Officer at the Marine Safety Office, Philadelphia, may be contacted at telephone number (215) 271–4940.

Dated: December 15, 1995.

John E. Veentjer,

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

[FR Doc. 95–31374 Filed 12–28–95; 8:45 am]

BILLING CODE 4910–14–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 63

[IB Docket No. 95–22, FCC 95–475]

Market Entry and Regulation of Foreign-affiliated Entities

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Report and Order contains information collections subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA, OMB, the general public, and other Federal agencies are invited to comment on the information collections contained in this proceeding

On November 28, 1995, the Federal Communications Commission adopted a Report and Order in response to a Notice of Proposed Rulemaking which the Commission adopted on February 7, 1995, that establishes a market entry standard for foreign carriers seeking to provide basic international telecommunications services under section 214 of the Communications Act of 1934, a amended (''the Act''). The Report and Order also establishes a standard by which the Commission will review whether it is in the public interest to permit foreign investment in licensees of common carrier radio facilities in excess of the benchmarks contained in section 310(b)(4) of the Act. The Report and Order was adopted. The Report and Order makes additional changes to the Commission's regulations of international common carriers.

In reviewing applicants for international section 214 authority filed by a foreign carrier or its U.S. affiliate (collectively ''foreign carrier''), the Commission will examine, as an important part of its public interest analysis, whether competitive opportunities exist for U.S. carriers in destination markets in which the foreign carrier has market power. The Commission will apply a similar analysis in reviewing indirect foreign investment in licensees of common carrier radio facilities under section 310(b)(4), but it will limit its review to the ''home market'' of the foreign investor. In addition to considering effective competitive opportunities, the Commission will examine additional public interest factors that might weigh in favor of, or against, approving the foreign carrier's international section 214 application, or permitting the indirect foreign investment in a common carrier radio licensee to exceed the section 310(b)(4) benchmark.

In taking this action, the Commission's primary goal is to advance the public interest by promoting effective competition in the U.S. telecommunications services market, particularly the market for international services. The action also reaffirms the Commission's goals to prevent anticompetitive conduct in the provisions of international services or facilities, and to encourage foreign governments to open their communications markets.

EFFECTIVE DATE: The rules adopted in this Report and Order will become effective January 29, 1996. However, if OMB has not approved the information collections contained in these rules by this date, the Commission will publish a document to delay the effective date of these rules.

Written comments by the public on the information collections are due January 10, 1996.

ADDRESSES: Submit all comments concerning the Paperwork Reduction Act to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW., Washington, DC 20554, or via the Internet to dconway@fcc. gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725–17th Street, NW., Washington, DC 20503 or via the Internet to fain—t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: For additional information concerning the information collections contained in this Report and Order contact Dorothy Conway at 202–418–0217, or via the Internet as dconway@fcc.gov.

For further information on the Report and Order contact: Susan O'Connell, Attorney, International Bureau, (202) 418–1484, Ken Schagrin, Attorney, International Bureau, (202) 418–1407, or Robert McDonald, Attorney, International Bureau, (202) 418–1467.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order adopted on November 28, 1995, and released November 30, 1995 (FCC 95–475). The full text of this Report and Order is available for inspection and copying during normal hours in the FCC Reference Center (Room 239), 1919 M St., NW., Washington, DC. The complete text also may be purchased from the Commission's Copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037

Paperwork Reduction Act

The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Report and Order. Comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

This Report and Order contains information collection requirements. Written comments by the public on the information collections are due January 10, 1996. Written comments must be submitted by OMB on the information collections on or before January 15, 1996.

OMB Approval Number: New Collection.

Title: Market Entry and Regulation of Foreign-affiliated Carriers.

Type of Review: New collection.

Respondents: Business or other for-profit.

Number of Respondents: 431 per year.

Estimated Time Per Response: 9.5 hours.

Total Annual Burden: 4127 hours.

Needs and Uses: The collections of information for which approval is here sought are contained in amendments to part 63 and in the Report and Order adopting such amendments. These information collections are authorized and necessary for the Commission to carry out its statutory mandate, pursuant to sections 4, 214, 219, 303(r) and 403 of the Communications Act, 47 U.S.C. 154, 214, 219, 303(r) and 403.

The information collections contained in amendments to §§ 63.01 (r) and (s) and 63.11 and 63.17(b)(4) of the Commission's rules are necessary to determine whether, and under what conditions, the public interest, convenience, and necessity will be served by authorizing particular foreign carriers, or their U.S. affiliates, to provide international common carrier services between the United States and countries where these foreign carriers have market power, *i.e.*, the ability to

discriminate against unaffiliated U.S. carriers through control of ''bottleneck services or facilities'' on the foreign end of a U.S. international route. ''Bottleneck services or facilities'' are those that are necessary to terminate U.S. international traffic.

Second, the information collections contained in amendments to § 63.10 of the Commission's rules are necessary for the Commission to maintain effective oversight of U.S. carriers that are affiliated with, or involved in certain co-marketing or similar arrangements with, foreign carriers that have market power.

Third, the information collections contained in amendments to § 63.01(k) of the Commission's rules are necessary to protect the U.S. public interest in cost-based international telecommunications services.

Fourth, the information collections under section 310(b)(4) of the Act are necessary to determine, under that section, whether a greater than 25 percent indirect foreign ownership interest in a U.S. common carrier radio licensee would be inconsistent with the public interest.

The Order adopts a requirement that section 214 applicants amend their pending applications to the extent they are inconsistent with the new rules. Applications pending as of the effective date of the new rules must be amended within thirty days of the effective date of the new rules. This information will be used to process pending applications under the Commission's public interest standard enunciated in the Order.

The information will be used by the Commission staff in carrying out its duties under the Communications Act. Common carrier applicants providing or seeking to provide international service under part 63 of the Commission's rules must comply with our rules.

Summary of Report and Order

In response to the Notice of Proposed Rulemaking (60 FR 11644 (March 2, 1995)), the Commission adopted a decision to further the goal of promoting effective competition in the U.S. telecommunications market, particularly the market for international services. In order to promote effective competition in this market, the Commission's new rules are designed to prevent anticompetitive conduct in the provision of international services or facilities, and to encourage foreign governments to open their communications markets.

With this Report and Order, the Commission adopts standards for regulating the entry of foreign carriers into the United States market for international telecommunications services. This Report and Order explicitly sets forth the entry criteria necessary to promote effective competition in the U.S. market for these services, including global, seamless network services. As an important part of the Commission's overall public interest analysis under Section 214 of the Communications Act, it will examine whether effective competitive opportunities exist for U.S. carriers in the destination markets of foreign carriers seeking to enter the U.S. international services market either directly or through an affiliation with a new or existing U.S. carrier.

Similarly, in deciding whether it is in the public interest to permit indirect foreign investment in licensees of common carrier wireless facilities in excess of the benchmarks contained in section 310(b)(4) of the Act, the Commission will examine whether foreign markets offer effective competitive opportunities to U.S. entities. This approach is fully consistent not only with the Commission's existing jurisdiction under section 310, but also with telecommunications bills currently pending in Congress which would specifically incorporate an effective competitive opportunities analysis as part of a section 310(b)(4) determination.

The New Entry Standard

The Commission's effective competitive opportunities analysis under section 214 of the Act will focus first on whether U.S. carriers have the legal right to provide international basic services in the destination markets where the foreign applicant has market power. If there are no legal barriers to entry, the Commission also will consider the practical ability for U.S. carriers to compete in those markets. The Commission considers several factors essential to viable competition. These factors include: First, whether there are reasonable and nondiscriminatory terms and conditions for interconnection to a foreign carrier's facilities; second, whether there are competitive safeguards to protect against anticompetitive conduct; and third, whether there is an effective regulatory framework to implement and enforce these conditions and safeguards. The Commission will apply the effective competitive opportunities analysis to foreign carriers seeking to provide facilities-based or resale service in the United States. The public interest analysis under section 214 also will continue to consider additional public interest factors, including the general significance of the proposed entry to the promotion of competition in the U.S. communications services market, the presence of cost-based accounting rates, as well as national security, law enforcement issues, foreign policy, or trade concerns raised by the Executive Branch.

The analysis under section 310 is similar to that under section 214, but with some important distinctions. Most notably, the Commission's determination will focus on the foreign investor's ''home market'', and will be applied to the specific service in which the foreign entity seeks to invest in the United States, e.g., cellular service. If the services in the U.S. and home markets are not precisely matched, the Commission will use the most closely substitutable wireless service in the home market, as determined from the consumer's perspective. The Commission also will examine additional public interest factors that might weigh in favor of, or against, allowing a foreign investor to exceed the 25 percent benchmark contained in section 310(b)(4). In determining a foreign investor's ''home market'', the Commission will identify (1) the country of its incorporation, organization, or charter; (2) the nationality of all investment principals, officers, and directors; (3) the country in which its world headquarters is located; (4) the country in which the majority of its tangible property, including production, transmission, billing, information, and control facilities, is located; and (5) the country from which it derives the greatest sales and revenues from its operations. If all five of these factors indicate that the same country should be considered to be the entity's home market, it will be presumed to be so, subject only to rebuttal based on clear and convincing evidence to the contrary. If these five factors yield inconsistent results, however, the Commission will balance them, as well as any other information that is particularly relevant to the case, to determine the appropriate home market under the totality of the circumstances.

Affiliation

For purposes of implementing this entry standard, the Commission adopts a new definition of ''affiliation''. It now defines affiliation as an ownership interest of greater than 25 percent, or a controlling interest at any level, in a U.S. carrier by a foreign carrier. The Commission also will apply its effective competitive opportunities analysis to foreign carrier investments of 25 percent or less if the investment presents a significant potential impact on competition in the U.S. market for

international telecommunications services. In addition, the Commission will aggregate investments of two or more foreign carriers where they are likely to act in concert and the combined interests either exceed 25 percent or constitute a controlling interest.

This definition of affiliation will apply both for purposes of determining when to apply the effective competitive opportunities analysis and of determining the regulatory status of all affiliated carriers, including U.S.-based carriers that have a greater than 25 percent investment, or a controlling interest, in a foreign carrier. The Commission also is adopting a prior notification and approval requirement to determine whether a particular investment in a U.S. carrier by a foreign carrier constitutes an affiliation with that foreign carrier, and to determine whether the investment serves the public interest, convenience and necessity. A U.S. international carrier is required to notify the Commission 60 days prior to acquisition by a foreign carrier of a 10 percent or greater interest in that U.S. carrier.

Amendment of Pending Applications

The Report and Order adopts a requirement that section 214 applicants amend their pending applications to the extent they are inconsistent with the new rules. The Report and Order requires that applications pending as of the effective date of the new rules be amended within thirty days of the effective date of the new rules.

Dominant Carrier and Other Operating Safeguards

This Report and Order also modifies the safeguards that apply to foreign-affiliated carriers regulated as dominant under § 63.10 of the Commission's rules, 47 CFR 63.10, as amended in the Report and Order. The modified dominant carrier safeguards also will apply to U.S. carriers on particular routes where they are engaged in a co-marketing or other arrangement with a dominant foreign carrier, and such arrangement presents a substantial risk of anticompetitive effects in the U.S. market for international telecommunications services.

The Commission has modified these safeguards to reduce regulatory burdens while maintaining effective oversight over foreign-affiliated or allied carriers. It allows dominant, foreign-affiliated or allied carriers to file tariffs on 14 days notice instead of the previous 45 days and relieves those carriers of the burden of filing cost support information. It also requires that a dominant, foreign-affiliated or allied carrier maintain complete records of the provisioning and maintenance of service and facilities it procures from its foreign carrier affiliate or ally. The Order maintains the existing requirement that a dominant foreign-affiliated carrier (and, under the new rules, a dominant, allied carrier) receive specific section 214 authorization before adding or removing circuits on routes where it is regulated as dominant, and file quarterly traffic and revenue reports.

The Order also conforms the Commission's ''no special concessions'' prohibition and ''no exclusive arrangements'' condition that have regularly been placed in section 214 authorizations and applies a ''no special concessions'' prohibition to all U.S. international carriers. This means that no U.S. carrier is allowed to accept a special concession directly or indirectly from any foreign carrier with respect to traffic or revenue flows between the United States and any foreign country for which the U.S. carrier is authorized to provide service.

Additional Matters

The Order additionally adopts new rules relating to the provision of international switched basic service via facilities-based and resold private lines. These rules apply to all U.S. carriers, both those that are affiliated and unaffiliated with a foreign carrier. And, it adopts a modified definition of a U.S. international facilities-based carrier.

Final Regulatory Flexibility Act Analysis

Pursuant to section 603 of Title 5, United States Code, 5 U.S.C. 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rulemaking in CC Docket No. 95–22. Written comments on the proposals in the Notice, including the Regulatory Flexibility Analysis, were requested.

A. Need and Purpose of this Action

This rulemaking proceeding establishes an effective competitive opportunities analysis as an important public interest factor in the Commission's overall public interest analysis of applications filed by foreign carriers to enter the U.S. international telecommunications market pursuant to section 214 of the Communications Act. It also adopts a similar analysis for determining whether the public interest would be disserved by permitting indirect foreign investment in common carrier licensees in excess of the benchmarks contained in section 310(b)(4) of the Act. In addition, this proceeding modifies existing rules and policies relating to the definition of a U.S. international facilities-based carrier, the regulation of certain dominant carriers in the provision of international service, and other rules governing the provision of switched services over international private lines.

B. Issues Raised by the Public Comments in Response to the Regulatory Flexibility Analysis

There were no comments submitted in response to the Regulatory Flexibility Analysis. The Notice of Proposed Rulemaking offered a number of alternatives for each issue raised. The Commission responded to commenters' concerns and significantly altered the proposed market entry standard. The new approach under section 214 is designed to focus on foreign carrier entry that poses a substantial risk of anticompetitive effects in the provision of international services. In addition, the Commission is adopting a standard that is clear and administratively feasible.

C. Significant Alternatives Considered

The Commission has attempted to balance all the commenters' concerns with our public interest mandate under the Act in order to adopt a clear and administratively feasible approach to market entry by foreign carriers. Instead of examining whether effective competitive opportunities exist for U.S. carriers in every primary market where a foreign carrier operates, regardless of whether the foreign carrier seeks to serve such market, the Commission will focus its analysis under section 214 only on destination countries where the foreign carrier holds market power. Our route-by-route approach reduces the regulatory burden on all U.S. carriers seeking an affiliation with a foreign carrier. The Commission has not adopted the suggestion of some parties to exempt small U.S. carriers from the market entry rules. Whether a dominant foreign carrier makes a significant investment in a small U.S. carrier or a large one, there is a substantial risk of anticompetitive effects. Therefore, the Commission declines to exempt small U.S. carriers from these rules.

The Commission proposed to modify its standard for determining when a U.S. carrier is affiliated with a foreign carrier for purposes of both the market entry analysis and post-entry regulation. The Commission considered investment levels ranging from greater than ten percent to controlling interests at any level. It also considered adopting an affiliation standard based on: The dollar amount of the investment; the percentage of the investment; or the

amount of traffic carried by the U.S. carrier in correspondence with the foreign carrier. The Commission additionally considered adopting a reciprocal affiliation standard. Based on the record, the Commission has modified its definition of affiliation and will now consider affiliated any U.S. carrier with either: (1) A greater than 25 percent interest (or a controlling interest at any level) held by a foreign carrier; or (2) a greater than 25 percent interest in, or control of, a foreign carrier.

The Commission will apply its effective competitive opportunities analysis to the first category of affiliated U.S. carriers on routes where the affiliated foreign carrier has market powers in the destination country. It will apply its dominant carrier safeguards to all affiliated U.S. carriers on routes where the affiliated foreign carrier has market power. These safeguards will also now apply to U.S. carriers on routes for which they have formed a non-exclusive co-marketing arrangement or other joint venture with a dominant foreign carrier, where such arrangements present a substantial risk of anticompetitive effects.

The Commission has eliminated the requirement that dominant, foreign-affiliated carriers file cost support with their tariffs. This will reduce burdensome filing requirements. The Commission also adopts its proposed 14-day notice period (currently 45 days) for the filing of international service tariffs by dominant, foreign-affiliated carriers. The Commission adopts a new recordkeeping requirement that a dominant, foreign-affiliated carrier maintain complete records of the provisioning and maintenance of network facilities and services it procures from its foreign affiliate or ally. The Commission found that although this requirement is a minor burden, its benefit in preventing anticompetitive conduct outweighs such a burden. The Commission adopts new rules related to the provision of switched services using international private lines. These rules will enhance opportunities for U.S. carriers to serve U.S. consumers more efficiently. The Commission also adopts a definition of ''U.S. international facilities-based carrier'' that may facilitate the ability of smaller U.S. carriers to obtain operating agreements.

Ordering clauses

Accordingly, it is ordered that the policies, rules, and requirements adopted herein, except those needing OMB approval, will become effective January 29, 1996.

Matters subject to OMB approval, pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, will become effective upon such approval.

This action is taken pursuant to sections 4, 214, 219, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 214, 219, 303(r) and 403.

It is further ordered That this proceeding is hereby terminated.

List of Subjects in 47 CFR Part 63

Communications common carriers, Reporting and recordkeeping requirements, Telegraph, Telephone.

Federal Communications Commission,

LaVera Marshall,

Acting Secretary.

Final Rules

Part 63 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 63—EXTENSION OF LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1.The authority citation for part 63 continues to read as follows:

Authority: Secs. 1, 4(i), 4(j), 201–205, 218, and 403 of the Communications Act of 1934, as amended, and sec. 613 of the Cable Communications Policy Act of 1984, 47 U.S.C. secs. 151, 154(i), 15(j), 201–205, 218, 403, and 533 unless otherwise noted.

2. Section 63.01 is amended by revising paragraphs (k)(5) and (r), redesignating paragraph (k)(6) as paragraph (k)(7), and adding new paragraphs (k)(6), (s) and Notes 1 through 4 to paragraph (r) to read as follows:

§ 63.01 Contents of applications.

* * * * *

(k) * * *

(5) The procedures set forth in this section are subject to Commission policies on resale of international private lines in CC Docket No. 90–337 as amended in IB Docket No. 95–22. If proposed facilities are to be acquired through the resale of private lines for the purpose of providing international switched basic services, applicant shall demonstrate for each country to which it seeks to provide such services that the country affords resale opportunities equivalent to those available under U.S. law. In this regard, applicant shall:

(i) State whether the Commission has previously determined that equivalent resale opportunities exist between the United States and the subject country; or

(ii) Include other evidence demonstrating that equivalent resale opportunities exist between the United States and the subject country, including any relevant bilateral agreements between the administrations involved. Parties must demonstrate that the foreign country at the other end of the private line provides U.S. carriers with:

(A) The legal right to resell international private lines, interconnected at both ends, for the provision of switched services;

(B) Nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carrier facilities for termination and origination of international services, with adequate means of enforcement;

(C) Competitive safeguards to protect against anticompetitive and discriminatory practices affecting private line resale; and

(D) Fair and transparent regulatory procedures, including separation between the regulator and operator of international facilities-based services.

(6) Except as otherwise provided in this paragraph, any carrier authorized under this part to acquire and operate international private line facilities other than through resale shall, for each country for which it seeks to provide switched basic service over its authorized private lines facilities, request such authority by formal application. Such application shall be accompanied by a demonstration that that country affords resale opportunities equivalent to those available under U.S. law. In this regard, applicant shall include the information required by paragraph (k)(5) of this section.

(i) No formal application is required under this paragraph in circumstances where the carrier's previously authorized private line facility is interconnected to the public switched network only on one end—either the U.S. or the foreign end—and where the carrier is not operating the facility in correspondence with a carrier that directly or indirectly owns the private line facility in the foreign country at the other end of the private line.

* * * * *

(r) A certification as to whether or not the applicant is, or has an affiliation with, a foreign carrier.

(1) The certification shall state with specificity each foreign country in which the applicant is, or has an affiliation with, a foreign carrier. For purposes of this certification:

(i) Affiliation is defined to include;

(A) A greater than 25% ownership of capital stock, or controlling interest at

any level, by the applicant, or by any entity that directly or indirectly controls or is controlled by it, or that is under direct or indirect common control with it, in a foreign carrier or in any entity that directly or indirectly controls a foreign carrier; or

(B) A greater than 25% ownership of capital stock, or controlling interest at any level, in the applicant by a foreign carrier, or by any entity that directly or indirectly controls or is controlled by a foreign carrier, or that is under direct or indirect common control with a foreign carrier; or by two or more foreign carriers investing in the applicant in the same manner in circumstances where the foreign carriers are parties to, or the beneficiaries of, a contractual relation (e.g., a joint venture or market alliance) affecting the provision or marketing of basic international telecommunications services in the United States. A U.S. carrier also will be considered to be affiliated with a foreign carrier where the foreign carrier controls, is controlled by, or is under common control with a second foreign carrier already found to be affiliated with that U.S. carrier under this section.

(ii) Foreign carrier is defined as any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, see Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC–88), Art 1.

(2) In support of the required certification, each applicant shall also provide the name, address, citizenship and principal businesses of its 10 percent or greater direct and indirect shareholders or other equity holders and identify any interlocking directorates.

(3) Each applicant that proposes to acquire facilities through the resale of the international switched or private line services of another U.S. carrier shall additionally certify as to whether or not the applicant has an affiliation with the U.S. carrier(s) whose facilities-based service(s) the applicant proposes to resell (either directly or indirectly through the resale of another reseller's service). For purposes of this paragraph, affiliation is defined as in paragraph (r)(1)(i) of this section, except that the phrase ''U.S. facilities-based international carrier'' shall be substituted for the phrase ''foreign carrier.''

(4) Each applicant that certifies under this section that it has an affiliation with a foreign carrier and that proposes to acquire facilities through the resale of the international private line services of another U.S. carrier shall additionally certify as to whether or not the affiliated foreign carrier owns or controls telecommunications facilities in the particular country(ies) to which the applicant proposes to provide service (i.e., the destination country(ies)). For purposes of this paragraph, telecommunication facilities are defined as the underlying telecommunications transport means, including intercity and local access facilities, used by a foreign carrier to provide international telecommunications services offered to the public.

(5) Each applicant and carrier authorized to provide international communications service under this part is responsible for the continuing accuracy of the certifications required by paragraphs (r)(3) and (4) of this section. Whenever the substance of any such certification is no longer accurate, the applicant/carrier shall as promptly as possible and in any event within 30 days file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided. This information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

(6) Each applicant that certifies that it is, or that it has an affiliation, a foreign carrier, as defined in paragraphs (r)(1)(i)(B) and (r)(1)(ii) of this section, in a named foreign country and that desires to operate as a U.S. facilities-based international carrier to that country from the United States shall provide information in its application filed under this part to demonstrate that either:

(i) The named foreign country (i.e., the destination foreign country) provides effective competitive opportunities to U.S. carriers to compete in that country's international facilities-based market; or

(ii) Its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.

(A) The demonstration specified by paragraph (r)(6)(i) of this section should address the following factors:

(1) The legal, or *de jure*, ability of U.S. carriers to enter the foreign market and provide facilities-based international services, in particular, international message telephone service (IMTS);

(2) Whether there exist reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services;

(3) Whether competitive safeguards exist in the foreign country to protect against anticompetitive practices, including safeguards such as:

(i) Existence of cost-allocation rules in the foreign country to prevent cross-subsidization;

(ii) Timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities;

(iii) Protection of carrier and customer proprietary information; and

(4) Whether there is an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards; and

(5) Any other factors the applicant deems relevant to its demonstration.

(B) The demonstration specified in paragraph (r)(6)(ii) of this section should include the same information requested by paragraph (r)(8) of this section.

(7) Each applicant that certifies that it is, or that it has an affiliation with, a foreign carrier, as defined in paragraphs (r)(1)(i)(B) and (r)(1)(ii) of this section, in a named foreign country and that desires to resell the international switched or non-interconnected private line services, respectively, of another U.S. carrier for the purpose of providing international communications services to the name foreign country from the United States shall provide information in its application filed under this part to demonstrate that either.

(i) The named foreign country (i.e., the destination foreign country) provides effective competitive opportunities to U.S. carriers to resell international switched or noninterconnect private line services, respectively; or

(ii) Its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.

(A) The demonstration specified by paragraph (r)(7)(i) of this section should address the following factors:

(1) The legal, or *de jure*, ability of U.S. carriers to enter the foreign market and provide resold international switched services (for switched resale applications) or non-interconnected private line services (for non-interconnected private line resale applications;

(2) Whether there exist reasonable and nondiscriminatory charges, terms and conditions for the provision of the relevant resale service;

(3) Whether competitive safeguards exist in the foreign country to protect against anticompetitive practices, including safeguards such as:

(i) Existence of cost-allocation rules in the foreign country to prevent cross-subsidization;

(ii) Timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities;

(iii) Protection of carrier and customer proprietary information; and

(4) Whether there is an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards; and

(5) Any other factors the applicant deems relevant to its demonstration.

(B) The demonstration specified in paragraph (r)(7)(ii) of this section should include the same information requested by paragraph (r)(8) of this section.

(8) Each applicant that certifies that it has an affiliation with a foreign carrier in a named foreign country and that desires to be regulated as non-dominant for the provision of international communications service to that country may provide information in its application filed under this part to demonstrate that its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the named foreign country. See § 63.10, Regulatory Classification of U.S. International Carriers.

(i) Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, such as:

(A) The monopoly, oligopoly or duopoly status of the destination country; and

(B) Whether the foreign affiliate has the potential to discriminate against unaffiliated U.S. international carriers through such means as preferential operating agreements, preferential routing of traffic, exclusive or more favorable transiting agreements, or preferential domestic access and interconnection arrangements.

(ii) Such a demonstration may also address other factors the applicant deems relevant to its demonstration, such as the effectiveness of public regulation in the destination country.

(s) Each applicant shall certify that the applicant has not agreed to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any foreign country which the applicant may serve under the authority granted under this part and will not enter into such agreements in the future.

(1) For purposes of this paragraph, and of §§ 63.11(c)(2)(iii), 63.13(a)(4), and 63.14, special concession is defined as any arrangement that affects traffic or revenue flows to or from the U.S. that is offered exclusively by a foreign carrier or administration to a particular U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route.

(2) The special concessions certification required by this paragraph and by §§ 63.11(c)(2)(iii) and 63.13(a)(4) shall be viewed as an ongoing representation to the Commission, and applicants/carriers shall immediately inform the Commission if at any time the representations in their certifications are no longer true. Failure to so inform the Commission will be deemed a material misrepresentation to the Commission.

Note 1 to paragraph (r): The word ''control'' as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2 to paragraph (r): The term ''U.S. facilities-based international carrier'' means one that holds an ownership, indefeasible-right-of-user, or leasehold interest in bare capacity in an international facility, regardless of whether the underlying facility is a common or noncommon carrier submarine cable, or an INTELSAT or separate satellite system.

Note 3 to paragraph (r): The assessment of ''capital stock'' ownership will be made under the standards developed in Commission case law for determining such ownership. See, e.g., Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995). ''Capital stock'' includes all forms of equity ownership, including partnership interests.

Note 4 to paragraph (r): In applying the provisions of this section, ownership and other interests in U.S. and foreign carriers will be attributed to their holders and deemed cognizable pursuant to the following criteria: Attribution of ownership interests in a carrier that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. (For example, if A owns 30% of company X, which owns 60% of company Y, which owns 26% of ''carrier,'' then X's interest in ''carrier'' would be 26% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in ''carrier'' would be 7.8% (0.30×0.26). Under the 25% attribution benchmark, X's interest in ''carrier'' would be cognizable, while A's interest would not be cognizable.)

3. Section 63.10 is amended by revising paragraphs (a)(1) through (a)(3), and adding paragraph (c) to read as follows:

§ 63.10 Regulatory classification of U.S. international carriers.

(a) * * *

(1) A U.S. carrier that has no affiliation with, and that itself is not, a foreign carrier in a particular country to which it provides service (i.e., a destination country) will presumptively be considered non-dominant for the provision of international communications services on that route;

(2) A U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is a monopoly in a destination country will presumptively be classified as dominant for the provision of international communications services on that route; and

(3) A U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is not a monopoly in a destination country and that seeks to be regulated as non-dominant on that route bears the burden of submitting information to the Commission sufficient to demonstrate that its foreign affiliate lacks the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or facilities in the destination country. Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, including those listed in § 63.01(r)(8).

* * * * *

(c) Any carrier classified as dominant for the provision of particular services on particular routes under this section shall comply with the following requirements in its provision of such services on each such route:

(1) File international service tariffs on 14-days notice without cost support;

(2) Maintain complete records of the provisioning and maintenance of basic network facilities and services procured from its foreign carrier affiliate or from an allied foreign carrier, including, but not limited to, those it procures on behalf of customers of any joint venture for the provision of U.S. basic or enhanced services in which the U.S. and foreign carrier participate, which information shall be made available to the Commission upon request;

(3) Obtain Commission approval pursuant to § 63.01 before adding or discontinuing circuits; and

(4) File quarterly reports of revenue, number of messages, and number of

minutes of both originating and terminating traffic within 90 days from the end of each calendar quarter.

4. Section 63.11 is revised to read as follows:

§ 63.11 Notification by and prior approval for U.S. international carriers that have or propose to acquire ten percent investments by, and/or an affiliation with, a foreign carrier.

(a) Any carrier authorized to provide international communications service under this part that, as of the effective date of this rule as amended in IB Docket No. 95–22, is, or has an affiliation with, a foreign carrier within the meaning of § 63.01(r)(1)(i)(A) or (r)(1)(i)(B), or that as of such date knows of an existing ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier by a foreign carrier, or that after the effective date of this rule becomes affiliated with a foreign carrier within the meaning of § 63.01(r)(1)(i)(A), shall notify the Commission within thirty days of the effective date of this rule or within thirty days of the acquisition of the affiliation, whichever occurs later. For purposes of this section, ''foreign carrier'' is defined as set forth in § 63.01(r)(1)(ii).

(1) The notification shall certify to the information specified in paragraph (c) of this section.

(2) Any carrier that has previously notified the Commission of an affiliation with a foreign carrier, as defined by § 63.01(r)(1) immediately prior to the rule's amendment in IB Docket No. 95–22, need not notify the Commission again of the same affiliation.

(b) Any carrier authorized to provide international communications service under this part that knows of a planned investment by a foreign carrier of a ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier shall notify the Commission within sixty days prior to the acquisition of such interest. The notification shall certify to the information specified in paragraph (c) of this section.

(c) The notification required under paragraphs (a) and (b) of this section shall contain a list of all affiliated foreign carriers and shall state individually the country or countries in which the foreign carriers named in paragraphs (a) and (b) of this section are authorized to provide telecommunications services offered to the public. It shall additionally specify which, if any, of these countries the U.S. carrier is authorized to serve under this part; what services it is authorized to provide to each such country; and the FCC File No. under which each such authorization was granted.

(1) The carrier should also specify, where applicable, those countries named in paragraph (c) for which it provides a specified international communications service solely through the resale of the international switched or private line services of U.S. facilities-based carriers with which the resale carrier does not have an affiliation. Such an affiliation is defined as in § 63.01(r)(1)(i), except that the phrase ''U.S. facilities-based international carrier'' shall be substituted for the phrase ''foreign carrier.''

(2) The carrier shall also submit with its notification:

(i) The ownership information as required to be submitted pursuant to § 63.01(r)(2);

(ii) Where the carrier is authorized as a private line reseller on a particular route for which it has an affiliation with a foreign carrier, as defined in § 63.01(r)(1)(i), a certification as required to be submitted pursuant to § 63.01(r)(4); and

(iii) A ''special concessions'' certification as required to be submitted pursuant to § 63.01(s).

(3) The carrier is responsible for the continuing accuracy of the certifications provided under this section. Whenever the substance of any certification provided under this section is no longer accurate, the carrier shall as promptly as possible, and in any event within 30 days, file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided, *except that* the carrier shall immediately inform the Commission if at any time the representations in the ''special concessions'' certification provided under paragraph (c)(2)(iii) of this section are no longer true. See § 63.01(s)(2). This information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

(d) Unless the carrier notifying the Commission of a foreign carrier affiliation under paragraph (a) of this section qualifies for the presumption of non-dominant regulation pursuant to § 63.10(a)(4), it should submit the information specified in § 63.01(r)(8) to retain its non-dominant status on any affiliated route.

(e) The Commission will issue public notice of the submissions made under this section for 14 days.

(1) In the case of a notification filed under paragraph (a) of this section, the Commission, if it deems it necessary, will by written order at any time before or after the submission of public comments impose dominant carrier regulation on the carrier for the affiliated routes based on the provisions of § 63.10.

(2) In the case of a planned investment by a foreign carrier of a ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier, the Commission will, unless it notifies the carrier in writing within 30 days of issuance of the public notice that the investment raises a substantial and material question of fact as to whether the investment serves the public interest, convenience and necessity, presume the investment to be in the public interest. If notified that the acquisition raises a substantial and material question, then the carrier shall not consummate the planned investment until it has filed an application under § 63.01 and submitted the information specified under paragraphs (r) (6) or (7), as applicable, and (8) of that section, and the Commission has approved the application by formal written order.

5. Section 63.12 is amended by revising paragraph (c)(1) to read as follows:

§ 63.12 Streamlined processing of certain international resale applications.

* * * * *

(c) * * *

(1) The applicant has an affiliation within the meaning of § 63.01(r)(3), with the U.S. facilities-based carrier whose international switched or private line services the applicant seeks authority to resell (either directly or indirectly through the resale of another reseller's services); or

* * * * *

6. Section 63.13 is amended by revising the last sentences of paragraphs (a)(3) and (a)(5), and by revising paragraph (a)(4) to read as follows:

§ 63.13 Streamlined procedures for modifying regulatory classification of U.S. international carriers from dominant to nondominant.

(a) * * *

(3) * * * For purposes of paragraph (a)(3), ''telecommunications facilities'' are defined as in § 63.01(r)(4).

(4) Any carrier filing a certified list pursuant to paragraph (a)(2) of this section must also provide the ''special concessions'' certification as required to be submitted pursuant to § 63.01(r)(3).

(5) * * * See § 63.01(s)(2).

7. Section 63.14 is revised to read as follows:

§ 63.14 Prohibition on agreeing to accept special concessions.

Any carrier authorized to provide international communications service

under this part shall be prohibited from agreeing to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country served under the authority of this part and from agreeing to enter into such agreements in the future. For purpose of this section, foreign carrier is defined as in § 63.01(r)(1)(ii); and special concession is defined as in § 63.01(s).

8. A new § 63.17 is added to read as follows:

§ 63.17 Special Provisions For U.S. International Common Carriers.

(a) Unless otherwise prohibited by the terms of its Section 214 certificate, a U.S. common carrier authorized under this part to provide international private line service, whether as a reseller or facilities-based carrier, may interconnect its authorized private lines to the public switched network on behalf of an end user customer for the end user customer's own use.

(b) Except as provided in paragraph (b)(5) of this section, a U.S. common carrier, whether a reseller or facilities-based, may engage in ''switched hubbing'' to countries not found to offer equivalent resale opportunities under § 63.01(k) (5) and (6) under the following conditions:

(1) U.S.-outbound switched traffic shall be routed over the carrier's authorized U.S. international private lines to an equivalent country, and then forwarded to a third, nonequivalent country only by taking at published rates and reselling the International Message Telephone Service (IMTS) of a carrier in the equivalent country;

(2) U.S.-inbound switched traffic shall be carried to an equivalent country as part of the IMTS traffic flow from a non-equivalent third country and then terminated in the United States over U.S. international private lines from the equivalent hub country;

(3) U.S. common carriers that route U.S.-outbound traffic via switched hubbing through an equivalent country shall tariff their service on a ''through'' basis from the United States to the ultimate foreign destination.

(4) No U.S. common carrier may engage in switched hubbing under this section to a country for which it has an affiliation with a foreign carrier unless and until it receives specific authority to do so under § 63.01. For purposes of this paragraph, ''affiliation'' and ''foreign carrier'' are defined as set forth in § 63.01(r)(1) (i)(B) and (ii), respectively.

[FR Doc. 95–31099 Filed 12–28–95; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 625

[I.D. 122695B]

Summer Flounder Fishery

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

ACTION: Notification of commercial quota transfer.

SUMMARY: NMFS announces that the State of New Jersey is transferring 20,000 lb (9,072 kg) of commercial summer flounder quota to the State of New York. NMFS adjusted the quotas and announces the revised commercial quota for each state involved.

EFFECTIVE DATE: December 26, 1995.

FOR FURTHER INFORMATION CONTACT: Lucy Helvenston, 508–281–9347.

SUPPLEMENTARY INFORMATION: Regulations implementing Amendment 2 to the Fishery Management Plan for the Summer Flounder Fishery (FMP) are found at 50 CFR part 625. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 625.20.

The commercial quota for summer flounder for the 1995 calendar year was set equal to 14,690,407 lb (6,663,569 kg), and the allocations to each state were published February 16, 1995 (60 FR 8958). At that time, New Jersey was allocated a quota of 2,456,969 (1,114,462 kg) and New York was allocated a quota of 1,123,374 lb (509,554 kg). On August 30, 1995, the State of North Carolina transferred 7,229 lb (3,279 kg) to the State of New Jersey, and the revised quota for New Jersey was set equal to 2,464,198 lb (1,117,741 kg) (60 FR 45107). On November 17, 1995, the State of Maryland transferred 50,000 lb of its commercial quota to the State of New York, and the revised quota for New York was set equal to 1,173,374 lb (532,233 kg) (60 FR 57685). On December 15, 1995, the State of Maryland made two further transfers to the State of New York that were published as one notification (60 FR 64349). The first transfer was for 20,000 lb (9,072 kg), and the second was for 30,000 lb (13,608 kg), and the revised quota for New York was set equal to 1,223,374 lb (554,913 kg).

The final rule implementing Amendment 5 to the FMP was published December 17, 1993 (58 FR 65936), and allows two or more states, under mutual agreement and with the concurrence of the Director, Northeast Region, NMFS (Regional Director) to transfer or combine summer flounder commercial quota. The Regional Director is required to consider the criteria set forth in § 625.20(f)(1), in the evaluation of requests for quota transfers or combinations.

New Jersey has agreed to transfer 20,000 lb (9,072 kg) of commercial quota to New York. The Regional Director has determined that the criteria set forth in § 625.20(f)(1) have been met, and publishes this notification of quota transfers. The revised quotas for the calendar year 1995 are: New Jersey, 2,444,198 lb (1,108,670 kg); and New York, 1,243,374 lb (563,985 kg).

This action does not alter any of the conclusions reached in the environmental impact statement prepared for Amendment 2 to the FMP regarding the effects of summer flounder fishing activity on the human environment. Amendment 2 established procedures for setting an annual coastwide commercial quota for summer flounder and a formula for determining commercial quotas for each state. The quota transfer provision was established by Amendment 5 to the FMP and the environmental assessment prepared for Amendment 5 found that the action had no significant impact on the environment. Under section 6.02b.3(b)(I)(aa) of NOAA Administrative Order 216–6, this action is categorically excluded from the requirement to prepare additional environmental analyses. This is a routine administrative action that reallocates commercial quota within the scope of previously published environmental analyses.

Classification

This action is taken under 50 CFR part 625 and is exempt from review under E.O. 12866.

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

Dated: December 26, 1995.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

[FR Doc. 95–31516 Filed 12–26–95; 4:12 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 60, No. 250
Friday, December 29, 1995

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

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1755

RUS Specification for Aerial Service Wires

AGENCY: Rural Utilities Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Utilities Service (RUS) proposes to amend its regulations on Telecommunications Standards and Specifications for Materials, Equipment and Construction, by codifying the RUS Specification for Aerial Service Wires. The new specification sets forth the engineering and technical standards that are required by RUS in outside plant environments.

DATES: Comments concerning this proposed rule must be received by RUS or postmarked no later than January 29, 1996.

ADDRESSES: Comments should be mailed to the Orren E. Cameron III, Director, Telecommunications Standards Division, Rural Utilities Service, room 2835, AG Box 1598, South Building, U.S. Department of Agriculture, Washington, DC 20250–1598. RUS requests an original and three copies of all comments (7 CFR part 1700). All comments received will be made available for public inspection at room 2835, South Building, U.S. Department of Agriculture, Washington, DC 20250–1598 between 8:00 a.m. and 4:00 p.m. (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Chief, Outside Plant Branch, Telecommunications Standards Division, Rural Utilities Service, room 2844, AG Box 1598, South Building, U.S. Department of Agriculture, Washington, DC 20250–1598, telephone number (202) 720–0667.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed rule has been determined to be not significant and therefore has not been reviewed by the Office of Management and Budget.

Executive Order 12778

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. If adopted, this proposed rule will not:

(1) Preempt any State or local laws, regulations, or policies;

(2) Have any retroactive effect; and

(3) Require administrative proceedings before parties may file suit challenging the provisions of this rule.

Regulatory Flexibility Act Certification

The Administrator of RUS has determined that this proposed rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This proposed rule involves standards and specifications, which may increase the direct short-term costs to RUS borrowers. However, the long-term direct economic costs are reduced through greater durability and lower maintenance cost over time.

Information Collection and Recordkeeping Requirements

The reporting and recordkeeping requirements contained in the proposed rule were approved by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended) under control number of 0572–0059.

Send questions or comments regarding this burden or any other aspect of these collections of information, including suggestions for reducing the burden, to F. Lamont Heppe, Jr., Deputy Director, Program Support Staff, Rural Utilities Service, Ag Box 1522, Washington, DC 20250–1522.

National Environmental Policy Act Certification

The Administrator of RUS has determined that this proposed rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) Therefore, this action does not require an environmental impact statement or assessment.

Catalog of Federal Domestic Assistance

The program described by this proposed rule is listed in the Catalog of Federal Domestic Assistance programs under No. 10.851, Rural Telephone Loans and Loan Guarantees; and No. 10.852, Rural Telephone Bank Loans. This catalog is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402.

Executive Order 12372

This proposed rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require consultation with State and local officials. A Notice of Final rule titled Department Programs and Activities Excluded from Executive Order 12372 (50 FR 47034) exempts RUS and RTB loans and loan guarantees, and RTB bank loans, to governmental and nongovernmental entities from coverage under this Order.

Background

RUS issues publications titled ''Bulletin'' which serve to guide borrowers regarding already codified policy, procedures, and requirements needed to manage loans, loan guarantee programs, and the security instruments which provide for and secure RUS financing. RUS issues standards and specifications for the construction of telephone facilities financed with RUS loan funds. RUS Bulletin 345–36, ''RUS Specification for Parallel Conductor Drop Wire,'' PE–7, dated January 25, 1983 presently contains the engineering and technical requirements for aerial service wires that are considered necessary for satisfactory performance in outside plant environments. Because of the technological advancements made in aerial service wire designs over the past eleven years, RUS proposes to incorporate and update the information contained in RUS Bulletin 345–36 into 7 CFR 1755.700 through 7 CFR 1755.704, RUS Specification for Aerial Service Wires, and to rescind RUS Bulletin 345–36 upon the effective date of 7 CFR 1755.700 through 7 CFR 1755.704.

The specification allows aerial service wire designs consisting of one pair through six pairs. The specification also allows aerial service wire designs

containing copper coated steel and nonmetallic reinforcing members.

The specification contains mechanical, electrical, and environmental requirements, and test methods for evaluation of these aerial service wire designs.

This action establishes RUS requirements for a wider range of aerial service wires without affecting current designs or manufacturing techniques. This wider selection of aerial service wires will afford RUS telephone borrowers the opportunity to increase subscriber services in an economical and efficient manner through enhanced wire designs brought about by technological advancements made during the past eleven years.

List of Subjects in 7 CFR Part 1755

Loan programs-communications, Reporting and recordkeeping requirements, Rural areas, Telephone.

For the reasons set out in the preamble, RUS proposes to amend Chapter XVII of title 7 of the Code of Federal Regulations as follows:

PART 1755—TELECOMMUNICATIONS STANDARDS AND SPECIFICATIONS FOR MATERIALS, EQUIPMENT AND CONSTRUCTION.

1. The authority citation for part 1755 continues to read as follows:

Authority: 7 U.S.C. 901 *et seq.*, 1921 *et seq.*, Pub. L. 103–354, 108 Stat. 3178 (7 U.S.C. 6941 *et seq.*).

2. Section 1755.98 is amended by adding a new entry to the table in numerical order to read as follows:

§ 1755.98 List of telephone standards and specifications included in other 7 CFR parts.

* * * * *

Section	Issue date	Title
1755.700 through 1755.704	[Effective date of final rule]	RUS Specification for Aerial Service Wires.

* * * * * * *

3. Sections 1755.700 through 1755.704 are added to read as follows:

§ 1755.700 RUS specification for aerial service wires.

§§ 1755.701 through 1755.704 cover the requirements for aerial service wires.

§ 1755.701 Scope.

(a) This section covers the requirements for aerial service wires intended for aerial subscriber drops.

(1) The aerial service wires can be either copper coated steel reinforced or nonmetallic reinforced designs.

(2) For the copper coated steel reinforced design, the reinforcing members are the conductors.

(i) The conductors are solid copper-covered steel wires.

(ii) The wire structure is completed by insulating the conductors with an overall extruded plastic insulating compound.

(3) For the nonmetallic reinforced design, the conductors are solid copper individually insulated with an extruded solid insulating compound.

(i) The insulated conductors are either layed parallel (two conductor design only) or twisted into pairs (a star-quad configuration is permitted for two pair wires).

(ii) The wire structure is completed by the application of nonmetallic reinforcing members and an overall plastic jacket.

(4) All wires sold to RUS borrowers for projects involving RUS loan funds under §§ 1755.700 through 1755.704 must be accepted by RUS Technical Standards Committee ''A'' (Telecommunications). For wires manufactured to the specification of §§ 1755.700 through 1755.704, all design changes to an accepted design must be submitted for acceptance. RUS will be the sole authority on what constitutes a design change.

(5) Materials, manufacturing techniques, or wire designs not specifically addressed by §§ 1755.700 through 1755.704 may be allowed if accepted by RUS. Justification for acceptance of modified materials, manufacturing techniques, or wire designs must be provided to substantiate product utility and long term stability and endurance.

(b) The American National Standard Institute/Insulated Cable Engineers Association, Inc. (ANSI/ICEA) S–89–648–1993 Standard For Telecommunications Aerial Service Wire, Technical Requirements referenced throughout §§ 1755.700 through 1755.704 is incorporated by reference by RUS. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of ANSI/ICEA S–89–648–1993 are available for inspection during normal business hours at RUS, room 2845, U.S. Department of Agriculture, Washington, DC 20250–1500 or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. Copies are available from ICEA, P. O. Box 440, South Yarmouth, MA 02664, telephone number (508) 394–4424.

§ 1755.702 Copper coated steel reinforced (CCSR) aerial service wire.

(a) *Conductors.* (1) Each conductor shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraphs 2.1 through 2.1.5.

(2) Factory joints in conductors shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 2.1.6.

(b) *Conductor insulation.* (1) The raw materials used for the conductor insulation shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraph 3.1.1.

(2) The raw materials shall be accepted by RUS prior to their use.

(3) The finished conductor insulation shall be free from holes, splits, blisters, or other imperfections and shall be as smooth as is consistent with best commercial practice.

(4) The finished conductor insulation shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraphs 3.1.5 through 3.1.5.4.

(5) The insulation shall have a minimum spot thickness of not less than 0.9 millimeters (mm) (0.03 inches (in.)) at any point.

(c) *Wire assembly.* (1) The two conductors shall be insulated in parallel to form an integral configuration.

(2) The finished wire assembly shall be either a flat or a notched oval. Other finished wire assemblies may be used provided that they are accepted by RUS prior to their use.

(3) The overall dimensions of the finished wire assembly shall be in accordance with the following requirements:

Diameter	Dimensions			
	Minimum		Maximum	
	mm	in.	mm	in.
Major .	5.5	0.22	8.0	0.31
Minor .	3.0	0.12	5.0	0.19

(d) *Conductor marking.* The insulated conductors of a finished wire shall be marked in accordance with the requirements specified in ANSI/ICEA S–89–648–1993, paragraph 3.1.4.

(e) *Electrical requirements.* (1) *Conductor resistance.* The direct current (dc) resistance of each conductor in a completed CCSR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.1.2.

(2) *Wet mutual capacitance.* The wet mutual capacitance of the completed CCSR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.1.3.

(3) *Wet attenuation.* The wet attenuation of the completed CCSR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.1.4.

(4) *Wet insulation resistance.* The wet insulation resistance of the completed CCSR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.1.5.

(5) *Dielectric strength.* (i) The wet dielectric strength between conductors and between each conductor of the completed CCSR aerial service wire and the surrounding water shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.1.6.

(ii) The dry dielectric strength between conductors of the completed CCSR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.1.7.

(6) *Fusing coordination.* The completed CCSR aerial service wire shall comply with the fusing coordination requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.1.8.

(7) *Insulation imperfections.* Each length of completed CCSR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.1.9.

(f) *Mechanical requirements.* (1) *Impact test.* (i) All CCSR aerial service wires manufactured in accordance with this section shall comply with the unaged impact test specified in ANSI/ICEA S–89–648–1993, paragraph 8.1.2.

(ii) All CCSR aerial service wires manufactured in accordance with this section shall comply with the aged impact test specified in ANSI/ICEA S–89–648–1993, paragraph 8.1.3.

(2) *Abrasion resistance test.* All CCSR aerial service wires manufactured in accordance with this section shall comply with the abrasion resistance test specified in ANSI/ICEA S–89–648–1993, paragraph 8.1.4.

(3) *Static load test.* All CCSR aerial service wires manufactured in accordance with this section shall comply with the static load test specified in ANSI/ICEA S–89–648–1993, paragraph 8.1.5.

(4) *Plasticizer compatibility test.* All CCSR aerial service wires manufactured in accordance with this section shall comply with the plasticizer compatibility test specified in ANSI/ICEA S–89–648–1993, paragraph 8.1.8.

(g) *Environmental requirements.* (1) *Cold temperature handling test.* (i) All CCSR aerial service wires manufactured in accordance with this section shall comply with the unaged cold temperature handling test specified in ANSI/ICEA S–89–648–1993, paragraph 8.2.1.

(ii) All CCSR aerial service wires manufactured in accordance with this section shall comply with the aged cold temperature handling test specified in ANSI/ICEA S–89–648–1993, paragraph 8.2.2.

(2) *Light absorption test.* All CCSR aerial service wires manufactured in accordance with this section shall comply with the light absorption test specified in ANSI/ICEA S–89–648–1993, paragraph 8.2.3.

(3) *Low temperature separation test.* All CCSR aerial service wires manufactured in accordance with this section shall comply with the low temperature separation test specified in ANSI/ICEA S–89–648–1993, paragraph 8.2.4.

(4) *Flammability test.* All CCSR aerial service wires manufactured in accordance with this section shall comply with the flammability test specified in ANSI/ICEA S–89–648–1993, paragraph 8.3.

(5) *Wire listing.* All CCSR aerial service wires manufactured in accordance with this section shall comply with the listing requirements specified in ANSI/ICEA S–89–648–1993, paragraph 8.4.

(h) *Identification marker.* Each length of CCSR aerial service wire shall be identified in accordance with ANSI/ICEA S–89–648–1993, paragraph 9.1.4. When surface marking is employed, the color of the initial marking shall be either white or silver.

(i) *Length marking (optional).* (1) Sequentially numbered length marking of the completed CCSR aerial service wire may be used at the option of the manufacturer unless specified by the end user.

(2) When sequentially numbered length markings are used, the length markings shall be in accordance with ANSI/ICEA S–89–648–1993, paragraph 9.1.5. The color of the initial marking shall be either white or silver.

(j) *Durability of marking.* The durability of the marking of the CCSR aerial service wire shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraph 9.1.6.

§ 1755.703 Nonmetallic reinforced (NMR) aerial service wire.

(a) *Conductors.* (1) Each conductor shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraphs 2.2 and 2.2.1.

(2) Factory joints made in the conductors during the manufacturing process shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 2.2.2.

(b) *Conductor insulation.* (1) The raw materials used for the conductor insulation shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraphs 3.2 through 3.2.2.

(2) The finished conductor insulation shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraph 3.2.3.

(3) The dimensions of the insulated conductors shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraph 3.2.3.1.

(4) The colors of the insulation shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraph 3.2.3.2.

(5) A permissible overall performance level of faults in conductor insulation shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 3.2.4.6. The length count and number of faults shall be recorded. The information shall be retained for a period of 6 months and be available for review by RUS when requested.

(6) Repairs to the conductor insulation during manufacture are permissible. The method of repair shall be accepted by RUS prior to its use. The repaired insulation shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 3.2.3.3.

(7) All repaired sections of insulation shall be retested in the same manner as originally tested for compliance with paragraph (b)(5) of this section.

(8) The colored insulating material removed from or tested on the conductor, from a finished wire shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraphs 3.2.4 through 3.2.4.5.

(c) *Identification of pairs and layup of pairs.* (1) The insulation shall be colored coded to identify:

(i) The tip and ring conductor of each pair; and

(ii) Each pair in the completed wire.

(2) The colors to be used in the pairs together with the pair numbers shall be in accordance with the table specified in ANSI/ICEA S–89–648–1993, paragraph 4.1.1.

(3) The insulated conductors shall be either layed parallel (two conductor design only) or twisted into pairs.

(4) When using parallel conductors for the two conductor design, the parallel conductors shall be designed to enable the wire to meet the electrical requirements specified in paragraphs (g) introductory text through (g)(9)(ii) of this section.

(5) When twisted pairs are used, the following requirements shall be met:

(i) The pair twists shall be designed to enable the wire to meet the electrical requirements specified in paragraphs (g) introductory text through (g)(9)(ii) of this section; and

(ii) The average length of pair twists in any pair in the finished wire, when measured on any 3 meter (10 foot) length, shall not exceed the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 4.1.

(6) An alternative method of forming the two-pair wire is the use of a star-quad configuration.

(i) The assembly of the star-quad shall be such as to enable the wire to meet the electrical requirements specified in paragraphs (g) introductory text through (g)(9)(ii) of this section.

(ii) The star-quad configuration shall be assembled in accordance with ANSI/ICEA S–89–648–1993, paragraph 4.1.2.

(iii) The average length of twist for the star-quad in the finished wire, when measured on any 3 meter (10 foot) length, shall not exceed the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 4.1.

(iv) The color scheme used to provide identification of the tip and ring conductors of each pair in the star-quad shall comply with the table specified in ANSI/ICEA S–89–648–1993, paragraph 4.1.2.

(d) *Strength members.* The strength members shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraphs 6.1 and 6.1.1.

(e) *Wire jacket.* (1) The jacket shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraphs 5.1 and 5.1.1.

(2) The jacket raw materials shall be accepted by RUS prior to their use.

(f) *Wire assembly.* The finished wire assembly shall be in accordance with ANSI/ICEA S–89–648–1993, paragraph 5.1.3 and Figure 5–1.

(g) *Electrical requirements.* (1) *Conductor resistance.* The dc resistance of each conductor in a completed NMR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.2.

(2) *Resistance unbalance.* (i) The dc resistance unbalance between the two conductors of any pair in a completed NMR aerial service wire and the average resistance unbalance of all pairs in a Quality Control Lot shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.3.

(ii) The resistance unbalance between tip and ring conductors shall be random with respect to the direction of unbalance. That is, the resistance of the tip conductors shall not be consistently higher with respect to the ring conductors and vice versa.

(3) *Dry mutual capacitance.* The dry mutual capacitance of the completed NMR aerial service wire shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.4, Type 1.

(4) *Pair-to-pair capacitance unbalance.* The pair-to-pair capacitance unbalance as measured on the completed NMR aerial service wire shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.5.

(5) *Attenuation.* (i) The dry attenuation of the completed NMR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.7.

(ii) The wet attenuation of the completed NMR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.8.

(6) *Insulation resistance.* (i) The dry insulation resistance of the completed NMR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.9.

(ii) The wet insulation resistance of the completed NMR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.10.

(7) *Wet Dielectric strength.* The wet dielectric strength between conductors and between each conductor of the completed NMR aerial service wire and the surrounding water shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.11.

(8) *Fusing coordination.* The completed NMR aerial service wire shall comply with the fusing coordination requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.13.

(9) *Crosstalk loss.* (i) The output-to-output far-end crosstalk loss (FEXT) for any pair of completed NMR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.14.

(ii) The input-to-input near-end crosstalk loss (NEXT) for any pair of completed NMR aerial service wire shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 7.2.14.

(h) *Mechanical requirements.* (1) *Impact test.* (i) All NMR aerial service wires manufactured in accordance with this section shall comply with the unaged impact test specified in § 1755.702(f)(1)(i).

(ii) All NMR aerial service wires manufactured in accordance with this section shall comply with the aged impact test specified in § 1755.702 (f)(1)(ii).

(2) *Abrasion resistance test.* All NMR aerial service wires manufactured in accordance with this section shall comply with the abrasion resistance test specified in § 1755.702 (f)(2).

(3) *Static load test.* All NMR aerial service wires manufactured in accordance with this section shall comply with the static load test specified in § 1755.702(f)(3).

(4) *Elongation test.* All NMR aerial service wires manufactured in accordance with this section shall comply with the elongation test specified in ANSI/ICEA S–89–648–1993, paragraph 8.1.7.

(5) *Plasticizer compatibility test.* All NMR aerial service wires manufactured in accordance with this section shall comply with the plasticizer compatibility test specified in § 1755.702(f)(4).

(i) *Environmental requirements.* (1) *Cold temperature handling test.* (i) All NMR aerial service wires manufactured in accordance with this section shall comply with the unaged cold temperature handling test specified in § 1755.702(g)(1)(i).

(ii) All NMR aerial service wires manufactured in accordance with this section shall comply with the aged cold temperature handling test specified in § 1755.702(g)(1)(ii).

(2) *Light absorption test.* All NMR aerial service wires manufactured in accordance with this section shall comply with the light absorption test specified in § 1755.702(g)(2).

(3) *Flammability test.* All NMR aerial service wires manufactured in accordance with this section shall comply with the flammability test specified in § 1755.702(g)(4).

(4) *Wire listing.* All NMR aerial service wires manufactured in

accordance with this section shall comply with the listing requirements specified in § 1755.702(g)(5).

(j) *Ripcord (optional).* (1) A ripcord may be used in the NMR aerial service wire structure at the option of the manufacturer unless specified by the end user.

(2) When a ripcord is used it shall comply with the requirements specified in ANSI/ICEA S–89–648–1993, paragraphs 4.2 through 4.2.3.

(k) *Identification marker.* Each length of NMR aerial service wire shall be identified in accordance with ANSI/ICEA S–89–648–1993, paragraphs 9.1 through 9.1.4. When surface marking is employed, the color of the initial marking shall be either white or silver.

(1) *Length marking (optional).* (1) Sequentially numbered length marking of the completed NMR aerial service wire may be used at the option of the manufacturer unless specified by the end user.

(2) When sequentially numbered length markings are used, the length markings shall be in accordance with § 1755.702(i)(2).

(m) *Durability of marking.* The durability of the marking of the NMR aerial service wire shall comply with the requirements specified in § 1755.702(j).

§ 1755.704 Requirements applicable to both CCSR and NMR aerial service wires.

(a) *Acceptance testing.* (1) The tests described in §§ 1755.700 through 1755.704 are intended for acceptance of wire designs and major modifications of accepted designs. What constitutes a major modification is at the discretion of RUS. These tests are intended to show the inherent capability of the manufacturer to produce wire products having long life and stability.

(2) For initial acceptance, the manufacturer shall:

(i) Certify that the product fully complies with each paragraph in §§ 1755.700 through 1755.704;

(ii) Agree to periodic plant inspections by RUS;

(iii) Certify whether the product complies with the domestic origin manufacturing provisions of the ''Buy American'' requirements of the Rural Electrification Act of 1938 (7 U.S.C. 903 note), as amended (the ''REA Buy-American provision'');

(iv) Submit at least three written user testimonials concerning field performance of the product; and

(v) Provide any other nonpropriety data deemed necessary by the Chief, Outside Plant Branch (Telecommunications).

(3) In order for RUS to consider a manufacturer's request that a product be requalified, the manufacturer shall certify not later than June 30 of the year in which requalification is required, that the product:

(i) Fully complies with each paragraph in 7 CFR §§ 1755.700 through 1755.704; and

(ii) Does or does not comply with the domestic origin manufacturing provisions of the REA Buy American provisions. The required certifications shall be dated within 90 days of the submission.

(4) Initial and requalification acceptance requests should be addresses to: Chairman, Technical Standards Committee ''A'' (Telecommunications), Telecommunications Standards Division, Rural Utilities Service, AG Box 1598, Washington, DC 20250–1598.

(b) *Extent of testing.* (1) *Tests on 100 percent of completed wire.* (i) Each conductor in the completed CCSR and NMR aerial service wire shall be tested for continuity in accordance with ANSI/ICEA S–89–648–1993, paragraphs 7.1.1 and 7.2.1, respectively;

(ii) Each conductor in the completed CCSR and NMR aerial service wire shall be tested for shorts in accordance with ANSI/ICEA S–89–648–1993, paragraphs 7.1.1 and 7.2.1, respectively; and

(iii) Each length of completed CCSR and NMR aerial service wire shall be tested for insulation imperfections in accordance with § 1755.702, paragraph (e)(7) and § 1755.703, paragraph (b)(5), respectively.

(2) *Capability tests.* Tests on a quality assurance basis shall be made as frequently as is required for each manufacturer to determine and maintain compliance with:

(i) Performance of the conductors;

(ii) Performance of the conductor insulation and jacket material;

(iii) Sequential marking and lettering;

(iv) Mutual capacitance, capacitance unbalance, attenuation, and crosstalk;

(v) Conductor resistance, resistance unbalance, and insulation resistance;

(vi) Dielectric strength and fusing coordination;

(vii) Impact, abrasion, static load, elongation, and plasticizer compatibility tests; and

(viii) Cold temperature handling, light absorption, low temperature separation, and flammability tests.

(c) *Summary of records of electrical and physical tests.*

(1) Each manufacturer shall maintain suitable summary records for a period of at least 3 years of all electrical and physical tests required on completed wire as set forth in paragraphs (b)(1) and (b)(2) of this section. The test data for a particular lot of aerial service wire shall be in a form such that it may be readily available to the purchaser or to RUS upon request.

(2) Measurements and computed values shall be rounded off to the number of places or figures specified for the requirement according to ANSI/ICEA S–89–648–1993, paragraph 1.3.

(d) *Manufacturing irregularities.* (1) Repairs to the insulation of CCSR aerial service wires are not permitted in wires supplied to end users under §§ 1755.700 through 1755.704.

(2) Repairs to the jacket of NMR aerial service wires are not permitted in wires supplied to end users under §§ 1755.700 through 1755.704.

(e) *Splicing.* Splicing of completed CCSR and NMR aerial service wires shall comply with the requirement specified in ANSI/ICEA S–89–648–1993, paragraph 8.1.1.

(f) *Preparation for shipment.* (1) CCSR and NMR aerial service wire shall be shipped either in coils or on reels.

(2) When CCSR and NMR aerial service wires are shipped on reels the following provisions shall apply:

(i) The diameter of the drum shall be large enough to prevent damage to the wire from reeling or unreeling. The reels shall be substantial and so constructed as to prevent damage to the wire during shipment and handling;

(ii) A waterproof corrugated board or other suitable means of protection accepted by RUS prior to its use may be applied to the reel. If the waterproof corrugated board or other suitable material is used for protection, it shall be suitably secured in place to prevent damage to the wire during storage and handling. The use of the waterproof corrugated board or other suitable means of protection shall be at the option of the manufacturer unless specified by the end user;

(iii) The outer end of the wire shall be securely fastened to the reel head so as to prevent the wire from becoming loose in transit. The inner end of the wire shall be securely fastened in such a way as to make it readily available if required for electrical testing. Spikes, staples, or other fastening devices which penetrate the conductor insulation of the CCSR aerial service wire and the jacket of the NMR aerial service wire shall not be used. The method of fastening the wire ends shall be accepted by RUS prior to their use.

(iv) Each length of wire shall be wound on a separate reel;

(v) Each reel shall be plainly marked to indicate the direction in which it should be rolled to prevent loosening of the wire on the reel; and

(vi) Each reel shall be stenciled or labeled on either one or both sides with the following information:

(A) Customer order number;

(B) Manufacturer's name and product code;

(C) Factory reel number and year of manufacture;

(D) Gauge of conductors and pair size of wire;

(E) Length of wire; and

(F) RUS designation letter ''K.''

(3) When CCSR and NMR aerial service wires are shipped in coils the following provisions shall apply:

(i) The diameter of the coil shall be large enough to prevent damage to the wire from coiling or uncoiling;

(ii) The nominal length of the wire in a coil shall be 305 meters (1,000 feet). No coil shall be less than 290 meters (950 feet) long or more than 460 meters (1,500 feet) long; however, 25 percent of the total number of coils may be less than 305 meters (1,000 feet);

(iii) The coils of wire shall be wound securely with strong tape in four separate evenly spaced places;

(iv) The coils may be protected from damage by wrapping the coil with heavy paper, burlap, or other suitable material accepted by RUS prior to its use. The use of the heavy paper, burlap, or other suitable means of protection shall be at the option of the manufacturer unless specified by the end user; and

(v) Each coil shall be tagged with the following information:

(A) Customer order number;

(B) Manufacturer's name and product code;

(C) Year of manufacture;

(D) Gauge of conductors and pair size of wire;

(E) Length of wire; and

(F) RUS designation letter ''K.''

(4) In lieu of wrapping the coil with heavy paper, burlap, or other suitable material, the coil may be packaged in a moisture resistant carton.

(5) When the coils are shipped in moisture resistant cartons, each carton shall be marked with the information specified in paragraphs (f)(3)(v)(A) through (f)(3)(v)(F) of this section.

(6) Other methods of shipment may be used if accepted by RUS prior to their use.

(7) When NMR aerial service wire is shipped, the ends of the wire shall be sealed in accordance with ANSI/ICEA S–89–648–1993, paragraph 9.2.

Dated: December 19, 1995.

Jill Long Thompson,

Under Secretary, Rural Economic and Community Development.

[FR Doc. 95–31453 Filed 12–28–95; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 888

[Docket No. 95N–0176]

Orthopedic Devices: Classification, Reclassification, and Codification of Pedicle Screw Spinal Systems; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending to March 4, 1996, the comment period for the proposed rule that published in the Federal Register of October 4, 1995 (60 FR 51946). The document proposed to classify certain unclassified preamendments pedicle screw spinal systems into class II (special controls), and to reclassify certain postamendments pedicle screw spinal systems from class III (premarket approval) to class II. FDA is taking this action in response to several requests for an extension to assure adequate time for preparation of comments.

DATES: Written comments by March 4, 1996.

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: Mark N. Melkerson, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2036.

SUPPLEMENTARY INFORMATION: In the Federal Register of October 4, 1995 (60 FR 51946), FDA published a proposed rule to classify certain unclassified preamendments pedicle screw spinal systems into class II (special controls), and to reclassify certain postamendments pedicle screw spinal systems from class III (premarket approval) to class II. FDA is proposing to place certain pedicle screw spinal systems in class II because the agency believes that sufficient information exists to establish special controls to provide reasonable assurance of its safety and effectiveness.

Interested persons were invited to comment by January 2, 1996. FDA received several requests to extend the comment period, including a request from a United States District Court Judge presiding over product liability actions concerning orthopedic bone screw products. The court requested that FDA allow a 60-day extension because court orders relating to the disclosure of certain information about pedicle screws may make it difficult for parties involved in the litigation to submit relevant information to FDA by January 2, 1996.

Because FDA wants to provide adequate time for the submission of all relevant information related to these important public health issues, FDA is extending the comment period for 60 days. Accordingly, FDA finds under section 520(d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360j(d)) that there is good cause for such an extension.

Interested persons may, on or before March 4, 1996, submit to 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.

Dated: December 21, 1995.

Joseph A. Levitt,

Deputy Director for Regulations Policy, Center for Devices and Radiological Health.

[FR Doc. 95–31460 Filed 12–28–95; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Parts 62 and 66

[CGD 94–091]

RIN 2115–AF14

Conformance of Uniform State Waterways Marking System and Western Rivers Marking System with the United States Aids to Navigation System and the Maritime Buoyage System of the International Association of Lighthouse Authorities

AGENCY: Coast Guard, DOT.

ACTION: Advance notice of proposed rulemaking and request for comments.

SUMMARY: The Coast Guard is considering changes that would bring the Uniform State Waterways Marking System (USWMS) and the Western Rivers Marking System (WRMS) more into conformance with the U.S. Aids to Navigation System (USATONS) and the

Maritime Buoyage System (MBS) of the International Association of Lighthouse Authorities (IALA). These changes would help mariners avoid misinterpreting signals they might see when transiting different bodies of water now subject to different marking systems.

DATES: Please submit comments on or before February 12, 1996.

ADDRESSES: Comments may be mailed to the Executive Secretary, Marine Safety Council (G–LRA, Room 3406) [CGD 94–091], 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. to 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 notice and request for comments. Comments will become part of this docket and will be available for inspection or copying at room 3406, U.S. Coast Guard Headquarters, between 8 a.m. to 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: LTJG Chad Asplund, Division of Short Range Aids to Navigation, Telephone: (202) 267–1386.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this notice and request for comments by submitting written data, views, or arguments. Persons submitting comments should include their names and addresses, identify this rulemaking [CG 94–091] and the specific section of this notice 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 8+ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgement of receipt of comments should enclose stamped, self-addressed postcards or envelopes.

Background and Purpose

In 1966 the USWMS was created to provide a system that would adequately mark State waters. At its inception it was meant in part to supplement the USATONS. It offered two types of aids to navigation, a system of regulatory markers as well as a system to supplement the USATONS. It features red and black buoys to mark lateral hazards.

The WRMS was introduced to establish a system that would adequately mark the dynamic waterways of the Mississippi River and its Western counterparts. Some deviations from the USATONS were necessary to adequately mark these waterways. The WRMS allowed for only a few light characteristics to mark the waterways. As the number of users increased, and as the number of aids increased, a need arose to differentiate among the aids in the WRMS.

In 1982, the United States, along with most of the world's other maritime Nations, became a party to the agreement that established the MBS of the IALA. In 1985 the United States began converting the USATONS to harmonize with the MBS; if finished in 1991. Yet the systems that mark the Uniform State Waterways and the Western Rivers are not fully in conformance with the single system comprising MBS and USATONS.

The purpose of this proposed change is to develop an approach to adequately mark the Uniform State Waterways and Western Rivers while minimizing the number of systems of aids to navigation.

The Coast Guard is considering the following changes:

1. Allowing the five existing flash characteristics authorized in the USATONS to be used in the WRMS.
2. Using non-lateral daymarks as crossing daymarks in the WRMS.
3. Replacing the black buoys in the USWMS with green buoys.
4. Removing cardinal marks from the USWMS.
5. Marking hazards in the USWMS with the appropriate lateral marks as in the USATONS.

Early Participation

The Coast Guard is consulting with the National Association of State Boating-Law Administrators and with users in the Second Coast Guard District, as well as with State maritime authorities, to gather information required for this proposed change.

Solicitation of Views

The Coast Guard solicits comments from all segments of the marine community and other interested persons on economic and other impacts and [suggested alternatives related to aids to navigation system] to adequately mark the Uniform State Waterways and the Western Rivers. Persons submitting comments should include their names and addresses, identify this docket [CG 94–091], identify their concern or concerns, state what impacts may result from one or more of the alternatives identified, suggest other alternatives, and provide reasons to support the suggested alternatives. The Coast Guard is particularly interested in receiving information, views, data, and reasons on the following questions and areas of concern:

1. WHAT WOULD BE THE ECONOMIC IMPACTS OF A PROPOSED CHANGE IN LIGHTING CHARACTERISTICS ON THE WESTERN RIVERS?

Would users be adversely affected by having additional lighting characteristics within the WRMS?

What financial impact would this have?

Who are the persons most affected?

2. WHAT OTHER FACTORS AFFECT A PROPOSED CHANGE IN LIGHTING?

Is there any other information that you feel may be helpful in implementing this change with less impact on the affected persons?

3. SHOULD CROSSING DAYBOARDS USED IN THE WRMS BE REPLACED BY THE NON-LATERAL DAYBOARDS USED IN THE USATONS?

Should the currently used single-color crossing dayboards be replaced by the red-and-white or green-and-white non-lateral marks for better visibility?

4. WHAT IS THE BEST WAY TO MARK OBSTRUCTIONS IN THE USWMS?

Should cardinal marks be retained, or should the States adopt a system similar to that of the USATONS?

5. SHOULD THE MEANING OF THE RED-AND-WHITE STRIPED BUOYS IN THE USWMS BE CHANGED SO SUCH BUOYS MARK SAFE WATER AS IN THE USATONS?

Dated: December 20, 1995.

Rudy K. Peschel,

Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.

[FR Doc. 95–31376 Filed 12–28–95; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 117

[CGD13–95–050]

Drawbridge Operation Regulations; South Slough, OR

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: At the request of the Oregon Department of Transportation (ODOT), the Coast Guard is considering an amendment to the regulations governing the operation of the South Slough Bridge at Charleston, Oregon. The proposed change would require one hour notice at all times when requesting openings of the drawspan of the bridge for the passage of vessels.

DATES: Comments must be received on or before February 27, 1996.

ADDRESSES: Comments should be mailed to Commander (oan), Thirteenth Coast Guard District, 915 Second Avenue, Seattle, Washington 98174–1067. The comments and other materials referenced in this notice will be available for inspection and copying at 915 Second Avenue, Room 3410, Seattle, Washington. Normal office hours are between 7:45 a.m. and 4:15 p.m., Monday through Friday, except federal holidays. Comments may also be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: John E. Mikesell, Chief, Plans and Programs Section, Aids to Navigation and Waterways Management Branch, (Telephone: (206) 220–7270).

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 (CGD13–95–050) 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 unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgment of receipt of comments should enclose stamped, self-addressed postcards or envelopes.

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 no public hearing. Persons may request a public hearing by writing to the Commander, Thirteenth Coast Guard District at the address under **ADDRESSES.** The request should include the reasons why a hearing would be beneficial. If it determines that the opportunity for oral presentations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the Federal Register.

Drafting Information

The drafters of this notice are Austin Pratt, Project Officer, Thirteenth Coast Guard District Aids to Navigation and Waterways Management Branch, and Lieutenant Commander John C. Odell, Project Attorney, Thirteenth Coast Guard District Legal Office.

Background and Purpose

At the request of the Oregon Department of Transportation (ODOT), the Coast Guard is considering an amendment to the regulations governing the operation of the South Slough Bridge at Charleston, Oregon. The proposed change would require one hour notice at all times when requesting openings of the drawspan of the bridge for the passage of vessels. Current regulations require the drawspan to open on signal, except that the drawspan need only open on the hour and half hour from 7 a.m. to 7 p.m. from June 1 through September 30. The current regulations provide an exception to the summertime on-the-hour-and-half-hour provisions for vessels in distress, commercial tugs and/or tows, and public vessels of the United States.

In recent years the total number of annual openings has decreased continuously from 2014 in 1988 to 765 in 1995. This year the greatest number of openings occurred in April. During April, 1995, there were a total of 89 openings, averaging somewhat less than 3 per day.

Because of the decreased number of openings during the summer months, ODOT no longer feels that the on-the-hour-and-half-hour provision is necessary for the efficient operation of the bridge. In recent years, ODOT has voluntarily waived the on-the-hour-and-half-hour restriction and has opened the bridge on signal whenever requested. Under the proposed change, the provision that allows the bridge to open only on the hour or half hour during the summer months would be removed. The exception for vessels in distress, commercial tugs and/or tows, and public vessels of the United States would also be removed. Under the proposed change, vessels needing emergency openings would still be able to request such openings under the general provisions of § 117.31 of this part. No new exception to the one-hour notice requirement will be created for commercial tugs and tows or public vessels because transit of the bridge by these types of vessels have become rare.

The decreased number of requested openings throughout the year has also made it unnecessary and cost-inefficient to require that a draw operator be present at the bridge at all hours. Under the proposed change, the one-hour notice requirement would allow time for the draw operator to travel to the bridge for requested openings.

Discussion of Proposed Rule

The proposed rule would amend 33 CFR 117.892 to state that the draw shall open on signal if at least one hour notice is provided. This one-hour notice requirement would apply year-around. The provision that allows the bridge to open only on the hour or half hour during the summer months would be removed along with the exception for vessels in distress, commercial tugs and/or tows, and public vessels of the United States.

Regulatory Evaluation

This proposed rule is not a significant regulatory action under 3(f) of Executive Order 12866 and does not require an assessment of potential cost and benefits under section 6(a)(3) of that order. It has been exempted from review by the Office of Management and Budget under that order. It is not significant under 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 proposed rule to be so minimal that a full regulatory evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. This expectation is based on the fact that vessel operators would not be unreasonably impeded or incur additional expense by a requirement to provide one hour notice for draw openings.

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 effect 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). The Coast Guard certifies under 5 U.S.C. 605(b) that this proposal, if adopted, will not have a significant impact on a significant number of small entities.

Collection of Information

This proposal 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 proposal under the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this proposal and concluded that, under section 2.B.2. of Commandant Instruction M16475.B,

this proposal is categorically excluded from further environmental documentation. A ''Categorical Exclusion Determination'' is available in the docket for inspection or copying.

List of Subjects in 33 CFR Part 117

Bridges.

Proposed Regulations

For the reasons set out in the preamble, the Coast Guard proposes to amend part 117 of title 33, Code of Federal Regulations, as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. Section 117.892 is revised to read as follows:

§ 117.892 South Slough.

The draw of the Oregon State highway bridge across South Slough at Charleston, Oregon, shall open on signal for the passage of vessels if at least one hour notice is given.

Dated: December 19, 1995.

J.W. Lockwood,

Rear Admiral, U.S. Coast Guard Commander, 13th Coast Guard District.

[FR Doc. 95–31521 Filed 12–28–95; 8:45 am]

BILLING CODE 4910–14–M

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket 95–79, Notice 2]

RIN 2127–AG01

Federal Motor Vehicle Safety Standard; Steering Control Rearward Displacement

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Proposed Rule, extension of comment period.

SUMMARY: On November 16, 1995, (60 FR 57565) the agency published a proposal to exclude certain vehicles from the application of Federal Motor Vehicle Safety Standard No. 204, Steering Control Rearward Displacement. The excluded vehicles would be passenger cars and other light vehicles that are certified to comply with the frontal barrier crash test requirements of the agency's occupant crash protection standard by means of an airbag. A 60-day comment period was announced for that proposal. Advocates for Highway and Auto Safety requested an extension of the period to submit written comments. Advocates urged the agency to extend the time to comment, due to significant demands on their staff, responding to other NHTSA dockets and participation in NHTSA Negotiated Rulemaking meetings in January. The agency agrees that the unusual coincidence of numerous agency activities of interest to Advocates may result in inadequate time to respond to this notice. Additionally the agency recognizes the limited resources available to commenters during this holiday season. Therefore, by this notice, the agency extends the comment period for another 30 days.

DATES: Written comments must be received by February 15, 1996.

ADDRESSES: All written comments should be mailed to the Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 7th Street, SW, Washington, DC 20590. Please refer to the docket number of the original docket, that is Docket 95–79; Notice 1, when submitting written comments.

FOR FURTHER INFORMATION CONTACT: Mr. Clarke B. Harper, Office of Vehicle Safety Standards, NPS–12, NHTSA, 400 7th Street, SW, Washington, DC 20590 (telephone 202–366–2264, fax 202–366–4329). By electronic mail: charper@nhtsa.dot.gov.

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.

Barry Felrice,

Associate Administrator for Safety Performance Standards.

[FR Doc. 95–31511 Filed 12–28–95; 8:45 am]

BILLING CODE 4910–59–P

Notices

Federal Register
Vol. 60, No. 250
Friday, December 29, 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

Rural Utilities Service

Delta-Montrose Electric Association, Inc.; Finding of No Significant Impact

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of finding of no significant impact.

SUMMARY: Notice is hereby given that the Rural Utilities Service (RUS) has made a finding of no significant impact (FONSI) with respect to the potential environmental impact related to the construction of a new headquarters facility proposed by Delta-Montrose Electric Association, Inc. (DMEA), of Delta, Colorado. The proposed project will be located on a site 2.0 miles north of the City of Montrose, Colorado, on County Road 6300 near U.S. Highway 50 in Montrose County, Colorado.

RUS has concluded that the environmental impacts from the proposed project would not be significant and that the proposed action is not a major Federal action significantly affecting the quality of the human environment. Therefore, the preparation of an environmental impact statement is not required.

FOR FURTHER INFORMATION CONTACT: Lawrence R. Wolfe, Senior Environmental Protection Specialist, Engineering and Environmental Staff, room 1246, Ag Box 1569, South Agriculture Building, RUS, Washington, DC 20250, telephone (202) 720–1784.

SUPPLEMENTARY INFORMATION: RUS, in accordance with its environmental policies and procedures, required that DMEA prepare a Borrower's Environmental Report (BER) reflecting the potential impacts of the proposed facilities. The BER, which includes input from Federal, State and local agencies and the public, has been adopted as RUS's Environmental Assessment for the project in accordance with 7 CFR Part 1794.61. RUS has concluded that the BER represents an accurate assessment of the environmental impacts of the project. The proposed project should have no impact on cultural resources, flood-plains, wetlands, important farmland, and federally listed or proposed for listing threatened or endangered species or their critical habitat.

Alternatives considered to the proposed project included no action, expansion of DMEA's existing headquarters facility, renovation of an existing commercial building, consolidation of DMEA facilities at one of the existing service center sites, and alternate sites. RUS has considered these alternatives and concluded that the project as proposed meets the needs of DMEA to reduce overcrowding at the present facility, provide increased space for equipment storage, consolidate operations done at various existing facilities and provide adequate space for future expansion.

Copies of the BER and FONSI are available for review at RUS at the address provided herein; or can be reviewed at or obtained from the offices of DMEA, P.O. Box 59, Delta, Colorado 81416–0059, telephone (970) 874–8081, during normal business hours.

Dated: December 21, 1995.

Adam M. Golodner,

Deputy Administrator, Program Operations.

[FR Doc. 95–31451 Filed 12–28–95; 8:45 am]

BILLING CODE 3410–15–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Cancellation of Import Restraint Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Honduras

December 22, 1995.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs cancelling import limits.

EFFECTIVE DATE: January 1, 1996.

FOR FURTHER INFORMATION CONTACT: Jennifer Aldrich, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

A notice and letter to the Commissioner of Customs published in the Federal Register on December 6, 1995 (60 FR 62406) announce the establishment of import restraint limits for textile products in Categories 352/652 and 435, produced or manufactured in Honduras and exported during the period January 1, 1996 through December 31, 1996. In the letter published below, the Chairman of CITA directs the Commissioner of Customs to cancel the implementation of that directive.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see Federal Register notice 59 FR 65531, published on December 20, 1994).

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 22, 1995.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Effective on January 1, 1996, this directive cancels the directive issued to you on November 29, 1995, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of cotton, wool and man-made fiber textile products in Categories 352/652 and 435, produced or manufactured in Honduras and exported during the period beginning on January 1, 1996 and extending through December 31, 1996.

This letter will be published in the Federal Register.

Sincerely,

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.95–31449 Filed 12–28–95; 8:45 am]

BILLING CODE 3510–DR–F

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the procurement list.

SUMMARY: This action adds to the Procurement List mimeograph and duplicating paper to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: January 29, 1996.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: On September 22, 1995, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (60 F.R. 49263) of proposed addition to the Procurement List.

Comments were received from a lawyer representing the current contractor for this mimeograph and duplicating paper. The lawyer claimed that addition of the paper to the Procurement List would violate the Committee's statute, the Javits-Wagner-O'Day (JWOD) Act, 41 U.S.C. 46–48c, because the fair market price established for the paper could not meet what the lawyer claimed to be the accepted legal meaning of that term, which is essentially the lowest possible price on which a buyer and seller could agree for the item in question.

The JWOD Act considers the determination of whether a commodity or service is suitable for addition to the Procurement List to be a separate Committee function from the establishment and modification as conditions change of a fair market price for the commodity or service. 41 U.S.C. 47 (a) & (b). The statutory requirement to use the informal rulemaking procedure set forth in 5 U.S.C. 553 applies only to the addition decision, and not the determination of a fair market price. This point was emphasized in a court decision which led to a 1994 revision of the Committee's regulations in this area. Consequently, the lawyer's claim is not one which the Committee is required to consider in making a decision to add mimeograph and duplicating paper to the Procurement List.

The suitability factors which the Committee considers in adding commodities and services to the Procurement List are set forth in its regulations at 41 CFR 51–2.4. The lawyer has attempted to link his pricing argument to one of these factors, capability of the designated nonprofit agency to produce a commodity, by claiming that this factor requires the nonprofit agency to demonstrate a capability to produce the commodity at what the lawyer considers to be a fair market price.

The lawyer relied on an obsolete and ambiguous formulation of the Committee's suitability regulation to make the connection between nonprofit agency capability and fair market price. The Committee revised its regulation in 1991 to remove this ambiguous language. As the lawyer has been informed, the Committee has never agreed with the interpretation he placed on the regulation.

In addition, the Committee does not believe that its discretion in setting fair market prices is as limited as the lawyer claimed. In a second comment letter, the lawyer admitted that his point was that ''fair market price'' must have an objective meaning rather than permitting the Committee to be totally arbitrary in setting prices, and that the objective meaning left room for some discretion. His difference with the Committee is thus over the extent of the Committee's discretion to set prices. The Committee believes that the JWOD Act and its legislative history allow for the discretion which the Committee exercises in setting prices under its fair market pricing policy. The initial fair market prices established for the mimeograph and duplicating paper are in accord with this policy.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the commodities, fair market price, and impact of the addition on the current or most recent contractors, the Committee has determined that the commodities listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4. I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities to the Government.

2. The action will not have a severe economic impact on current contractors for the commodities.

3. The action will result in authorizing small entities to furnish the commodities to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the commodities proposed for addition to the Procurement List.

Accordingly, the following commodities are hereby added to the Procurement List:

Paper, Mimeograph and Duplicating
7530–00–234–7169
7530–00–285–3070
7530–00–364–3035
7530–00–286–6178
7530–01–072–2533
7530–01–074–1832
7530–00–213–7125
7530–00–221–0805
7530–00–224–6754
7530–00–239–9747
7530–00–253–0986
7530–01–037–5555
7530–01–072–2534
7530–01–240–4768

This action does not affect current contracts awarded prior to the effective date of this addition or options exercised under those contracts.

Beverly L. Milkman,

Executive Director.

[FR Doc. 95–31493 Filed 12–28–95; 8:45 am]

BILLING CODE 6820–33–P

Procurement List Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the procurement list.

SUMMARY: This action adds to the Procurement List commodities to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: January 29, 1996.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: On November 3 and 13, 1995, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (60 F.R. 55835 and 56988) of proposed additions to the Procurement List. After consideration of

the material presented to it concerning capability of qualified nonprofit agencies to provide the commodities, fair market price, and impact of the additions on the current or most recent contractors, the Committee has determined that the commodities listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4. I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities to the Government.

2. The action will not have a severe economic impact on current contractors for the commodities.

3. The action will result in authorizing small entities to furnish the commodities to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the commodities proposed for addition to the Procurement List.

Accordingly, the following commodities are hereby added to the Procurement List:

Military Resale Commodity

Pad, Scouring, M.R. 561

Commodities

Cord Assembly, Elastic, 4020–01–072–4557

Shape, Day Maritime, 8345–01–101–1101

This action does not affect current contracts awarded prior to the effective date of this addition or options exercised under those contracts.

Beverly L. Milkman,

Executive Director.

[FR Doc. 95–31494 Filed 12–28–95; 8:45 am]

BILLING CODE 6820–33–P

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee has received proposals to add to the Procurement List a commodity and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

COMMENTS MUST BE RECEIVED ON OR BEFORE: January 29, 1996.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a) (2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government (except as otherwise indicated) will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodity and services to the Government.

2. The action does not appear to have a severe economic impact on current contractors for the commodity and services.

3. The action will result in authorizing small entities to furnish the commodity and services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the commodity and services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following commodity and services have been proposed for addition to Procurement List for production by the nonprofit agencies listed:

Commodity

Bag, Plastic, 8105–01–150–6256
NPA: Wichita Industries and Services for the Blind, Wichita, Kansas at its facility in Pittsburg, Kansas

Services

Assembly of Backpack Pump Outfit (4320–00–289–8912)
General Services Administration, Region 7, Fort Worth, Texas
NPA: Expanco, Inc., Fort Worth, Texas

Grounds Maintenance, Department of Veterans Affairs, Medical Center, 801 South Marion Street, Lake City, Florida
NPA: CARC-Advocates for Citizens with Disabilities, Lake City, Florida

Janitorial/Custodial, Social Security Administration, Metro West Complex, 300 North Greene Street, Baltimore, Maryland
NPA: The Chimes, Inc., Baltimore, Maryland

Janitorial/Custodial, Basewide, Fort Indiantown Gap, Annville, Pennsylvania
NPA: UCP of Schuylkil, Carbon and Northumberland Counties, Pottsville, Pennsylvania

Beverly L. Milkman,

Executive Director.

[FR Doc. 95–31495 Filed 12–28–95; 8:45 am]

BILLING CODE 6820–33–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER95–1543–002, ER95–764–003, and EL96–20–000]

Illinois Power Company; Notice of Initiation of Proceeding and Refund Effective Date

December 26, 1995.

Take notice that on December 20, 1995, the Commission issued an order in the above-indicated dockets initiating a proceeding in Docket No. EL96–20–000 under section 206 of the Federal Power Act.

The refund effective date in Docket No. EL96–20–000 will be 60 days after publication of this notice in the Federal Register.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31484 Filed 12–28–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. ER96–108–000, ER96–109–000, ER96–110–000, and ER95–760–000]

Duke/Louis Dreyfus L.L.C., Duke Energy Marketing Corp., and Duke Power Company; Notice of Issuance of Order

December 26, 1995.

Duke Power Company (Duke) has filed two proposed open access

transmission tariffs. Also, Duke and two of its power marketing affiliates, Duke/Louis Dreyfus L.L.C. (Duke/Dreyfus) and Duke Energy Marketing Corp. (Duke Energy), have filed applications for authorization to sell power at market-based rates, and for certain waivers and authorizations. In particular, Duke/Dreyfus and Duke Energy have requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liabilities by Duke/Louis Dreyfus and Duke Energy.

On December 14, 1995, the Commission issued an Order Accepting for Filing and Suspending Transmission Tariffs, as Modified, Conditionally Granting Requests for Market-Based Rates, and Establishing hearing Procedures (Order) in the above-docketed proceeding.

The Commission's December 14, 1995, Order conditionally granted the request for blanket approval under Part 34, subject to the conditions found in Ordering Paragraphs (F) (2), (3) and (5):

(2) Within 30 days of the date of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by Duke Energy and Duke/Dreyfus should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.211 and 385.214.

(3) Absent a request to be heard within the period set forth in Ordering Paragraph (2) above, Duke/Dreyfus and Duke Energy are hereby authorized to issue securities and to assume obligations or liabilities as guarantor, endorser, surety or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of the applicant, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(5) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of Duke Energy's and Duke/Dreyfus' issuances of securities or assumptions of liabilities * * *.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is January 16, 1996.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31485 Filed 12–28–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER96–559–000, et al.]

Commonwealth Edison Company, et al.; Electric Rate and Corporate Regulation Filings

December 21, 1995.

Take notice that the following filings have been made with the Commission:

1. Commonwealth Edison Company

[Docket No. ER96–559–000]

Take notice that on December 8, 1995, Commonwealth Edison Company (ComEd) submitted Service Agreements, establishing Stand Energy Corporation (Stand), NorAm Energy Services (NorAm) and AES Power Inc. (AES), dated November 9, 1995, PECO Energy Company (PECO), dated November 8, 1995, and Wisconsin Public Service Corporation (WPS), dated October 20, 1995, as customers under the terms of ComEd's Transmission Service Tariff FTS–1 (FTS–1 Tariff). The Commission has previously designated the FTS–1 Point to Point Service Tariff as FERC Electric Tariff, Second Revised Volume No. 3.

ComEd requests an effective date of November 9, 1995 for the Service Agreements with Stand, NorAm and AES, and an effective date of November 8, 1995 for the Service Agreements between ComEd and PECO and ComEd and WPS, and accordingly seeks waiver of the Commission's notice requirements. Copies of this filing were served upon Stand, NorAm, AES, PECO, WPS and the Illinois Commerce Commission.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

2. Maine Public Service Company

[Docket No. ER96–561–000]

Take notice that on December 8, 1995, Maine Public Service Company (Maine Public), filed revisions to its open access tariff.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

3. UtiliCorp United Inc.

[Docket No. ER96–562–000]

Take notice that on December 8, 1995, UtiliCorp United Inc. tendered for filing on behalf of its operating division, Missouri Public Service, a Service Agreement under its Power Sales Tariff, FERC Electric Tariff Original Volume No. 10, with *Central Illinois Light Company.* The Service Agreement provides for the sale of capacity and energy by Missouri Public Service to *Central Illinois Light Company* pursuant to the tariff.

UtiliCorp requests waiver of the Commission's Regulations to permit the Service Agreement to become effective in accordance with its terms.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

4. UtiliCorp United Inc.

[Docket No. ER96–563–000]

Take notice that on December 8, 1995, UtiliCorp United Inc. tendered for filing on behalf of its operating division, WestPlains Energy-Kansas, a Service Agreement under its Power Sales Tariff, FERC Electric Tariff Original Volume No. 12, with *Central Illinois Light Company.* The Service Agreement provides for the sale of capacity and energy by WestPlains Energy-Kansas to *Central Illinois Light Company* pursuant to the tariff.

UtiliCorp requests waiver of the Commission's Regulations to permit the Service Agreement to become effective in accordance with its terms.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

5. UtiliCorp United Inc.

[Docket No. ER96–564–000]

Take notice that on December 8, 1995, UtiliCorp United Inc. tendered for filing on behalf of its operating division, WestPlains Energy-Colorado, a Service Agreement under its Power Sales Tariff, FERC Electric Tariff Original Volume No. 11, with *Central Illinois Light Company.* The Service Agreements provides for the sale of capacity and energy by WestPlains Energy-Colorado to *Central Illinois Light Company* pursuant to the tariff.

UtiliCorp requests waiver of the Commission's Regulations to permit the Service Agreement to become effective in accordance with its terms.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

6. PECO Energy Company

[Docket No. ER96–565–000]

Take notice that on December 11, 1995, PECO Energy Company (PECO) filed a Service Agreement dated December 4, 1995, with Coastal Electric Services Company (COASTAL) under PECO's Electric Tariff Original Volume

No. 1 (Tariff). The Service Agreement adds COASTAL as a customer under the Tariff.

PECO requests an effective date of December 4, 1995, for the Service Agreement.

PECO states that copies of this filing have been supplied to COASTAL and to the Pennsylvania Public Utility Commission.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

7. Wisconsin Public Service Corporation

[Docket No. ER96–566–000]

Take notice that on December 11, 1995, Wisconsin Public Service Corporation tendered for filing an executed service agreement with Industrial Energy Applications, Inc. under its CS–1 Coordination Sales Tariff.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

8. Wisconsin Electric Power Company

[Docket No. ER96–567–000]

Take notice that on December 11, 1995, Wisconsin Electric Power Company (Wisconsin Electric), tendered for filing an Electric Service Agreement between itself and AEP Service Company (AEP). The Electric Service Agreement provides for service under Wisconsin Electric's Coordination Sales Tariff.

Wisconsin Electric requests an effective date of sixty days from the date of filing. Copies of the filing have been served on AEP, the Public Service Commission of Wisconsin and the Michigan Public Service Commission.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

9. Illinois Power Company

[Docket No. ER96–568–000]

Take notice that on December 11, 1995, Illinois Power Company (Illinois Power), 500 South 27th Street, Decatur, Illinois 62525, tendered for filing firm and non-firm transmission agreements under which Illinois Power will take transmission service pursuant to its open access transmission tariff. The agreements are based on the Form of Service Agreements in Illinois Power's tariff.

Illinois Power has requested an effective date of December 4, 1995.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

10. Wisconsin Electric Power Company

[Docket No. ER96–569–000]

Take notice that on December 11, 1995, Wisconsin Electric Power Company (Wisconsin Electric), tendered for filing an Electric Service Agreement and a Transmission Service Agreement between itself and Catex-Vitol Electric L.L.C. (Catex). The Electric Service Agreement provides for service under Wisconsin Electric's Coordination Sales Tariff. The Transmission Service Agreement allows Catex to receive transmission service under Wisconsin Electric's proposed FERC Point to Point Transmission Tariff, currently pending under Docket No. ER95–1474, Rate Schedule STNF.

Wisconsin Electric requests an effective date of sixty days from the date of filing. Copies of the filing have been served on Catex, the Public Service Commission of Wisconsin and the Michigan Public Service Commission.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

11. Central Hudson Gas and Electric Corporation

[Docket No. ER96–571–000]

Take notice that on December 11, 1995, Central Hudson Gas and Electric Corporation (CHG&E), tendered for filing pursuant to 35.12 of the Federal Energy Regulatory Commission's (Commission) Regulations in 18 CFR, a Service Agreement between CHG&E and Cenergy Inc. The terms and conditions of service under this Agreement are made pursuant to CHG&E's FERC Electric Rate Schedule, Original Volume 1 (Power Sales Tariff) accepted by the Commission in Docket No. ER94–1662. CHG&E also has requested waiver of the 60-day notice provision pursuant to 18 CFR 35.11.

A copy of this filing has been served on the Public Service Commission of the State of New York.

Comment date: January 4, 1996, in accordance with Standard Paragraph E at the end of this notice.

12. Louisville Gas and Electric Company

[Docket No. ER96–572–000]

Take notice that on December 11, 1995, Louisville Gas and Electric Company, tendered for filing copies of service agreements between Louisville Gas and Electric Company and Rainbow Energy Marketing Corporation under Rate GSS.

Comment date: January 4, 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. 95–31482 Filed 12–28–95; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL ENERGY REGULATORY COMMISSION

[Project Nos. 1962–000, et al.]

Hydroelectric Applications (Pacific Gas & Electric Company, et al.); Notice of Applications

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

1a. *Type of Application:* New License.

b. *Project No.:* 1962–000.

c. *Date Filed:* September 28, 1979.

d. *Applicant:* Pacific Gas and Electric Company (PG&E).

e. *Name of Project:* Rock Creek-Cresta Project.

f. *Location:* North Fork Feather River near the towns of Marysville and Oroville in Butte, Plumas, Sutter, and Yuba counties, California.

g. *Filed Pursuant to:* Federal Power Act, 16 USC §§ 791(a)–825(r).

h. *Applicant Contact:* Tom Jereb, Project Manager, Pacific Gas and Electric Company, P.O. Box 770000, Mail Code N11D, San Francisco, CA 94177, (415) 973–9320.

i. *FERC Contact:* James Haimes at (202) 219–2780.

j. *Deadline Date:* February 16, 1996.

k. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time—see attached paragraph D6.

l. *Description of Existing Project:* The constructed Rock Creek-Cresta Project includes two developments—Rock Creek and Cresta. There are

approximately 542 acres of United States lands within the project boundary, including 416.5 acres within Plumas National Forest. Most (292.6 acres) of the project's federal lands are occupied by project transmission line right-of-way.

Rock Creek Development is comprised of the following facilities: (1) Rock Creek Dam, a 126-foot-high concrete gravity dam with overflow structure that has a crest length of 567 feet; (2) a primary spillway containing two 124-foot-wide bays, each controlled by a hydraulically operated drum gate; (3) a 22.5-foot-wide supplementary spillway, located to the west of the drum gates, controlled by a radial gate; (4) Rock Creek Reservoir, the 2.8-mile-long, 118-acre impoundment formed in 1950 by Rock Creek Dam; (5) a reinforced concrete intake structure within the reservoir, about 100 feet upstream of the dam near the western abutment; (6) a 34,110-foot-long tunnel, varying in diameter from 19 to 25 feet, with an underground surge chamber; (7) two penstocks, 906 and 938 feet long, with diameters varying from 12 feet to 9.75 feet; (8) a reinforced concrete and steel frame powerhouse, located on the west bank of the river about 6.5 miles downstream from Rock Creek Dam, containing 2 vertical Francis turbines with a combined maximum hydraulic capacity of 3,660 cubic feet per second (cfs), each turbine rated at 73,500 horsepower (HP) (54.8 megawatts [MW]), and direct-connected to a generator with a capacity of 62.4 MW, resulting in a total turbine-controlled installed capacity of 109.6 MW; and (9) a switchyard, adjacent to the powerhouse, containing two 13.8/230-kilovolt (kV) transformer banks.

Cresta Development includes the following facilities: (1) Cresta Dam, a 114-foot-high concrete gravity dam with overflow structure that has a crest length of 377.5 feet; (2) a primary spillway containing two 124-foot-wide bays, each controlled by a hydraulically operated drum gate; (3) a 22.5-foot-wide supplementary spillway, located to the east of the drum gates, controlled by a radial gate; (4) Cresta Reservoir, the 2.9-mile-long, 95-acre impoundment formed in 1949 by Cresta Dam; (5) a reinforced concrete intake structure within the reservoir, about 100 feet upstream of the dam, near the eastern abutment; (6) a 21,080-foot-long tunnel, varying in diameter from 19 to 26 feet, with an underground surge chamber; (7) two 12-foot-diameter steel penstocks, 800 and 775 feet long; (8) a reinforced concrete, steel frame powerhouse, located on the east bank of the river about 4 miles downstream of Cresta Dam, containing 2 vertical Francis turbines with a combined maximum hydraulic capacity of 4,065 cfs, each turbine rated at 46,500 HP (34.7 MW) and direct-connected to a generator having a capacity of 36.9 MW, resulting in a total turbine-controlled installed capacity of 69.4 MW; and (9) a switchyard, located adjacent to the powerhouse, containing two 11.5/230-kv transformer banks.

The Rock Creek-Cresta Project also includes three 230-kilovolt transmission lines: (1) A 71.6-mile-long line from Rock Creek switchyard to the Rio Oso substation in the Sacramento Valley; (2) a 7.7-mile-long line connecting the Rock Creek and Cresta switchyards; and (3) a 63.8-mile-long line from the Cresta switchyard to the Rio Oso substation.

PG&E currently proposes to: (1) Continue operating the existing Rock Creek and Cresta Developments as peaking facilities to generate an average of 1,014.3 gigawatt-hours per year; (2) install at the Rock Creek powerhouse new runners on both turbines and new main transformers; (3) implement the provisions of its 1991 Fish and Wildlife Agreement with the California Department of Fish and Game concerning the Rock Creek-Cresta Project; (4) construct, operate, and maintain handicapped-accessible public access areas for fishing and carry-in boating at Indian Bar on Rock Creek Reservoir and also at Rock Creek Inlet, located at the upper end of Cresta Reservoir, each area to include paved parking for 12 vehicles, one sealed-vault restroom, refuse containers, and signs; (5) install informational signs and traffic barriers to prevent the launching of trailered boats at the existing, undeveloped Chips Creek access area on Rock Creek reservoir; and (6) implement the sediment management measures filed with the Commission on November 6, 1995.

By letters dated March 18, 1993, and February 13, 1995, PG&E informed the Commission that it was withdrawing several previously filed proposals to construct and operate: (1) Two water diversion facilities and associated conduits, which would have diverted flows from Jackass Creek and Chambers Creek into Rock Creek tunnel; and (2) additional facilities at the Rock Creek—Cresta Project.

The following facilities that PG&E previously proposed to construct and operate at the Rock Creek Development are no longer included in the application for new license: (1) A small powerhouse at Rock Creek Dam containing one turbine-generator unit with a maximum hydraulic capacity of 108 cfs and an installed capacity of 750 kilowatts (kW); (2) an enlarged intake to and concrete liner in the unlined portions of Rock Creek tunnel, which would have increased this facility's hydraulic capacity; (3) a 14-foot-diameter, 500-foot-long steel penstock to serve a new turbine-generator; and (4) a new powerhouse containing one turbine-generator unit having a maximum hydraulic capacity of 2,000 cfs and an installed capacity of 78 MW.

The following facilities that PG&E previously proposed to construct and operate at the Cresta Development are no longer included in the application for new license: (1) A small powerhouse at Cresta Dam containing one turbine-generator unit having a maximum hydraulic capacity of 52 cfs and an installed capacity of 375 kW; (2) an enlarged intake to and concrete liner in the unlined portions of Cresta tunnel; (3) a 15-foot-diameter, 655-foot-long steel penstock to serve a new turbine-generator; (4) a new powerhouse containing one turbine-generator unit with a maximum hydraulic capacity of 1,535 cfs and an installed capacity of 34 MW; (5) new turbine runners on the existing units at Cresta powerhouse; and (6) new transformers.

m. Purpose of Project: The average annual generation of the Rock Creek - Cresta Project is 1,014.3 GWh. Power generated at the project is delivered to customers within the applicant's service area.

n. This notice also consists of the following standard paragraphs: B and D6.

o. Available Locations of Application: A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 208–1371. A copy is also available for inspection and reproduction at Pacific Gas and Electric Company's office at 245 Market Street, Room 1124, San Francisco, California 94177.

2a. *Type of Application:* Joint Application for Transfer of License (Minor License).

b. Project No.: 2446–013.

c. Date Filed: November 3, 1995.

d. Applicants: Commonwealth Edison Company and Dixon Energy, L.L.C.

e. Name of Project: Dixon Hydroelectric Project.

f. Location: On the Rock River in Dixon, Lee County, Illinois, approximately 100 miles west of Chicago and 35 miles south and west of Rockford, Illinois.

g. Filed Pursuant to: Federal Power Act, 16 USC §§ 791(a)–825(r)./

h. Contacts:

Ms. Pamela B. Strobel and Mr. Robert E. Berdelle, Commonwealth Edison Company, One First National Plaza, Chicago, IL 60690 (708) 663–5054
Mr. Paul F. Hanzlik, Hopkins & Sutter, Three First National Plaza, Chicago, IL 60602 (312) 558–4231

i. FERC Contact: Mr. Lynn R. Miles, (202) 219–2671.

j. Comment Date: February 5, 1996.

k. Description of the Proposed Action: The licensee, Commonwealth Edison Company, seeks to transfer the project license and become a co-licensee with Dixon Energy, L.L.C.

l. This notice also consists of the following standard paragraphs: B, C1, and D2.

3a. *Type of Application:* Conduit Exemption.

b. Project No.: 11564–000.

c. Date filed: November 29, 1995.

d. Applicant: Robert Z. Walker and Harold Foster.

e. Name of Project: West Hill.

f. Location: On Cold Springs, a tributary of Cold Creek, in Siskiyou County, California. Township 47N, Range 4W, Section 18.

g. Filed Pursuant to: Federal Power Act 16 USC §§ 791(a)–825(r).

h. Applicant Contact: Mr. Robert Z. Walker, 11834 Ager Beswick Road, Montague, CA 96064.

i. FERC Contact: Michael Spencer at (202) 219–2846.

j. Description of Project: The proposed project would consist of: (1) a bifurcation attached to the applicant's existing irrigation conduit; (2) a 1,500-foot-long, 24-inch-diameter penstock; (3) a powerhouse containing four generating units with a combined capacity of 100.4 kW and an average annual generation of 280.0 MWh; and (4) a tailrace discharging into Cold Creek, consisting of two 15-inch-diameter PVC pipes.

k. With this notice, we are initiating consultation with the State Historic Preservation Officer (SHPO), as required by section 106, National Historic Preservation Act, and the regulations of the Advisory council on Historic Preservation, 36 CFR 800.4.

l. Under Section 4.32 (b)(7) of the Commission's regulations (18 CFR), if any resource agency, Indian Tribe, or person believes that the applicant should conduct an additional scientific study to form an adequate factual basis for a complete analysis of the application on its merits, they must file a request for the study with the Commission, not later than 60 days after the date of the filing of the application, and must serve a copy of the request on the applicant.

4a. *Type of Application:* Major License—Existing Dam.

b. Project No.: 11565–000.

c. Date filed: December 1, 1995.

d. Applicant: Thermalito Power Corporation.

e. Name of Project: Therm II.

f. Location: At the California Department of Water Resources' Thermalito afterbay dam, in Butte County, California. Township 19 N, Range 1 E, Section 33.

g. Filed Pursuant to: Federal Power Act 16 USC 791(a)–825(r).

h. Applicant Contact: Mr. Stan Malinky, 311 D Street, West Sacramento CA 95605, (916) 372–0534.

i. FERC Contact: Michael Spencer at (202) 219–2846.

j. Description of Project: The proposed project would develop the excess capacity of licensed Project No. 2100, and would consist of: (1) a new gated outlet structure installed at the dam; (2) a powerhouse containing three generating units with a combined capacity of 10,900 Kw and an average annual generation of 56 Gwh; (3) a 400-foot-long, 200-foot-wide tailrace canal leading to the Feather River and connecting to; (4) the existing Sutter-Butte canal to be used for releases (5) a 350-foot-long transmission line; and (6) appurtenant facilities.

k. With this notice, we are initiating consultation with the State Historic Preservation Officer (SHPO), as required by section 106, National Historic Preservation Act, and the regulations of the Advisory council on Historic Preservation, 36 CFR 800.4.

l. Under Section 4.32 (b)(7) of the Commission's Regulations (18 CFR), if any resource agency, Indian Tribe, or person believes that the applicant should conduct an additional scientific study to form an adequate factual basis for a complete analysis of the application on its merits, they must file a request for the study with the Commission, not later than 60 days after the date of the filing of the application, and must serve a copy of the request on the applicant.

5a. *Type of Application:* Amendment of Recreation Plan and Change of Project Boundary.

b. Project No.: 2628–047.

c. Date Filed: November 1, 1995.

d. Applicant: Alabama Power Company.

e. Name of Project: R. L. Harris Project.

f. Location: The project reservoir is located on the Tallapoosa River in east-central Alabama in Clay, Cleburne, and Randolph counties near the cities of Lineville and Wedowee.

g. Filed pursuant to: Federal Power Act, 16 U.S.C. § 791(a)-825(r).

h. Applicant Contact: Barry Lovett, Alabama Power Company, 600 North 18th Street, P. O. Box 2641, Birmingham, AL 35291–0364, (205) 250–1268.

i. FERC contact: John K. Hannula, (202) 219–0116.

j. Comment date: February 5, 1996.

k. Description of Application: The licensee proposes to remove residential lands from the project, increase the amount of hunting lands, open hunting areas to the handicapped, add Flatrock Park to the project, and encourage recreation within natural areas. The licensee will maintain total project acreage but the project boundary would be changed. The proposed changes would improve the management, maintenance, security and recreational uses of project lands.

l. This notice also consists of the following standard paragraphs: B, C1, and D2.

6a. *Type of Application:* Non-Project Use of Project Lands and Waters and Amending License.

b. Project No: 2009–009.

c. Date Filed: November 21, 1995.

d. Applicant: Virginia Electric and Power Company.

e. Name of Projects: Gaston and Roanoke Rapids.

f. Location: Lake Gaston Reservoir of the Gaston Development in Mecklenberg County, Virginia.

g. Filed Pursuant to: Section 23(b) of the Federal Power Act.

h. Applicant Contact: Mr. W. R. Cartwright, Senior Vice President—Fossil and Hydro, Virginia Power, 5000 Dominion Boulevard, Glen Allen, VA 23060, (804) 273–3590.

i. FERC Contact: Steve Edmondson (202) 219–2653.

j. Comment Date: February 2, 1996.

k. Description of Project: Virginia Power has filed for Commission approval, a request for non-project use of project lands and waters to allow the Town of South Hill Virginia to construct, operate and maintain a water intake facility within the Gaston and Roanoke Rapids Project in the Lake Gaston Reservoir approximately 300 feet upstream of the US Highway No. 1 Bridge. The applicant is proposing the withdrawal of up to 14 million gallons per day of water from the Lake Gaston Reservoir for municipal purposes.

l. This notice also consists of the following standard paragraphs: B, C1, and D2.

Standard Paragraphs

B. Comments, Protests, or Motions to Intervene—Anyone may submit

comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C1. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

D6. Filing and Service of Responsive Documents—The application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

The Commission directs, pursuant to section 4.34(b) of the regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108, May 20, 1991) that all comments, recommendations, terms and conditions and prescriptions concerning the application be filed with the Commission within 60 days from the issuance date of this notice. (February 16, 1996 for Project No. 1962–000). All reply comments must be filed with the Commission within 105 days from the date of this notice. (April 1, 1996 for Project No. 1962–000).

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with 18 CFR 385.2008.

All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: December 26, 1995.

Lois D. Cashell,

Secretary.

[FR Doc. 95–31483 Filed 12–28–95; 8:45 am]

BILLING CODE 6717–01–P

THE FEDERAL RESERVE SYSTEM

Agency Forms Under Review

AGENCY: Board of Governors of the Federal Reserve System (Board)

ACTION: Notice and request for comment. Proposed Agency Information Collection Activities; Comment

BACKGROUND: In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Board may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid Office of Management and Budget (OMB) control number. The following currently approved collection of information has received approval from the Federal Financial Institutions Examination Council (FFIEC), of which the Board is a member, and is hereby published for comment. At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the information collection may be modified prior to the Board's submission to OMB for review and approval. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the federal banking agencies' functions, including whether the information has practical utility;

(b) The accuracy of the Board's estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

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

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

DATES: Comments must be submitted on or before February 27, 1996.

ADDRESSES: Comments, which should refer to the OMB control number, should be addressed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, D.C. 20551, or delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments received may be inspected in room M-P-500 between 9:00 a.m. and 5:00 p.m., except as provided in section 261.8 of the Board's Rules Regarding Availability of Information, 12 CFR 261.8(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Milo Sunderhauf, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: A copy of the reporting form and instructions, the Paperwork Reduction Act Submission (OMB 83-I), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below.

Mary M. McLaughlin, Board Clearance Officer, (202) 452-3829, Division of Research and Statistics, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, D.C. 20551. Telecommunications Device for the Deaf (TDD) users may 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: Proposal to extend, without revision, the following currently approved collection of information:

Title: Report of Assets and Liabilities of a Non-U.S. Branch that is Managed or Controlled by a U.S. Branch or Agency of a Foreign (Non-U.S.) Bank

Form Number: FFIEC 002S

OMB Number: 7100-0273.

Frequency of Response: Quarterly.

Affected Public: U.S. branches and agencies of foreign banks.

Estimated Number of Respondents: 130

Estimated Time per Response: 6 burden hours.

Estimated Total Annual Burden: 3,120 burden hours.

General Description of Report: This information collection is mandatory: 12 U.S.C. 3105(b)(2), 1817(a), and 3102(b) and is given confidential treatment (5 U.S.C. 552(b)(8)).

Small businesses are not affected.

Abstract: On a quarterly basis, all U.S. branches and agencies of foreign banks (U.S. branches) are required to file detailed schedules of assets and liabilities in the form of a condition report and a variety of supporting schedules (FFIEC 002). This report is a uniform report established by the FFIEC, which the Federal Reserve collects and processes on behalf of all three federal bank regulatory agencies, that is, the Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

A separate supplement (FFIEC 002S) collects information on assets and liabilities of any non-U.S. branch that is managed or controlled by a U.S. office of the foreign bank. Managed or controlled means that the majority of the responsibility for business decisions, including but not limited to decisions with regard to lending or asset management or funding or liability management, or the responsibility for recordkeeping in respect of assets or liabilities for that foreign branch resides at the U.S. branch or agency. A separate supplement must be completed for each applicable foreign branch. The supplements must be filed quarterly along with the U.S. branch's or agency's FFIEC 002.

Data collected on the FFIEC 002S are used

(1) To monitor deposit and credit transactions of U.S. residents;

(2) For monitoring the impact of policy changes;

(3) For analyzing structural issues concerning foreign bank activity in U.S. markets;

(4) For understanding flows of banking funds and indebtedness of developing countries in connection with data collected by the International Monetary Fund (IMF) and the Bank for International Settlements (BIS) that are used in economic analysis; and (5) to provide information to assist in the supervision of U.S. offices of foreign banks, which often are managed jointly with these branches.

CURRENT ACTIONS: The proposal to extend, without revision, the Report of Assets and Liabilities of a Non-U.S. Branch That is Managed or Controlled by a U.S. Branch or Agency of a Foreign (Non-U.S.) Bank (FFIEC 002S) that is the subject of this notice has been approved by the FFIEC. Clarifications or conforming changes would be made to several instructions.

REQUEST FOR COMMENT: Comments submitted in response to this Notice will be summarized or included in the Board's requests for OMB approval. All comments will become a matter of public record. Written comments should address the accuracy of the burden estimates and ways to minimize burden including the use of automated collection techniques or the use of other forms of information technology as well as other relevant aspects of the information collection request.

Board of Governors of the Federal Reserve System, December 22, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95-31463 Filed 12-28-95; 8:45am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Agency Forms Under Review

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice.

BACKGROUND:

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act of 1995, as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number. Board-approved collections of information will be incorporated into the official OMB inventory of currently approved collections of information. A copy of the OMB 83-I and supporting statements and the approved collection of information instruments will be placed into OMB's public docket files. The following information collections, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collections, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on:

(a) Whether the proposed collections of information are necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

(b) The accuracy of the Federal Reserve's estimate of the burden of the proposed information collections, including the validity of the methodology and assumptions used;

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

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

DATES: Comments must be submitted on or before February 27,1996.

ADDRESSES: Comments, which should refer to the OMB control number (or

Agency form number in the case of a new information collection that has not yet been assigned an OMB number), should be addressed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, DC 20551, or delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments received may be inspected in room M-P-500 between 9:00 a.m. and 5:00 p.m., except as provided in section 261.8 of the Board's Rules Regarding Availability of Information, 12 CFR 261.8(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Milo Sunderhauf, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed form and instructions, the Paperwork Reduction Act Submission (OMB 83-I), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below.

Mary M. McLaughlin, Federal Reserve Board Clearance Officer (202-452-3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact Dorothea Thompson (202-452-3544), Board of Governors of the Federal Reserve System, Washington, DC 20551.

Proposal to approve under OMB delegated authority the extension, with revision, of the following reports:

1. Report title: Report of Condition for Foreign Subsidiaries of U.S. Banking Organizations and Financial Information for Foreign Subsidiaries of U.S. Banking Organizations
Agency form number: FR 2314a, b and c
OMB control number: 7100-0073
Frequency: Quarterly and annually
Reporters: Foreign subsidiaries of U.S. banks, bank holding companies, and Edge and agreement corporations
Annual reporting hours: 5,459
Estimated average hours per response: 1.5 to 10.5
Number of respondents: 1,165
Small businesses are not affected.

General description of report: This information collection is mandatory [12 U.S.C. 324, 602, 625 and 1824] and is given confidential treatment [5 U.S.C. 552(b)(8)].

Abstract: The FR 2314 reports collect information annually from all direct or indirect foreign subsidiaries of U.S. member banks, bank holding companies, and Edge or agreement corporations. The FR 2314a collects information on assets, liabilities, contingent liabilities, and eleven supporting schedules, including income and expenses. The FR 2314b collects the same information on assets, liabilities, contingent liabilities, and income and expenses. The FR 2314c collects information on total assets, equity capital, off-balance-sheet items, and net income. Subsidiaries with significant asset size or volume of foreign exchange trading report the FR 2314a quarterly.

The data are used to monitor the growth and activities of the subsidiaries and to supervise the overall operation of the parent organization. Revisions are proposed to make the FR 2314 reports more consistent with the parent organizations' reports of condition and income and to improve the Federal Reserve's surveillance of overseas banking operations. The proposed revisions would be effective as of the December 31, 1995, reporting date. The due date for filing the revised reports would be extended, as appropriate, based on the date of final Board approval. Following this approval, respondents would be informed of the rescheduled due date.

The Federal Reserve proposes several changes to the FR 2314a and FR 2314b reports, summarized as follows.

(1) Revise the reporting criteria for filing the FR 2314a and the FR 2314b. Currently subsidiaries file the FR 2314a quarterly if they have total assets of at least $2 billion or commitments to purchase foreign currencies and U.S. dollar exchange of at least $5 billion. The instruction would be revised to include subsidiaries that have at least $5 billion in off-balance-sheet activity measured by the sum of commitments to purchase foreign currencies and U.S. dollar exchange, all other futures and forwards contracts, written option contracts, purchased option contracts, notional value of interest rate swaps, notional value of exchange swaps, and the notional value of other swaps. In addition the reporting criteria for filing the FR 2314a on an annual basis would be raised to include respondents with total assets greater than $250 million, up from $100 million. Subsidiaries with total assets of $50 million or more but not more than $250 million would file the FR 2314b.

(2) Additions to allow for compliance with Financial Accounting Board (FASB) Statement No. 115. Subsidiaries would report a new schedule for securities that would provide information on available-for-sale securities and held-to-maturity securities, and new items to collect information on the net unrealized holding gains (losses) on available-for-sale securities and information on the change in net unrealized holding gains (losses) in available-for-sale securities.

(3) Additions to allow for compliance with FASB Interpretation Number (FIN) 39. Subsidiaries would report new items for

(a) trading liabilities,

(b) assets held in trading accounts, and

(c) revaluation gains on interest rate, foreign exchange rate, and other commodity and equity contracts.

(4) Additions to capture income from trading account activity. Subsidiaries would report new items for

(a) interest income and dividends form assets held in trading accounts, and

(b) gains (losses) and fees from trading assets and liabilities.

(5) Deletions of selected items. Subsidiaries would no longer report the items for

(a) dividends on stock,

(b) cash dividends declared reported on Schedule I, and

(c) net retained income. Dividend on stock would be added to the item for interest on bonds, notes, and debentures.

2. Report title: Report of Changes in Investments (Made Pursuant to Subparts A and C of Regulation K)
Agency form number: FR 2064
OMB control number: 7100-0109
Frequency: On occasion
Reporters: U.S. member banks, bank holding companies, and Edge and agreement corporations
Annual reporting hours: 1,200
Estimated average hours per response: 0.75
Number of respondents: 50
Small businesses are not affected.

General description of report: This information collection is mandatory [12 U.S.C. 602, 625 and 1844] and is given confidential treatment [5 U.S.C. 552(b)(4)].

Abstract: Member banks, Edge and agreement corporations, and bank holding companies are required to file the FR 2064 to record changes in their international investments. Sections 25 and 25A of the Federal Reserve Act (FRA) and Sections 4(c)(13) and 4(c)(14) of the Bank Holding Company Act govern the formation of Edge and agreement corporations and export trading companies and the international

and foreign activities of U.S. banking organizations, including those of national banks, state member banks, Edge and agreement corporations, and bank holding companies. Pursuant to these statutory provisions, the Board adopted various regulatory provisions, all of which were consolidated in the Board's Regulation K, setting forth the procedures for making investments and engaging in activities under these statutes. Investments made under these procedures are reported on the FR 2064 whenever the reporting criteria are met. The FR 2064 report is filed no later than the last day of the month following the month in which the reportable investment occurred.

Under the proposed revisions, the FR 2064 would be enlarged from eight to thirteen items and portions of four existing items would be expanded. The reporting threshold for material investments would be increased from $100,000 to $1 million and the basis of the threshold would change from the historical cost of the reporter's investment in the investee to the total cost. Other proposed changes would request information on investments made by U.S. and foreign banking organizations in Edge and agreement corporations and export trading companies and on substantive changes in the activities of a company in which an investment has been made. In addition, reports would be required when the activity of the investee changes and when there is a change in the percentage of the investee's voting rights held by its direct parent or in the percentage of the investee's equity held by the reporting organization. In addition, minor clarifying changes would be made to the report and instructions. The proposed revisions will enable the Federal Reserve to more fully and accurately monitor compliance with the Federal Reserve Act, the Bank Holding Company Act, and the relevant sections of Regulation K. The net effect of the proposed revisions to the FR 2064 on reporting burden will be to increase the annual burden for this report by 450 hours, or 60 percent. The revised FR 2064 report and instructions would be implemented as of March 31, 1996.

Board of Governors of the Federal Reserve System, December 22, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95-31464 Filed 12-28-95; 8:45am]

BILLING CODE 6210-01-F

Aileen International Co., 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 Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. Aileen International Co., Inc.; Bloice Enterprises Corp.; Caprice Maritime Limited; Colonel County, Inc.; Early Haven Investments, Corp.; Feldome Worldwide Corp.; Colonel County, Inc.; Garbay Isle Investments, Inc.; Jacklyn Finance Co., Ltd.; Swain Finance Co., Inc.; Foye Investments, Inc.; all of Coral Gables, Florida, *and J.G.D.S. Limitada*, Santa fe de Bogota, Colombia; to become bank holding companies by acquiring 99.2 percent of the voting shares of Eagle National Bank of Miami, N.A., Miami, Florida.

B. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Barretville Corporation, Barretville, Tennessee; to become a bank holding company by acquiring 39.4 percent of the voting shares of Somerville Bank & Trust Company, Somerville, Tennessee.

Board of Governors of the Federal Reserve System, December 22, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95-31455 Filed 12-28-95; 8:45 am]

BILLING CODE 6210-01-F

Gerald E. Long; 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 12, 1996.

A. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. Gerald E. Long, Bottineau, North Dakota; to acquire an additional 2.07 percent, for a total of 14.75 percent, of the voting shares of State Bank of Bottineau Holding Company, Bottineau, North Dakota, and thereby indirectly acquire State Bank of Bottineau, Bottineau, North Dakota.

Board of Governors of the Federal Reserve System, December 22, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95-31456 Filed 12-28-95; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Advisory Committees: Notice of Meetings

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: This notice announces forthcoming meetings of public advisory committees of the Food and Drug Administration (FDA). This notice also summarizes the procedures for the meetings and methods by which interested persons may participate in open public hearings before FDA's advisory committees.

FDA has established an Advisory Committee Information Hotline (the

hotline) using a voice-mail telephone system. The hotline provides the public with access to the most current information on FDA advisory committee meetings. The advisory committee hotline, which will disseminate current information and information updates, can be accessed by dialing 1–800–741–8138 or 301–443–0572. Each advisory committee is assigned a 5–digit number. This 5–digit number will appear in each individual notice of meeting. The hotline will enable the public to obtain information about a particular advisory committee by using the committee's 5–digit number. Information in the hotline is preliminary and may change before a meeting is actually held. The hotline will be updated when such changes are made.

MEETINGS: The following advisory committee meetings are announced:

Ophthalmic Devices Panel of the Medical Devices Advisory Committee

Date, time, and place. January 22, 1996, 9:30 a.m., Holiday Inn—Gaithersburg, Two Montgomery Village Ave., Gaithersburg, MD. A limited number of overnight accommodations have been reserved at the hotel. Attendees requiring overnight accommodations may contact the hotel at 301–948–8900 or 1–800–465–4329 and reference the FDA Panel meeting block. Reservations will be confirmed at the group rate based on availability. Attendees with a disability requiring special accommodations should contact Sociometrics, Inc., 8300 Colesville Rd., suite 550, Silver Spring, MD 20910, 301–608–2151. The availability of appropriate accommodations cannot be assured unless prior notification is received.

Type of meeting and contact person. Open public hearing, 9:30 a.m. to 10:30 a.m., unless public participation does not last that long; open committee discussion, 10:30 a.m. to 1:30 p.m.; closed presentation of data, 1:30 p.m. to 5:30 p.m.; Sara M. Thornton, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2053, or FDA Advisory Committee Information Hotline, 1–800–741–8138 (301–443–0572 in the Washington, DC area), Ophthalmic Devices Panel, code 12396.

General function of the committee. The committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before December 29, 1995, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. The committee will review and recommend the classification status for currently unclassified devices which may include lacrimal system plugs, lacrimal system repair devices, and scleral plugs. The Intraocular and Corneal Implants Branch will request committee discussion on the clinical annex of the draft American National Standards Institute (ANSI) standard for glaucoma drainage devices.

Closed committee deliberations. The committee will discuss trade secret and/or confidential commercial information relevant to investigational device exemption applications and premarket approval applications for vitreo-retinal, surgical, and diagnostic devices, intraocular and corneal implants, and contact lenses. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Microbiology Devices Panel of the Medical Devices Advisory Committee

Date, time, and place. January 25, 1996, 9:45 a.m., and January 26, 1996, 8:45 a.m., Gaithersburg Hilton, Grand Ballroom, 620 Perry Pkwy., Gaithersburg, MD. A limited number of overnight accommodations have been reserved at the Gaithersburg Hilton. Attendees requiring overnight accommodations may contact the hotel at 301–977–8900 and reference the FDA Panel meeting block. Reservations will be confirmed at the group rate based on availability. Attendees with a disability requiring special accommodations should contact Sociometrics, Inc., 8300 Colesville Rd., suite 550, Silver Spring, MD 20910, 301–608–2151. The availability of appropriate accommodations cannot be assured unless prior notification is received.

Type of meeting and contact person. Open public hearing, January 25, 1996, 9:45 a.m. to 10:45 a.m., unless public participation does not last that long; open committee discussion, 10:45 a.m. to 6:30 p.m.; closed committee deliberations, January 26, 1996, 8:45 a.m. to 9:45 a.m.; open public hearing, 9:45 a.m. to 10:45 a.m., unless public participation does not last that long; open committee discussion, 10:45 a.m. to 5 p.m.; Freddie M. Poole, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 30l–594–2096, or FDA Advisory Committee Information Hotline, 1–800–741–8138 (301–443–0572 in the Washington, DC area), Microbiology Devices Panel, code 12517.

General function of the committee. The committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before January 10, 1996, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. On January 25, 1996, the committee will discuss a premarket approval application (PMA) for an in vitro diagnostic, target-amplified nucleic acid device for the detection of *Mycobacterium tuberculosis* complex in digested, decontaminated human respiratory specimens. On January 26, 1996, the committee will discuss issues concerning the accuracy of commercially available serological kits for the detection of human anti-Toxoplasma IgM and anti-Borrelia borgdorferi antibodies in relation to their indication for use.

Closed committee deliberations. On January 26, 1996, FDA staff will present to the committee trade secret and/or confidential commercial information regarding pending and future device submissions. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Science Advisory Board to the National Center for Toxicological Research

Date, time, and place. January 29, 1996, 1 p.m., and January 30, 1996, 9 a.m., Bldg. 12, conference room, National Center for Toxicological Research, Jefferson, AR.

Type of meeting and contact person. Open board discussion, January 29, 1996, 1 p.m. to 4:30 p.m.; open board

discussion, January 30, 1996, 9 a.m. to 1 p.m.; open public hearing, 1 p.m. to 2 p.m., unless public participation does not last that long; open board discussion, 2 p.m. to 3:30 p.m.; closed board deliberations, 3:30 p.m. to 4:30 p.m.; Ronald F. Coene, National Center for Toxicological Research (HFT–10), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–3155, or FDA Advisory Committee Information Hotline, 1–800–741–8138 (301–443–0572 in the Washington, DC area), Science Advisory Board to the National Center for Toxicological Research, code 12559.

General function of the board. The board advises on establishment and implementation of a research program that will assist the Commissioner of Food and Drugs to fulfill regulatory responsibilities.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before January 15, 1996, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open board discussion. The board will be given a progress report on its recommendation that resulted from the board's Site Visit Team Report on the Center's Analytical Methods Development Program. The board will be presented and asked to review the Center's integration of the eight programs it has site visited and made recommendations. The presentation will include a discussion of the resource allocation to these programs as well as their relationship to the Center's strategic vision and goals. A final agenda will be available on January 22, 1996, from the contact person.

Closed board deliberations. The board will discuss personal information concerning individuals associated with the research programs at the Center, disclosure of which would constitute a clearly unwarranted invasion of personal privacy. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(6)).

Each public advisory committee meeting listed above may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee deliberation. Every advisory committee meeting shall have an open public hearing portion. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. The dates and times reserved for the separate portions of each committee meeting are listed above.

The open public hearing portion of each meeting shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairperson determines will facilitate the committee's work.

Public hearings are subject to FDA's guideline (subpart C of 21 CFR part 10) concerning the policy and procedures for electronic media coverage of FDA's public administrative proceedings, including hearings before public advisory committees under 21 CFR part 14. Under 21 CFR 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants.

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in this Federal Register notice. Changes in the agenda will be announced at the beginning of the open portion of a meeting.

Any interested person who wishes to be assured of the right to make an oral presentation at the open public hearing portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairperson's discretion.

The agenda, the questions to be addressed by the committee, and a current list of committee members will be available at the meeting location on the day of the meeting.

Transcripts of the open portion of the meeting may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, rm. 12A–16, 5600 Fishers Lane, Rockville, MD 20857, approximately 15 working days after the meeting, at a cost of 10 cents per page. The transcript may be viewed at the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, approximately 15 working days after the meeting, between the hours of 9 a.m. and 4 p.m., Monday through Friday. Summary minutes of the open portion of the meeting may be requested in writing from the Freedom of Information Office (address above) beginning approximately 90 days after the meeting.

The Commissioner has determined for the reasons stated that those portions of the advisory committee meetings so designated in this notice shall be closed. The Federal Advisory Committee Act (FACA) (5 U.S.C. app. 2, 10(d)), permits such closed advisory committee meetings in certain circumstances. Those portions of a meeting designated as closed, however, shall be closed for the shortest possible time, consistent with the intent of the cited statutes.

The FACA, as amended, provides that a portion of a meeting may be closed where the matter for discussion involves a trade secret; commercial or financial information that is privileged or confidential; information of a personal nature, disclosure of which would be a clearly unwarranted invasion of personal privacy; investigatory files compiled for law enforcement purposes; information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action; and information in certain other instances not generally relevant to FDA matters.

Examples of portions of FDA advisory committee meetings that ordinarily may be closed, where necessary and in accordance with FACA criteria, include the review, discussion, and evaluation of drafts of regulations or guidelines or similar preexisting internal agency documents, but only if their premature disclosure is likely to significantly frustrate implementation of proposed agency action; review of trade secrets and confidential commercial or financial information submitted to the agency; consideration of matters involving investigatory files compiled for law enforcement purposes; and review of matters, such as personnel records or individual patient records, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Examples of portions of FDA advisory committee meetings that ordinarily shall not be closed include the review, discussion, and evaluation of general preclinical and clinical test protocols and procedures for a class of drugs or devices; consideration of labeling requirements for a class of marketed drugs or devices; review of data and information on specific investigational or marketed drugs and devices that have

previously been made public; presentation of any other data or information that is not exempt from public disclosure pursuant to the FACA, as amended; and, deliberation to formulate advice and recommendations to the agency on matters that do not independently justify closing.

This notice is issued under section 10(a)(1) and (2) of the Federal Advisory Committee Act (5 U.S.C. app. 2), and FDA's regulations (21 CFR part 14) on advisory committees.

Dated: December 19, 1995.

Michael A. Friedman,

Deputy Commissioner for Operations.

[FR Doc. 95–31461 Filed 12–28–95; 8:45 am]

BILLING CODE 4160–01–F

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32832]

Burlington Northern Railroad Company—Trackage Rights Exemption—Norfolk and Western Railway Company

Norfolk and Western Railway Company (NW) has agreed to grant overhead trackage rights to Burlington Northern Railroad Company (BN) over 14.6 miles of its rail line from milepost 16.4 at Chicago Ridge, IL, through NW's Landers Yard in Chicago at milepost 10.8, to NW's Calumet Yard at milepost B510.

The purpose of this transaction is to improve the operating efficiencies of NW and BN. The trackage rights were scheduled to become effective on December 18, 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 Interstate Commerce Commission, 1201 Constitution Avenue, NW., Washington, DC 20423[1] and served on: Michael E. Roper, 3800 Continent Plaza, 777 Main Street, Fort Worth, TX 76102–5384.

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 21, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31402 Filed 12–28–95; 8:45 am]

BILLING CODE 7035–01–P

[1] 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. 32831]

Burlington Northern Railroad Company—Trackage Rights Exemption—Indiana Harbor Belt Railroad Company

Indiana Harbor Belt Railroad Company (IHB) has granted 9.8 miles of overhead trackage rights to Burlington Northern Railroad Company (BN), between IHB's connection with BN at milepost 31.0, in LaGrange, IL, and IHB's connection with Norfolk Southern Railway Company at milepost 21.2, in Chicago Ridge, IL. The transaction was scheduled to be consummated on December 18, 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[1] and served on: Michael E. Roper, Associate General Counsel, Burlington Northern Railroad Company, 3800 Continental Plaza, 777 Main Street, Fort Worth, TX 76102–5384.

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 18, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31403 Filed 12–28–95; 8:45 am]

BILLING CODE 7035–01–P

[1] 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: Interstate Commerce Commission, 1201 Constitution Avenue, NW., Washington, DC 20423.

[Finance Docket No. 32828]

Chicago Short Line Railway Company; Trackage Rights Exemption; Consolidated Rail Corporation

Chicago Short Line Railway Company filed a verified notice under 49 CFR 1180.2(d)(7) to acquire overhead trackage rights from Consolidated Rail Corporation (Conrail) over 9.65 0.05± miles of rail line, as follows: (1) The 0.05±-mile segment between Conrail's right-of-way line and the point of switch of the new interlocked switch in Conrail's Chicago Line at milepost 509.5±, in South Chicago, IL; (2) the 7.40±-mile segment comprising main tracks (including appurtenant sidings, crossovers, and connecting tracks) of the Chicago Line between milepost 502.6±, at Indiana Harbor, IN, and milepost 510.0±, at South Chicago; (3) the 0.20±-mile segment of the BRC connection lead between the connection with the Chicago Line main track at milepost 509.7±, in South Chicago, thence westerly to Conrail's property line at Rock Island Junction, IL; and (4) the 2.0±-mile segment of Conrail's Calumet River Line between its connection with the Chicago Line at milepost 0.0±, in South Chicago, and milepost 1.9±, at South Chicago, plus 0.1±-mile through 110th Street Yard to LVT (Republic) Steel. The trackage rights were to become effective on such date as the parties may agree in writing as provided in their trackage rights agreement, but not sooner than the effective date of the exemption.

As a condition to 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).

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 reopen will not stay the exemption's effectiveness. An original and 10 copies of all pleadings, referring to Finance Docket No. 32838, must be filed with the Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.[1] In addition, a copy of each pleading must

[1] 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.

be served on: John J. Paylor, Consolidated Rail Corporation, 2001 Market St., 16A, P.O. Box 41416, Philadelphia, PA 19101–1416 and Daniel R. Minnick, Chicago Short Line Railway Company, 3060 Eggers Ave., Cleveland, OH 44105–1012.

Decided: December 21, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31501 Filed 12–28–95; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32836]

Akron Barberton Cluster Railway Company; Trackage Rights Exemption; Wheeling and Lake Erie Railway Company

Akron Barberton Cluster Railway Company (ABCR) has filed a verified notice under 49 CFR 1180.2(d)(7) to acquire overhead trackage rights from Wheeling & Lake Erie Railway Company (W&LE) over 15.4 miles of rail line, as follows: (1) That segment of W&LE's Cleveland Main Line extending from the junction with ABCR's Kent Line at milepost 33.0±, in Kent, OH, thence to W&LE's Mogadore Junction at milepost 40.1 (milepost 169.3 on W&LE's Akron, Canton & Youngstown Main Line); and (2) that segment of W&LE's Akron, Canton & Youngstown Main Line extending from milepost 169.3 through Brittain Yard to milepost 161.0, near the Rock Cut interchange. The transaction was to have been consummated on or about December 15, 1995.

As a condition to 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).

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 reopen will not stay the exemption's effectiveness. An original and 10 copies of all pleadings, referring to Finance Docket No. 32836, must be filed with the Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.[1] In addition, a copy of each pleading must be served on Terence M. Hynes, Sidley & Austin, 1722 Eye Street, NW., Washington, DC 20006.

Decided: December 22, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31502 Filed 12–28–95; 8:45 am]

BILLING CODE 7035–01–P

[1] 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. 32830]

Alameda Corridor Construction Application

AGENCY: Interstate Commerce Commission.

ACTION: Notice of construction application.

SUMMARY: The Commission is publishing notice of an application filed by the Cities of Los Angeles and Long Beach, CA, under 49 U.S.C. 10901 and 49 CFR Part 1150 for authority to construct a 20-mile rail corridor (the Alameda Rail Corridor) extending from the Ports of Los Angeles and Long Beach (the Ports) to points in central Los Angeles. This notice sets forth the procedures governing public participation in the application proceeding.

DATES: Written comments by interested persons must be filed by January 16, 1996, and concurrently served on applicants' representatives. Each comment must contain the basis for the party's position either in support of or in opposition to the application and must be accompanied by a certificate of service. Applicants' replies must be filed by January 22, 1996.

ADDRESSES: Send an original and 10 copies of all pleadings, referring to Finance Docket No. 32830, to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, 1201 Constitution Avenue, NW., Washington, DC 20423. In addition, commenters must concurrently send one copy to each of applicants' representatives: Samuel M. Sipe, Jr., Steptoe & Johnson LLP, 1330 Connecticut Avenue, NW., Washington, DC 20036; James K. Hahn, 425 South Palos Verdes St., San Pedro, CA 90733; and John R. Calhoun, 11th Floor, 333 E. Ocean Blvd., Long Beach, CA 90802.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 927–5660. [TDD for the hearing impaired: (202) 927–5721.]

SUPPLEMENTARY INFORMATION: The proposed Alameda Rail Corridor (Corridor) will consist of a multiple main track, high density, predominantly 40-mile per hour rail line with centralized traffic control to permit bi-directional operation on each main track. The Corridor will run north from the Ports along and generally parallel to Alameda Street for a distance of approximately 20 miles to points in central Los Angeles where it will connect with the existing rail lines of The Atchison, Topeka & Santa Fe Railway Company, the Union Pacific Railroad Company, and Southern Pacific Transportation Company (Southern Pacific). The Corridor will be built generally along the existing former Southern Pacific San Pedro Branch right of way and is designed to consolidate rail traffic to and from the Ports on the rail line, facilitate access, increase capacity, and improve service to Port terminals and facilities.

On the basis of the written comments, the Commission will determine whether any additional hearing is necessary. If there is no opposition to the application, the Commission may reach a decision using the information in the application.

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.

Decided: December 21, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31503 Filed 12–28–95; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32794]

Ventura County Transportation Commission—Acquisition Exemption—Southern Pacific Transportation Company

Ventura County Transportation Commission (VCTC), a noncarrier, has filed a notice of exemption to acquire 28.39[1] miles of rail line known as the Santa Paula Branch owned by Southern Pacific Transportation Company (SPT) from milepost 431.59 to milepost 403.2 in Ventura County, CA. SPT will continue common carrier freight

[1] While in its verified notice of exemption VCTC states that it is acquiring 32.39 miles of rail line, the actual mileage between mileposts is 28.39 miles. Commission staff contacted VCTC for clarification. VCTC supplemented the record by facsimile dated December 20, 1995, stating that the balance of the miles are miscellaneous track, spurs and sidings included in the purchase and sale.

services on the line from milepost 415.0 to milepost 403.2, pursuant to the agreement of the parties. The portion of the line between milepost 431.593 and milepost 415.0, was approved for discontinuance of service by the Commission in *Southern Pacific Transportation Company—Discontinuance of Service Exemption—In Ventura County, CA,* Docket No. AB–12 (Sub-No. 143X), (ICC served Nov. 30, 1992). The proposed acquisition was expected to be consummated on or about October 31, 1995.

Any comments must be filed with the Commission and served on: Mary Redus Gayle, Esq., Burke, Williams & Sorensen, 2310 E. Ponderosa Drive, Suite 1, Camarillo, CA 93010.

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 21, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31405 Filed 12–28–95; 8:45 am]

BILLING CODE 7035–01–P

[Docket No. AB–33 (Sub-No. 70)]

Union Pacific Railroad Company—Abandonment—Wallace Branch, ID

AGENCY: Interstate Commerce Commission.

ACTION: Request for comments.

SUMMARY: The Rails to Trails Conservancy (RTC) seeks the immediate issuance of a certificate of interim trail use (CITU) under section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for a 71.5-mile rail line of Union Pacific Railroad Company (UP) between milepost 16.5, near Plummer, and milepost 7.6, near Mullan, via milepost 80.4/0.0, near Wallace, in Benewah, Kootenai, and Shoshone Counties, ID. This notice is to request comments from all interested parties, agencies, and members of the public as to whether there is any impediment to the issuance of Trails Act authority in the unusual circumstances of this case.

In *Union Pacific RR. Co.—Aband.—Wallace Branch, ID,* 9 I.C.C.2d 325 (1992), 9 I.C.C.2d 377 (1992), and 9 I.C.C.2d 446 (1993), the Commission granted UP's application to abandon this line, subject to various conditions. Specifically, the Commission allowed UP to discontinue service on the line, but provided that the carrier could not fully abandon the line (i.e., salvage the line and give up the right-of-way) until the environmental impacts of those actions are fully addressed and resolved. A request for a CITU was filed in 1992, but it was not acted on because an offer of financial assistance (OFA) under 49 U.S.C. 10905 was filed to acquire the line for continued rail service. The OFA process, however, terminated without a sale agreement or a request to the agency to set terms.

On judicial review of the abandonment decision, the United States Court of Appeals for the District of Columbia Circuit affirmed in part and reversed in part. *State of Idaho et al.* v. *ICC,* 35 F.3d 585 (D.C. Cir. 1994). As pertinent here, the court affirmed the Commission's decision to permit UP to discontinue rail operations on the line. But the court concluded that the Commission had attempted to delegate away too much of its responsibility to look at the potential environmental impacts of salvage activity and accordingly remanded the conditional salvage authorization.

By decision served December 2, 1994, the Commission reopened the abandonment proceeding. The Commission's decision vacated the conditional authorization of salvage activity here, except for the portion of the line within a ''Superfund'' site, where section 121(e)(1), 42 U.S.C. 962(e)(1), relieves UP of the requirement to obtain permission from the Commission if it does so in compliance with the Comprehensive Environmental Response Compensation and Liability Act. The decision also clarified that UP may not engage in any other salvage activity on this line until it has complied with the six environmental conditions previously imposed by the agency (under Commission supervision) and appropriate environmental documentation is prepared taking a final look at the environmental impacts of salvage followed by a determination as to whether the economic benefits of salvage outweigh the potential environmental harm.

Following the issuance of that decision, RTC, in August 1995, requested the immediate issuance of a CITU to permit trail use under section 8(d) on the entire 71.5-mile right-of-way, including the portion of the line within the Superfund site. RTC submitted the statement of willingness to assume financial responsibility and liability for the right-of-way required by the Commission's Trails Act rules and agreed to rail banking. UP stated that it is willing to negotiate with RTC. In addition, the railroad, in view of the outstanding environmental conditions imposed in this case, stated that if there is an agreement in principle between UP and RTC or any other group for trail use or other use of this right-of-way, it would request Commission approval of that use prior to execution of any written agreement between the parties.

Given the unusual circumstances of this case, we request comments from all interested parties, agencies, and members of the public as to whether there are any impediments to the issuance of Trails Act authority here.

DATES: Comments are due by January 29, 1996.

ADDRESSES: An original and 10 copies of all comments, referring to Docket No. AB–33 (Sub-No. 70), should be filed with the Office of the Secretary, Case Control Branch, Interstate Commerce Commission, 1201 Constitution Avenue NW, Washington, DC 20423.[1] In addition, a copy of all comments must be served on all parties of record.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 927–5660. [Assistance for the hearing-impaired is available through TDD at (202) 927–5721.]

Decided: December 22, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31404 Filed 12–28–95; 8:45 am]

BILLING CODE 7035–01–P

[Docket Nos. AB–464X and AB–290 (Sub. No. 174X)]

Piedmont and Atlantic Railroad Co., Inc., d/b/a Yadkin Valley Railroad Company; Discontinuance of Service Exemption and Norfolk Southern Railway Company—Abandonment Exemption

Piedmont and Atlantic Railroad Co., Inc., d/b/a Yadkin Valley Railroad Company (YVRR), and Norfolk Southern Railway Company (NS) have filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments and Discontinuances* for YVRR to discontinue service over and NS to abandon 8.7 miles of rail line between milepost CF–29.8 at Rural Hall and milepost CF–38.5 at Brook Cove, in

[1] 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.

Forsyth and Stokes Counties and the City of Rural Hall, NC.

YVRR and NS certify that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic can be rerouted over other lines or will be retained and interchanged between NS and YVRR on track now lying between MP CF–29.8 and MP CF–31.2, which will be reclassified as house or interchange track; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (service of environmental report on agencies), 49 CFR 1105.8 (service of historic report on State Historic Preservation Officer), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (service of verified notice on governmental agencies) have been met.

As a condition to use of this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on January 28, 1996, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29[3] must be filed by January 8, 1996. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 18, 1996, with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.[4]

A copy of any pleading filed with the Commission should be sent to applicant's representative: Jo A. DeRoche, Attorney for YVRR, Weiner, Brodsky, Sidman & Kider, 1350 New York Ave., N.W. Suite 800, Washington, DC 20005–4797; and James R. Paschall, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510.

If the notice of exemption contains false or misleading information, the exemption is void *ab initio.*

Applicant has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by January 3, 1996. Interested persons may obtain a copy of the EA by writing to SEA (Room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Chief of SEA, at (202) 927–6248. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: December 21, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–31500 Filed 12–28–95; 8:45 am]

BILLING CODE 7035–01–P

[1] A stay will be issued routinely by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Commission's Section of Environmental Analysis in its independent investigation) cannot be made before the effective date of the notice of exemption. See *Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any entity seeking a stay on environmental concerns is encouraged to file its request as soon as possible in order to permit the Commission to review and act on the request before the effective date of this exemption.

[2] See *Exempt. of Rail Abandonment—Offers of Finan. Assist.,* 4 I.C.C.2d 164 (1987).

[3] The Commission will accept a late-filed trail use request as long as it retains jurisdiction to do so.

[4] 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.

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–395]

South Carolina Electric & Gas Company and South Carolina Public Service Authority (Virgil C. Summer Nuclear Station Unit 1); Exemption

I

South Carolina Electric & Gas Company, et al. (the licensee) is the holder of Facility Operating License No. NPF–12, which authorizes operation of the Virgil C. Summer Nuclear Station, (VCSNS) Unit 1. The license provides, among other things, that the licensee is subject to all rules, regulations, and orders of the Commission now or hereinafter in effect. The facility consists of one pressurized water reactor located in Fairfield County, South Carolina.

II

It is stated in 10 CFR 73.55, ''Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage,'' paragraph (a), that ''The licensee shall establish and maintain an onsite physical protection system and security organization which will have as its objective to provide high assurance that activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety.''

It is specified in 10 CFR 73.55(d), ''Access Requirements,'' paragraph (1), that ''The licensee shall control all points of personnel and vehicle access into a protected area.'' It is specified in 10 CFR 73.55(d)(5) that ''A numbered picture badge identification system shall be used for all individuals who are authorized access to protected areas without escort.'' It also states that an individual not employed by the licensee (i.e., contractors) may be authorized access to protected areas without escort provided the individual ''receives a picture badge upon entrance into the protected area which must be returned upon exit from the protected area * * *.''

The licensee proposed to implement an alternative unescorted access control system which would eliminate the need to issue and retrieve badges at each entrance/exit location and would allow all individuals with unescorted access to keep their badges with them when departing the site.

An exemption from 10 CFR 73.55(d)(5) is required to allow contractors who have unescorted access to take their badges offsite instead of returning them when exiting the site. By letter dated June 28, 1995, the licensee requested an exemption from certain requirements of 10 CFR 73.55(d)(5) for this purpose.

III

Pursuant to 10 CFR 73.5, ''Specific exemptions,'' the Commission may, upon application of any interested person or upon its own initiative, grant such exemptions in this part as it determines are authorized by law and will not endanger life or property or the common defense and security, and are otherwise in the public interest. Pursuant to 10 CFR 73.55, the

Commission may authorize a licensee to provide measures for protection against radiological sabotage provided the licensee demonstrates that the measures have ''the same high assurance objective'' and meet ''the general performance requirements'' of the regulation, and ''the overall level of system performance provides protection against radiological sabotage equivalent'' to that which would be provided by the regulation.

At the VCSNS site, unescorted access into protected areas is controlled through the use of a photograph on a combination badge and keycard (hereafter, referred to as badge). The security officers at the entrance station use the photograph on the badge to visually identify the individual requesting access. The badges for both licensee employees and contractor personnel who have been granted unescorted access are issued upon entrance at the entrance/exit location and are returned upon exit. The badges are stored and are retrievable at the entrance/exit location. In accordance with 10 CFR 73.55(d)(5), contractor individuals are not allowed to take badges offsite. In accordance with the plant's physical security plan, neither licensee employees nor contractors are allowed to take badges offsite.

Under the proposed system, each individual who is authorized for unescorted access into protected areas would have the physical characteristics of their hand (hand geometry) registered with their badge number in the access control system. When an individual enters the badge into the card reader and places the hand on the measuring surface, the system would record the individual's hand image. The unique characteristics of the extracted hand image would be compared with the previously stored template in the access control system to verify authorization for entry. Individuals, including licensee employees and contractors, would be allowed to keep their badges with them when they depart the site and thus eliminate the process to issue, retrieve and store badges at the entrance stations to the plant. Badges do not carry any information other than a unique identification number.

All other access processes, including search function capability, would remain the same. This system would not be used for persons requiring escorted access, i.e., visitors.

Based on a Sandia National Laboratories report entitled, ''A Performance Evaluation of Biometric Identification Devices'' (SAND91–0276 UC–906 Unlimited Release, Printed June 1991), and on the licensee's experience with the current photo-identification system, the licensee stated that the false-accept rate for the hand geometry system is at least equal to the current system. The licensee will implement a process for testing the proposed system to ensure continued overall level of performance equivalent to that specified in the regulation. The Physical Security Plan for VCSNS, Unit 1, will be revised to include implementation and testing of the hand geometry access control system and to allow licensee employees and contractors to take their badges offsite.

The licensee will control all points of personnel access into a protected area under the observation of security personnel through the use of a badge and verification of hand geometry. A numbered picture badge identification system will continue to be used for all individuals who are authorized unescorted access to protected areas. Badges will continue to be displayed by all individuals while inside the protected area.

Since both the badges and hand geometry would be necessary for access into the protected areas, the proposed system would provide for a positive verification process. The potential loss of a badge by an individual, as a result of taking the badge offsite, would not enable an unauthorized entry into protected areas.

For the foregoing reasons, pursuant to 10 CFR 73.55(a), the NRC staff has determined that the proposed alternative measures for protection against radiological sabotage meet ''the same high assurance objective'' and ''the general performance requirements'' of the regulation and that ''the overall level of system performance provides protection against radiological sabotage equivalent'' to that which would be provided by the regulation.

IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 73.5, an exemption is authorized by law, will not endanger life or property or common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants an exemption from those requirements of 10 CFR 73.55(d)(5) relating to the returning of picture badges upon exit from the protected area such that individuals not employed by the licensee, i.e., contractors who are authorized unescorted access into the protected area, may take their picture badges offsite.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not result in any significant adverse environmental impact (60 FR 43819).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 21st day of December 1995.

For the Nuclear Regulatory Commission.

Steven A. Varga,

Director, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 95–31478 Filed 12–28–95; 8:45 am]

BILLING CODE 7590–01–P

[Docket Nos. 50–295 and 50–304]

Commonwealth Edison Company; Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. DPR–39 and DPR–48, issued to Commonwealth Edison Company (ComEd, the licensee), for operation of the Zion Nuclear Power Station, Units 1 and 2, located in Lake County, Illinois.

The proposed amendments, requested by the licensee in its letter of November 3, 1995, as supplemented on November 22, 1995, would represent a full conversion from the current Technical Specifications (TS) to a set of TS based on NUREG–1431, ''Standard Technical Specifications, Westinghouse Plants,'' September 1992. NUREG–1431 has been developed through working groups composed of both NRC staff members and Westinghouse owners and has been endorsed by the staff as part of an industry-wide initiative to standardize and improve TS. As part of this submittal, the licensee has applied the criteria contained in the NRC Final Policy Statement on Technical Specification Improvement for Nuclear Power Reactors (58 FR 39132, dated 7/22/93) to the current Zion Nuclear Power Station TS.

The licensee has categorized the proposed changes into four general groupings. These groupings are characterized as relocated requirements, administrative changes, less restrictive changes involving deletion of requirements, and more restrictive changes.

''R''—Relocation of Requirements

Relocating requirements that do not meet the TS criteria, to documents with an established control program, allows the TS to be reserved only for those conditions or limitations upon reactor operation that are necessary to

adequately limit the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety, thereby focusing the scope of TS.

Therefore, requirements that do not meet the TS criteria in the NRC Final Policy Statement on Technical Specification Improvement for Nuclear Power Reactors have been relocated to other 10 CFR 50.59 controlled documents. This policy statement addresses the scope and purpose of TS. In doing so, it establishes a specific set of objective criteria for determining which regulatory requirements and operating restrictions should be included in the TS. These criteria are as follows:

Criterion 1: Installed instrumentation that is used to detect and indicate in the control room, a significant abnormal degradation of the reactor coolant pressure boundary;

Criterion 2: A process variable that is an initial condition of a design basis accident (DBA) or transient analyses that either assumes the failure of or presents a challenge to the integrity of a fission product barrier;

Criterion 3: A structure, system or component that is part of the primary success path and which functions or actuates to mitigate a design basis accident or transient that either assumes the failure of or presents a challenge to the integrity of a fission barrier;

Criterion 4: A structure, system or component which operating experience or probabilistic safety assessment has shown to be significant to public health and safety.

The application of these criteria is provided in the ''Application of Selection Criteria to the Zion Technical Specifications.'' Requirements which met the criteria have been included in the proposed improved TS. ComEd proposes to remove the requirements which do not meet the criteria from the TS and relocate the requirements to a suitable owner controlled document. The requirements in the relocated Specifications will not be affected by this TS change. ComEd will initially continue to perform the required operation and maintenance to assure that the requirements are satisfied. Relocating specific requirements for systems or variables will have no impact on the system's operability or the variable's maintenance, as applicable. 10 CFR 50.59 will be utilized as the control mechanism for the relocated Specifications as they will be placed in plant procedures or other controlled documents governed by 10 CFR 50.59. This would allow ComEd to make changes to these requirements, without NRC approval, if the change does not involve an unreviewed safety question. These controls are considered adequate for assuring structures, systems and components in the relocated specifications are maintained operable and variables in the relocated specifications are maintained within limits.

''A''—Administrative Changes to Requirements

Reformatting and rewording the remaining requirements in accordance with the style of the improved Westinghouse Standard Technical Specifications in NUREG–1431 will make the TS more readily understandable to plant operators and other users. Application of the format and style will also assure consistency is achieved between specifications. As a result, the reformatting and rewording of the TS has been performed to make them more readily understandable by plant operators and other users. During this reformatting and rewording process, no technical changes (either actual or interpretational) to the TS were made unless they were identified and justified.

''LA''—Less Restrictive, Administrative Deletion of Requirements

Portions of some specifications provide information that is descriptive in nature regarding the equipment, system(s), actions or surveillances. This information is proposed to be deleted from the specification and moved to the proposed Bases, Updated Final Safety Analysis Report (UFSAR), or procedures. The removal of descriptive information to the Bases of the TS, UFSAR or procedures is permissible, because the Bases, UFSAR or procedures will be controlled through a process which utilizes 10 CFR 50.59. This will not impact the actual requirements but may provide some flexibility and how the requirement is conducted. Therefore, the descriptive information that has been moved continues to be maintained in an appropriately controlled manner.

''M''—More Restrictive Changes to Requirements

The Zion TS are proposed to be modified in some areas to impose more stringent requirements than previously identified. These more restrictive modifications are being imposed to be consistent with the improved Westinghouse Standard TS. Such changes have been made after ensuring the previously evaluated safety analysis was not affected. Also, other more restrictive technical changes have been made to achieve consistency, correct discrepancies, and remove ambiguities from the specification.

The modifying of the Zion TS and the changes made to achieve consistency within the specifications have been performed in a manner such that the most stringent requirements are imposed, except in cases which are individually evaluated.

Before issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By January 29, 1996, the licensee may file a request for a hearing with respect to issuance of the amendments to the subject facility operating licenses and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition, and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should

also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendments under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 248–5100 (in Missouri 1-(800) 342–6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to Robert A. Capra, Director, Project Directorate III–2: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this Federal Register notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60690, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendments dated November 3, 1995, as supplemented on 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 Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

Dated at Rockville, Maryland, this 22nd day of December 1995.

For the Nuclear Regulatory Commission.

Robert A. Capra,

Director, Project Directorate III–2, Division of Reactor Projects—III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 95–31480 Filed 12–28–95; 8:45 am]

BILLING CODE 7590–01–P

[Docket Nos. 50–325 and 50–324]

Carolina Power & Light Company; Brunswick Steam Electric Plant, Units 1 and 2; Exemption

I

The Carolina Power & Light Company (the licensee) is the holder of Facility Operating License Nos. DPR–71 and DPR–62, which authorize operation of the Brunswick Steam Electric Plant (BSEP). The licenses provide, among other things, that the licensee is subject to all rules, regulations, and orders of the Commission now or hereafter in effect.

These facilities consist of two boiling water reactors located at the licensee's site in Brunswick County, North Carolina.

II

Title 10 CFR 50.71 ''Maintenance of records, making of reports,'' paragraph (e)(4) states, in part, that ''Subsequent revisions [to the Final Safety Analysis Report (FSAR)] must be filed annually or 6 months after each refueling outage provided the interval between successive updates to the FSAR does not exceed 24 months.'' The two BSEP units share a common FSAR; therefore, this rule requires the licensee to update the same document within 6 months after a refueling outage for either unit.

III

10 CFR 50.12(a), ''Specific exemptions,'' states that * * *

> The Commission may, upon application by any interested person, or upon its own initiative, grant exemptions from the requirements of the regulations of this part, which are- (1) Authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security. (2) The Commission will not consider granting an exemption unless special circumstances are present.

10 CFR 50.12(a)(2)(ii) states that special circumstances are present when * * *

> Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule * * *

IV

As noted in the staff's safety evaluation, the licensee's proposed schedule for FSAR updates will ensure that the BSEP FSAR will be maintained current within 24 months of the last revision and the interval for submission of the 10 CFR 50.59 design change report will not exceed 24 months. The Commission has determined that,

pursuant to 10 CFR 50.12, an exemption is authorized by law, will not present an undue risk to the public health and safety and is consistent with common defense or security, and is otherwise in the public interest. The Commission has also determined that special circumstances are present as defined in 10 CFR 50.12(a)(2)(ii). The Commission hereby grants the licensee an exemption from the requirement of 10 CFR 50.71(e)(4) to submit updates to the BSEP FSAR within six months of each outage. The licensee will be required to submit updates to the BSEP FSAR once per fuel cycle (based upon the Unit 1 refueling outage schedule). With the current length of fuel cycles, FSAR updates would be submitted every 18 months, but not to exceed 24 months from the last submittal.

Pursuant to 10 CFR 51.32, the Commission has determined that granting of this exemption will have no significant effect on the quality of the human environment (60 FR 64456). This exemption is effective upon issuance.

Dated at Rockville, Maryland this 21st day of December 1995.

For the Nuclear Regulatory Commission.

Steven A. Varga,

Director, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 95–31481 Filed 12–28–95; 8:45 am]

BILLING CODE 7590–01–P

[Docket Nos. STN 50–454 and STN 50–455]

Commonwealth Edison Company (Byron Station, Units 1 and 2) Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption to Facility Operating License Nos. NPF–37 and NPF–66, issued to Commonwealth Edison Company (ComEd, the licensee), for operation of the Byron Station, Units 1 and 2, located in Ogle County, Illinois.

Environmental Assessment

Identification of Proposed Action

The proposed action is in accordance with the licensee's application for an exemption from certain requirements of 10 CFR 73.55, ''Requirements for Physical Protection of Licensed Activities in Nuclear Power Reactors Against Radiological Sabotage.'' The requested exemption would allow the implementation of a hand geometry biometric system off site access control in conjunction with photograph identification badges, and would allow the badges to be taken off site.

The Need for the Proposed Action

Pursuant to 10 CFR 73.55(a), the licensee is required to establish and maintain an onsite physical protection system and security organization.

In 10 CFR 73.55(d), ''Access Requirements,'' it specifies in part that ''The licensee shall control all points of personnel and vehicle access into a protected area.'' In 10 CFR 73.55(d)(5), it specifies in part that ''A numbered pictured badge identification system shall be used for all individuals who are authorized access to protected areas without escort.'' It further indicates that an individual not employed by the licensee (e.g., contractors) may be authorized access to protected areas without an escort provided the individual, ''receives a picture badge upon entrance into the protected area which must be returned upon exit from the protected area.''

Currently unescorted access for both employee and contractor personnel into the Byron Station, Units 1 and 2, is controlled through the use of picture badges. Positive identification of personnel who are authorized and request access into the protected area is established by security personnel making a visual comparison of the individual requesting access and that individual's picture badge. The picture badges are issued, sorted, and retrieved at the entrance/exit location to the protected area. In accordance with 10 CFR 73.55(d)(5), contractor personnel are not allowed to take their picture badges off site. In addition, in accordance with plant's physical security plan, the licensee's employees are also not allowed to take their picture badges off site. The licensee proposes to implement an alternative unescorted access control system which would eliminate the need to issue and retrieve picture badges at the entrance/exit location to the protected area. The proposal would also allow contractors who have unescorted access to keep their picture badges in their possession when departing the Byron site. In addition, the site security plans will be revised to allow implementation of the hand geometry system and to allow employees and contractors with unescorted access to keep their picture badges in their possession when leaving the Byron site.

Environmental Impacts of the Proposed Action.

The Commission has completed its evaluation of the proposed action. In addition to their picture badges, all individuals with authorized unescorted access will have the physical characteristics of their hand (hand geometry) registered with their picture badge number in a computerized access control system. Therefore, all authorized individuals must not only have their picture badges to gain access into the protected area, but must also have their hand geometry confirmed.

All other access processes, including search function capability and access revocation, will remain the same. A security officer responsible for access control will continue to be positioned within a bullet-resistant structure. The proposed system is only for individuals with authorized unescorted access and will not be used for individuals requiring escorts.

The underlying purpose for requiring that individuals not employed by the licensee must receive and return their picture badges at the entrance/exit is to provide reasonable assurance that the access badges could not be compromised or stolen with a resulting risk that an unauthorized individual could potentially enter the protected area. Although the proposed exemption will allow individuals to take their picture badges off site, the proposed measures require not only that the picture badge be provided for access to the protected area, but also that verification of the hand geometry registered with the badge be performed as discussed above. Thus, the proposed system provides an identity verification process that is equivalent to the existing process.

Accordingly, the Commission concludes that the exemption to allow individuals not employed by the licensee to take their picture badges off site will not result in an increase in the risk that an unauthorized individual could potentially enter the protected area. Consequently, the Commission concludes that there are no significant radiological impacts associated with the proposed action.

The proposed exemption does not affect non-radiological plant effluents and has no other environmental impact. Accordingly, the Commission concludes that there are no significant non-radiological environmental impacts associated with the proposed action.

Alternatives to the Proposed Action

Since the Commission has concluded there is no measurable environmental impact associated with the proposed action, any alternatives with equal or greater environmental impact need not be evaluated. The principal alternative to the proposed action would be to deny the requested action. Denial of the requested action would not significantly enhance the environment in that the

proposed action will result in a process that is equivalent to the existing identification verification process.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement for the Byron Station, Units 1 and 2.

Agencies and Persons Consulted

In accordance with its state policy, on December 20, 1995, the staff consulted with the Illinois State official, Mr. Frank Niziolek, Head, Reactor Safety Section; Division of Engineering; Illinois Department of Nuclear Safety, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

Based upon the foregoing environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed exemption.

For further details with respect to this action, see the licensee's letter dated November 6, 1995, which is available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Byron Public Library, 109 N. Franklin, P.O. Box 434, Byron, Illinois.

Dated at Rockville, Maryland, this 22nd day of December 1995.

For the Nuclear Regulatory Commission.

Robert A. Capra,

Director, Project Directorate III–2, Division of Reactor Projects—III/IV Office of Nuclear Reactor Regulation.

[FR Doc. 95–31479 Filed 12–28–95; 8:45 am]

BILLING CODE 7590–01–P

Documents Containing Reporting or Recordkeeping Requirements: Office of Management and Budget (OMB) Review

AGENCY: U. S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment. The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

1. Type of submission: Revision.
2. The title of the information collection: 10 CFR 35.32 and 35.33, ''Quality Management Program and Misadministrations''.
3. The form number if applicable: Not applicable.
4. How often the collection is required: One time submittal of a quality management program (QMP) for each existing and new licensee, when the QMP is modified, or when new modalities (uses) are added to an existing license. Misadministrations are reported as they occur. Records of written directives, administered dose or dosage, an annual review of the QMP, and recordable events must be maintained in auditable form for 3 years and misadministrations for 5 years.
5. Who will be required or asked to report: 10 CFR Part 35 licensees and equivalent Agreement State licensees who use byproduct material in limited diagnostic and therapeutic ranges.
6. An estimate of the number of responses: 3825.
7. The estimated number of annual respondents: 6388.
8. An estimate of the total number of hours needed annually to complete the requirement or request: Approximately 51,778 hours (reporting: 38,706 hrs/yr and recordkeeping: 13,072 hrs/yr).
9. An indication of whether Section 3507(d), Pub. L. 104–13 applies: applicable.
10. Abstract: In the medical use of byproduct material, there have been instances where byproduct material was not administered as intended or administered to a wrong individual which resulted in unnecessary exposures or inadequate or incorrect diagnostic or therapeutic procedures. The most frequent causes of these incidents were: insufficient supervision, deficient procedures, failure to follow procedures, and inattention to detail. To reduce the frequency of such events, the NRC requires licensees to implement a quality management program (10 CFR 35.32) to provide high confidence that byproduct material or radiation from byproduct material will be administered as directed by an authorized user physician.

Records and reports to NRC are required for certain errors in the administration of limited diagnostic and therapeutic quantities of byproduct material by medical use licensees. Section 35.33 clarifies these requirements to avoid confusion over whether certain events should be reported to NRC and to help ensure that the licensee is in compliance with the requirements. NRC has a responsibility to inform the medical community of generic issues identified in the NRC review of misadministrations.

NRC has revised the definition for ''misadministration'' in 10 CFR 35.2, ''Definitions.'' The revision considerably reduces the number of ''errors'' that must be reported to the NRC or an Agreement State.

Collection of this information will enable the NRC to ascertain whether misadministrations are investigated by the licensee and that corrective action is taken.

A copy of the submittal may be viewed free of charge at the NRC Public Document Room, 2120 L Street, NW, (Lower Level), Washington, DC. Members of the public who are in the Washington, DC, area can access the submittal via modem on the Public Document Room Bulletin Board (NRC's Advanced Copy Document Library) NRC subsystem at FedWorld, 703–321–3339. Members of the public who are located outside of the Washington, DC, area can dial FedWorld, 1–800–303–9672, or use the FedWorld Internet address: fedworld.gov (Telnet). The document will be available on the bulletin board for 30 days after the signature date of this notice. If assistance is needed in accessing the document, please contact the FedWorld help desk at 703–487–4608.

Comments and questions should be directed to the OMB reviewer by January 29, 1996: Troy Hillier, Office of Information and Regulatory Affairs (3150–0171), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395–3084.

The NRC Clearance Officer is Brenda Jo. Shelton, (301) 415–7233.

Dated at Rockville, Maryland, this 27th day of December 1995.

For the Nuclear Regulatory Commission.

Gerald F. Cranford,

Designated Senior Official for Information Resources Management.

[FR Doc. 95–31545 Filed 12–28–95; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Request for Comment on Proposed Collection of Information Under the Paperwork Reduction Act; Customer Satisfaction Surveys and Focus Groups

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intention to request OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation intends to request that the Office of Management and Budget approve a series of new collections of information under the Paperwork Reduction Act. The purpose of the information collections, which will be conducted through focus groups and surveys over a three-year period, is to help the PBGC assess the efficiency and effectiveness with which it serves its customers and to design actions to address identified problems. The effect of this notice is to advise the public of, and to solicit public comment on, these proposed collections of information.

ADDRESSES: All written comments should be addressed to: Office of General Counsel, Pension Benefit Guaranty Corporation, Suite 340, 1200 K St. NW., Washington, D. C. 20005. The comments will be available for public inspection at the PBGC Communications and Public Affairs Department, Suite 240, 1200 K Street, NW., Washington, DC 20005, between the hours of 9 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Marc L. Jordan, Attorney, Office of the General Counsel, Suite 340, 1200 K Street, NW., Washington, DC 20005, 202–326–4026 (202–326–4179 for TTY and TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) establishes policies and procedures for controlling the paperwork burdens imposed by Federal agencies on the public. The Act vests the Office of Management and Budget (OMB) with regulatory responsibility over these burdens, and OMB has promulgated rules on the clearance of collections of information by Federal agencies.

Executive Order 12862, Setting Customer Service Standards, states that, in order to carry out the principles of the National Performance Review, the Federal Government must be customer-driven. It directs all executive departments and agencies that provide significant services directly to the public to provide those services in a manner that seeks to meet the customer service standards established in the Executive Order.

The PBGC proposes to establish a mechanism through which it will be able to explore issues of mutual concern (*e.g.*, kind and quality of desired services) with its major outside client groups, *i.e.*, participants and beneficiaries, plan sponsors and their affiliates, plan administrators, pension practitioners and others involved in the establishment, operation and termination of plans covered by the PBGC's insurance program.

The areas of concern to the PBGC and its client groups will change over time, and it is important that the PBGC have the ability to evaluate customer concerns quickly. Accordingly, the PBGC plans to request that OMB grant ''generic'' approval, for a three-year period, of focus groups and surveys of the PBGC's outside client groups. Participation in the focus groups and surveys will be voluntary. The PBGC will consult with OMB regarding each specific information collection during the approval period.

This voluntary collection of information will put a slight burden on a very small percentage of the public. The PBGC expects to conduct focus groups involving a total of approximately 225 persons each year, with a total annual burden of approximately 675 hours, including travel time. (Some portion of this time may be spent completing surveys at focus group meetings.) In addition, the PBGC expects to distribute written surveys to approximately 1,600 persons each year (in most cases as an adjunct to a focus group), with a total annual burden of approximately 200 hours.

The PBGC is specifically seeking public 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 estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Issued at Washington, DC, this 26th day of December, 1995.

Martin Slate,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 95–31527 Filed 12–28–95; 8:45 am]

BILLING CODE 7708–01–P

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–21619; 812–9870]

The Cardinal Group, et al.; Notice of Application

December 22, 1995.

AGENCY: Securities and Exchange Commission (the ''SEC.'').

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the ''Act'').

APPLICANTS: The Cardinal Group (''Cardinal''), Cardinal Fund, Inc. (''Old-CFI''), Cardinal Government Obligations Fund (''Old-CGOF''), Cardinal Government Securities Trust (''Old-CGST''), Cardinal Tax Exempt Money market Trust (''Old-CTEMT'') (collectively, Old-CFI, Old-CGOF, Old-CGST, and Old-CTEMT are the ''Acquired Funds''), the Ohio Company (''TOC''), and Cardinal Management Corp. (''CMC'').

RELEVANT ACT SECTIONS: Order requested under section 17(b) of the Act to exempt applicants from the provisions of section 17(a).

SUMMARY OF APPLICATION: Applicants seek an order to permit applicants to effectuate a reorganization between the Acquired Funds and Cardinal.

FILING DATE: The application was filed on December 4, 1995.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 17, 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 of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, N.W., Washington, D.C. 20549. Applicants, 155 East Broad Street, Columbus, Ohio 43215.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 942–0572, 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 at the SEC's Public Reference Branch.

Applicants' Representations

1. Cardinal and the Acquired Funds are registered under the Act as open-end management investment companies. Cardinal currently offer two series. In connection with the reorganization described below, Cardinal has created and plans to offer shares of four additional series, the Cardinal Fund (''New-CFI''), Cardinal Government Obligations Fund, (''New-CGOF''), Cardinal Government Securities Trust, and Cardinal Tax Exempt Money Market Fund (collectively, the ''Acquiring Series''). TOC and its affiliates beneficially own, as of November 30, 1995, 6% of the outstanding common shares of Old-CFI, 9.1% of the outstanding shares of Old-CGST, and 7.5% of the outstanding shares of Old-CTEMT.

2. TOC serves as investment adviser for Old-CFI and as principal underwriter for Cardinal and the Acquired Funds. CMC serves as investment adviser for Cardinal, including each Acquiring Series, Old-CGOF, Old-CGST, and Old-CTEMT. CMC is a wholly-owned subsidiary of TOC.

3. Cardinal has adopted a distribution and shareholder service plan pursuant to rule 12b–1 under the Act. New-CFI and New-CGOF have elected to be covered by the distribution and shareholder service plan. Old-CFI and Old-CGOF have not adopted a distribution plan pursuant to rule 12b–1. Old-CFI and Old-CGOF also charge a contingent deferred sales load as will New-CFI and New-CGOF.

4. The board of trustees or directors of Cardinal and the Acquired Funds (the ''Boards'') have approved agreements and plans of reorganization and liquidation providing for the transfer of all of the assets of each of the Acquired Funds to the Acquiring Series in exchange for Acquiring Series shares. The reorganization is subject to the assumption by the Acquiring Series of all of the liabilities of each of the Acquired Funds.

5. As a result of the reorganization, shareholders of each Acquired Fund will receive, in exchange for his or her shares of an Acquired Fund, shares of the corresponding Acquiring Series with an aggregate value equal to the value of such shareholder's shares of the Acquired Fund, calculated as of the close of business on the business day immediately prior to the closing for each fund. Each Acquired Fund will liquidate and distribute shares of the Acquiring Series to their respective shareholders after the relevant closing.

6. The Boards, including the members who are not ''interested persons'' as such term is defined by the Act, have concluded that the reorganizations would be in the best interest of the Acquired Funds and Cardinal and of the shareholders, respectively, of the Acquiring Series and the Acquired Funds, and that the interests of the existing shareholders of the respective funds will not be diluted as a consequence thereof. In making this determination, the Boards considered a number of factors, including the business objectives and purposes of the reorganization; compatibility of the investment objectives, policies, and restrictions of the respective Acquiring Series and Acquired Fund; the expense ratios of the Acquiring Series and the Acquired Funds; and the anticipated benefits to shareholders of the Acquiring Series and to the Acquiring Series' service providers.

7. Each Acquired Fund's participation in the proposed reorganization is subject to approval by the holders of the outstanding shares of that Acquired Fund. Approval will be solicited pursuant to a prospectus/proxy statement, which will be mailed to shareholders of the Acquired Funds. None of the agreements conditions the completion of the reorganization on the favorable vote of the shareholders of the other Acquired Funds.

8. The expenses of each reorganization are to be paid by TOC, except that each of the Acquiring Series will be responsible for its own organization costs and each Acquired Fund will be responsible for the portion of the proxy solicitation and other costs associated with its annual or special meeting of shareholders.

9. The consummation of each reorganization is subject to certain conditions, including that the parties shall have received from the SEC the order requested herein, and the receipt of an opinion of tax counsel to the effect that upon consummation of each reorganization and the transfer of substantially all the assets of each Acquired Fund, no gain or loss will be recognized by the Acquired or Acquiring Series or their shareholders as a result of the reorganization. Applicants will not make any material changes adversely affecting the rights of shareholders that affect the application without the prior approval of the SEC staff.

Applicants' Legal Analysis

1. Section 17(a) of the Act provides, in pertinent part, that it is unlawful for any affiliated person of a registered investment company, or any affiliated person of such an affiliated person, acting as principal, knowingly to sell or purchase securities to or from such registered company.

2. Section 2(a)(3) of the Act defines the term ''affiliated person'' of another person to include, in pertinent part, (a) any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of such other person, (b) any person 5% or more of the outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person, (c) any person directly or indirectly controlling, controlled by, or under common control with such other person, and (d) if such other person is an investment company, any investment adviser thereof.

3. Rule 17a–8 under the Act 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 solely by reason of having a common investment adviser, common directors, and/or common officers, provided that certain conditions set forth in the rule are satisfied. TOC and its affiliates own more than 5% of the outstanding shares of each of Old-CFI, Old-CGST, and Old-CTEMT. Accordingly, these funds and Cardinal may be affiliated persons for reasons in addition to having common directors and officers and a common and/or affiliated investment adviser.

4. Section 17(b) of the Act provides that the SEC may exempt a transaction from the prohibitions of section 17(a) if evidence establishes that the terms of the proposed transactions, including the consideration to be paid, are reasonable and fair and do not involve overreaching on the part of any person concerned, and that the proposed transaction is consistent with the policy of the registered investment company concerned and with the general purposes of the Act.

5. Applicants believe that the reorganizations are consistent with the policies and purposes of the Act. In addition, applicants state that the exchange of assets will be based on each fund's relative net asset values and that no sales charge or contingent deferred

sales charge will be incurred by shareholders of the Acquired Funds in connection with their acquisition of Acquiring Series shares. Further, applicants state that the Boards, including the non-interested members, have concluded that the reorganization is in the best interest of the shareholders of the Acquired Fund. In addition, the investment objectives, policies, and restrictions of the Acquiring Series are substantially similar to those of the Acquired Funds and that the differences reflect either the desire for uniformity among the different series of Cardinal, to reflect more current regulations, and/or for easier operation.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31512 Filed 12–28–95; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 21620; 812–9798]

Voyageur Fund Managers, Inc., et al.; Notice of Application

December 22, 1995.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the ''Act'').

APPLICANTS: Voyageur fund Managers, Inc. (the ''Sponsor''), Voyageur Unit Investment Trust, Voyageur Equity Trust, Voyageur Tax-Exempt Trust, and any future unit investment trusts sponsored by the Sponsor (together with the three above-named unit investment trusts, the ''Trusts'') and their respective series (each, a ''Series'').

RELEVANT ACT SECTIONS: Order requested under section 6(c) granting an exemption from sections 2(a)(32), 2(a)(35), 14(a), 19(b), 22(d), and 26(a)(2) of the Act and rules 19b–1 and 22c–1 thereunder; under section 11(a) for an exemption from section 11(c); and under sections 6(c) and 17(b) for an exemption from section 17(a).

SUMMARY OF APPLICATION: Applicants request an order: (a) Permitting the Trusts to impose sales charges on a deferred basis and to waive the deferred sales charge in certain cases; (b) permitting certain offers of exchange involving the Trusts; (c) exempting the Sponsor from having to take for its own account or place with others $100,000 worth of units in certain Trusts; (d) permitting certain Trusts to distribute capital gains resulting from redemptions of portfolio securities within a reasonable time after receipt; and (e) permitting a terminating Series of the Voyageur Equity trust to sell portfolio securities to a new Series of that Trust under the circumstances described below.

FILING DATE: The application was filed on October 5, 1995.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 16, 1996, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reasons for the request, and the issues contested. Persons who wish to be notified of a hearing may request such notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, c/o Voyageur Fund Managers, Inc., 90 South Seventh Street, Suite 4400, Minneapolis, Minnesota 55402.

FOR FURTHER INFORMATION CONTACT: H.R. Hallock, Jr., Special Counsel, at (202) 942–0564 or C. David Messman, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. Each of the Trusts is or will be a unit investment trust registered under the Act and sponsored by the Sponsor. The investment objectives of the Trusts may differ. The principal underwriter for the Trusts is or will be Voyageur Fund Distributor, Inc. (the ''Distributor''). The Sponsor and Distributor are each indirect wholly-owned subsidiaries of Dougherty Financial Group, Inc.

2. Each of the Trusts consists or will consist of one or more separate Series. Each Series is created by a trust indenture among the Sponsor, a banking institution or trust company as trustee, and an evaluator. The Sponsor acquires a portfolio of securities which it deposits with the trustee in exchange for certificates representing units of fractional undivided interest in the deposited portfolio (''Units''). The Sponsor will deposit substantially more than $100,000 of debt or equity securities, depending on the objective of the particular Series, for each Series.

3. The Units are then offered to the public through the Distributor and dealers at a public offering price which, during the initial offering period, is based upon the aggregate offering side evaluation of the underlying securities plus a front-end sales charge. The sales charge is the maximum amount applicable to a Series and is currently approximately 4.9% of the public offering price. The Sponsor may reduce the sales charge under certain circumstances, which will be disclosed in the prospectus. Any such reduction will be made in accordance with rule 22d–1.

4. The Distributor maintains a secondary market for Units of outstanding Series and continually offers to purchase these Units at prices based upon the bid side evaluation of the underlying securities. If the Distributor discontinues maintaining such a market at any time for any Trust, holders of Units (''Unitholders'') of such Trust may redeem their Units through the trustee.

5. Distribution payments of tax-exempt or taxable income, depending on the investment objective of a particular Trust, will be made to Unitholders on an annual, semi-annual, quarterly or monthly basis. The Trusts generally are permitted to distribute to Unitholders any capital gains earned in connection with the sale of portfolio shares along with the Trust's regular distributions in reliance on paragraph (c) of rule 19b–1.

A. The Deferred Sales Charge

1. Applicants seek an order permitting them to impose a deferred sales charge (''DSC'') and to reduce or waive the DSC under certain circumstances. Under Applicants' proposal, the Sponsor will determine the maximum amount of the sales charge per Unit. The Sponsor and Distributor will have discretion to defer the collection of all or part of such sales charge over a period (the ''Collection Period'') subsequent to the settlement date for the purchase of Units. The Sponsor will in no event add to the deferred amount of the sales charge any additional amount for interest or any similar or related charge to reflect or adjust for such deferral.

2. The Distributor anticipates collecting a portion of the total sales charge immediately upon purchase of Trust Units. The balance of the sales charge will be collected in installments

over the Collection Period for the particular Trust. To the extent that distribution income is sufficient to pay a DSC installment, such deductions will be collected from distributions on a holder's Units (''Distribution Deductions''). If distribution income is insufficient to pay a DSC installment, the trustee, pursuant to the powers granted in the trust indenture, will have the ability to sell portfolio securities in an amount necessary to provide the requisite payments. If a Unitholder redeems or sells to the Sponsor his or her Units before the total sales charge has been collected from installment payments, the Sponsor intends to deduct the remainder of any DSC from sale or redemption proceeds.

3. For purposes of calculating the amount of the DSC due upon redemption or sale of Units, it will be assumed that Units on which the sales charge has been paid in full are liquidated first. Any Units liquidated over and above such amounts will be subject to the DSC, which will be applied on the assumption that Units held for the longest time are redeemed first, unless the investor directs otherwise. The Sponsor or Distributor may choose in the future to waive the DSC in connection with redemption or sales of Units under certain circumstances. Any such waiver will be disclosed in the prospectus for each Trust affected and will be implemented in accordance with rule 22d–1.

4. The Sponsor believes that the operation and implementation of the DSC program will be adequately disclosed and explained to potential investors as well as Unitholders. The prospectus for each Trust will describe the operation of the DSC, including the amount and date of each Distribution Deduction and the duration of the Collection Period. The prospectus will also contain disclosure pertaining to the trustee's ability to sell Trust securities in the event that income generated by the Trust portfolio is partially or wholly insufficient to pay for DSC expenses. The securities confirmation statement for each Unitholder's purchase transaction will state both the front-end sales charge imposed, if any, and the amount of the DSC to be imposed. In addition, each annual report will provide Unitholders with information as to the amount of annual DSC payments made by the Trust during the previous fiscal year on both a Series and per Unit basis.

B. The Exchange Option

1. Applicants also seek exemptive relief to allow certain offers of exchange among the Series of the Trusts (the ''Exchange Option''). The Exchange Option will extend to all exchanges of Unites, regardless of whether such Units are subject to a front-end sales charge or a DSC, and includes exchanges in connection with the termination of a Trust. An investor who purchases Units under the Exchange Option will pay a lower aggregate sales charge than that paid by a new investor, subject to the limited exceptions described below. While Units of an applicable Trust are normally sold on the secondary market with maximum sales charges of approximately 5.5% of the public offering price, the sales charge on Units acquired pursuant to the proposed Exchange Option generally will be reduced to a flat fee of $25 per Unit ($25 per 100 Units in the case of a Series whose Units initially cost approximately $10 per Unit, or $25 per 1,000 Units in the case of a Series whose Units initially cost approximately $1.00 per Unit).

2. An adjustment will be made if Units of any Trust are exchanged within five months of their acquisition for Units of a Trust with a higher sales charge (the ''Five Months Adjustment''), or for exchanges of Units that impose Distribution Deductions for Units of a Trust that impose a front-end sales charge occurring at any time before the Distribution Deductions had at least equaled the per Unit sales charge then applicable (the ''DSC Front-end Adjustment''). In such cases, the exchange fee will be the greater of (i) $25 per Unit (or its equivalent) or (ii) an amount that, together with the sales charge already paid on the Units being exchanged, equals the normal sales charge on the Units of a Trust being acquired through such exchange determined as of the date of the exchange.

3. Under the Exchange Option, if DSC Units are exchanged for DSC Units of another Trust, the reduced sales charge will be collected in connection with such an exchange. The Distribution Deductions will continue to be taken from the investment income generated by the newly acquired Units, or proceeds from the sale of Trust portfolio securities, as the case may be, until the original balance of the sales charge owed on the initial investment has been collected. The DSC will not be collected at the time of exchange, except in the case of any exchange to a Trust not having a DSC.

C. Purchase and Sale Transactions Between Series

1. Applicants finally seek exemptive relief to permit certain terminating Series of the Voyageur Equity Trust to sell their portfolio securities to new Series in the Voyageur Equity Trust. Certain Series of the Voyageur Equity Trust (referred to herein individually either as the ''State Trusts'' or the ''Index Trusts'' and, collectively, as the ''Rollover Trusts'') will have the specific characteristics described below.

2. The State Trusts will contain equity securities of companies paying the highest dividends located in a particular state or states that meet certain capital requirements, as specified below. The investment objective of the State Trusts will be to provide an above-average total return through a combination of potential capital appreciation and dividend income by investing in a designated number of the highest dividend yielding companies (''Eligible Companies''), as of a specified day which is one of several days before the State Trust is created which (a) have their principal operations located in a specified state or states, and (b) have a market capitalization in excess of $250 million. Applicants anticipate that many of the securities of Eligible companies will be traded on a national securities exchange or on the Nasdaq National Market System (''Nasdaq-NMS'').

3. The Index Trusts will contain a portfolio of equity securities which represents a portion of a specific published index (and ''Index''). Each Index Trust will consist of a portfolio that contains equity securities (''Equity Securities'') which are (a) actively traded (i.e., have had an average daily trading volume in the preceding six months of at least 500 shares equal in value to at least U.S. $25,000) on (i) an exchange (an ''Exchange'') which is either a national securities exchange that meets the qualifications of section 6 of the Securities Exchange Act of 1934, as amended, or a foreign securities exchange (a ''Foreign Exchange'') that meets the qualifications set forth in a proposed amendment to rule 12d3–1(d)(6) under the Act [1] and which releases daily closing prices, or (ii) the Nasdaq-NMS and (b) included in an Index. The investment objective of each

[1] Investment Company Act Release No. 17096 (Aug. 3, 1989) (proposing amendments to rule 12d3–1). The proposed amended rule defined a ''Qualified Foreign Exchange'' to mean a stock exchange in a country other than the United States where: (1) Trading generally occurred at least four days a week; (2) there were limited restrictions on the ability of acquiring companies to trade their holdings on the exchange; (3) the exchange had a trading volume in stocks for the previous year of at least U.S. $7.5 billion; and (4) the exchange had a turnover ratio for the preceding year of a least 20% of its market capitalization. The version of the amended rule that was adopted did not include the part of the proposed amendment defining the term ''Qualified Foreign Exchange.''

Index Trust will be to seek a greater total return than that achieved by the stocks constituting the entire Index over the life of the Index Trust. To achieve this objective, each Index Trust will consist of a specified number of the highest dividend yielding stocks in such trusts' respective Index.

4. Each Rollover Trust will hold its securities for a specified period, generally one year. As the Rollover Trust terminates, the Sponsor intends to create a new Series of the same type (the ''New Trust'') for the next period. With respect to the Index Trusts, the New Trust will be based on the same Index, using the same number of current top dividend yielding stocks in the Index. With respect to the State Trusts, the New Trust will be based on the same number of current top dividend yielding companies located in the same state or states and that meet the minimum capital requirements. Each Rollover Trust has a specified date upon which Unitholders in the terminating Rollover Trust may at their option redeem their Units in the terminating trust and receive in return Units in the New Trust which is created on or about the date such option may be exercised.

5. In connection with its termination, each Rollover Trust will sell all of its portfolio securities as quickly as practicable, but over a period of time so as to minimize any adverse impact on the market price. Similarly, a New Trust will acquire its portfolio securities in purchase transactions. Because there normally will be some overlap between the portfolios of each Rollover Trust and the corresponding New Trust, this procedure will result in substantial brokerage commissions on portfolio securities of the same issue that are borne by the Rollover Trust and the New Trust and, consequently, the Unitholders of both the Rollover Trust and the New Trust. In light of these costs, Applicants request an exemptive order to allow any Index Trust to sell Equity Securities, and the State Trusts to sell securities of the Eligible companies, that are listed on an Exchange or Nasdaq-NMS and actively traded (as described above), to their respective New Trusts and to permit the New Trusts to purchase such securities at the closing sale prices of the securities on the applicable Exchange or on Nasdaq-NMS on the sale date. As required by Condition C.3. and 4., below, these transactions must be effected in compliance with rule 17a–7, except for certain provisions of paragraph (e) thereof.

6. To minimize overreaching, the Sponsor will certify to the trustee, within five days of each sale from a Rollover Trust to a New Trust, (a) that the transaction is consistent with the policy of both the Rollover Trust and the New Trust, as recited in their respective registration statements and reports filed under the Act, (b) the date of such transaction and (c) the closing sales price on the Exchange or Nasdaq-NMS for the sale date of the securities subject to such sale. The trustee will countersign the certificate, unless the trustee disagrees with the price listed on the certificate, in which event the trustee will immediately inform the Sponsor and return the certificate to the Sponsor with corrections duly noted. If the Sponsor can verify the corrected price, the Sponsor will ensure that the price of Units of the New Trust, and distribution to Unitholders of the Rollover Trust, accurately reflect the corrected price. If the Sponsor disagrees with the trustee's corrected price, the Sponsor and the trustee will jointly determine the correct sales price by reference to a mutually agreeable, indepenently published list of closing sales prices for the date of the transaction.

Applicants' Legal Analysis

1. Applicants request an exemption under section 6(c) granting relief from sections 2(a)(32), 2(a)(35), 22(d) and 26(a)(2) and rule 22c–1 to permit Applicants to assess a DSC, and to waive the DSC under certain circumstances. Applicants also request an exemption under section 11(a) for relief from section 11(c) to enable them to implement the Exchange Option. In addition, Applicants request an exemption pursuant to sections 6(c) and 17(b) granting relief from section 17(a) to permit Rollover Trusts to sell portfolio securities to a New Trust and to permit the New Trusts to purchase such securities. Finally, Applicants seek an exemption under section 6(c) granting relief from sections 14(a) and 19(b) and rule 19b–1 to the extent described below.

2. Section 2(a)(32) defines a ''redeemable security'' as a security that, upon its presentation to the issuer, entitles the holder to receive approximately his or her proportionate share of the issuer's current net assets, or the cash equivalent of those assets. Because the imposition of a DSC may cause a redeeming Unitholder to receive an amount less than the net asset value of the redeemed Units, Applicants seek an exemption from section 2(a)(32) so that Units subject to a DSC are considered redeemable securities for purposes of the Act.[2]

3. Section 2(a)(35), in relevant part, defines the term ''sales load'' to be the difference between the public selling price of a security and that portion of the sale proceeds invested or held for investment by the depositor or trustee. Because a DSC is not charged at the time of purchase, Applicants request an exemption from section 2(a)(35).

4. Rule 22c–1 requires that the price of a redeemable security issued by an investment company for purposes of sale, redemption, and repurchase be based on the security's current net asset value. Because the imposition of a DSC may cause a redeeming Unitholder to receive an amount less than the net asset value of the redeemed Units, Applicants seek an exemption from this rule.

5. Section 22(d) requires an investment company and its principal underwriter and dealer to sell securities only at a current public offering price described in the investment company's prospectus. Because sales charges traditionally have been a component of the public offering price, section 22(d) historically required that all investors be charged the same load. Rule 22d–1 was adopted to permit the sale of redeemable securities ''at prices which reflect scheduled variations in, or elimination of, the sales load.'' Because rule 22d–1 does not extend to scheduled variations in DSCs, Applicants seek relief from section 22(d) to permit them to waive or reduce their DSC in certain instances.

6. Section 26(a)(2), in relevant part, prohibits a trustee or custodian of a unit investment trust from collecting from the Trust as an expense any payment to a depositor or principal underwriter thereof. Because of this prohibition, Applicants need an exemption to permit the trustee to collect the DSC installments from Distribution Deductions or Trust assets and disburse them to the Sponsor.

7. Section 6(c) provides, in relevant part, that the SEC, by order upon application, may conditionally or uconditionally exempt any person or transaction, or any class or classes of persons or transactions, from any provision or provisions of the Act or of any rule thereunder, if and to the extent that such exemption is appropriate in the public interest and consistent with the protection of investors and the

[2] Without an exemption, a Trust selling Units subject to a DSC could not meet the definition of a unit investment trust under section 4(2) of the Act. As here relevant, section 4(2) defines a unit investment trust as an investment company that issues only ''redeemable securities.''

purposes fairly intended by the policy and provisions of the Act. Applicants believe that implementation of the deferred sales charge program in the manner described above would be fair and in the best interests of the Unitholders of the Trusts. Thus, granting the requested relief from sections 2(a)(32), 2(a)(35), 22(d), and 26(a)(2) and rule 22c–1 would meet the requirements for an exemption established by section 6(c).

8. Section 11(c) prohibits any offers of exchange of the securities of a registered unit investment trust for the securities of any other investment company, unless the terms of the offer have been approved by the SEC under section 11(a). Applicants assert that the reduced sales charge imposed at the time of exchange is a reasonable and justifiable expense to be allocated for the professional assistance and operational expenses incurred in connection with the Exchange Option.

9. Section 17(a) makes it unlawful for an affiliated person of a registered investment company to sell securities to, or purchase securities from, the company. Investment companies under common control may be considered affiliated persons of one another. Each Series will have an identical or common Sponsor, Voyageur Fund Managers, Inc. Since the Sponsor of each Series may be considered to control each Series, it is likely that each Series would be considered an affiliated person of the others.

10. Section 17(b) provides that the SEC shall exempt a proposed transaction from section 17(a) if evidence establishes that: (a) The terms of the proposed transaction are reasonable and fair and do not involve overreaching; (b) the proposed transaction is consistent with the policies of the registered investment company involved; and (c) the proposed transaction is consistent with the general provisions of the Act. As noted above, section 6(c) authorizes the SEC to exempt classes of transactions. Applicants believe the proposed sales of portfolio securities from a Rollover Trust to a New Trust satisfy the exemptive requirements set forth in sections 6(c) and 17(b).

11. Rule 17a–7 under the Act permits registered investment companies that might be deemed affiliates solely by reason of common investment advisers, directors, and/or officers, to purchase securities from, or sell securities to, one another at an independently determined price, provided certain conditions are met. Paragraph (e) of the rule requires an investment company's board of directors to adopt and monitor the procedures for these transactions to assure compliance with the rule. A unit investment trust does not have a board of directors and, therefore, may not rely on the rule. Applicants represent that they will comply with all of the provisions of rule 17a–7, other than paragraph (e).

12. Applicants represent that purchases and sales between Series will be consistent with the policy of each Series, as only securities that otherwise would be bought and sold on the open market pursuant to the policy of each Series will be involved in the proposed transactions. Further, Applicants submit that requiring the Series to buy and sell on the open market leads to unnecessary brokerage fees and is therefore contrary to the general purposes of the Act.

13. Section 14(a) requires in substance that investment companies have $100,000 of net worth prior to making a public offering. As noted previously, the Sponsor will deposit substantially more than $100,000 of debt or equity securities for each Series. As the Sponsor intends to sell all of a Trust Series' Units to the public, however, representing the entire beneficial ownership of the Trust, Applicants request exemptive relief from the net worth requirement of section 14(a). Applicants will comply in all respects with rule 14a–3, which provides an exemption from section 14(a), except that the Voyageur Equity Trust and certain future Trusts (the ''Equity Trusts'') will not restrict their portfolio investments to ''eligible trust securities'' as required by the rule.

14. Section 19(b) and rule 19b–1 make it unlawful, except under limited circumstances, for a registered investment company to distribute long-term capital gains more than once every twelve months. Rule 19b–1(c), under certain circumstances, excepts a unit investment trust investing in ''eligible trust securities'' (as defined in rule 14a–3) from the requirements of rule 19b–1. Because the Equity Trusts, as noted above, will not restrict their portfolio to ''eligible trust securities,'' the Equity Trusts will not qualify for the exemption in paragraph (c) of rule 19b–1. Applicants therefore request an exemption from section 19(b) and 19b–1 to the extent necessary to permit any capital gains earned in connection with the sale of portfolios shares to be distributed to Unitholders along with the Equity Trust's regular distributions. In all other respects, Applicants will comply with section 19(b) and rule 19b–1.

15. Applicants submit that the dangers which section 19(b) and rule 19b–1 are designed to prevent do not exist in the Equity Trusts. Any gains from the redemption of portfolio securities would be triggered by the need to meet Trust expenses, deferred sales charge installments, or by requests to redeem Units, events over which the Sponsor and the Equity Trusts have no control. Moreover, since principal distributions must be clearly indicated in accompanying reports to Unitholders as a return of principal and will be relatively small in comparison to normal dividend distributions, there is little danger of confusion from failure to differentiate among distributions.

Applicants' Conditions

The Applicants agree that any order granting the application will be made subject to the following conditions:

A. Conditions With Respect to DSC Relief and Exchange Option

1. Whenever the Exchange Option is to be terminated or its terms are to be amended materially, any holder of a security subject to that privilege will be given prominent notice of the impending termination or amendment at least 60 days prior to the date of termination or the effective date of the amendment, *provided* that: (a) No such notice need be given if the only material effect of an amendment is to reduce or eliminate the sales charge payable at the time of an exchange, to add one or more new Series eligible for the Exchange Option, or to delete a Series which has terminated; and (b) no notice need be given if, under extraordinary circumstances, either (i) there is a suspension of the redemption of Units of the Trust under section 22(e) of the Act and the rules and regulations promulgated thereunder, or (ii) a Trust temporarily delays or ceases the sale of its Units because it is unable to invest amounts effectively in accordance with applicable investment objectives, policies and restrictions.

2. An investor who purchases Units under the Exchange Option will pay a lower aggregate sales charge than that which would be paid for the Units by a new investor, unless the Five Months or DSC Front-end Exchange Adjustments apply.

3. The prospectus of each Trust offering exchanges and any sales literature or advertising that mentions the existence of the Exchange Option will disclose that the Exchange Option is subject to modification, termination or suspension, without notice except in certain limited cases.

4. Each Series offering Units subject to a deferred sales charge will include in its prospectus the table required by item 2 of Form N–1A (modified as

appropriate to reflect the differences between unit investment trusts and open-end management investment companies) and a schedule setting forth the number and date of each installment payment.

B. Condition for Exemption From Section 14(a)

Applicants will comply in all respects with the requirements of rule 14a–3, except that the Equity Trusts will not restrict their portfolio investments to ''eligible trust securities.''

C. Conditions for Exemption From Section 17(a)

1. Each sale of Equity Securities by an Index Trust, or Eligible Companies' securities by a State Trust, to a New Trust will be effected at the closing price of the securities sold on the applicable Exchange or the Nasdaq-NMS on the sale date, without any brokerage charges or other remuneration except customary transfer fees, if any.

2. The nature and conditions of such transactions will be fully disclosed to investors in the appropriate prospectus of each future Rollover Trust and new Trust.

3. The trustee of each Rollover Trust and New Trust will (a) review the procedures discussed in the application relating to the sale of securities from a Rollover Trust and the purchase of those securities for deposit in a New Trust and (b) make such changes to the procedures as the trustee deems necessary that are reasonably designed to comply with paragraphs (a) through (d) of rule 17a–7.

4. A written copy of these procedures and a written record of each transaction pursuant to any order granting the application will be maintained as provided in rule 17a–7(f).

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31513 Filed 12–28–95; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 21618; 811–7684]

Household Personal Portfolios

December 22, 1995.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the ''Act'').

APPLICANT: Household Personal Portfolios.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant requests an order declaring that it has ceased to be an investment company.

FILING DATES: The application was filed on August 10, 1995 and amended on December 12, 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 the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, D.C. 20549. Applicant, 2 North LaSalle Street, Chicago, Illinois 60602.

FOR FURTHER INFORMATION CONTACT: Sarah A. Buescher, Staff Attorney, at (202) 942–0573, or Alison E. Baur, 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.

Applicant's Representations

1. Applicant is an open-end, diversified management investment company organized as a Massachusetts business trust. Applicant has five portfolios; Growth Equity Portfolio; Equity Income Portfolio; Fixed Income Portfolio; Tax-Exempt Income Portfolio; and Short-Term Income Portfolio.

2. SEC records indicate that applicant registered under the Act on April 28, 1993 by filing a notification of registration on Form N–8A pursuant to section 8(a) of the Act. Also on that date, applicant filed a registration statement on Form N–1A pursuant to section 8(b) of the Act and the Securities Act of 1933. The registration statement became effective on August 3, 1993, and the initial public offering commenced on the same date.

3. On December 19, 1994, after determining that applicant could no longer provide the desired safety, diversity, or earnings to shareholders because of applicant's small asset base, applicant's board of trustees authorized the appropriate officers to enter into an Agreement and Plan of Liquidation (''Plan'').

4. Pursuant to the Plan, applicant would be liquidated on February 28, 1995 (''Liquidation Date''), and on that date shareholders who had not redeemed their shares would have them automatically redeemed. Shareholders of applicant on or after December 19, 1994 would receive, upon redemption, the greater of (a) the shareholder's account balance (reflecting net asset value per share) on the date the redemption request is received or the Liquidation Date (whichever applies) or (b) the aggregate amount of the shareholder's purchase payments. Such payment method was used to ensure that shareholders would not receive less than their minimum initial investment. Household International, Inc., (''Household'') the parent of applicant's manager/distributor, Hamilton Investments, Inc., agreed to compensate any shareholder of record on or after December 19, 1994 for the amount by which all purchase payments made by that shareholder exceeded the shareholder's account balance upon redemption.

5. On February 28, 1995, all outstanding shares of applicant were liquidated and the proceeds were paid in cash to the shareholders. Distributions to all securityholders in complete liquidation of their interests have been made. Applicant did not incur any brokerage commissions attributable to the disposition of its portfolio securities.

6. In connection with the liquidation, applicant incurred $9,725 of aggregate expenses, consisting primarily of legal fees and mailing expenses, all of which were paid by Household. Household also reimbursed applicant for applicant's remaining unamortized organizational expenses of $287,710.

7. As of the date of this application, applicant has no assets and no outstanding debts or liabilities. Applicant has no shareholders and is not a party to any litigation or administrative proceeding. Applicant is not presently engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

8. Applicant intends to file an instrument required to terminate its existence as a Massachusetts business trust.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31510 FIled 12–28–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–36625; File No. SR–Phlx–95–90]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Listing Standards for Options on Equity Securities Issued in a Reorganization Transaction Pursuant to a Public Offering or a Rights Distribution

December 21, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 19, 1995, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend its listing standards in respect of options on equity securities issues in a spin-off, reorganization, recapitalization, restructuring or similar transaction where the issuance is made pursuant to a public offering or a rights distribution. The text of the proposed rule change is available at the Office of the Secretary, Phlx, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Phlx 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 Phlx 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 purpose of the proposed rule change is to amend the special listing standards set forth in Phlx Rule 1009, Commentary .05 that apply to options on equity securities issued in certain spin-offs, reorganizations, recapitalizations, restructurings or similar transactions (referred to herein as ''restructuring transactions'') so as to also include securities issued pursuant to a public offering or a rights distribution that is part of a restructuring transaction.

The proposed amendment to Rule 1009, Commentary .05 is intended to facilitate the listing of options on equity securities issued in restructuring transactions (referred to as ''Restructure Securities'') by permitting the Exchange to base its determination as to the satisfaction of certain of the listing standards set forth in Exchange Rule 1009 and Commentary .01 thereunder by reference to (1) specified characteristics of the ''Original Security'' in respect of which the Restructure Security was issued or distributed; (2) the trading market of the Original Security; (3) the number of shares of the Restructure Security issued and outstanding; or (4) to the listing standards of the exchange on which the Restructure Security is listed. Rule 1009, Commentary .05 would permit the Exchange to certify a Restructure Security as options eligible sooner than if it had to wait until it could base its certification on characteristics of the Restructure Security itself, but only in circumstances where the factors relied upon make it reasonable to conclude that the Restructure Security will in fact satisfy applicable listing criteria.

As recently approved by the Commission, Phlx Rule 1009, Commentary .05 does not extend to restructuring transactions involving the issuance of a Restructure Security in a public offering or a rights distribution.[3] The questions raised by the proposed extension of Commentary .05 to Phlx Rule 1009 to reorganization transactions involving public offering or rights distributions reflect that when a Restructure Security is issued in a public offering or pursuant to a rights distribution, it cannot automatically be assumed that the shareholder population of the Restructure Security and the Original Security will be the same. Instead, the holders of a Restructure Security issued in a public offering will be those persons who subscribed for and purchased the security in the offering, and the holders of a Restructure Security issued in a rights distribution will be those persons who elected to exercise their rights. Even in the case of a distribution of nontransferable rights to shareholders of the Original Security, not all such shareholders may choose to exercise their rights. As a result, it cannot be assumed that the Restructure Security will necessarily satisfy listing criteria pertaining to minimum number of holders, minimum public float and trading volume simply because the Original Security satisfied these criteria.

On the other hand, the Exchange believes that the same reasons for wanting to make an options market available without delay to holders of securities issued in reorganizations that do not involve public offerings or rights distributions apply with equal force to securities issued in reorganizations that do involve public offerings or rights distributions, so long as there can be reasonable assurance that the securities satisfy applicable options listing standards. That is, holders of an Original Security who utilize options to manage the risks of their stock positions may well find themselves to be holders of both the Original Security and the Restructure Security following a reorganization because they chose to purchase the Restructure Security in a public offering or to exercise rights in order to maintain the same investment position they had prior to the reorganization. Such holders may want to continue to use options to manage the risks of their combined stock position after the reorganization, but they can do so only if options on the Restructure Security are available. The Exchange believes that it is important to avoid any undue delay in the introduction of options trading in such a Restructure Security in circumstances where there is sound reason to believe that the Restructure Security does in fact satisfy options listing standards.

Accordingly, the Phlx proposes to add new paragraph (d) to Commentary .05 of Rule 1009, to address situations where a Restructure Security is issued pursuant to a public offering or rights distribution. Pursuant to the proposed rule change, the Exchange may certify the Restructure Security as satisfying minimum shareholder and minimum public float requirements on the basis provided for in approved Commentary .05(c), only after at least five days of ''regular way'' trading. Moreover, after due diligence, the Exchange must have no reason to believe that the Restructure

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] See Securities Exchange Act Release No. 36020 (July 24, 1995), 60 FR 39039 (July 31, 1995) (order approving Commentary .05 to Phlx Rule 1009).

Security does not satisfy these requirements. Additionally, in order to base certification on Commentary .05 of Rule 1009, the closing prices of the Restructure Security on each of the five or more trading days prior to the selection date must be at least $7.50. Finally, as is required for all underlying securities selected for options trading, trading volume in the Restructure Security must be at least 2,400,000 shares during a period of twelve months or less up to the time the security is so selected.

The effect of the proposed rule change is that a Restructure Security issued pursuant to a public offering or a rights distribution that is part of a reorganization will be eligible for options trading only if it satisfies all of the existing standards applicable to the selection of underlying securities generally, except that (A) the Exchange may assume the satisfaction of the minimum public ownership requirement of 7,000,000 shares and the minimum 2,000 shareholders requirement if (i) either the percentage of value tests of subparagraph (a)(1) of Commentary .05 are met or the aggregate market value represented by the Restructure Security is at least $500,000,000; and if (ii) the Restructure Security is listed on an exchange or an automatic quotation system having equivalent listing requirements or at least 40,000,000 shares of the Restructure Security are issued and outstanding, and if (iii) after the Restructure Security has traded ''regular way'' for at least five trading days and after having conducted due diligence in the matter, the Exchange has no reason to believe that these requirements are not met, and (B) subject to the same percentage of value or aggregate market value requirements, the Restructure Security may be deemed to satisfy the minimum market price per share requirement if it has a closing market price per share of at least $7.50 during each of the five or more trading days preceding the date of selection, instead of having to satisfy this requirement over a majority of days over a period of three months. (In the event the Restructure Security has a closing price that is less than $7.50 on any of the trading days preceding its selection, it will have to satisfy this requirement on a majority of trading days over a period of three months before it can be certified as eligible for options trading.) For any Restructure Security issued in a public offering or a rights distribution that does satisfy these requirements, the effect of the proposed rule change will be to permit its certification of options trading to take place as early as on the sixth day after trading in the stock commences, instead of having to wait for three months of trading.

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 in general, and furthers the objectives of Section 6(b)(5) in particular, by removing impediment to a free and open market in options covering securities issued in public offerings or pursuant to rights distributions as part of restructuring transactions and other similar corporate reorganizations.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

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, NW., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to the File No. SR-Phlx-95-90 and should be submitted by January 19, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31504 Filed 12–28–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–36623; File No. SR–CBOE–95–51]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 to the Proposed Rule Change by the Chicago Board Options Exchange, Incorporated, Relating to the Listing of the Trading of Options and Long-Term Options on the CBOE Automotive Index and Long-Term Options on a Reduced-Value CBOE Automotive Index

December 21, 1995.

I. Introduction

On August 31, 1995, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') submitted to the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to provide for the listing and trading of index options on the CBOE Automotive Index (''Automotive Index'' or ''Index''). Notice of the proposal appeared in the Federal Register on October 5, 1995.[3] No comment letters were received on the proposed rule change. On December 14, 1995, the Exchange filed with the Commission Amendment No. 1 to the proposed change.[4] This order approves the Exchange's proposal, as amended.

[4] 17 CFR 200.30–(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] See Securities Exchange Act Release No. 36295 (September 28, 1995), 60 FR 52229.

[4] In Amendment No. 1, as discussed more fully herein, the Exchange proposed certain maintenance standards for the Automotive Index. See Letter from Eileen Smith, Director, Product Development, Research Department, CBOE, to John Ayanian, Attorney, Office of Market Supervision (''OMS''),

Continued

II. Description of Proposal

A. General

The CBOE proposes to list for trading options on the Automotive Index, a new securities index developed by the CBOE. The Automotive Index consists of ten companies involved in the design and manufacture of automobiles and automotive parts (replacement and original equipment).[5] The CBOE also proposes to list either long-term options on the full-value Index or long-term options on a reduced-value Index that will be computed at one-tenth of the value of the Automotive Index (''Automotive Index LEAPS'' or ''Index LEAPS'').[6] Automotive Index LEAPS will trade independent of and in addition to regular Index options traded on the Exchange,[7] however, as discussed below, for purposes of position and exercise limits, positions in Index LEAPS and regular Index options will be aggregated.

B. Composition of the Index

The Index was designed by the Exchange and is comprised of ten companies involved in the design and manufacture of automobiles and automotive parts. The share of each of the components contained in the Index currently trade in the U.S. on the New York Stock Exchange (''NYSE'').

As of the close of trading on July 31, 1995, the Index was valued at 179.93. As of the same date, the components comprising the Index ranged in capitalization from $2.3 billion to $36.4 billion. The total capitalization as of that date was $112.2 billion; the mean capitalization was $11.2 billion; and the median capitalization was $4.8 billion. The largest component accounted for 20% of the total weighting of the Index, while the smallest accounted for 5.00%. The top five components accounted for 68.33% of the total weight of the Index.[8] The average trading volume of the components of the Index, for the period from February 1, 1995, through July 31, 1995, ranged from a high of 3.53 million shares per day to a low of 135,738 shares per day.

C. Maintenance

The Index will be maintained by CBOE. To maintain continuity in the Index following an adjustment to a component security, the divisor will be adjusted. Changes which may result in divisor changes include, but are not limited to, certain rights issuances, quarterly re-balancing, and component security changes. A component of the Index may be replaced in the event of certain events, such as a merger, consolidation, dissolution, or liquidation.

The Index is re-balanced after the close of business on Expiration Friday on the March Quarterly Cycle. In addition, the Index will be reviewed on approximately a monthly basis by the CBOE staff. The CBOE may change the composition of the Index at any time to reflect changes affecting the components of the Index or the Automotive industry generally. If it becomes necessary to remove a component from the Index, every effort will be made to add a component that preserves the character of the Index. Moreover, replacement securities must be ''reported securities'' as defined in Rule 11Aa3–1 of the Act.[9] In considering securities to be added to the Index, the CBOE will take into account the capitalization, liquidity, volatility, and name recognition of the proposed replacement component. CBOE will not decrease the number of components to less than 9 nor increase the number of components to more than 13.

If the number of stocks is increased, the weights will be redistributed such that the largest stock will never account for more than 25% of the weight of the Index and the top three stocks will not account for more than 50% of the weight of the Index and the remaining weight will be distributed among the remaining components to reflect the relative market value of those components. For example, if Stock XYZ is added and it is in the same market value range as those stocks with an 8.33% weight in the Index,[10] the following may be the result of the re-balancing: (1) GM—20%; (2) F—17.5%; (3) C—12.5%; (4) GT—10%; (5) TRW—6.25%; (6) GPC—6.25%; (7) ETN—6.25%; (8) XYZ—6.25%; (9) DCN—5%; (10) ECH—5%; and (11) MGA—5%.

If the number of stocks in the Index is decreased to 9, the largest stock will have a weight of no more than 25% of the Index and the top three stocks will account for no more than 55% of the Index. The remaining weight will be reallocated among the remaining components.

If it becomes necessary to replace a component security intra-quarter, the replacement security will be added at the same weight as the security being removed.[11] If a stock is replaced at the time of a quarterly re-balancing, the components will be ranked according to market value and the weighting methodology currently in use at the time of the replacement will be applied.[12] The number of component stocks in the Index will only be changed at the time of a quarterly re-balancing.

Prior to making any of the above changes to the Automotive Index, CBOE will notify members and member firms of the changes. Generally, these changes are sent by facsimile to member firms and distributed on the trading floor approximately one week prior to the change.[13]

Additionally, at each quarterly re-balancing, the Exchange will ensure that at least 80% of the number of components, and at least 90% of the weight of the Index satisfies the initial listing criteria in CBOE Rule 5.3[14] (for components which are not the subject of

Division of Market Regulation (''Market Regulation''), Commission, dated December 14, 1995 (''Amendment No. 1'').

[5] The components of the Index are: Chrysler Corporation Holding Co. (''C''); Dana Corp. (''DCN''); Echlin Inc. (''ECH''); Eaton Corp. (''ETN''); Ford Motor Co. (''F''); General Motors Corp. (''GM''); Genuine Parts Co. (''GPC''); Goodyear Tire and Rubber Co. (''GT''); Magna International Inc. (''MGA''); and TRW Inc. (''TRW'').

[6] LEAPS is an acronym for Long-Term Equity Anticipation Securities. LEAPS are long-term index option series that expire from 12 to 36 months from their date of issuance. See CBOE Rule 24.9(b)(1).

[7] According to the CBOE, no proxy for the performance of this industry group is currently available in the U.S. exchange-traded derivatives markets, and the Exchange believes that options on the Index will provide investors with a low-cost means to participate in the performance of or to hedge the risk of investments in this sector.

[8] The Index portfolio is composed of ten components such that the largest capitalized Index component (GM) represents 20% of the Index value, the second largest component (F) represents 17.5%, the third largest component (C) represents 12.5%, the fourth largest component (GT) represents 10%, the fifth (GT), sixth (TRW), and seventh (GPC) largest components each represent 8.33%, and the eight (DCN), ninth (ECH), and tenth (MGA) largest components each represent 5%.

[9] See Amendment No. 1 *supra* note 4.

[10] See *supra* note 8.

[11] In the event that it becomes necessary to remove General Motors Corp., Ford Motor Co., or Chrysler Corporation, CBOE would most likely re-balance the Index at the time of the component change. The weighting of the Index would be reallocated depending on the market value of the replacement security. See Amendment No. 1, *supra* note 4.

[12] See Amendment No. 1, *supra* note 4. According to CBOE, the Index components will always be ranked in descending market capitalization order and the Index portfolio adjusted in accordance with the maintenance standards set forth herein. Telephone conversation between Eileen Smith, Director, Product Development, Research Department, CBOE, and John Ayanian, Attorney, OMS, Market Regulation, Commission, on December 14, 1995.

[13] See Amendment No. 1, *supra* note 4.

[14] The CBOE's options listing standards, which are uniform among the options exchanges, provide that a security underlying an option must, among other things, meet the following requirements: (1) the public float must be at least 7,000,000 shares; (2) there must be a minimum of 2,000 stockholders; (3) trading volume in the U.S. must have been at least 2.4 million over the preceding twelve months; and (4) the U.S. market price must have been at least $7.50 for a majority of the business days during the preceding three calendar months. See CBOE Rule 5.3, Interpretation and Policy .01.

standardized options trading) or the maintenance criteria in CBOE Rule 5.4[15] (for components which are currently the subject of standardized options trading).

The CBOE will promptly notify the Commission staff at any time that the CBOE determines that the Index fails to satisfy any of the above maintenance criteria. Further, in such an event, the Exchange will not open for trading any additional series of Index options or Index LEAPS unless the Exchange determines that such failure is not significant, and the Commission staff affirmatively concurs in that determination, or unless the Commission specifically approves the continued listing of that class of Index options or Index LEAPS pursuant to a proposal filed in accordance with Section 19(b)(2) of the Act.

D. Applicability of CBOE Rules Regarding Index Options

Except as modified by this order, the rules in Chapter XXIV of the CBOE Rules will be applicable to Index options and full-value and reduced-value Index LEAPS. In accordance with Chapter XXIV of CBOE's rules, the Index will be treated as a narrow-based index for purposes of applicable position and exercise limits, policies regarding trading halts and suspensions,[16] and margin treatment.[17]

E. Calculation of the Index

The Index will be calculated by CBOE or its designee on a real-time basis using last-sale prices. The value of the Index will be calculated continuously and will be disseminated to the Options Price Reporting Authority (''OPRA'') every fifteen seconds by the CBOE, based on the last-sale prices of the securities comprising the Index. OPRA, in turn, will disseminate the Index value to other financial vendors such as Reuters, Telerate, and Quotron.[18] If a component security is not currently being traded on its primary market, the most recent price at which the security traded on such market will be used in the Index calculation.

The Index is calculated on a ''modified equal-dollar-weighted'' method. The value of the Index equals the current combined market value (based on U.S. primary market prices) of the assigned number of shares of each of the components in the Index divided by the current Index divisor. The Index divisor was initially calculated to yield a benchmark value of 150.00 at the close of trading on December 16, 1994. The value of the Index at the close on July 31, 1995, was 179.93.

Each of the ten component securities is represented in dollar amounts that approximate the relative sizes of the companies in the Index. The Exchange believes that this methodology will present a fair representation of the automotive industry without assigning excessive weight to the top three securities (GM, F, and C), as measured by market capitalization. The initial component weights, and the weights at the time of the last quarterly re-balancing on June 16, 1995, were: GM—20%, F—17.5%, C—12.5%, GT—10%, ETN—8.33%, GPC—8.33%, TRW—8.33%, DCN—5%, ECH—5%, and MGA—5%.

The number of shares of each component security in the Index will remain fixed between quarterly reviews except in the event of certain types of corporate actions, such as the payment of a dividend (other than an ordinary cash dividend), stock distributions, stock splits, reverse stock splits, rights offerings, or a distribution, reorganization, recapitalization, or some such similar event with respect to an Index component. When the Index is adjusted between quarterly reviews, the number of shares of the relevant component in the portfolio will be adjusted, to the nearest whole share, to maintain the component's relative weight in the Index at the level immediately prior to the corporate action. In the event of a replacement, the average dollar value of the remaining portfolio components will be calculated and that amount invested in the new component stock, to the nearest whole share. In both cases, the divisor will be adjusted, if necessary, to ensure continuity in the value of the Index.[19]

The Index value for purposes of settling outstanding regular Index options and full-value and reduced-value Index LEAPS contracts upon expiration will be calculated based upon the regular way opening sale prices for each of the securities comprising the Index in their primary market on the last trading day prior to expiration.[20] In the event that a security traded as a Nasdaq/NM security is added to the Index, the first reported sale price for those shares will be used for determining a settlement value. Once the shares of all of the component securities represented in the Index have opened for trading, the value of the Index will be determined and that value will be used as the final settlement value for expiring Index options contracts, including full-value and reduced-value Index LEAPS. If any of the components of the Index do not open for trading on the last trading day before expiration, then the prior trading day's (i.e., normally Thursday's) last sale price will be used in the Index value calculation. In this regard, before deciding to use Thursday's closing value for a security contained in the Index for purposes of determining the settlement value of the Index, the CBOE will wait until the end of the trading day on Expiration Friday (as defined herein).[21]

F. Contract Specifications

The proposed options on the Index will be cash-settled, European-style options.[22] The trading hours applicable to the Index options will be from 8:30 a.m. to 3:10 p.m., Chicago time. The Index multiplier will be $100. The strike price interval will be $5.00 for full-value Index options with a duration of one year or less to expiration.[23] In addition, pursuant to CBOE Rule 24.9, there may be up to six expiration months outstanding at any given time. Specifically, there may be up to three expiration months from the March, June, September, and December cycle plus up to three additional near-term months so that the two nearest term months will always be available. As described in more detail below, the Exchange also intends to list several Index LEAPS series that expire from 12 to 36 months from the date of issuance.

Lastly, the options on the Index will expire on the Saturday following the third Friday of the expiration month

[15] The CBOE's options maintenance standards, which are uniform among the options exchanges, provide that a security underlying an option must, among other things, meet the following requirements: (1) The public float must be at least 6,300,000 shares; (2) there must be a minimum of 1,600 stockholders; (3) trading volume in the U.S. must have been at least 1.8 million over the preceding twelve months; and (4) the U.S. market price must have been at least $5.00 for a majority of the business days during the preceding six calendar months. See CBOE Rule 5.3, Interpretation and Policy .01.

[16] See CBOE Rule 24.7.

[17] See CBOE Rule 24.11.

[18] Telephone conversation between Eileen Smith, Director, Product Development, Research Department, CBOE, and John Ayanian, Attorney, OMS, Market Regulation, Commission, on October 31, 1995.

[19] Telephone conversation between Eileen Smith, Director, Product Development, Research Department, CBOE, and John Ayanian, Attorney, OMS, Market Regulation, Commission, on October 31, 1995.

[20] As noted above, each of the component securities currently trade on the NYSE.

[21] Telephone conversation between Eileen Smith, Director, Product Development, Research Department, CBOE, and John Ayanian, Attorney, OMS, Market Regulation, Commission, on October 31, 1995.

[22] A European-style option can be exercised only during a specified period before the option expires.

[23] For a description of the strike price intervals for reduced-value Index options and long-term Index options, See infra, Section II.G.

(''Expiration Friday''). Accordingly, because options on the Index will settle based upon opening prices of the securities comprising the Index on the last trading day before expiration (normally Expiration Friday), the last trading day for an expiring Index option series will normally be the second to the last business day before expiration (normally a Thursday).

G. Listing of Long-Term Options on the Full-Value or Reduced-Value Automotive Index

The proposal provides that the Exchange may list long-term Index options that expire from 12 to 36 months from listing based on the full-value Index or a reduced-value Index that will be computed at one-tenth of the full-value Automotive Index. Existing Exchange requirements applicable to full-value Index options will apply to full-value and reduced-value Index LEAPS.[24] The current and closing Index value for reduced-value Automotive Index LEAPS will be computed by dividing the value of the full-value Index by 10 and rounding the resulting figure to the nearest one-hundredth. For example, an Index value of 179.66 would be 17.97 for the reduced-value Index LEAPS and an Index value of 179.64 would be 17.96 for the reduced-value Index LEAPS. The reduced-value Index LEAPS will also be European-style and will be subject to the same rules that govern the trading of Index options, including sales practice rules, margin requirements and floor trading procedures. Pursuant to CBOE Rule 24.9, the strike price interval for the reduced-value Index LEAPS will be no less than $2.50 instead of $5.00.

H. Position and Exercise Limits, Margin Requirements, and Trading Halts

Exchange rules governing margin requirements,[25] position and exercise limits,[26] and trading halt procedures [27] that are applicable to the trading of narrow-based index options will apply to options traded on the Index. The proposal further provides that, for purposes of determining whether given positions in full-value and reduced-value Index LEAPS comply with applicable position and exercise limits, positions in full-value and reduced-value Index LEAPS will be aggregated with positions in the regular Index options. For these purposes, ten reduced-value contracts will equal one full-value contract.

I. Surveillance

Surveillance procedures currently used to monitor trading in each of the Exchange's other index options will also be used to monitor trading in regular Index options and in full-value and reduced-value Index LEAPS. These procedures include complete access to trading activity in the shares of the securities comprising the Index. Further, the Intermarket Surveillance Group Agreement will be applicable to the trading of options on the Index.[28]

III. Findings and Conclusions

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6(b)(5).[29] Specifically, the Commission finds that the trading of Automotive Index options, including full-value and reduced-value Index LEAPS, will serve to promote the public interest and help to remove impediments to a free and open securities market by providing investors with a means of hedging exposure to market risk associated with the automotive industry.[30] The trading of options on the Automotive Index, including full-value and reduced-value Index LEAPS, however, raises several issues related to index design, customer protection, surveillance, and market impact. The Commission believes, for the reasons discussed below, that the CBOE has adequately addressed these issues.

A. Index Design and Structure

The Commission finds that the Automotive Index is a narrow-based index, because it is only composed of ten stocks, all of which are within the automotive industry. The Commission also finds that the reduced-value Automotive Index is also narrow-based because it is composed of same component securities as the Automotive Index and merely dividing the Index value by ten will not alter that basic character of the Index. Accordingly the Commission believes it is appropriate for the CBOE to apply its rules governing narrow-based index options to trading in the Index options and Index LEAPS.[31]

The Commission also finds that the large capitalizations, liquid markets, and relative weightings of the individual securities comprising the Index minimize the potential for manipulation of the Index. First, the securities comprising the Index are actively traded, with an average daily trading volume for all components for the period from February 1, 1995 through July 31, 1995, of approximately 10.91 million shares per day. Second, the market capitalizations of the components of the Index are large, ranging from a high of $36.4 billion to a low of $2.3 billion as of July 31, 1995, with the mean and median being $11.23 billion and $4.74 billion, respectively. Third, although the Index is composed of only 10 securities, no particular component security or group of securities dominates the Index. Specifically, as of June 16, 1995, no component security contained in the Index accounted for more than 20% of

[24] See CBOE Rule 24.9(b).

[25] Pursuant to CBOE Rule 24.11, the margin requirements for the Index options will be: (1) For short options positions, 100 percent of the current market value of the options contract plus 20 percent of the underlying aggregate Index value, less any out-of-the-money amount, with a minimum requirement of the options premium plus 10 percent of the underlying Index value; and (2) for long options positions, 100 percent of the options premium paid.

[26] Pursuant to CBOE Rules 24.4A and 24.5, respectively, the position and exercise limits for the Index options will be 9,000 contracts, unless the Exchange determines, pursuant to such rules, that a lower limit is warranted.

[27] Pursuant to CBOE rule 24.7, the trading on the CBOE of Index options and Index LEAPS may be halted or suspended whenever trading in component securities whose weighted value represents more than 20 percent of the Index value are halted or suspended.

[28] The Intermarket Surveillance Group (''ISG'') was formed on July 14, 1983 to, among other things, coordinate more effectively surveillance and investigative information sharing arrangements in the stock and options markets. See Intermarket Surveillance Group Agreement, July 14, 1983. The most recent amendment to the ISG Agreement, which incorporates the original agreement and all amendments made thereafter, was signed by ISG members on January 29, 1990. *See* Second amendment to the Intermarket Surveillance Group Agreement, January 29, 1990. The members of the ISG are: the Amex; the Boston Stock Exchange, Inc.; the CBOE; the Chicago Stock Exchange, Inc.; the National Association of Securities Dealers, Inc. (''NASD''); the NYSE; the Pacific Stock Exchange, Inc.; and the Philadelphia Stock Exchange, Inc. Because of potential opportunities for trading abuses involving stock index futures, stock options, and the underlying stock and the need for greater sharing of surveillance information for these potential intermarket trading abuses, the major stock index futures exchanges (*e.g.,* the Chicago Mercantile Exchange and the Chicago Board of Trade) joined the ISG as affiliate members in 1990.

[29] 15 U.S.C. 78f(b)(5).

[30] Pursuant to Section 6(b)(5) of the Act, the Commission must predicate approval of any new option proposal upon a finding that the introduction of such new derivative instrument is in the public interest. Such a finding would be difficult for a derivative instrument that served no hedging or other economic function because any benefits that might be derived by market participants likely would be outweighed by the potential for manipulation, diminished public confidence in the integrity of the markets, and other valid regulatory concerns. In this regard, the trading of listed Index options and full-value and reduced-value Index LEAPS will provide investors with a hedging vehicle that should reflect the overall movement of automotive industry securities.

[31] See *supra* Section II.H.

the Index's total value and the five highest weighted securities in the Index accounted for 68.33% of the Index's value.

Fourth, the proposed maintenance criteria will serve to ensure that: (1) The Index remains composed substantially of liquid, highly capitalized securities; and (2) the Index is not dominated by any one security that does not satisfy the Exchange's options listing criteria. Specifically, in considering changes to the composition of the Index, 90% of the weight of the Index and 80% of the number of components in the Index must comply with the listing criteria for standardized options trading set forth in CBOE Rule 5.3 (for securities that are not then the subject of standardized options trading) and CBOE Rule 5.4 (for securities that are then the subject of standardized options trading).[32] Additionally, the CBOE is required to review the composition of the Index at least quarterly to ensure that the Index continues to meet this 90%/80% criterion.

The CBOE will promptly notify the Commission staff at any time that the CBOE determines that the Index fails to satisfy any of the above maintenance criteria. Further, in such an event, the Exchange will not open for trading any additional series of Index options or Index LEAPS unless the Exchange determines that such failure is not significant, and the Commission staff affirmatively concurs in that determination, or unless the Commission specifically approves the continued listing of that class of Index options or Index LEAPS pursuant to a proposal filed in accordance with Section 19(b) of the Act.

For the above reasons, the Commission believes that these criteria minimize the potential for manipulation of the Index and eliminate domination concerns.

B. Customer Protection

The Commission believes that a regulatory system designed to protect public customers must be in place before the trading of sophisticated financial instruments, such as Automotive Index options, including full-value and reduced-value Automotive Index LEAPS, can commence on a national securities exchange. The Commission notes that the trading of standardized exchange-traded options occurs in an environment that is designed to ensure, among other things, that: (1) The special risks of options are disclosed to public customers; (2) only investors capable of evaluating and bearing the risks of options trading are engaged in such trading; and (3) special compliance procedures are applicable to options accounts. Accordingly, because the Index options and Index LEAPS will be subject to the same regulatory regime as the other standardized index options currently traded on the CBOE, the Commission believes that adequate safeguards are in place to ensure the protection of investors in Automotive Index options and full-value and reduced-value Automotive Index LEAPS.

C. Surveillance

The Commission believes that a surveillance sharing agreement between an exchange proposing to list a stock index derivative product and the exchange(s) trading the stocks underlying the derivative product is an important measure for surveillance of the derivative and underlying securities markets. Such agreements ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses, thereby making the stock index product less readily susceptible to manipulation.[33] In this regard, the Commission notes that the NYSE, which currently is the primary market for all of the Index's component securities, is a member of the ISG.[34] The Commission believes that this arrangement ensures the availability of information necessary to detect and deter potential manipulations and other trading abuses, thereby making the Index options and full-value and reduced-value Index LEAPS less readily susceptible to manipulation.[35]

D. Market Impact

The Commission believes that the listing and trading on the CBOE of Automotive Index options, including full-value and reduced-value Index LEAPS, will not adversely impact the markets for the securities contained in the Index.[36] First, because of the ''modified equal-dollar-weighting'' formula described above, no one security or group of securities represented in the Index will dominate the weight of the Index immediately following a quarterly re-balancing. Second, the maintenance criteria for the Index ensure that the Index will be substantially comprised of securities that satisfy the Exchange's listing standards for standardized options trading. Third, because the securities comprising the Index must be ''reported securities'' as defined in Rule 11Aa3–1 of the Act, the components of the Index generally will be actively-traded and highly-capitalized. Fourth, the 9,000 contract position and exercise limits applicable to Index options and Index LEAPS will serve to minimize potential manipulation and market impact concerns.

Lastly, the Commission believes that settling expiring Automotive Index options, including full-value and reduced-value Index LEAPS, based on the opening prices of the component securities is consistent with the Act.

The Commission finds good cause for approving Amendment No. 1 to the proposal prior to the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. Specifically, Amendment No. 1 provides objective maintenance criteria which, for the reasons stated above, minimize the potential for manipulation of the Index and the securities comprising the Index. Further, as discussed above, the Commission believes that these maintenance criteria significantly strengthen the customer protection and surveillance aspects of the proposal, as originally proposed.[37]

Based on the above, the Commission finds good cause for approving Amendment No. 1 to the proposed rule change on an accelerated basis and believes that the proposal, as amended, is consistent with sections 6(b)(5) and 19(b)(2) of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1. 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

[32] Additionally, the securities contained in the Index must be ''reported'' securities and must be traded on the Amex or the NYSE or must be Nasdaq/NM securities. See also *supra* notes 9–15 and accompanying text discussing certain requirements involving changes in the Index.

[33] See Securities Exchange Act Release No. 31243 (September 28, 1992), 57 FR 45849 (October 5, 1992).

[34] See *supra* 28.

[35] See *e.q.*, Securities Exchange Act Release No. 31243 (September 28, 1992), 57 FR 45849 (October 5, 1992) (order approving the listing of index options and index LEAPS on the CBOE Biotech Index).

[36] In addition, the CBOE has represented that the CBOE and the OPRA have the necessary systems capacity to support those new series of index options that would result from the introduction of Index options and Index LEAPS. See Memorandum from Joe Corrigan, Executive Director, OPRA, to William Speth, CBOE, dated August 30, 1995.

[37] See *supra* note III.A.

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to the File Number SR–CBOE–95–51 and should be submitted by January 19, 1996.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[38] that the proposed rule change (SR–CBOE–95–51), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[39]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31506 Filed 12–28–95; 8:45 am]

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[Release No. 34–36622; File No. SR–PSE–95–27]

Self-Regulatory Organizations; Pacific Stock Exchange, Incorporated; Order Granting Approval to Proposed Rule Change Relating to the Amendment of Its Minor Rule Plan To Include Certain Rules on Financial Reporting and Cooperation in Exchange Investigations and the Establishment of a Charge for the Late Filing of Periodic FOCUS Reports

December 21, 1995.

On October 17, 1995, the Pacific Stock Exchange, Incorporated (''PSE'' or ''Exchange'') submitted to the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its Minor Rule Plan to include certain rules on financial reporting and cooperation in Exchange investigations and to establish an administrative charge for the late filing of quarterly FOCUS Reports.

The proposed rule change was published for comment in Securities Exchange Act Release No. 36474 (November 9, 1995), 60 FR 57611 (November 16, 1995). No comments were received on the proposal.

The Exchange's Minor Rule Plan (''MRP''), set forth in PSE Rule 10.13, provides that the Exchange may impose a fine not to exceed $5,000 on any member, member organization, or person associated with a member or member organization, for any violation of an Exchange rule that has been deemed to be minor in nature and approved by the Commission for inclusion in the MRP. PSE Rule 10.13, subsections (h)–(j), sets forth the specific Exchange rules deemed to be minor in nature.

The Exchange is proposing to add the following provision to the MRP as PSE Rule 10.13(j)(5): ''Failure to file a financial report or financial information in the type, form, manner and time prescribed by the Exchange. (Rule 2.12(a)).''[3] The Exchange is also proposing to amend its Recommended Fine Schedule for rules listed in the MRP to establish the following recommended fines for violations of PSE Rule 2.12(a): $100 for a first-time violation; $250 for a second-time violation; and $500 for a third-time violation.[4]

The Exchange is also proposing to add the following provision to the MRP as PSE Rule 10.13(j)(6): ''Delaying, impeding or failing to cooperate in an Exchange investigation. (Rule 10.2(b)).'' The Exchange is also proposing to amend its Recommended Fine Schedule for rules listed in the MRP to establish the following recommended fines for violations of PSE Rule 10.2(b): $100 for a first-time violation; $250 for a second-time violation; and $500 for a third-time violation.

In addition, the Exchange is proposing to amend PSE Rule 2.12(b)(1) to establish an administrative charge for member organizations that are late in filing their periodic FOCUS Reports with the Exchange.[5] The proposed rule change would add a reference to Rule 17a–5 to the text of PSE Rule 2.12(b)(1), making the late filing of periodic FOCUS Reports subject to the same ''late charge'' schedule that currently applies to the late filing of annual FOCUS Reports required by Rule 17a–10 under the Act.[6]

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b).[7] In particular, the Commission believes the proposal is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public, and with the Section 6(b)(6) requirement that the rules of an exchange provide that its members be appropriately disciplined for violations of an exchange's rules and the Act.

Specifically, the Commission believes that adding the above-listed provisions to the Exchange's MRP is consistent with Sections 6(b)(5) and 6(b)(6) in that the purpose of the Exchange's MRP is to provide for a response to a violation of Exchange rules when a meaningful sanction is needed, but when initiation of a formal disciplinary proceeding pursuant to PSE Rule 10.3[8] is not suitable because such a proceeding would be more costly and time-consuming than would be warranted

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[38] 15 U.S.C. 78s(b)(2).

[39] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] PSE Rule 2.12(a) states: ''Every member organization which is not a member of another national securities exchange or registered national securities association which is the Designated Examining Authority for that member organization shall file with the Exchange answers to Financial Questionnaires, Reports of Income and Expenses and additional financial information in the type, form, manner and time prescribed by the Exchange.''

The Exchange stated that Rule 2.12(a) does not encompass the filing with the Exchange of either periodic or annual FOCUS Reports required by SEC Rules 17a–5 or 17a–10. Telephone conversation between Michael D. Pierson, Senior Attorney, PSE, and Jon Kroeper, Attorney, SEC, on December 19, 1995.

[4] For a discussion of the Exchange's Recommended Fine Schedule, see Securities Exchange Act Release No. 34322 (July 6, 1994), 59 FR 35958 (July 14, 1994).

[5] The Exchange's Plan filed pursuant to Rule 17a–5(a)(4) under the Act requires PSE member organizations that are not exempt from Rule 15c3–1 under the Act (''Net Capital Rule'') to file periodic FOCUS Reports with the Exchange if the PSE is their designated examining authority (''DEA''). *See* 17 CFR 240.17a–5(a)(4); Securities Exchange Act Release No. 11935 (December 17, 1975), 40 FR 59706 (December 30, 1975) (order approving the PSE's Plan pursuant to Rule 17a–5). In 1993, the SEC approved certain changes to the Net Capital Rule, including the elimination of an exemption for certain equity exchange specialists, effective as of April 1, 1994. *See* Securities Exchange Act Release No. 32737 (August 11, 1993), 58 FR 43555 (August 17, 1993). Consequently, as of April 1, 1994, a number of Exchange specialists became obligated to file FOCUS reports with the Exchange. Prior to April 1994, no PSE member organizations were required to file such reports with the Exchange.

[6] 17 CFR 240.17a–10. The current ''late charge'' schedule found in PSE Rule 2.12(b)(1) is as follows: 1–30 days later—$200; 31–60 days late—$400; 61–90 days late—$800. Any failure to file an annual FOCUS Report longer than 90 days is referred to the Ethics and Business Conduct Committee for appropriate disciplinary action.

[7] 15 U.S.C. 78f(b).

[8] PSE Rule 10.3 governs the initiation of formal disciplinary proceedings by the Exchange for violations within the disciplinary jurisdiction of the Exchange

given the nature of the violation.[9] PSE Rule 10.13 provides for an appropriate response to minor violations of certain Exchange rules while preserving the due process rights of the party accused through specified required procedures.[10]

Moreover, the Commission finds that violations of the provisions being added to the MRP are objective and technical in nature, and easily verifiable, thereby lending themselves to the use of expedited proceedings. Noncompliance with the provisions may be determined objectively and adjudicated quickly without the complicated factual and interpretive inquiries associated with more sophisticated Exchange disciplinary proceedings. If, however, the Exchange determines that a violation of one of these rules is not minor in nature, the Exchange retains the discretion to initiate full disciplinary proceedings in accordance with Exchange Rule 10.3.

The Commission also believes that the establishment of an administrative charge for the late filing of periodic FOCUS Reports is consistent with Section 6(b)(1) of the Act in that it will enhance the Exchange's ability to enforce compliance with Rule 17a-5 under the Act and the rules of the Exchange by providing the PSE with a standardized response to such instances and members with a clear incentive to file their periodic FOCUS Reports on a timely basis.

Finally, the Commission finds that, consistent with Section 6(b)(6), the imposition of both the recommended fines for the above-listed additions to the MRP and an administrative charge for the late filing of periodic FOCUS Reports should result in appropriate discipline of members, in a manner that is proportionate to the nature of such violations. The Commission, however, expects the PSE to bring full disciplinary proceedings in appropriate cases involving the additions to the MRP and the late filing of periodic FOCUS Reports (*e.g.*, in cases where the violation is egregious or where there is a history or pattern of repeated violations).

[9] The inclusion of a rule in an exchange's minor rule plan should not be interpreted to mean that it is not an important rule. On the contrary, the Commission recognizes that the inclusion of minor violations of particular rules under a minor rule violation plan may make the exchange's disciplinary system more efficient in prosecuting more egregious and/or repeated violations of these rules, thereby furthering its mandates to protect investors and the public interest.

[10] The MRP permits any person to contest the Exchange's imposition of a fine through submission of a written answer, at which time the matter will become a formal disciplinary proceeding.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change (SR–PSE–95–27) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31507 Filed 12–28–95;8:45 am]

BILLING CODE 8010–01–M

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

[Release No. 34–36629; International Series Release No. 909; File No. SR–NYSE–95–29]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendments No. 1 and 2 Relating to the Specifications and Content Outline for the Canadian Module of the General Securities Registered Representative Examination (Series 37 and Series 38)

December 21, 1995.

I. Introduction

On September 18, 1995, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') submitted to the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt a Canadian module of the General Securities Registered Representative Examination.

The proposed rule change was published for comment in the Federal Register on October 23, 1995.[3] No comments were received on the proposal. Amendment No. 1[4] was filed on November 2, 1995. Amendment No. 2[5] was filed on December 19, 1995. This order approves the proposal, including Amendments No. 1 and 2 on an accelerated basis.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 36378 (Oct. 16, 1995), 60 FR 54401.

[4] Amendment No. 1 confirmed that the Exchange has procedures in place that ensure the module remains current in view of industry changes in the United States as well as Canada, and it assigned separate series numbers to the two examinations contained in the module. See Letter dated November 1, 1995, from James E. Buck, Senior Vice President and Secretary, NYSE, to Glen Barrentine, Team Leader, SEC.

[5] Amendment No. 2 broadened the scope of the module slightly by adding some subtopics to it. See letter dated December 15, 1995, from James E. Buck, Senior Vice President and Secretary, NYSE, to Glen Barrentine, Team Leader, SEC.

II. Description of the Proposal

Presently, registered representatives who are already qualified to conduct business in Canada and who wish to sell securities in the United States must qualify as registered representatives in the U.S. by successfully completing the General Securities Registered Representative Examination (Series 7). In an effort to reduce redundant qualification requirements, the Exchange has developed a Canadian module of the Series 7 which consists of two examinations, the Series 37 and the Series 38. As a subset of the Series 7, these examinations cover subject matter that is not covered, or is not covered in sufficient detail, on the Canadian qualification examinations. The Series 37 is for Canadian registered representatives who hold the additional Canadian license to sell options. This examination contains only 45 questions because it excludes questions pertaining to options. All other Canadian registered representatives must pass the Series 38. This is a 90 question examination that includes questions concerning options.

To become registered with the Exchange, qualified Canadian registered representatives in good standing with the Canadian securities authorities would be required to obtain a passing score on one of the two examinations contained in the Canadian module. Canadian representatives seeking to sell municipal securities, however, would be required to pass either the standard Series 7 or a combination of the applicable Canadian module examination and the Series 52 (Municipal Securities Representative Examination).

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b)(5) and Section 6(c)(3)(B).[6]

The Commission believes the proposal is consistent with Section 6(b)(5)[7] because it is designed to perfect the mechanism of a free and open market. The Canadian module of the series 7 reduces duplicative qualification requirements and, at the same time, allows the Exchange to ensure that the Canadian representatives wishing to become registered with the Exchange are fully qualified. In addition, U.S. representatives currently receive substantially reciprocal

[6] 15 U.S.C. 78f(b)(5) and 78f(c)(3)(B).

[7] 15 U.S.C. 78f(b)(5).

treatment from the Canadian securities authorities, thus easing their access to the Canadian market.[8]

The Commission also believes the proposal is consistent with Section 6(c)(3)(B)[9] because it establishes standards of training, experience, and competence for persons associated with Exchange members and member organizations. The Canadian module should provide comprehensive coverage of the topics contained in the Series 7 that are not covered, or are not covered in sufficient detail, in the Canadian qualification examinations. Accordingly, the Canadian module, along with the Canadian qualification examinations, should adequately measure the Canadian representatives' knowledge of U.S. securities laws, markets, investment products, and sales practices.

The Commission finds good cause for approving proposed Amendments No. 1 and 2 prior to the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. Amendment No. 1 confirmed that the Exchange has procedures in place that ensure the module remains current in view of industry changes in the United States as well as Canada, and it assigned separate series numbers to the two examinations contained in the module. Amendment No. 2 broadened the scope of the Canadian module slightly to ensure that it is sufficient to measure Canadian registered representatives' knowledge of U.S. securities laws, markets, investment products, and sales practices. Although Amendment No. 2 added a few subtopics, the general scope of the module did not change. For these reasons, the Commission finds good cause for accelerating approval of Amendments No. 1 and 2.

Interested persons are invited to submit written data, views, and arguments concerning Amendments No. 1 and 2 to the proposed rule change. 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 Amendments No. 1 and 2 between the Commission and any persons, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth street, N.W., Washington, D.C. 20549. Copies of such filing also will be available at the principal office of the NYSE. All submissions should refer to File No. SR–NYSE–95–29 and should be submitted by January 19, 1996.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–NYSE–95–29), including Amendments No. 1 and 2 on an accelerated basis, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31508 Filed 12–28–95; 8:45 am]

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[8] The Canadian Securities Institute, in conjunction with the Investment Dealers Association of Canada, developed the New Entrants Exam. The New Entrants Exam is a shortened examination module for U.S. qualified registered representatives seeking to conduct business with Canadian citizens.

[9] 15 U.S.C. 78f(c)(3)(B).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

[Release No. 34–36633; File No. SR–Amex–95–51]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange, Inc. Relating to the Use of Automated Telephone Voting Systems by Member Organizations or Their Proxy Agents

December 22, 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 13, 1995, the American Stock Exchange, Inc. (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. On December 15, 1995, the Exchange submitted Amendment No. 1 to the proposed rule change.[1] 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 Exchange is proposing to amend Rule 577 and Section 723 of the Company Guide to permit the use of automated telephone voting systems by member organizations or their proxy agents.

The proposed rule change would amend Amex Rule 577 and Section 723 of the Amex Company Guide by adding the following text:

Instructions from beneficial owners may also be accepted by member organizations or their agents through the use of an automated telephone voting system which has been approved by the Exchange. Such a system shall utilize an identification code for beneficial owners and provide an opportunity for beneficial owners to validate votes to ensure that they were received correctly. The automated system must provide beneficial owners with the same power and authority to issue, revoke, or otherwise change voting instructions as currently exists for instructions communicated in written form. Records of voting including the date of receipt of instructions and the name of the recipient must be retained by the member organizations or their agents.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of an basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A. B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Exchange Rules 575 through 585 specify the manner in which an Exchange member organization must transmit proxy materials to customers who are the beneficial owners of securities held of record by the member organization. The voting process which is currently used by member organizations (or their proxy agents) provides for the transmission of a proxy statement and voting authorization form to beneficial owners. The appropriate voting selections are indicated on the form by the beneficial owner and mailed

[1] See Letter from Claudia Crowley, Special Counsel, Amex, to Glen Barrentine, Team Leader, Division of Market Regulation, SEC, dated December 14, 1995. Amendment No. 1 clarifies that the Exchange is filing its proposed rule change pursuant to Rule 19b–4(e)(6) as a ''non-controversial'' rule change and makes appropriate changes to the Form 19b–4. See infra note 3 for further description of Amendment No. 1.

back to the members organization or its agent. Beneficial owners presently also have the option of providing oral voting instructions to the member organization.

The New York Stock Exchange (''NYSE'') recently amended its rules to permit member organizations or their proxy agents to use automated telephone voting systems to receive voting instructions from beneficial owners.[2] Such systems permit beneficial owners to give voting instructions on appropriate corporate proposals through a touch tone telephone, which utilizes identification codes and provides a validation opportunity to confirm that the voting instructions were received correctly. This type of system is deemed to be less prone to tabulation error than the current system.

To provide member organizations and beneficial owners of securities with consistent industry procedures (which in turn are more efficient and cost effective) the Exchange is proposing to conform its rules to those of the NYSE by amending Rule 577 and Section 723 of the Company Guide to permit the use of automated telephone voting systems by member organizations and their proxy agents. Beneficial owners will be informed of the new voting option by specific language at the top of the voting form.[3] However, the use of such systems will not be mandatory, and beneficial owners will still have the option to vote in writing using the voting authorization form.

The proposed rule change provides that only those automated telephone systems which have received Exchange approval may be used by member organizations or their proxy agents, and specifies that the Exchange may only approve an automated system if it provides an identification code for beneficial owners as well as an opportunity for beneficial owners to validate instructions to ensure that they were received correctly. In addition, the automated system must provide beneficial owners with the same power and authority to issue, revoke, or otherwise change voting instructions as currently exists for instructions communicated in written form. Further, member organizations or their agents utilizing this method must maintain records of voting, including the date of receipt of the instructions and the name of the recipient.

Initially, the Exchange anticipates approving only the Automatic Data Processing Brokerage Information Services Group (''ADP''), which is also the only system currently approved by the NYSE. As is the case with the NYSE, the Exchange will consult with the Commission Staff prior to approving any additional system(s) and will only approve such system(s) if the Commission Staff believes that it operates in a manner consistent with Section 14(a) of the Act and the rules and regulations thereunder.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; (3) does not become operative for 30 days from December 13, 1995, the date on which it was filed, and the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(e)(6) thereunder.[4]

At any time within 60 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, 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 at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Amex-95-51 and should be submitted by January 19, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–31509 Filed 12–28–95; 8:45 am]

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[2] See Securities Exchange Act Release No. 36040 (July 31, 1995), 60 FR 40215 (Aug. 7, 1995) (File No. SR–NYSE–95–15).

[3] The following language, which is also in use by the NYSE, will be used: ''As an alternative to completing this form, you may enter your vote instructions by telephone. Call toll free 1–800–454–8683 and follow the simple instructions.'' In Amendment No. 1, the Exchange clarifies that if the specific language in the voting form to inform beneficial owners of the new telephone voting option is changed in any manner, the Exchange will contact the Commission and receive approval before using the new language.

[4] 17 CFR 240.19b-4(e)(6).

SOCIAL SECURITY ADMINISTRATION

Agency Forms Submitted to the Office of Management and Budget for Clearance

Normally on Fridays, the Social Security Administration publishes a list of information collection packages that will require submission to the Office of Management and Budget (OMB) for clearance in compliance with Public Law 96–511, as amended (Pub. L. 104–13 effective October 1, 1995), The Paperwork Reduction Act. Since the last list was published in the Federal

Register on December 22, 1995, the information collections listed below have been proposed or will require extension of the current OMB approval.

(Call the SSA Reports Clearance Officer on (410) 965–4142 for a copy of the form(s) or package(s), or write to the SSA Reports Clearance Officer at the address listed after the information collections.)

1. Coverage of Employees of State and Local Governments, F–20–404M. The information collected in accordance with this regulation is obtained from State governments (or interstate instrumentalities) desiring to obtain Social Security coverage for their employees. The respondents are State governments.

Number of Respondents: 52.

Frequency of Response: 6.

Average Burden Per Response: 1 hour.

Estimated Annual Burden: 312 hours.

2. Plans for Achieving Self-Support—0960–NEW. The information is collected when a Supplemental Security Income (SSI) recipient desires to use available income and resources to obtain education and/or training in order to become self-supportive. The information is used to evaluate the recipient's plan for achieving self-support to determine whether the plan may be approved. The respondents are SSI recipients.

Number of Respondents: 5,500.

Frequency of Response: 1.

Average Burden Per Response: 20 minutes.

Estimated Annual Burden; 1,833 hours.

Written comments and recommendations regarding these information collections should be sent within 60 days from the date of this publication directly to the SSA Reports Clearance Officer at the following address: Social Security Administration, DCFAM, Attn: Charlotte S. Whitenight, 6401 Security Blvd., 1–A–21 Operations Bldg., Baltimore, MD 21235.

In addition to your comments on the accuracy of the agency's burden estimate, we are soliciting comments on the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology.

Dated: December 22, 1995.

Charlotte Whitenight,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 95–31488 Filed 12–28–95; 8:45 am]

BILLING CODE 4190–29–P

DEPARTMENT OF TRANSPORTATION

Office of The Secretary

[Order 95–12–37; Docket OST–95–771]

Application of Laker Airways, Inc. for Certificate Authority

AGENCY: Department of Transportation.

ACTION: Notice of order to show cause.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Laker Airways, Inc., fit, willing, and able, and awarding it a certificate of public convenience and necessity to engage in interstate scheduled air transportation of persons, property, and mail.

DATES: Persons wishing to file objections should do so no later than January 8, 1996.

ADDRESSES: Objections and answers to objections should be filed in Docket OST–95–771 and addressed to the Documentary Services Division (C–55, Room PL–401), U.S. Department of Transportation, 400 Seventh Street SW., Washington, DC 20590 and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Ms. Carol A. Woods, Air Carrier Fitness Division (X–56, Room 6401), U.S. Department of Transportation, 400 Seventh Street SW., Washington, DC 20590, (202) 366–2340.

Dated: December 22, 1995.

Mark L. Gerchick,

Acting Assistant Secretary for Aviation and International Affairs.

[FR Doc. 95–31476 Filed 12–28–95; 8:45 am]

BILLING CODE 4910–62–M

DEPARTMENT OF THE TREASURY

Fiscal Service

Coupons Under Book-Entry Safekeeping (CUBES)

AGENCY: Bureau of the Public Debt, Fiscal Service, Treasury.

ACTION: Notice.

SUMMARY: This notice is being published to announce the reopening by the Department of the Treasury of its Coupons Under Book-Entry Safekeeping (CUBES) program, to permit the conversion of certain physical coupons detached from U.S. Treasury bonds to book-entry form in the commercial book-entry system. With the reopening of the conversion window under CUBES, depository institutions holding eligible coupons will have the opportunity, during the period from March 4, 1996, to and including August 30, 1996, to convert such coupons to book-entry form. Other entities wishing to convert stripped coupons must arrange to do so through a depository institution.

DATES: March 4, 1996, through August 30, 1996, as described below.

FOR FURTHER INFORMATION CONTACT: Maureen Parker, Director, Division of Securities Systems, Bureau of the Public Debt, Parkersburg, West Virginia, 26106–1328, (304) 480–7761.

SUPPLEMENTARY INFORMATION: The CUBES regulations permit reopenings of the CUBES window for conversion to book-entry form of detached, physical coupons. 31 CFR Part 358.0(c) provides, in part, that notice of time periods for conversion, as well as coupons eligible for conversion and applicable fees, will be published in the Federal Register two months prior to the date coupons may be presented. Accordingly, pursuant to that authority, Treasury will reopen the window for conversion under its CUBES program beginning March 4, 1996, and ending close of business August 30, 1996. Under the program, depository institutions holding coupons stripped from Treasury securities will be permitted to convert them to book-entry form. Entities other than depository institutions which hold stripped Treasury coupons and which wish to convert them to book-entry accounts under the CUBES program must arrange for such conversion through a depository institution.

Only Treasury coupons stripped before the date of this notice, and with payment dates on or after February 15, 1997, will be eligible for conversion, excluding those having payment dates during a callable period.

Presentation of coupons under the reopened CUBES window may be made only at the Federal Reserve Bank of New York (FRBNY) and in compliance with the presentation procedures established by FRBNY. Submissions of coupons are subject to the terms and conditions described in Appendix A of Part 358, except insofar as the terms and conditions are modified by the regulations, the provisions of this notice, or the procedures issued by the FRBNY related to the conversion.

Physical coupons submitted for the CUBES program will be subject to rejection and book-entry CUBES balances established as a result of the submission of coupons will be subject to adjustment until the submission has been verified and approved by Treasury. This verification and approval will be

completed by Treasury within twelve (12) business days following deposit by FRBNY of the coupons into the designated accounts. Such verification and approval by Treasury are final determinations.

The CUBES program will offer on-line trading of CUBES balances between depository institutions. However, the submitting institution is prohibited from trading any CUBES balance resulting from the submission of coupons under this notice prior to the Treasury verification of the submission and approval of the resulting CUBES balances.

If, as a result of verification, Treasury determines that an adjustment is necessary to one or more CUBES balances for the submitting institution, the institution will be notified. If a CUBES balance is insufficient for a reduction adjustment to be processed, the submitting institution is responsible for immediately acquiring such CUBES balance as is necessary to allow the adjustments to be made.

The value of all coupons submitted to FRBNY on the same date with the same delivery instructions and for the same payment date will be rounded down to the next lowest full dollar amount since on-line trading is done only in full dollar amounts. For example, on March 18, Institution A submits coupons for a variety of customers or accounts and directs that the CUBES balances be established in its trust account (or similar subaccount). The total of the coupon value with this delivery instruction for payment date 8/15/01 is $44,356.87. The total of the value for payment date 11/15/01 is 56,002.13. The submitting institution will receive in its trust account an 8/15/01 CUBES balance of $44,356.00 and an 11/15/01 CUBES balance of $56,002.00.

Book-entry transfers of CUBES will be subject to the same fee schedule applicable for the transfer of other on-line Treasury book-entry securities.

Once stripped coupons have been converted to CUBES, their reconversion to physical form will not be permitted. The principal (corpus) securities from which the interest coupons have been stripped will not be accepted in CUBES.

A depository institution wishing to participate in CUBES should contact Grace Jaiman (212) 720–8183 or Joanna Grever (212) 720–8184 of FRBNY as soon as possible to obtain an information package and the necessary supplies required to present the stripped coupons in acceptable form. The institution should inform the FRBNY of its intention to participate as soon as possible, but no later than two weeks before deposit, and should submit a completed holdings statement on the form provided in the information package.

Participants will be charged a participation fee of $4 per coupon for conversion to book-entry. Participants will also bear the full cost and risk associated with both the delivery of the coupons to the FRBNY and any returns that may be necessary if the stated presentation procedures are not followed.

Submitters of coupons are deemed to agree to the terms and conditions set forth in this notice, 31 CFR Part 358, including Appendix A, and any other requirements that may be prescribed by the Department of the Treasury and the FRBNY.

Dated: December 22, 1995.

Richard L. Gregg,

Commissioner, Bureau of the Public Debt.

[FR Doc. 95–31462 Filed 12–28–95; 8:45 am]

BILLING CODE 4810–35–P

[Dept. Circ. 570, 1995 Rev., Supp. No. 6]

Surety Companies Acceptable on Federal Bonds; Providence Washington Insurance Company

A Certificate of Authority as an acceptable surety on Federal Bonds is hereby issued to the following company under Sections 9304 to 9308, Title 31, of the United States Code, effective December 4, 1995. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 1995 Revision, on page 34446 to reflect this addition:

Providence Washington Insurance Company. BUSINESS ADDRESS: P.O. Box 518, Providence, RI 02901–0518. PHONE: (401) 453–7000. UNDERWRITING LIMITATION *b*/: $5,445,000. SURETY LICENSES *c*/: AL, AK, AZ, AR, CA, CO, CT, DE, DC, FL, GA, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, VT, WA, WV, WI, WY. INCORPORATED IN: Rhode Island.

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR, Part 223). A list of qualified companies is published annually as of July 1 in Treasury Department Circular 570, with details as to underwriting limitations, areas in which licensed to transact surety business and other information.

Copies of the Circular may be obtained by calling the U.S. Department of the Treasury, Financial Management Service, computerized public bulletin board system (FMS Inside Line) at (202) 874–6817/7034/6953/6872 or by purchasing a hard copy from the Government Printing Office (GPO), Washington, DC, telephone (202) 874–0132. When ordering the Circular from GPO, use the following stock number: 048–000–00489–0.

For further assistance, contact the U.S. Department of the Treasury, Financial Management Service, Funds Management Division, Surety Bond Branch, 3700 East-West Highway, Room 6F04, Hyattsville, MD 20782, telephone (202) 874–7102.

Dated: December 19, 1995.

Charles F. Schwan III,

Director, Funds Management Division, Financial Management Service.

[FR Doc. 95–31486 Filed 12–28–95; 8:45 am]

BILLING CODE 4810–35–M

[Dept. Circ. 570, 1995—Rev., Supp. No. 5]

Surety Companies Acceptable on Federal Bonds, Termination of Authority; The American Road Insurance Company

Notice is hereby given that the Certificate of Authority issued by the Treasury to the American Road Insurance Company, of Dearborn, Michigan, under the United States Code, Title 31, Sections 9304–9308, to qualify as an acceptable surety on Federal bonds is terminated effective November 17, 1995.

The Company was last listed as an acceptable surety on Federal bonds at 60 FR 34437, June 30, 1995.

With respect to any bonds currently in force with the American Road Insurance Company, bond-approving officer may let such bonds run to expiration and need not secure new bonds. However, no new bonds should be accepted from the Company. In addition, bonds that are continuous in nature should not be renewed.

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Funds Management Division, Surety Bond Branch, 3700 East-West Highway, Room 6F04, Hyattsville, MD 20872, telephone (202/FTS) 874–6765.

Dated: December 18, 1995.

Charles F. Schwan III,

Director, Funds Management Division, Financial Management Service.

[FR Doc. 95–31487 Filed 12–28–95; 8:45 am]

BILLING CODE 4810–35–M

Internal Revenue Service

Information Reporting Program Advisory Committee; Meeting

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Rescheduled Open Meeting of the Information Reporting Program Advisory Committee (IRPAC).

SUMMARY: In 1991 the IRS established the Information Reporting Program Advisory Committee. The primary purpose of IRPAC is to provide an organized public forum for discussion of relevant information reporting issues between the officials of the IRS and representatives of the payer community. IRPAC offers constructive observations about current or proposed policies, programs, and procedures and, when necessary, suggests ways to improve the operation of the Information Reporting Program.

The meeting previously scheduled for November 14 & 15, which was canceled because of the Government-wide furlough, has been rescheduled for Wednesday and Thursday, January 31 and February 1, 1996. The meeting will be held in Room 3313 of the Internal Revenue Service Building. The building is located at 1111 Constitution Avenue, NW., Washington, DC. The meeting will begin at 9:30 a.m., on both days, concluding about mid-day on February 1st. Topics to be discussed are listed below along with a summarized version of the agenda.

Summarized Agenda for Meeting on January 31–February 1, 1996

Wednesday, January 31, 1996

9:30 Public Meeting Opens
11:30 Break for Lunch
1:00 IRPAC Presentations Continue
4:00 Adjourn for the Day

Thursday, February 1, 1996

9:30 Public Meeting Reconvenes
12:00 Adjourn

The topics that will be covered (in order) are as follows:

(1) Broader Usage of Form 4669
(2) Notional Principal Contracts
(3) Form 4224 Recertifications
(4) Collection of IRS Forms
(5) Investment Advisor Responsibilities
(6) Employee Tip Reporting - Revision of Form 4070
(7) Improvement in Communications with Small Business
(8) TAXLINK
(9) Reporting Requirements for Forms 5498 and 1099R
(10) Reporting Repayments by Employees
(11) Fringe Benefit Reporting on Form W–2
(12) Digital Cash
(13) Procurement Card Reporting
(14) Merchandise and Nonreportable Services
(15) Reporting Nonqualified Deferred Compensation
(16) Medical Service Provider and Sole Proprietor Education and Compliance

Note: Last minute changes to the topics under discussion are possible and could prevent advance notice.

SUPPLEMENTARY INFORMATION: IRPAC reports to the National Director, Service Center Compliance, who is the executive responsible for information reporting and is charged with its systemwide planning and improvement. IRPAC is instrumental in providing advice to enhance the IRP Program. Increasing participation by external stakeholders in the planning and improvement of the tax system will help achieve the goals of increasing voluntary compliance and reduction of burden. IRPAC is currently comprised of 20 representatives from various segments of the private sector payer community. IRPAC members are not paid for their time or services, but consistent with Federal regulations, they are reimbursed for their travel and lodging expenses to attend two meetings each year.

DATES: The meeting, which will be open to the public, will be in a room that accommodates approximately 75 people, including members of IRPAC and IRS officials. Seats are available to the public on a first-come, first-served basis. In order to get your name on the building access list, *notification of intent to attend this meeting must be made with Ms. Tommie Matthews no later than Friday, January 26, 1996. Ms. Matthews can be reached at 202–622–4215 (not a toll-free number).* Notification of intent to attend should include your name, organization and phone number. To have a copy of the agenda faxed to you, also call Ms. Matthews at the phone number shown above.

ADDRESSES: If you would like to have IRPAC consider a written statement, please write to Kate LaBuda at IRS, Office of Service Center Compliance, CP:CO:SC:P, Room 2013, 1111 Constitution Avenue, NW., Washington, DC, 20224.

FOR FURTHER INFORMATION CONTACT: To give notification of intent to attend this meeting or to request a copy of the agenda, call Ms. Tommie Matthews at 202–622–4214 (not a toll-free number). For general information about IRPAC, call Kate LaBuda at 202–622–3404 (not a toll-free number).

Dated: December 20, 1995.

Approved:

Larry Faulkner,

Director, Office of Payer Compliance, Service Center Compliance.

[FR Doc. 95–31458 Filed 12–28–95; 8:45 am]

BILLING CODE 4830–01–U

Departmental Offices; Proposed Agency Information Collection Activities; Comment, Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on an information collection that is due for renewed approval by the Office of Management and Budget. The comment period is required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Office of International Financial Analysis within the Department of the Treasury is soliciting comments concerning Treasury International Capital Forms CQ–1 and CQ–2, Financial and Commercial Liabilities to, and Claims on, Unaffiliated Foreigners.

DATES: Written comments should be received on or before February 26, 1996 to be assured of consideration.

ADDRESSES: Direct all written comments to Gary A. Lee, Manager, Treasury International Capital Reporting System, Department of the Treasury, Room 5452–A, 1500 Pennsylvania Avenue NW., Washington DC 20220.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the forms and instructions should be directed to Gary A. Lee, Manager, Treasury International Capital Reporting System, Department of the Treasury, Room 5452–A, 1500 Pennsylvania Avenue NW., Washington DC 20220, (202)622–2270.

SUPPLEMENTARY INFORMATION:

Title: Financial and Commercial Liabilities to, and Claims on, Unaffiliated Foreigners, Treasury International Capital Forms CQ–1 and CQ–2.

OMB Number: 1505–0024.

Abstract: Forms CQ–1 and CQ–2 are required by law and are designed to collect timely information on international portfolio capital

movements, including data on financial and commercial liabilities to, and claims on, unaffiliated foreigners held by nonbanking enterprises in the United States. This information is necessary for compiling the U.S. balance of payments accounts, for calculating the U.S. international investment position, and for use in formulating U.S. international financial and monetary policies.

Current Actions: No changes to reporting requirements are proposed at this time. Minor revisions to instructions will aim to clarify current reporting requirements, but will not affect current paperwork burden.

Type of Review: Extension.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 500

Estimated Average Time per Respondent: Four (4) hours per respondent per filing.

Estimated Total Annual Burden Hours: 8,000 hours, based on four reporting periods per year.

REQUEST FOR COMMENTS: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. The public is invited to submit written comments concerning: whether Forms CQ–1 and CQ–2 are necessary for the proper performance of the functions of the Office, including whether the information collected has practical uses; the accuracy of the above burden estimates; how to enhance the quality, usefulness, and clarity of the information to be collected; and how to minimize the reporting and/or recordkeeping burdens on respondents, including the use of information technologies to automate the collection of the data.

T. Ashby McCown,

Director, Office of International Financial Analysis.

[FR Doc. 95–31414 Filed 12–28–95; 8:45 am]

BILLING CODE 4810–25–M

Office of Thrift Supervision

[No. 95–202]

Organizational Structure for Senior Management

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice.

SUMMARY: Pursuant to the publication requirements of section 552 of Title 5, United States Code, the Office of Thrift Supervision (OTS) is giving notice of its new organizational structure for senior management. In 1995, the Director of the OTS implemented a senior level reorganization by establishing five offices reporting directly to him. These offices are designated as: Research and Analysis, Chief Counsel, Supervision, Administration, and External Affairs.

FOR FURTHER INFORMATION CONTACT: Evelyne Bonhomme, Counsel (Banking and Finance), (202) 906–7052, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington DC 20552.

SUPPLEMENTARY INFORMATION: Pursuant to the publication requirements of the Freedom of Information Act,[1] the OTS is giving notice of its new organizational structure for senior management. The final rule that replaced the OTS's general organization regulations with a brief overview was published in the Federal Register on Wednesday December 27, 1995.[2]

The functions of the OTS's senior management are currently defined as follows:

Director of OTS

The Director of the OTS directs and carries out the mission of the OTS, which is statutorily responsible for the regulation and supervision of all savings associations. The Director determines policy for the OTS and makes final decisions on regulations, policies, and administrative adjudications governing the industry as a whole and on measures affecting individual institutions. The Director ensures that the OTS achieves its mission by directing a program of on-site, risk-focused examinations; taking appropriate supervisory and legal actions against institutions and individuals; and by resolving financially nonviable institutions.

Executive Director for Supervision

The Executive Director for Supervision provides expert personal and confidential counsel to the Director concerning policy decisions and considerations involving the program responsibilities for Supervision. Specifically, the Executive Director (i) oversees and directs the examination and supervision of thrift institutions in the five OTS regions to ensure the safety and soundness of the industry, (ii) ensures compliance with consumer protection laws and regulations, (iii) oversees the regional quality assurance program to ensure consistent applications of policies and procedures, (iv) oversees, directs, and manages the development of national policy guidelines to enhance statutes and regulations and the establishment of programs to implement new policy and law, (v) oversees, directs, and manages applications processing, securities filing, corporate secretary and corporate systems program areas, (vi) serves as the OTS regulatory appeals officer, and (vii) represents the OTS's Director in the Director's absence.

Executive Director for Research and Analysis

The Executive Director for Research and Analysis provides expert and confidential advice to the Director regarding the financial condition of the thrift industry. The Executive Director for Research and Analysis is responsible for the direction and oversight of the research and analysis functions of the OTS. The Executive Director oversees and directs the activities of four units: Risk Management, Economic Analysis, Industry Analysis, and Financial Reporting, ensuring the coordination and cooperation of the units to achieve optimal operating efficiencies. The Executive Director oversees the preparation and review of various OTS financial reports, including the quarterly report on the financial condition of the thrift industry, and the preparation and review of OTS regulations, bulletins, other policy documents, congressional testimony and official correspondence on matters relating to the condition of the thrift industry, interest rate risk, financial derivatives, and economic issues.

Chief Counsel

The Chief Counsel provides expert and confidential legal advice to the Director. As the OTS's chief legal officer, the Chief Counsel directs, manages, and oversees the legal activities of the OTS including: provision of legal services to the Director, OTS and other OTS staff; representation of OTS on pending litigation and other matters; preparation of the record for final OTS action in accordance with legal requirements; legal review of transactional applications and notices; prosecution of enforcement actions relating to thrift institutions; provision of legal advice and opinions on regulatory and administrative matters; and drafting support on regulatory projects, statutes and congressional testimony.

Executive Director for Administration

The Executive Director for Administration provides expert and confidential advice to the Director of the

[1] 5 U.S.C. 552.

[2] 60 FR 66866 (December 27, 1995).

OTS on the overall direction of the OTS, including policy and administrative functions, and serves as the Chief Financial Officer and Senior IRM Official. The Executive Director for Administration directs the policy development and operations of OTS's administrative, contracting and procurement, training and human resources, ADP and telecommunications, financial management and records/information management programs. In addition, the Executive Director is responsible for overall guidance to the Washington Headquarters and regional offices on a full range of administrative and management functions, providing administrative support to the Headquarters staff and coordinating a program of decentralized support to the five regional offices and quality assurance evaluations of administrative activities in the regional offices.

Executive Director for External Affairs

The Executive Director for External Affairs reports to the Director of OTS, and provides expert personal and confidential counsel to the Director concerning policy decisions and considerations involving the program responsibilities for External Affairs. The Executive Director for External Affairs directs, oversees, and formulates policy concerning the OTS's external affairs activities including Congressional Liaison, Press Relations, Interagency Relations, and other external OTS coordination and presentation.

Dated: December 21, 1995.

By the Office of Thrift Supervision.

Jonathan L. Fiechter,

Acting Director.

[FR Doc. 95–31465 Filed 12–28–95; 8:45 am]

BILLING CODE 6720–01–P

Sunshine Act Meetings

Federal Register
Vol. 60, No. 250
Friday, December 29, 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).

UNIFORMED SERVICES UNIVERSITY OF THE HEALTH SCIENCES

TIME AND DATE: 9:00 a.m., February 5, 1996.

PLACE: Naval Medical Center, San Diego, California.

STATUS: Open—under ''Government in the Sunshine Act'' (5 U.S.C. 552b(e)(3)).

MATTERS TO BE CONSIDERED:

9:00 a.m. Meeting—Board of Regents

(1) Approval of Minutes—November 6, 1995
(2) Faculty Matters
(3) Departmental Reports
(4) Financial Report
(5) Report—President, USUHS
(6) Report—Dean, School of Medicine
(7) Comments—Chairman, Board of Regents
(8) New Business

CONTACT PERSON FOR MORE INFORMATION: Bobby D. Anderson, Executive Secretary of the Board of Regents, 301/295–3116.

Dated: Decemeber 27, 1995.

Linda Bynum,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 95–31552 Filed 12–27–95; 11:26 am]

BILLING CODE 5000–04–M

federal register

Friday
December 29, 1995

Part II

Department of Agriculture

Rural Utilities Service

7 CFR Part 1710, et al.

Loan Policies and Security Documents for Electric Borrowers; Final Rule

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Parts 1710, 1717 and 1718

RIN 0572–AB06

Loan Policies and Security Documents for Electric Borrowers

AGENCY: Rural Utilities Service.

ACTION: Final rule.

SUMMARY: The Rural Utilities Service (RUS) hereby establishes new policies and requirements for loan contracts ordinarily required for loans made to electric distribution borrowers. The rule updates and clarifies the framework for loan contract provisions, conforms loan contract provisions with the new form of mortgage recently approved, and provides greater flexibility in addressing the financial needs of individual borrowers and the credit risks involved with individual lending situations. Conforming amendments to RUS lien accommodation requirements and to regulations regarding 110 percent borrowers, and changes to RUS operational controls, are also set forth.

EFFECTIVE DATE: This rule is effective January 29, 1996.

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

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

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

Information Collection and Recordkeeping Requirements

The recordkeeping and reporting burdens contained in this rule were approved by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), under control numbers 0572–0032 and 0572–0103.

Send questions or comments regarding these burdens or any other aspect of these collections of information, including suggestions for reducing the burden, to F. Lamont Heppe, Jr., Deputy Director, Program Support Staff, Rural Utilities Service, Ag Box 1522, Washington, DC 20250–1500.

Background

On September 29, 1994, at 59 FR 49594, the Rural Utilities Service (RUS) published a proposed rule, 7 CFR part 1718 Loan Security Documents for Electric Borrowers, Subpart B Mortgage for Distribution Borrowers, which proposed the agency's policies and requirements for mortgages used to secure direct and guaranteed loans made to electric distribution borrowers. The final rule for the mortgage was published in the Federal Register on July 18, 1995 at 60 FR 36882. On that same day, at 60 FR 36904, RUS published a proposed rule on a model form of a new loan contract for distribution borrowers, 7 CFR part 1718 Loan Security Documents for Electric Borrowers, Subpart C Loan Contracts with Distribution Borrowers. The proposed rule also included proposed amendments to 7 CFR part 1710 and 7 CFR part 1717 Subpart R, to ensure consistency between these regulations and the new mortgage and proposed loan contract. It was also proposed that a new Subpart M Operational Controls be added to 7 CFR part 1717, which would cut back the reach of certain operational controls contained in existing mortgages and loan contracts.

A total of 29 separate comments, representing 33 different organizations, were received on the proposed new loan contract for distribution borrowers and the associated proposed regulations. Comments were received from the National Rural Electric Cooperative Association (NRECA), CoBank, 3 state-wide and one multi-state borrower association, 17 distribution borrowers, and 10 generation and transmission borrowers (G&Ts). The individual distribution borrowers that commented were concentrated in the plains and Rocky Mountain states, with 8 in North Dakota, 3 in Colorado, 2 in Wyoming, and one each in South Dakota, Montana, Minnesota, and Iowa.

Operational Controls

Comments by the NRECA and one state-wide association focused primarily on the extent of operational controls retained in the loan contract and the general approach taken in the loan contract and 7 CFR part 1717 subpart M for defining RUS' rights with respect to operational controls. In the proposed loan contract some operational controls were stated in specific terms while others were stated in broad terms, with the agency relying on 7 CFR part 1717 subpart M and other regulations to define the controls in more specific terms and to narrow their reach.

NRECA and the one state-wide association recommended that (a) further cuts be made in operational controls, (b) all operational controls be stated in appropriately narrow and specific terms in the loan contract itself, rather than relying on regulations to further define and limit the controls, and (c) criteria be developed to exempt ''creditworthy'' borrowers from most of the remaining operational controls. Relatively few comments on operational controls were received from other commenters. Several commenters indicated their support either for individual changes in operational controls proposed by RUS or for the proposed changes in general, as well as for changes that have been made in RUS regulations over the past several years.

RUS agrees that further cuts can be made in operational controls and that some operational controls can and should be stated in more specific, narrower terms in the loan contract itself. Such changes have been made wherever possible in the final model loan contract. They are as follows:

- Section 5.15 of the proposed loan contract requiring the borrower to acquire and construct the electric system in conformance with RUS

regulations has been eliminated. RUS' more specific oversight interests regarding extensions and additions and construction standards are retained in other sections.

• Section 6.3 of the proposed loan contract granting RUS general approval rights over borrower expenditures for legal, engineering, and supervisory services has been eliminated. Certain limited approval rights, such as approval of contracts for engineering services when the construction is financed by RUS, have been retained.

• Section 6.7 of the proposed loan contract granting RUS general approval rights over the acquisition, construction, or procurement of generating facilities and existing facilities and systems has been eliminated. Limited approval authority with respect to such facilities and systems has been retained in section 6.2.

• Section 9.14 of the proposed loan contract authorizing RUS to appoint construction supervisors if construction does not proceed in accordance with the loan documents has been eliminated. RUS approval authority over general managers in cases of default has been retained.

• Paragraph (m) of section 4.1 of the proposed loan contract requiring compliance with RUS regulations as one of the conditions for the borrower to receive loan advances has been revised to require compliance with the loan contract and mortgage.

• Section 5.9 of the proposed loan contract on area coverage has been revised by eliminating the reference to ''to the extent required by RUS'' and in its place specifically stating the borrower's obligations and discretion with regard to contributions in aid of construction. These requirements are the same as those in existing 7 CFR part 1710.103(b).

• Section 5.14 of the proposed loan contract has been revised to eliminate the requirement that borrowers use construction plans and specifications in conformance with RUS regulations for projects funded from non-RUS sources. Thus, while distribution borrowers will continue to be required to follow RUS design and construction standards and the list of accepted materials regardless of the source of funding, plans and specifications for construction not financed by an RUS loan or loan guarantee will not be subject to agency review and approval.

• Section 5.16 of the proposed loan contract has been revised to limit to only those projects financed by RUS the requirement that borrowers use forms of contracts promulgated by RUS for construction, procurement, and engineering and architectural services.

• Section 5.17 of the proposed loan contract has been revised to limit to only those projects financed by RUS the requirement that borrowers follow RUS contract bidding requirements.

• Section 6.2 of the proposed loan contract has been revised to limit RUS' authority to approve electric system extensions and additions to extensions and additions financed by RUS, and only 3 categories of extensions and additions funded from other sources: generating facilities, existing facilities and systems in service, and projects to serve a customer whose annual kWh purchases or maximum annual kW demand in the foreseeable future is projected to exceed 25 percent of the borrower's total kWh sales or maximum kW demand in the year immediately preceding the acquisition or start of construction of facilities. In addition, significance thresholds have been added to the first two categories, such that RUS approval will not be required if the generating and related facilities do not exceed the lesser of 5 megawatts or 30 percent of the borrower's equity, and if the existing facilities and systems in service do not exceed 10 percent of the borrower's net utility plant.

• Section 6.5(a) of the proposed loan contract has been revised to limit to projects financed by RUS the requirement that contracts for construction, procurement, and engineering and architectural services be subject to RUS approval.

As to the recommendation that a set of criteria be developed and included in the loan contract to exempt ''creditworthy'' borrowers from most remaining operational controls, further analysis and experience is needed before a reasoned decision can be made. RUS believes it would be very difficult to develop a set of criteria that would be appropriate for all borrowers and for all or most operational controls. Such an approach also raises significant issues regarding the flexibility that would be available to tailor individual loan contracts to deal with individual lending circumstances and specific credit risks. RUS believes it is only prudent to gain some actual experience with the new loan contract and mortgage before deciding whether such a significant step is warranted.

The changes to the proposed loan contract cited above go a long way toward further reducing RUS oversight over operational decisions. Those changes are in addition to the reductions in operational controls in the new distribution mortgage, the new loan contract as proposed and now codified, and various regulations published by RUS over the past few years. Following are some examples of these reforms in operational oversight, which in most cases apply not just to borrowers that execute the new loan documents but also, pursuant to 7 CFR part 1717 subpart M, to borrowers under the existing ''old'' loan documents:

• Article II of the new distribution mortgage authorizes borrowers to issue additional secured debt and to refinance secured debt without mortgagee approval if certain objective tests are met.

• The new loan contract and 7 CFR 1717.604 limit RUS approval authority over borrowers' long-range engineering plans and construction work plans to construction financed by RUS.

• The new loan contract and 7 CFR 1717.608 limit RUS approval rights over power supply contracts, interconnection agreements, wheeling agreements, and pooling agreements to contracts and agreements having a term of more than 2 years. Moreover, RUS authority to approve system management and maintenance contracts is limited to contracts covering all or substantially all of the borrower's electric system.

• The new loan contract and 7 CFR 1717.609 eliminate RUS approval over general managers except for borrowers in default.

• The new loan contract and 7 CFR 1717.612 eliminate RUS approval authority over the bank used by the borrower, and require only that RUS loan funds be deposited in a bank insured by the Federal Deposit Insurance Corporation or other Federal agency acceptable to RUS.

• The new distribution mortgage and 7 CFR 1717.610 eliminate RUS approval over compensation of board members.

• Section 3.10 of the new distribution mortgage and 7 CFR 1717.615 authorize borrowers to merge or consolidate without mortgagee approval if certain objective tests are met.

• Section 3.11 of the new distribution mortgage and 7 CFR 1717.616 give borrowers greater latitude to sell, lease, or transfer mortgaged property without mortgagee approval.

• The new loan contract and 7 CFR 1717.617 reduce from 40 percent to 30 percent the level of equity a borrower must have before being subject to RUS approval of cash distributions.

• Subpart R of 7 CFR 1717 provides borrowers advance approval of lien accommodations if certain objective tests are met.

• Subpart N of 7 CFR 1717 totally exempts borrowers from RUS approval of their investments, loans and guarantees if certain objective tests are

met. Some 84 percent of distribution borrowers currently qualify for the exemption.

• 7 CFR 1717.613 exempts borrowers from obtaining RUS approval of purchases of data processing and system control equipment if the equipment is not financed by RUS.

• The new loan contract and 7 CFR 1717.614 reduce from 90 days to 30 days the prior notice to RUS required for prospective changes in the borrower's general rate structure, and require such notice only when specifically requested in writing by RUS.

• Recently published 7 CFR part 1726 carries out several reforms in RUS oversight of electric system construction policies and procedures relating to construction financed by RUS. For example:

—The requirement that RUS approve construction subcontracts was eliminated.
—The dollar thresholds for determining when competitive bidding must be used generally were raised.
—The dollar thresholds for determining when RUS approval of a contract is required were raised.
—The requirement that RUS approve contracts for headquarters facilities was eliminated.
—The requirement that RUS approve amendments to construction contracts was eliminated in certain cases.
—The number of forms that must be submitted to RUS for closing out construction contracts was reduced.

It was also recommended that the exemptions and waivers of controls set forth in 7 CFR part 1717 Subpart M be removed entirely and transferred to the new loan contract. Subpart M has been retained since it provides exemptions and waivers of controls contained in existing loan contracts and mortgages. If it were removed, only borrowers that execute the new loan contract and new mortgage would have the benefit of these changes.

As noted above, the narrower forms of RUS' approval rights and operational controls proposed in Subpart M have been adopted in the final loan contract. Furthermore, several additional provisions of the new mortgage and loan contract providing borrowers with greater latitude that were not included in proposed Subpart M have been included in final Subpart M and will be available to borrowers with the ''old'' forms of loan documents. For example, § 1717.615 will allow borrowers under the old loan documents to consolidate and merge without RUS approval under the same conditions as in section 3.10 of the new mortgage. Similarly, § 1717.616 will allow borrowers under the old loan documents to sell, lease or transfer capital assets without RUS approval under the same conditions as in section 3.11 of the new mortgage, if, in addition to their standard TIER and DSC requirements, they meet the Operating TIER and Operating DSC requirements of section 5.4 of the new loan contract. Also, § 1717.617 will allow borrowers under the old loan documents to pay cash distributions without RUS approval if their equity after the distribution is at least 30 percent and if the same conditions as under section 6.8 of the new loan contract are met.

Effect of Subsequent Rulemaking on Loan Contract Provisions

Related to the concerns expressed about those RUS approval rights and controls expressed in the loan contract in broad terms, several commenters also objected to loan contract terms being subject to amendment and modification by subsequent rulemaking, as proposed in 7 CFR 1718.100(d), even though such changes could not exceed the authority granted to RUS in the loan contract. As indicated above, many of the RUS approval rights and controls have been revised to limit them more precisely to the specific measures deemed necessary by RUS for loan security. In some cases (e.g., limitations on borrower investments and use of standard contract forms for RUS financed construction) this was not possible or only partly possible, and therefore these provisions remain subject to RUS rulemaking. To avoid any misunderstanding about the reach of § 1718.100(d), the section has been revised to clearly indicate that only those provisions of the loan contract that defer to RUS regulations or to the discretion of the Administrator or RUS, are subject to the interpretations and modifications of subsequent rulemaking, not to exceed the authority granted to the Administrator or RUS in the loan contract provision.

Applicability of Subpart M

Proposed § 1717.601 indicated that Subpart M would be applicable to all loan documents regardless of whether the loan documents were executed before or after the effective date of the rule. At the time the proposed loan contract was published, several operational controls in the loan contract were expressed in broad terms, while proposed Subpart M cut back the reach of those controls. As indicated above, the loan contract has been revised so that the reach of the controls in the loan contract is the same as those in Subpart M. Thus, Subpart M in its final form affects only ''old'' loan documents with operational controls whose reach is broader than the corresponding provisions in Subpart M. Section 1717.601 has therefore been revised to indicate that the approvals and exceptions to controls contained in Subpart M apply only to loan documents dated prior to the effective date of Subpart M.

Operating TIER and DSC

The proposed rule proposed that an Operating Times Interest Earned Ratio (Operating TIER) and Operating Debt Service Coverage ratio (Operating DSC), both set at a minimum of 1.1, be added to standard TIER and standard DSC as part of the rate covenant.

NRECA did not comment on the concept or formulation of Operating TIER and Operating DSC, but recommended that the minimum level be set a 1.0. Several G&Ts and their members, concentrated in the plains and Rocky Mountain states, raised questions about the formulation or definition of the ratios, and in some cases about the level as well. One multi-state borrower association indicated support both for the formulation of the ratios and the 1.1 level.

One of the primary criticisms of the formulation of the ratios was the belief that the core business of the borrower, as reflected in the operating coverage ratios, ought to be defined to include cash received by distribution borrowers during the year from their G&T suppliers and secured lenders for patronage capital retirements. Many of these commenters also recommended inclusion of cash received from interest bearing accounts, and in some cases, from other borrower investments.

RUS agrees that cash received from the retirement of patronage capital by G&T suppliers and lenders does relate to a borrower's core utility business. The fact that a G&T or lender is capable of making such payments in cash also reflects to a substantial degree the current economic and financial performance of the G&T and lender, unlike patronage capital allocations, whose current and future value may be uncertain.

Cash received from interest income or other investments, on the other hand, may not bear much relationship to the current performance of the borrower's core utility business. At best, it may reflect only past performance which enabled the borrower to make the investments in the first place. Such income also reflects the up and down cycles of debt and equity markets and

does not reflect the current ability of the core utility business to meet expenses and generate a small margin. Such investments can provide needed capital to meet unexpected and unforeseeable costs arising from storm damage, litigation over service territory, and other unforeseeable events, but once used for these purposes it is not available to meet the expenses of the core utility business, and it should not be relied upon for that purpose in any event.

Based on these considerations, Operating TIER and Operating DSC have been modified to include with operating margins cash received from a borrower's G&T and creditors for patronage capital retirements. With such cash receipts included with operating margins, recent experience indicates that very few if any borrowers will have difficulty in meeting Operating TIER and Operating DSC set at the minimum level of 1.1. Even without including such cash receipts with operating margins, only 18 borrowers in 1993 and only 13 borrowers in 1994 that met the standard TIER and standard DSC requirements failed to meet an Operating TIER and Operating DSC of 1.1, based on the average of the best 2 out of 3 years. Data for a small sample of borrowers that might have some problems in meeting the operating ratios without including cash received from G&T suppliers and creditors indicate that including such cash will substantially improve their results. Moreover, § 1710.114 gives the Administrator the authority to set coverage ratios below the normal levels if he or she determines that the lower ratios are required to ensure the repayment of, and/or reasonable security for, RUS loans.

Several borrowers argued that the rate covenant should be placed in the mortgage rather than the loan contract, while several others and a multi-state borrower association argued that it was appropriate to place it in the loan contract. RUS had included the rate covenant in the proposed mortgage, but shifted it to the loan contract based on the recommendations of several public commenters and the difficulty of reaching agreement among the principal lenders to rural electric systems over exactly how the coverage ratios should be structured. The rate covenant has been retained in the loan contract.

Finally, a technical amendment has been made to the definitions of TIER and DSC contained in the model mortgage for distribution borrowers, to eliminate inconsistencies between those two terms as defined in the mortgage, and to achieve greater consistency among the definitions of TIER, DSC, OTIER, and ODSC as those terms are defined in the mortgage, the loan contract, and in § 1710.2. ''Taxes paid, if any, based upon income'' has been eliminated from the numerator of TIER in the mortgage. This term was not included in the numerator of DSC in the mortgage, nor was it included in the numerators of either TIER or DSC as defined in § 1710.2 or in the numerators of either OTIER or ODSC in the proposed loan contract.

The definition of DSC contained in the mortgage has been amended by eliminating the phrase starting with ''provided, however,'' which related to the calculation of principal and interest required to be paid on long-term debt in the event any debt is refinanced. A similar provision was not included in the definition of TIER in the mortgage, with respect to calculating interest required to be paid in the event any long-term debt is refinanced. Nor was such a provision included in the definitions of DSC, TIER, ODSC or OTIER in § 1710.2 or in the definitions of OTIER and ODSC in the proposed loan contract. Properly calculating the coverage ratios under the existing mortgage when some debt has been refinanced during the year has not been a problem, and RUS does not believe the deleted provision is needed.

Use of Standard Contract Forms

One commenter noted that proposed 7 CFR 1717.606 provides that borrowers are required to use RUS-promulgated forms of contracts for construction and for engineering and architectural services only if the construction is financed by RUS, but that 7 CFR part 1726 sets dollar limits below which RUS-promulgated forms need not be used. The commenter wondered whether § 1717.606 is intended to override the flexibility provided by the dollar thresholds in part 1726. It is not, and § 1717.606 has been revised to make that clear.

Limitations on Issuing Additional Secured Indebtedness

A commenter questioned whether the first condition in section 6.14 of the proposed loan contract on issuing additional secured debt without RUS approval should read ''the Maturity of the Loan'' or ''the weighted average life of the loan'' shall not exceed the weighted average of the expected remaining useful lives of the assets being financed. RUS agrees that it should read ''weighted average life of the loan'', and has made the change.

Also in section 6.14 of the proposed loan contract, a technical error was made in conforming the contract to the formatting style of the Federal Register. This has been corrected.

System of Accounts and Outside Accountants

NRECA recommended that RUS eliminate its system of accounts and rely exclusively on the Federal Energy Regulatory Commission's (FERC) system of accounts. Aspects of this question were addressed in developing the new distribution mortgage. It was concluded that so long as there were any outstanding notes held by the government, accounting standards would be based on the RUS system of accounts. This system is exactly the same as the FERC system of accounts, except for a small number of accounts needed to account for RUS loan funds and activities specific to the cooperative form of organization. RUS believes it is essential that borrowers' financial statements be consistent from year to year and from borrower to borrower, and conform to a consistent interpretation of accounting requirements. This is necessary to meet the agency's accountability to the President and Congress for the public funds lent to borrowers.

It has been suggested that relying exclusively on FERC's system of accounts will somehow eliminate the need to obtain accounting interpretations or insulate borrowers from changes in accounting requirements and interpretations promulgated by the Financial Accounting Standards Board. This, of course, is not true, since such interpretations and changes in requirements would continue regardless of the system of accounts followed.

NRECA also recommended that RUS rely exclusively on outside accountants, apparently meaning that RUS rely in particular on outside accountants to do audits of RUS loan fund accounts. RUS believes that it is important to retain agency accountants to oversee the system of accounts, render timely responses to borrowers' accounting questions, and to continue to audit RUS loan fund accounts. Based on discussions with individual borrowers, NRECA, and other borrower organizations, RUS is proceeding with certain changes in our oversight of the system of accounts to respond to problems and concerns that have been raised, and to provide more timely responses to borrower inquiries.

Immaterial Violations of Requirements

Several commenters argued that borrowers should not be held to an absolute standard in meeting certain requirements, since it would be very

difficult for borrowers to ensure that there will be no minor violations of requirements which have no material adverse effect on the interests of RUS. RUS agrees that minor violations of certain requirements, which in the agency's judgment will have no material adverse effect on the agency's interests, should not represent a default. This has been reflected in changes made to proposed sections 5.2(b), 5.6, 5.10, and 6.15.

Borrowers Exempt From Certain Controls Under Section 306E of the Act

Section 306E of the Rural Electrification Act directed RUS to issue interim final regulations to minimize approval rights and restrictions imposed on the operations of electric borrowers whose net worth exceeds 110 percent of the outstanding loans made or guaranteed by RUS, and to offer without delay to share the government's lien on the borrower's system or subordinate its lien on the property financed by a private lender. In issuing the regulations, RUS is authorized to establish requirements, guided by the practices of private lenders with respect to similar credit risks, to ensure that the security, including loan repayment, of the government's loans will remain reasonably adequate.

RUS issued the interim final regulations on January 28, 1994 at 59 FR 3982. Comments on the regulations were received from NRECA, the National Rural Utilities Cooperative Finance Corporation, and 6 borrowers. In general, the comments argued for greater relaxation of operational controls than in the interim final rule.

When the proposed loan contract and final new mortgage for distribution borrowers was published in July of this year, RUS indicated that comments on these documents as well as on the interim final rule would be considered in making revisions to the interim final rule relating to so-called 110 percent borrowers. As indicated above, the new loan contract has been substantially revised to reduce the number and breadth of operational controls. These controls are intended to apply to a fairly broad spectrum of credit risks, and as such RUS believes they reflect the types of controls that some private lenders would require for a similar spectrum of credit risks.

The provisions of the new mortgage and new loan contract, and 7 CFR part 1717 subpart M, in many cases provide greater latitude to borrowers than established originally in 7 CFR 1710.7 for 110 percent borrowers. Therefore, 1710.7 has been revised to reflect the greater latitude provided by the new loan documents and Subpart M.

In assessing credit risks, private lenders look at a large number of factors relating to the size and quality of the financial assets of a borrower; the borrower's new worth and debt position; current and past financial performance; the strength and stability of the borrower's markets and the borrower's position in those markets; market diversity, concentrations, and growth or decline; the borrower's cost competitiveness and investment in new technologies and system modernization; commitments to research and development and innovation; experience and structure of management; internal cost and financial controls; and a number of other factors. When considering the adequacy of net worth, most private lenders look at the quality of the borrower's assets and the ratio of net worth to total debt, rather than only the long-term debt owed to the lender. It is RUS' judgment that the fact that a borrower has net worth equal to 110 percent of only the government's outstanding long-term loans does not justify further relaxation of operational controls over and above those provided in the new loan documents and regulations based on prudent private lending practices for a similar spectrum of credit risks. RUS is willing to consider, on a case by case basis, alternative loan document provisions for the better quality credits.

List of Subjects

7 CFR Part 1710

Electric power, Electric utilities, Loan programs—energy, Rural areas.

7 CFR Part 1717

Administrative practice and procedure, Electric power, Electric utilities, Intergovernmental relations, Investments, Lien accommodation, Lien subordination, Loan programs—energy, Operational controls, Reporting and recordkeeping requirements, Rural areas.

7 CFR Part 1718

Administrative practice and procedure, Electric power, Electric utilities, Loan programs—energy, Loan security documents, Reporting and recordkeeping requirements, Rural areas.

For the reasons explained in the preamble and under the authority of 7 U.S.C. 901 *et seq.*, RUS amends 7 CFR Chapter XVII as follows:

PART 1710—GENERAL AND PRE-LOAN POLICIES AND PROCEDURES COMMON TO INSURED AND GUARANTEED ELECTRIC LOANS

1. The authority citation for part 1710 continues to read as follows:

Authority: 7 U.S.C. 901–950b; Public Law 99–591, 100 Stat, 3341–16; Public Law 103–354, 108 Stat. 3178 (7 U.S.C. 6941 *et seq.*).

2. Section 1710.2 is amended in paragraph (a) by revising the definition for ''Tier'' and by adding the new definitions in alphabetical order to read as follows:

§ 1710.2 Definitions and rules of construction.

(a) *Definitions.* * * *

* * * * *

DSC means Debt Service Coverage of the borrower calculated as:

$$DSC = \frac{A + B + C}{D}$$

Where:

All amounts are for the same calendar year and are based on the RUS system of accounts and RUS Forms 7 and 12. References to line numbers in the RUS Forms 7 and 12 refer to the June 1994 version of RUS Form 7 and the December 1993 version of RUS Form 12, and will apply to corresponding information in future versions of the forms;

A=Depreciation and Amortization Expense of the borrower, which equals Part A, Line 12 of RUS Form 7 (distribution borrowers) or Section A, Line 20 of RUS Form 12a (power supply borrowers);

B=Interest expense on total long-term debt of the borrower, which equals Part A, Line 15 of RUS Form 7 or Section A, Line 22 of RUS Form 12a, except that interest expense shall be increased by ⅓ of the amount, if any, by which restricted rentals of the borrower (Part M, Line 3 of RUS Form 7 or Section K, Line 4 of RUS Form 12h) exceed 2 percent of the borrower's equity (RUS Form 7, Part C, Line 36 [Total Margins & Equities] less Line 26 [Regulatory Assets] or RUS Form 12a, Section B, Line 38 [Total Margins & Equities] less Line 28 [Regulatory Assets]);

C=Patronage Capital or Margins of the borrower, which equals Part A, Line 28 of RUS Form 7 or Section A, Line 35 of RUS Form 12a; and

D=Debt Service Billed (RUS + other), which equals the sum of all payments of principal and interest required to be made on account of total long-term debt of the borrower during the calendar year, plus ⅓ of the amount, if any, by which restricted rentals of the borrower (Part M, Line 3 of RUS Form 7 or Section K, Line 4 of RUS Form 12h) exceed 2 percent of the borrower's equity (RUS Form 7, Part C, Line 36 [Total Margins & Equities] less Line 26 [Regulatory Assets] or RUS Form 12a, Section B, Line 38 [Total Margins & Equities] less Line 28 [Regulatory Assets]);

* * * * *

Electric system means all of the borrower's interests in all electric

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

* * * * *

ODSC means Operating Debt Service Coverage of the electric system calculated as:

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

Where:

All amounts are for the same calendar year and are based on the RUS system of accounts and RUS Form 7. References to line numbers in the RUS Form 7 refer to the June 1994 version of the form, and will apply to corresponding information in future versions of the form;

A=Depreciation and Amortization Expense of the electric system, which usually equals Part A, Line 12 of RUS Form 7;

B=Interest expense on total long-term debt of the electric system, which usually equals Part A, Line 15 of RUS Form 7, except that such interest expense shall be increased by ⅓ of the amount, if any, by which restricted rentals of the electric system (usually Part M, Line 3 of RUS Form 7) exceed 2 percent of the borrower's equity (RUS Form 7, Part C, Line 36 [Total Margins & Equities] less Line 26 [Regulatory Assets]);

C=Patronage Capital & Operating Margins of the electric system, which usually equals Part A, Line 20 of RUS Form 7, plus cash received from the retirement of patronage capital by suppliers of electric power and by lenders for credit extended for the Electric System; and

D=Debt Service Billed (RUS + other), which equals the sum of all payments of principal and interest required to be made on account of total long-term debt of the electric system during the calendar year, plus ⅓ of the amount, if any, by which restricted rentals of the Electric System (usually Part M, Line 3 of RUS Form 7) exceed 2 percent of the borrower's equity (RUS Form 7, Part C, Line 36 [Total Margins & Equities] less Line 26 [Regulatory Assets]).

* * * * *

OTIER means Operating Times Interest Earned Ratio of the electric system calculated as:

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

Where:

All amounts are for the same calendar year and are based on the RUS system of accounts and RUS Form 7. References to line numbers in the RUS Form 7 refer to the June 1994 version of the form, and will apply to corresponding information in future versions of the form;

A=Interest expense on total long-term debt of the electric system, which usually equals Part A, Line 15 of RUS Form 7, except that such interest expense shall be increased by ⅓ of the amount, if any, by which restricted rentals of the electric system (usually Part M, Line 3 of RUS Form 7) exceed 2 percent of the borrower's equity (RUS Form 7, Part C, Line 36 [Total Margins & Equities] less Line 26 [Regulatory Assets]); and

B=Patronage Capital & Operating Margins of the electric system, which usually equals Part A, Line 20 of RUS Form 7, plus cash received from the retirement of patronage capital by suppliers of electric power and by lenders for credit extended for the Electric System.

* * * * *

TIER means Times Interest Earned Ratio of the borrower calculated as:

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

Where:

All amounts are for the same calendar year and are based on the RUS system of accounts and RUS Forms 7 and 12. References to line numbers in the RUS Forms 7 and 12 refer to the June 1994 version of RUS Form 7 and the December 1993 version of RUS Form 12, and will apply to corresponding information in future versions of the forms;

A=Interest expense on total long-term debt of the borrower, which equals Part A, Line 15 of RUS Form 7 or Section A, Line 22 of RUS Form 12a, except that interest expense shall be increased by ⅓ of the amount, if any, by which restricted rentals of the borrower (Part M, Line 3 of RUS Form 7 or Section K, Line 4 of RUS Form 12h) exceed 2 percent of the borrower's equity (RUS Form 7, Part C, Line 36 [Total Margins & Equities] less Line 26 [Regulatory Assets] or RUS Form 12a, Section B, Line 38 [Total Margins & Equities] less Line 28 [Regulatory Assets]); and

B=Patronage Capital or Margins of the borrower, which equals Part A, Line 28 of RUS Form 7 or Section A, Line 35 of RUS Form 12a.

* * * * *

3. Section 1710.7 is revised as follows:

§ 1710.7 Exemptions of RUS operational controls under section 306E of the RE Act.

(a) *General policy.* (1) Section 306E of the RE Act directs the Administrator to issue interim final regulations to minimize approval rights, requirements, restrictions, and prohibitions imposed on the operations of electric borrowers whose net worth exceeds 110 percent of the outstanding loans made or guaranteed to the borrower by RUS. The section also directs the Administrator, when requested by a private lender providing financing for capital investments by such borrowers, to offer, without delay, to share the government's lien on the borrowers' systems or subordinate the government's lien on the property financed by the private lender.

(2) In issuing the regulations, the Administrator is authorized to establish requirements, guided by the practices of private lenders with respect to similar credit risks, to ensure that the security, including the assurance of repayment, for loans made or guaranteed by RUS will remain reasonably adequate. If the regulations are not issued within 180 days of enactment of section 306E, the Administrator may not, until the regulations are issued, require prior approval of, or establish any requirement, restriction, or prohibition, with respect to the operations of any electric borrower that meets the 110 percent ratio.

(3) Nothing in section 306E limits the authority of the Administrator to establish terms and conditions on the use of funds from loans made or guaranteed by RUS, to establish loan feasibility criteria and other requirements for the approval of RUS loans or loan guarantees, such as those set forth in this part, or to take any other action specifically authorized by law.

(4) This section addresses the application of section 306E of the RE Act to RUS operational controls and other requirements that apply in general to RUS borrowers. The application of section 306E to lien accommodations and subordinations is set forth in 7 CFR 1717.860 and 1717.904.

(5) The exemptions granted by this section, 7 CFR 1717.860, and 7 CFR 1717.904 apply only to RUS controls and approval rights. They do not affect the controls and approval rights of other co-mortgagees under the RUS mortgage.

(6) For purposes of this section, the terms ''default,'' ''financed or funded by RUS,'' ''interchange agreement,'' ''interconnection agreement,'' ''loan documents,'' ''pooling agreement,'' ''power supply contract,'' and ''wheeling agreement'' have the meanings as set forth in 7 CFR 1717.602.

(b) *Determination of ratio.* The following principles and procedures will apply to the calculation of net worth as a ratio, expressed as a percent, to the outstanding balance of all loans made or guaranteed to the borrower by RUS, hereinafter called the borrower's ''net worth to RUS debt ratio'', or simply ''the ratio'':

(1) For purposes of determining whether a borrower is exempt from approvals, requirements, restrictions, or prohibitions imposed by RUS with respect to borrower operations, i.e., ''operational controls,'' the ratio normally will be based on data as of December 31. Net worth will be based on the year-end financial and statistical reports submitted by borrowers to RUS, and outstanding loans made or guaranteed by RUS will be based on RUS's records. The financial and statistical reports (Form 7 for distribution borrowers and Form 12a for power supply borrowers) are subject to RUS review and revision, and they must comply with RUS's system of accounts and accounting principles set forth in 7 CFR part 1767. Since sinking fund depreciation is not approved under 7 CFR part 1767, net worth for borrowers using sinking fund depreciation will be calculated as if the borrower had been using straight line depreciation;

(2) Net worth will be calculated by taking total margins and equities (from Part C of RUS Form 7 for distribution borrowers, or Section B of RUS Form 12a for power supply borrowers) and subtracting assets properly recordable in account 182.2, Unrecovered Plant and Regulatory Study Costs, and account 182.3, Other Regulatory Assets, as defined in 7 CFR part 1767; and

(3) By no later than May 1 of each year, RUS will notify each borrower in writing of its ratio as of December 31 of the preceding year. If a borrower's net worth to RUS debt ratio exceeds 110 percent based on the year-end data, the borrower will be exempt from the operational controls exempted under paragraph (c) of this section until subsequently notified in writing by RUS that it is no longer exempt.

(c) *Borrower operations exempted from RUS controls.* Borrowers who are notified by RUS in writing that their net worth to RUS debt ratio exceeds 110 percent are exempted from the operational controls of the RUS mortgage and loan contract listed in this paragraph. These controls, which are implemented through RUS regulations and other documents, are as follows:

(1) *RUS approval of extensions and additions.* RUS approval of extensions and additions to borrowers' electric systems, except for the following:

(i) Extensions and additions financed by RUS;

(ii) Construction, procurement, or leasing of generating facilities, regardless of the source of funding, if the combined capacity of the facilities to be built, procured, or leased, including any future facilities included in the planned project, will exceed 25 megawatts in the case of power supply borrowers, or the lesser of 5 megawatts or 30 percent of the borrower's equity in the case of distribution borrowers;

(iii) Acquisition or leasing of existing electric facilities or systems in service, regardless of the source of funding, whose purchase price, or capitalized value in the case of a lease, exceeds 10 percent of the borrower's net utility plant; and

(iv) Construction, procurement, or leasing of electric facilities, regardless of the source of funding, to serve a customer whose annual kWh purchases or maximum annual kW demand in the foreseeable future is projected to exceed 25 percent of the borrower's total kWh sales or maximum kW demand in the year immediately preceding the acquisition or start of construction;

(2) *Long-range engineering plans and construction work plans.* RUS approval of long-range engineering plans and CWPs if the borrower does not intend to seek RUS financing for any of the facilities, equipment or other purposes included in those plans. However, if requested by RUS, a borrower must provide an informational copy of such plans to RUS;

(3) *Plans and specifications.* RUS approval of plans and specifications for construction not financed by RUS;

(4) *Standard forms of construction contracts, and engineering and architectural services contracts.* RUS requirements to use standard forms of contracts for construction, procurement, engineering services, and architectural services, if the construction, procurement or services are not financed by RUS. To be eligible for this waiver the contracts used must not contain any provisions that prohibit or restrict the assignment of the contracts to the government upon the exercise by RUS of its remedies under security instruments securing loans made or guaranteed by RUS;

(5) *Contract bidding requirements.* RUS requirements regarding the competitive bidding of construction contracts, if the construction is not financed by RUS;

(6) *RUS approval of contracts.* (i) Construction contracts and architectural and engineering contracts. RUS approval of contracts for construction and procurement and for architectural and engineering services, if such construction, procurement or services are not financed by RUS.

(ii) *Large retail power contracts.* RUS approval of contracts to sell electric power to retail customers except when the contract is for longer than 2 years and the kWh sales or kW demand for any year covered by the contract exceeds 25 percent of the borrower's total kWh sales or maximum kW demand for the year immediately preceding execution of the contract. This exemption applies regardless of the source of funding of any plant extensions, additions or improvements that may be involved in connection with the contract.

(iii) *Power supply arrangements.* (A) RUS approval of power supply contracts (including but not limited to economy energy sales and emergency power and energy sales), interconnection agreements, interchange agreements, wheeling agreements, pooling agreements, and any other similar power supply arrangements subject to approval by RUS, if they have a term of 2 years or less. Amendments to said power supply arrangements are also exempted from RUS approval provided that the amendment does not extend the term of the arrangement for more than 2 years beyond the date of the amendment.

(B) Any amendment to a schedule or exhibit contained in any power supply arrangement subject to RUS approval that merely has the effect of either altering a list of interconnection or delivery points or changing the value of a variable term (but not the formula itself) contained in a formulary rate or charge.

(C) The exemptions under this paragraph (c)(6)(iii) apply regardless of whether the borrower is a seller or purchaser of the services furnished by the contracts or arrangements, and regardless of whether or not a Federal power marketing agency is a party to any of them.

(iv) *System management and maintenance contracts.* RUS approval of contracts for the management and operation of a borrower's electric system or for the maintenance of the electric system, if such contracts do not cover all or substantially all of the electric system.

(v) *Other contracts.* [Reserved];

(7) *RUS approval of general manager.* RUS approval of the selection of a borrower's manager and employment contract, provided that the borrower is not in default under its loan documents or any other agreement with RUS. Nothing herein shall limit the right of RUS under the loan documents to request termination of the employment of a manager in the event of a default by the borrower;

(8) *Board of directors.* RUS approval of compensation of a borrower's board of directors;

(9) *Certain expenditures.* (i) RUS approval of expenditures for legal, accounting, and supervisory services by

a borrower. However, while expenditures for accounting do not require RUS approval, the selection of a certified public accountant by the borrower to prepare audited reports required by RUS remains subject to RUS approval.

(ii) RUS approval of expenditures for engineering services by a borrower, if such engineering services will not be financed by RUS;

(10) *Banks.* RUS approval of banks or other depositories used by a borrower. However, without the prior written approval of RUS, a borrower shall not deposit funds from loans made or guaranteed by RUS in any bank or other depository that is not insured by the Federal Deposit Insurance Corporation or other Federal agency acceptable to RUS, or in any account not so insured.

(11) *Certain equipment.* RUS approval of the purchase of data processing equipment and system control equipment by a borrower, if the equipment is not financed by RUS;

(12) *Notification of rate changes.* Requirement that distribution borrowers notify RUS in writing of proposed changes in electric rates 90 days prior to the effective date of such rates. Instead, the required notification period shall be 30 days, and such notification shall be required only if requested by RUS;

(13) *Consolidations and mergers.* RUS approval of mergers and consolidations, and conveyances or transfers of the mortgaged property substantially as an entirety, if the following conditions are met:

(i) Such consolidation, merger, conveyance or transfer shall be on such terms as shall fully preserve the lien and security of the mortgage and the rights and powers of the mortgagees;

(ii) The entity formed by such consolidation or with which the borrower is merged or the corporation which acquires by conveyance or transfer the mortgaged property substantially as an entirety shall execute and deliver to the mortgagees a mortgage supplemental in recordable form and containing an assumption by such successor entity of the due and punctual payment of the principal of and interest on all of the outstanding notes and the performance and observance of every covenant and condition of the mortgage;

(iii) Immediately after giving effect to such transaction, no default under the mortgage shall have occurred and be continuing;

(iv) The borrower shall have delivered to the mortgagees a certificate of its general manager or other officer, in form and substance satisfactory to each of the mortgagees, which shall state that such consolidation, merger, conveyance or transfer and such supplemental mortgage comply with this section and that all conditions precedent herein provided for relating to such transaction have been complied with;

(v) The borrower shall have delivered to the mortgagees an opinion of counsel in form and substance satisfactory to each of the mortgagees; and

(vi) The entity formed by such consolidation or with which the borrower is merged or the corporation which acquires by conveyance or transfer the mortgaged property substantially as an entirety shall be an entity:

(A) Having equity equal to at least 27% of its total assets on a pro forma basis after giving effect to such transaction;

(B) Having a pro forma TIER of not less than 1.50 and a pro forma DSC of not less than 1.25 for each of the two preceding calendar years; and

(C) Having net utility plant equal to or greater than 1.0 times its total long-term debt on a pro forma basis;

(14) *Sale, lease, or transfer of capital assets.* RUS approval for a distribution borrower to sell, lease, or transfer capital assets, if the following conditions are met:

(i) The borrower is not in default;

(ii) In the most recent year for which data are available, the borrower achieved a TIER of at least 1.5, DSC of at least 1.25, OTIER of at least 1.1, and ODSC of at least 1.1, in each case based on the average or the best 2 out of the 3 most recent years;

(iii) The sale, lease, or transfer of assets will not reduce the borrower's existing or future requirements for energy or capacity being furnished to the borrower under any wholesale power contract which has been pledged as security to the government;

(iv) Fair market value is obtained for the assets;

(v) The aggregate value of assets sold, leased, or transferred in any 12-month period is less than 10 percent of the borrower's net utility plant prior to the transaction;

(vi) The proceeds of such sale, lease, or transfer, less ordinary and reasonable expenses incident to such transaction, are immediately:

(A) Applied as a prepayment of all notes secured under the mortgage equally and ratably;

(B) In the case of dispositions of equipment, materials or scrap, applied to the purchase of other property useful in the borrower's utility business; or

(C) Applied to the acquisition of construction of utility plant; and

(vii) If the borrower has an RUS-approved wholesale power contract with a power supply borrower (seller), the circumstances of the sale, lease or transfer of capital assets conform with the conditions in such contract under which the seller may not withhold its consent to the sale, lease or transfer;

(15) *Limitations on distributions.* RUS approval for a borrower to declare or pay dividends, pay or determine to pay patronage refunds, retire patronage capital, or make any other cash distributions, if the following conditions are met:

(i) After giving effect to the distribution, the borrower's equity will be greater than or equal to 30 percent of its total assets;

(ii) The borrower is current on all payments due on all notes secured under the mortgage;

(iii) The borrower is not otherwise in default under its loan documents; and

(iv) After giving effect to the distribution, the borrower's current and accrued assets will be not less than its current and accrued liabilities.

(d) *RUS requirements and operational controls not exempted.* All requirements and operational controls contained in the RUS mortgage and loan contract, or otherwise imposed on borrowers pursuant to statute or regulation, that are not specifically listed in paragraph (c) of this section are not exempted and shall continue to apply according to their terms. Examples of such requirements and controls not exempted are listed in this paragraph for the convenience of the public. This list is not exhaustive, and the absence of a requirement or control from this list in no way means that the requirement or control has been exempted:

(1) Requirements and operational controls contained in the RUS mortgage or loan contract that are necessary to ensure that the security for loans made or guaranteed by RUS is reasonably adequate and that the loans will be repaid, or to accomplish other fundamental purposes of the RE Act. Some of these also represent terms and conditions with respect to the use by borrowers of the proceeds of loans made or guaranteed by RUS. Together, these controls include, but are not limited to, the following:

(i) Area coverage requirements set forth in the loan contract and in § 1710.103;

(ii) Requirement that certain borrowers maintain, on an ongoing basis, a power requirements study and a power requirements study work plan, as set forth in §§ 1710.201 and 1710.202;

(iii) Requirement that borrowers follow RUS construction standards and use RUS accepted materials, as set forth

in § 1710.41, § 1710.45, and 7 CFR part 1728;

(iv) Requirement that borrowers maintain, on an ongoing basis, a long-range engineering plan and a construction work plan, as set forth in § 1710.250(b);

(v) Requirement that borrowers set rates for electric service sufficient to maintain certain coverage ratios, as set forth in § 1710.114;

(vi) Certain RUS approvals of retirements of capital credits in excess of amounts specifically authorized in the mortgage;

(vii) RUS approval of borrower investments, loans, guarantees, and other obligations under 7 CFR part 1717, subpart N;

(viii) RUS requirements on accounting, auditing, irregularities, financial reporting, and access to books and records;

(ix) Requirement that borrowers record the mortgage and mortgage amendments;

(x) Requirement that the mortgagor maintain and preserve the priority lien of the mortgage and defend title to the mortgaged property;

(xi) Requirements on maintenance and repair of the mortgaged property;

(xii) Requirements on insurance of the mortgaged property; and

(xiii) Certain RUS approvals of borrower mergers and consolidations; and

(2) Requirements imposed on borrowers pursuant to statute or regulation and not specifically exempted by paragraph (c) of this section. See, for example, §§ 1710.122 through 1710.127.

(e) *Rescission of exemptions if borrower defaults.* If a borrower is in default with respect to any requirement of its mortgage, loan contract with RUS, or any other agreement with RUS that has not been exempted pursuant to paragraph (c) of this section or other RUS regulations, upon written notice to the borrower RUS may rescind all or any part of the exemptions granted pursuant to paragraph (c) of this section or other RUS regulations. The reinstated requirements and controls will remain in effect until RUS determines that they are no longer needed to help ensure that the security, including the assurance of repayment, for loans made or guaranteed by RUS will remain reasonably adequate.

(f) *Reinstated controls.* If RUS controls are reinstated because the borrower defaults or its net worth falls below 110 percent of RUS debt, such controls and approval rights will apply to all applicable subsequent actions of the borrower, including without limitation the amendment of contracts that the borrower entered into while eligible for an exemption under this section.

§ 1710.103 [Amended]

4. Section 1710.103 is amended by removing in paragraph (b) the sentence ''The loan contract shall contain provisions to this effect.''.

5. Section 1710.114 is revised to read as follows:

§ 1710.114 TIER, DSC, OTIER and ODSC requirements.

(a) *General.* Requirements for coverage ratios are set forth in the borrower's mortgage, loan contract, or other contractual agreements with RUS. The requirements set forth in this section apply to borrowers that receive a loan approved by RUS on or after February 10, 1992. Nothing in this section, however, shall reduce the coverage ratio requirements of a borrower that has contractually agreed with RUS to a higher requirement.

(b) *Coverage ratios.* (1) Distribution borrowers. The minimum coverage ratios required of distribution borrowers, whether applied on an annual or average basis, are a TIER of 1.50, DSC of 1.25, OTIER of 1.1, and ODSC of 1.1. OTIER and ODSC shall apply to distribution borrowers that receive a loan approved by RUS on or after January 29, 1996.

(2) The minimum coverage ratios required of power supply borrowers, whether applied on an annual or average basis, are a TIER of 1.05 and DSC of 1.00.

(3) When new loan contracts are executed, the Administrator may, case by case, increase the coverage ratios of distribution and power supply borrowers above the levels cited in paragraphs (b)(1) and (b)(2), respectively, of this section if the Administrator determines that the higher ratios are required to ensure reasonable security for and/or the repayment of loans made or guaranteed by RUS. Also, the Administrator may, case by case, reduce said coverage ratios if the Administrator determines that the lower ratios are required to ensure reasonable security for and/or the repayment of loans made or guaranteed by RUS.

(4) If a distribution borrower has in service or under construction a substantial amount of generation and associated transmission plant financed at a cost of capital substantially higher than the cost of funds under section 305 of the RE Act, then the Administrator may establish, in his or her sole discretion, blended levels for TIER, DSC, OTIER, and ODSC based on the respective shares of total utility plant represented by said generation and associated transmission plant and by distribution and other transmission plant.

(c) *Requirements for loan feasibility.* To be eligible for a loan, borrowers must demonstrate to RUS that they will, on a pro forma basis, earn the coverage ratios required by paragraph (b) of this section in each of the years included in the borrower's long-range financial forecast prepared in support of its loan application, as set forth in subpart G of this part.

(d) *Requirements for maintenance of coverage ratios.* (1) *Prospective requirement.* Borrowers must design and implement rates for utility service to provide sufficient revenue (along with other revenue available to the borrower in the case of TIER and DSC) to pay all fixed and variable expenses, to provide and maintain reasonable working capital and to maintain on an annual basis the coverage ratios required by paragraph (b) of this section. Rates must be designed and implemented to produce at least enough revenue to meet the requirements of this paragraph under the assumption that average weather conditions in the borrower's service territory will prevail in the future, including average system damage and outages due to weather and the related costs. Failure to design and implement rates pursuant to the requirements of this paragraph shall be an event of default upon notice provided in accordance with the terms of the borrower's mortgage or loan contract.

(2) *Retrospective requirement.* The average coverage ratios achieved by a borrower in the 2 best years out of the 3 most recent calendar years must meet the levels required by paragraph (b) of this section. If a borrower fails to achieve these average levels, it must promptly notify RUS in writing. Within 30 days of such notification or of the borrower being notified in writing by RUS, whichever is earlier, the borrower, in consultation with RUS, must provide a written plan satisfactory to RUS setting forth the actions that will be taken to achieve the required coverage ratios on a timely basis. Failure to develop and implement a plan satisfactory to RUS shall be an event of default upon notice provided in accordance with the terms of the borrower's mortgage or loan contract.

(3) *Fixed and variable expenses,* as used in this section, include but are not limited to: all taxes, depreciation, maintenance expenses, and the cost of electric power and energy and other operating expenses of the electric

system, including all obligations under the wholesale power contract, all lease payments when due, and all principal and interest payments on outstanding indebtedness when due.

(e) *Requirements for advance of funds.* (1) If a borrower applying for a loan has failed to achieve the coverage ratios required by paragraph (b) of this section during the latest 12 month period immediately preceding approval of the loan, or if any of the borrower's average coverage ratios for the 2 best years out of the most recent 3 calendar years were below the levels required in paragraph (b) of this section, RUS may withhold the advance of loan funds until the borrower has adopted an annual financial plan and operating budget satisfactory to RUS and taken such other action as RUS may require to demonstrate that the required coverage ratios will be maintained in the future and that the loan will be repaid with interest within the time agreed. Such other action may include, for example, increasing system operating efficiency and reducing costs or adopting a rate design that will achieve the required coverage ratios, and either placing such rates into effect or taking action to obtain regulatory authority approval of such rates. If failure to achieve the coverage ratios is due to unusual events beyond the control of the borrower, such as unusual weather, system outage due to a storm or regulatory delay in approving rate increases, then the Administrator may waive the requirement that the borrower take the remedial actions set forth in this paragraph, provided that such waiver will not threaten loan feasibility.

(2) With respect to any outstanding loan approved by RUS on or after February 10, 1992, if, based on actual or projected financial performance of the borrower, RUS determines that the borrower may not achieve its required coverage ratios in the current or future years, RUS may withhold the advance of loan funds until the borrower has taken remedial action satisfactory to RUS.

6. Section 1710.250 is amended by revising paragraphs (b) and (e) and adding a new paragraph (k) to read as follows:

§ 1710.250 General.

* * * * *

(b) Generally, all borrowers are required to maintain up-to-date long range engineering plans approved by their boards of directors. Current CWPs approved by the borrower's board must also be developed and maintained for distribution and transmission facilities and for improvements and replacements of generation facilities. All such distribution, transmission or generation facilities must be included in the respective CWPs regardless of the source of financing.

* * * * *

(e) Applications for a loan or loan guarantee from RUS (new loans or budget reclassifications) must be supported by a current CWP approved by both the borrower's board of directors and RUS. RUS approval of these plans relates only to the facilities, equipment, and other purposes to be financed by RUS, and means that the plans provide an adequate basis from a planning and engineering standpoint to support RUS financing. RUS approval of the plans does not mean that RUS approves of the facilities, equipment, or other purposes for which the borrower is not seeking RUS financing. If RUS disagrees with a borrower's estimate of the cost of one or more facilities for which RUS financing is sought, RUS may adjust the estimate after consulting with the borrower and explaining the reasons for the adjustment.

* * * * *

(k) Upon written request from a borrower, RUS may waive in writing certain requirements with respect to long-range engineering plans and CWPs if RUS determines that such requirements impose a substantial burden on the borrower and that waiving the requirements will not significantly affect the accomplishment of the objectives of this subpart. For example, if a borrower's load is forecast to remain constant or decline during the planning period, RUS may waive those portions of the plans that relate to load growth.

§ 1710.251 [Amended]

7. Section 1710.251 is amended by removing the words ''and RUS'' from the first sentence of paragraph (a).

§ 1710.252 [Amended]

8. Section 1710.252 is amended by removing the words ''and RUS'' from the first sentence of paragraph (a).

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

9. The authority citation for part 1717 continues to read as follows:

Authority: 7 U.S.C. 901–950b; Pub. L. 103–354, 108 Stat. 3178 (7 U.S.C. 6941 *et seq.*), unless otherwise noted.

10. Subpart M is added to part 1717 to read as follows:

Subpart M—Operational Controls

Sec.

1717.600 General.
1717.601 Applicability.
1717.602 Definitions.
1717.603 RUS approval of extensions and additions.
1717.604 Long-range engineering plans and construction work plans.
1717.605 Design standards, plans and specifications, construction standards, and RUS accepted materials.
1717.606 Standard forms of construction contracts, and engineering and architectural services contracts.
1717.607 Contract bidding requirements.
1717.608 RUS approval of contracts.
1717.609 RUS approval of general manager.
1717.610 RUS approval of compensation of the board of directors.
1717.611 RUS approval of expenditures for legal, accounting, engineering, and supervisory services.
1717.612 RUS approval of borrower's bank or other depository.
1717.613 RUS approval of data processing and system control equipment.
1717.614 Notification of rate changes.
1717.615 Consolidations and mergers.
1717.616 Sale, lease, or transfer of capital assets.
1717.617 Limitations on distributions.

Subpart M—Operational Controls

§ 1717.600 General.

(a) *General.* The loan contract and mortgage between the Rural Utilities Service (RUS) and electric borrowers imposes certain restrictions and controls on the borrowers and gives RUS (and other co-mortgagees in the case of the mortgage) the right to approve or disapprove certain actions contemplated by the borrowers. Certain of these controls and approval rights are referred to informally as ''operational controls'' because they pertain to decisions or actions with respect to the operation of the borrowers' electric systems. The approval authority granted to RUS by the loan contract or mortgage regarding each decision or action subject to controls is often stated in broad, unlimited terms. This subpart lists the main operational controls affecting borrowers and establishes for each area of control the circumstances under which RUS approval of a decision or action by a borrower is either required or not required. In some cases, only the general principles or general circumstances pertaining to RUS approval or control are presented in this subpart, while the details regarding the circumstances and requirements of RUS approval or control are set forth in other RUS regulations. Since this subpart addresses only the main operational controls, failure to address a control or approval right in this subpart in no way

invalidates such controls or rights established by the loan contract, mortgage, other agreements between a borrower and RUS, and RUS regulations.

(b) *Case by case amendments.* Upon written notice to a borrower, RUS may amend or annul the approvals and exceptions to controls set forth in this subpart or other RUS regulations if the borrower is in violation of any provision of its loan documents or any other agreement with RUS, or if RUS determines that loan security and/or repayment is threatened. Such amendment or annulment will apply to decisions and actions of the borrower after said written notice has been provided by RUS.

(c) *Generic notices.* By written notice to all borrowers or a group of borrowers, RUS may grant or waive approval of decisions and actions by the borrowers that are controlled under the loan documents and RUS regulations. RUS may also by written notice withdraw or cut back its grant or waiver of approval of said decisions and actions made by previous written notice, but may not by such notice extend its authority to approve decisions and actions by borrowers beyond the authority granted by the loan documents and RUS regulations.

§ 1717.601 Applicability.

(a) The approvals and exceptions to controls conveyed by this subpart apply only to controls and approval rights normally included in RUS loan documents dated prior to January 29, 1996. They do not apply to special controls and approval requirements included in loan documents or other agreements executed between a borrower and RUS that relate to individual problems or circumstances specific to an individual borrower.

(b) The approvals and exceptions to controls granted by RUS in this subpart shall not in any way affect the rights of other co-mortgagees under the mortgage or their loan contracts.

§ 1717.602 Definitions.

Terms used in this subpart that are not defined in this section have the meanings set forth in 7 CFR part 1710. In addition, for the purposes of this subpart:

Default means an event of default as defined in the borrower's loan documents or other agreement with RUS, and furthermore includes any event that has occurred and is continuing which, with notice or lapse of time and notice, would become an event of default.

Equity means the borrower's total margins and equities computed pursuant to RUS accounting requirements but excluding any regulatory created assets.

Financed or funded by RUS means financed or funded wholly or in part by a loan made or guaranteed by RUS, including concurrent supplemental loans required by 7 CFR 1710.110, loans to reimburse funds already expended by the borrower, and loans to replace interim financing.

Interchange agreement means a contractual arrangement that can include a variety of services utilities provide each other to increase reliability and efficiency, and to avoid duplicating expenses. Some examples are: transmission service (the use of transmission lines to move power and energy from one area to another); emergency service (an agreement by one utility to furnish another with power and energy to protect it in times of emergency, such as power plant outages); reserve sharing (contributions to a common pool of generating plant reserves so that each individual utility's reserves can be reduced); and economic exchanges (swapping power and energy from different plants to avoid running the most expensive units).

Interconnection agreement means a contract governing the terms for establishing or using one or more electrical connections between two or more electric systems permitting a flow of power and energy among the systems.

Loan documents means the mortgage (or other security instrument acceptable to RUS), the loan contract, and the promissory note entered into between the borrower and RUS.

Net utility plant means the amount constituting the total utility plant of the borrower, less depreciation, computed in accordance with RUS accounting requirements.

Pooling agreement means a contract among two or more interconnected electric systems to operate on a coordinated basis to achieve economies and/or enhance reliability in supplying their respective loads.

Power supply contract means any contract entered into by a borrower for the sale or purchase, at wholesale, of electric energy.

Regulatory created assets means the sum of any amounts properly recordable as unrecovered plant and regulatory study costs or as other regulatory assets, computed pursuant to RUS accounting requirements.

RUS accounting requirements means the system of accounts prescribed for electric borrowers by RUS regulations as such RUS accounting requirements exist at the date of applicability thereof.

RUS regulations mean regulations of general applicability published by RUS from time to time as they exist at the date of applicability thereof, and shall also include any regulations of other federal entities which RUS is required by law to implement.

Total assets means an amount constituting the total assets of the borrower as computed pursuant to RUS accounting requirements, but excluding any regulatory created assets.

Wheeling agreement means a contract providing for the use of the electric transmission facilities of one electric utility to transmit power and energy of another electric utility or other entity to a third party. Such transmission may be accomplished directly or by displacement.

§ 1717.603 RUS approval of extensions and additions.

(a) *Distribution borrowers.* Prior written approval by RUS is required for a distribution borrower to extend or add to its electric system if the extension or addition will be financed by RUS. For extensions and additions that will not be financed by RUS, approval is hereby given to distribution borrowers to make such extensions and additions to their electric systems, including the use of (or commitment to use) general funds of the borrower, except for the following:

(1) Construction, procurement, or leasing of generating facilities if the combined capacity of the facilities to be built, procured, or leased, including any future facilities included in the planned project, will exceed the lesser of 5 megawatts or 30 percent of the borrower's equity;

(2) Acquisition or leasing of existing electric facilities or systems in service whose purchase price, or capitalized value in the case of a lease, exceeds 10 percent of the borrower's net utility plant; and

(3) Construction, procurement, or leasing of electric facilities to serve a customer whose annual kWh purchases or maximum annual kW demand in the foreseeable future is projected to exceed 25 percent of the borrower's total kWh sales or maximum kW demand in the year immediately preceding the acquisition or start of construction.

(b) *Power supply borrowers.* Prior written approval by RUS is required for a power supply borrower to extend or add to its electric system if the extension or addition will be financed by RUS. Requirements for RUS approval of extensions and additions that will not be financed by RUS are set forth in other RUS regulations.

(c) *Additional details.* Additional details relating to RUS approval of extensions and additions of a borrower's electric system financed by RUS are set forth in other RUS regulations, e.g., in 7 CFR parts 1710 and 1726.

§ 1717.604 Long-range engineering plans and construction work plans.

(a) All borrowers are required to maintain up-to-date long-range engineering plans and construction work plans (CWPs) in form and substance as set forth in 7 CFR part 1710, subpart F.

(b) Applications for financing from RUS must be supported by a long-range engineering plan and CWP approved by RUS.

(c) RUS approval is not required for long-range engineering plans and CWPs if the borrower does not intend to seek RUS financing for any of the facilities, equipment or other purposes included in those plans. However, if requested by RUS, a borrower must provide an informational copy of such plans to RUS.

§ 1717.605 Design standards, plans and specifications, construction standards, and RUS accepted materials.

All borrowers, regardless of the source of funding, are required to comply with applicable RUS requirements with respect to system design, construction standards, and the use of RUS accepted materials. Borrowers must comply with applicable RUS requirements with respect to plans and specifications only if the construction or procurement will be financed by RUS. These requirements are set forth in other RUS regulations, especially in 7 CFR parts 1724 and 1728.

§ 1717.606 Standard forms of construction contracts, and engineering and architectural services contracts.

All borrowers are encouraged to use the standard forms of contracts promulgated by RUS for construction, materials, equipment, engineering services, and architectural services, regardless of the source of funding for such construction and services. Borrowers are required to use these standard forms of contracts only if the construction, procurement or services are financed by RUS, and only to the extent required by RUS regulations. RUS requirements with respect to such standard forms of contract are set forth in 7 CFR part 1724 for architectural and engineering services, and in 7 CFR part 1726 for construction, materials, and equipment.

§ 1717.607 Contract bidding requirements.

Borrowers must follow RUS requirements regarding bidding for contracts for construction, materials, and equipment only if financing of the construction or procurement will be provided by RUS. These requirements are set forth in 7 CFR part 1726.

§ 1717.608 RUS approval of contracts.

(a) *Construction contracts and architectural and engineering contracts.* RUS approval of contracts for construction and procurement and for architectural and engineering services is required only when such construction, procurement or services are financed by RUS. Detailed requirements regarding RUS approval of such contracts are set forth in 7 CFR part 1724 for architectural and engineering services, and in 7 CFR part 1726 for construction and procurement.

(b) *Large retail power contracts.* RUS approval of contracts to sell electric power to retail customers is required only if the contract is for longer than 2 years and the kWh sales or kW demand for any year covered by the contract exceeds 25 percent of the borrower's total kWh sales or maximum kW demand for the year immediately preceding execution of the contract. This requirement applies regardless of the source of funding of any plant extensions, additions or improvements that may be involved in connection with the contract.

(c) *Power supply arrangements.* (1) Power supply contracts (including but not limited to economy energy sales and emergency power and energy sales), interconnection agreements, interchange agreements, wheeling agreements, pooling agreements, and any other similar power supply arrangements subject to approval by RUS are deemed approved if they have a term of 2 years or less. Amendments to said power supply arrangements are also deemed approved provided that the amendment does not extend the term of the arrangement for more than 2 years beyond the date of the amendment.

(2) Any amendment to a schedule or exhibit contained in any power supply arrangement subject to RUS approval, which merely has the effect of either altering a list of interconnection or delivery points or changing the value of a variable term (but not the formula itself) contained in a formulary rate or charge is deemed approved.

(3) The provisions of this paragraph (c) apply regardless of whether the borrower is a seller or purchaser of the services furnished by the contracts or arrangements, and regardless of whether or not a Federal power marketing agency is a party to any of them.

(d) *System management and maintenance contracts.* RUS approval of contracts for the management and operation of a borrower's electric system or for the maintenance of the electric system is required only if such contracts cover all or substantially all of the electric system.

(e) *Other contracts.* [Reserved]

§ 1717.609 RUS approval of general manager.

(a) If a borrower's mortgage or loan contract grants RUS the unconditioned right to approve the employment and/or the employment contract of the general manager of the borrower's system, such approval is hereby granted provided that the borrower is in compliance with all provisions of its loan documents and any other agreements with RUS.

(b) If a borrower is in default with respect to any provision of its loan documents or any other agreement with RUS:

(1) Such borrower, if directed in writing by RUS, shall replace its general manager within 30 days after the date of such written notice; and

(2) Such borrower shall not hire a general manager without prior written approval by RUS.

§ 1717.610 RUS approval of compensation of the board of directors.

If a borrower's mortgage or loan contract requires the borrower to obtain approval from RUS for compensation provided to members of the borrower's board of directors, such requirement is hereby waived.

§ 1717.611 RUS approval of expenditures for legal, accounting, engineering, and supervisory services.

(a) If a borrower's mortgage or loan contract requires the borrower to obtain approval from RUS before incurring expenses for legal, accounting, supervisory (other than for the management and operation of the borrower's electric system, see § 1717.608(d)), or other similar services, such approval is hereby granted. However, while expenditures for accounting do not require RUS approval, the selection of a certified public accountant by the borrower to prepare audited reports required by RUS remains subject to RUS approval.

(b) If a borrower's mortgage or loan contract requires the borrower to obtain approval from RUS before incurring expenses for engineering services, such approval is hereby granted if such services will not be financed by RUS. Approval requirements with respect to

engineering services financed by RUS are set forth in other RUS regulations.

§ 1717.612 RUS approval of borrower's bank or other depository.

If a borrower's mortgage or loan contract gives RUS the authority to approve the bank or other depositories used by the borrower, such approval is hereby granted. However, without the prior written approval of RUS, a borrower shall not deposit funds from loans made or guaranteed by RUS in any bank or other depository that is not insured by the Federal Deposit Insurance Corporation or other Federal agency acceptable to RUS, or in any account not so insured.

§ 1717.613 RUS approval of data processing and system control equipment.

If a borrower's mortgage or loan contract requires the borrower to obtain approval from RUS before purchasing data processing equipment or system control equipment, such approval is hereby granted if the equipment will not be financed by RUS.

§ 1717.614 Notification of rate changes.

If a distribution borrower is required by its loan documents to notify RUS in writing of proposed changes in electric rates more than 30 days prior to the effective date of such rates, the required notification period shall be 30 days. Moreover, such notification shall be required only upon the request of RUS.

§ 1717.615 Consolidations and mergers.

A distribution or power supply borrower may without the prior approval of RUS, consolidate or merge with any other corporation or convey or transfer the mortgaged property substantially as an entirety if the following conditions are met:

(a) Such consolidation, merger, conveyance or transfer shall be on such terms as shall fully preserve the lien and security of the RUS mortgage and the rights and powers of the mortgagees;

(b) The entity formed by such consolidation or with which the borrower is merged or the corporation which acquires by conveyance or transfer the mortgaged property substantially as an entirety shall execute and deliver to the mortgagees a mortgage supplemental in recordable form and containing an assumption by such successor entity of the due and punctual payment of the principal of and interest on all of the outstanding notes and the performance and observance of every covenant and condition of the mortgage;

(c) Immediately after giving effect to such transaction, no default under the mortgage shall have occurred and be continuing;

(d) The borrower shall have delivered to the mortgagees a certificate of its general manager or other officer, in form and substance satisfactory to each of the mortgagees, which shall state that such consolidation, merger, conveyance or transfer and such supplemental mortgage comply with this section and that all conditions precedent herein provided for relating to such transaction have been complied with;

(e) The borrower shall have delivered to the mortgagees an opinion of counsel in form and substance satisfactory to each of the mortgagees; and

(f) The entity formed by such consolidation or with which the borrower is merged or the corporation which acquires by conveyance or transfer the mortgaged property substantially as an entirety shall be an entity having:

(1) Equity equal to at least 27% of its total assets on a pro forma basis after giving effect to such transaction;

(2) A pro forma TIER of not less than 1.50 and a pro forma DSC of not less than 1.25 for each of the two preceding calendar years; and

(3) Net utility plant equal to or greater than 1.0 times its total long-term debt on a pro forma basis.

§ 1717.616 Sale, lease, or transfer of capital assets.

A distribution borrower may without the prior approval of RUS sell, lease, or transfer any capital asset if the following conditions are met:

(a) The borrower is not in default;

(b) In the most recent year for which data are available, the borrower achieved a TIER of at least 1.5, DSC of at least 1.25, OTIER of at least 1.1, and ODSC of at least 1.1, in each case based on the average or the best 2 out of the 3 most recent years;

(c) The sale, lease, or transfer of assets will not reduce the borrower's existing or future requirements for energy or capacity being furnished to the borrower under any wholesale power contract which has been pledged as security to the government;

(d) Fair market value is obtained for the assets;

(e) The aggregate value of assets sold, leased, or transferred in any 12-month period is less than 10 percent of the borrower's net utility plant prior to the transaction;

(f) The proceeds of such sale, lease, or transfer, less ordinary and reasonable expenses incident to such transaction, are immediately:

(1) Applied as a prepayment of all notes secured under the mortgage equally and ratably;

(2) In the case of dispositions of equipment, materials or scrap, applied to the purchase of other property useful in the borrower's utility business; or

(3) Applied to the acquisition of construction of utility plant.

§ 1717.617 Limitations on distributions.

If a distribution or power supply borrower is required by its loan documents to obtain prior approval from RUS before declaring or paying any dividends, paying or determining to pay any patronage refunds, or retiring any patronage capital, or making any other cash distributions, such approval is hereby given if the following conditions are met:

(a) After giving effect to the distribution, the borrower's equity will be greater than or equal to 30 percent of its total assets;

(b) The borrower is current on all payments due on all notes secured under the mortgage;

(c) The borrower is not otherwise in default under its loan documents; and

(d) After giving effect to the distribution, the borrower's current and accrued assets will be not less than its current and accrued liabilities.

11. Section 1717.850 is amended by revising paragraphs (a), (b), (f), (g)(1)(ii), (h)(2), and (m) to read as follows:

§ 1717.850 General.

(a) *Scope and applicability.* (1) This subpart R establishes policies and procedures for the accommodation, subordination or release of the Government's lien on borrower assets, including approvals of supporting documents and related loan security documents, in connection with 100 percent private sector financing of facilities and other purposes. Policies and procedures regarding lien accommodations for concurrent supplemental financing required in connection with an RUS insured loan are set forth in subpart S of this part.

(2) This subpart and subpart S of this part apply only to debt to be secured under the mortgage, the issuance of which is subject to the approval of the Rural Utilities Service (RUS) by the terms of the borrower's mortgage with respect to the issuance of additional debt or the refinancing or refunding of debt. If RUS approval is not required under such terms of the mortgage itself, a lien accommodation is not required. If the loan contract or other agreement between the borrower and RUS requires RUS approval with respect to the issuance of debt or making additions to or extensions of the borrower's system, such required approvals do not by

themselves result in the need for a lien accommodation.

(b) *Overall policy.* (1) Consistent with prudent lending practices, the maintenance of adequate security for RUS's loans, and the objectives of the Rural Electrification Act (RE Act), it is the policy of RUS to provide effective and timely assistance to borrowers in obtaining financing from other lenders by sharing RUS's lien on a borrower's assets in order to finance electric facilities, equipment and systems, and certain other types of community infrastructure. In certain circumstances, RUS may facilitate the financing of such assets by subordinating its lien on specific assets financed by other lenders.

(2) It is also the policy of RUS to provide effective and timely assistance to borrowers in promoting rural development by subordinating RUS's lien for financially sound rural development investments under the conditions set forth in § 1717.858.

* * * * *

(f) *Safety and performance standards.* (1) To be eligible for a lien accommodation or subordination from RUS, a borrower must comply with RUS standards regarding facility and system planning and design, construction, procurement, and the use of materials accepted by RUS, as required by the borrower's mortgage, loan contract, or other agreement with RUS, and as further specified in RUS regulations.

(2) RUS ''Buy American'' requirements shall not apply.

(g) * * *

(1) * * *

(ii) Obtain a certification from a registered professional engineer, for each year during which funds from the separate subaccount are utilized by the borrower, that all materials and equipment purchased and facilities constructed during the year from said funds comply with RUS safety and performance standards, as required by paragraph (f) of this section, and are included in an CWP or CWP amendment approved by the borrower's board of directors;

* * * * *

(h) * * *

(2) To the extent that provisions in a borrower's loan contract or mortgage in favor of RUS may be inconsistent with paragraphs (g)(1) and (h)(1) of this section, paragraphs (g)(1) and (h)(1) of this section are intended to constitute an approval or waiver under the terms of such instruments, and in any regulations implementing such instruments, with respect to facilities financed with debt obtained entirely from non-RUS sources without an RUS guarantee.

* * * * *

(m) *Waiver authority.* Consistent with the RE Act and other applicable laws, any requirement, condition, or restriction imposed by this subpart, or subpart S of this part, on a borrower, private lender, or application for a lien accommodation or subordination may be waived or reduced by the Administrator, if the Administrator determines that said action is in the Government's financial interest with respect to ensuring repayment and reasonably adequate security for loans made or guaranteed by RUS.

* * * * *

12. Section 1717.851 is amended by removing the definitions for ''ODSC'' and ''OTIER'' and by adding the following definitions in alphabetical order to read as follows:

§ 1717.851 Definitions.

* * * * *

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

* * * * *

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

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

* * * * *

Water and waste disposal system means any system of community infrastructure whose primary function is the supplying of water and/or the collection and treatment of waste water and whose services are available by design to all or a substantial portion of the members of the community.

* * * * *

13. In § 1717.852, paragraphs (a)(1) introductory text and (a)(1)(ii) are amended by adding the words ''and/or steam'' before the word ''power'', paragraphs (a)(3) through (a)(7) and paragraph (b) are revised, and paragraph (a)(8) is added to read as follows:

§ 1717.852 Financing purposes.

(a) * * *

(3) The following types of community infrastructure substantially located within the electric service territory of the borrower: water and waste disposal systems, solid waste disposal systems, telecommunication and other electronic communications systems, and natural gas distribution systems;

(4) Front-end costs, when and as the borrower has obtained a binding commitment from the non-RUS lender for the financing required to complete the procurement or construction of the facilities;

(5) Transaction costs included as part of the cost of financing assets or refinancing existing debt, provided, however, that the amount of transaction costs eligible for lien accommodation or subordination normally shall not exceed 5 percent of the principal amount of financing or refinancing provided, net of all transaction costs;

(6) The refinancing of existing debt secured under the mortgage;

(7) Interest during construction of generation and transmission facilities if approved by RUS, case by case, depending on the financial condition of the borrower, the terms of the financing, the nature of the construction, the treatment of these costs by regulatory authorities having jurisdiction, and such other factors deemed appropriate by RUS; and

(8) Lien subordinations for certain rural development investments, as provided in § 1717.858.

(b) *Purposes ineligible.* The following financing purposes are not eligible for a lien accommodation or subordination from RUS:

(1) Working capital, including operating funds, unless in the judgment of RUS the working capital is required to ensure the repayment of RUS loans and/or other loans secured under the mortgage;

(2) Facilities, equipment, appliances, or wiring located inside the premises of the consumer, except:

(i) Certain load-management equipment (see 7 CFR 1710.251(c));

(ii) Renewable energy systems and RUS-approved programs of demand side management and energy conservation; and

(iii) As determined by RUS on a case by case basis, facilities included as part of certain cogeneration projects to furnish electric and/or steam power to end-user customers of the borrower;

(3) Investments in a lender required of the borrower as a condition for obtaining financing; and

(4) Debt incurred by a distribution or power supply borrower to finance

facilities, equipment or other assets that are not part of the borrower's electric system or one of the four community infrastructure systems cited in paragraph (a)(3) of this section, except for certain rural development investments eligible for a lien subordination under § 1717.858.

* * * * *

14. Section 1717.854 is amended by revising the section heading and paragraphs (a), (b), (c)(1) and (c)(2), removing paragraph (c)(7), redesignating paragraphs (c)(3) through (c)(6) as paragraphs (c)(4) through (c)(7), adding a new paragraph (c)(3), adding ''and'' at the end of newly designated paragraph (c)(6)(vi) and removing ';and'' at the end of newly designated paragraph (c)(7) and adding a period in its place to read as follows:

§ 1717.854 Advance approval—100 percent private financing of distribution, subtransmission and headquarters facilities, and certain other community infrastructure.

(a) *Policy*. Requests for a lien accommodation or subordination from distribution borrowers for 100 percent private financing of distribution, subtransmission and headquarters facilities, and for community infrastructure listed in § 1717.852(a)(3), qualify for advance approval by RUS if they meet the conditions of this section and all other applicable provisions of this subpart. Advance approval means RUS will approve these requests once RUS is satisfied that the conditions of this section and all other applicable provisions of this subpart have been met.

(b) *Eligible purposes*. Lien accommodations or subordinations for the financing of distribution, subtransmission, and headquarters facilities and community infrastructure listed in § 1717.852(a)(3) are eligible for advance approval, except those that involve the purchase of existing facilities and associated service territory.

(c) * * *

(1) The borrower has achieved a TIER of at least 1.5 and a DSC of at least 1.25 for each of 2 calendar years immediately preceding, or any 2 consecutive 12 month periods ending within 180 days immediately preceding, the issuance of the debt;

(2) The ratio of the borrower's equity, less deferred expenses, to total assets, less deferred expenses, is not less than 27 percent, after adding the principal amount of the proposed loan to the total assets of the borrower;

(3) The borrower's net utility plant as a ratio to its total outstanding long-term debt is not less than 1.0, after adding the principal amount of the proposed loan to the existing outstanding long-term debt of the borrower;

* * * * *

15. Section 1717.855 is amended by revising the section heading and paragraph (a) to read as follows:

§ 1717.855 Application contents: Advance approval—100 percent private financing of distribution, subtransmission and headquarters facilities, and certain other community infrastructure.

* * * * *

(a) A certification by an authorized official of the borrower that the borrower and, as applicable, the loan are in compliance with all conditions set forth in § 1717.854(c) and all applicable provisions of §§ 1717.852 and 1717.853;

* * * * *

16. Section 1717.856 is amended by revising the section heading, the introductory text, the introductory text of paragraph (a), and paragraph (c)(3) to read as follows:

§ 1717.856 Application contents: Normal review—100 percent private financing.

Applications for a lien accommodation or subordination for 100 percent private financing for eligible purposes that do not meet the requirements of § 1717.854 must include the following information and documents:

(a) A certification by an authorized official of the borrower that:

* * * * *

(c) * * *

(3) The borrower has achieved the TIER and DSC and any other coverage ratios required by its mortgage or loan contract in each of the two most recent calendar years; and

* * * * *

§ 1717.857 [Amended]

17. Section 1717.857 is amended by removing paragraph (a)(5), by adding ''and'' at the end of paragraph (a)(3), and by removing ';and'' at the end of paragraph (a)(4)(ii) and adding a period in its place.

§ 1717.860 [Amended]

18. Section 1717.860 is amended by redesignating paragraph (f) as paragraph (e).

PART 1718—LOAN SECURITY DOCUMENTS FOR ELECTRIC BORROWERS

19. The authority citation for part 1718 continues to read as follows:

Authority: 7 U.S.C. 901–950b; Pub. L. 103–354, 108 Stat. 3178 (7 U.S.C. 6941 *et seq.*).

20. Section 1.01 of Appendix A to Subpart B of part 1718 is amended by revising the definitions for ''Debt Service Coverage Ratio (''DSC'') ''and'' Times Interest Earned Ratio (''TIER'')'' to read as follows:

Appendix A to Subpart B of Part 1718—Model Form of Mortgage for Electric Distribution Borrowers

* * * * *

Section 1.01 Definitions. * * *

* * * * *

Debt Service Coverage Ratio (''DSC'') shall mean the ratio determined as follows: for each calendar year add (i) Patronage Capital or Margins of the Mortgagor, (ii) Interest Expense on Total Long Term Debt of the Mortgagor (as computed in accordance with the principles set forth in the definition of TIER) and (iii) Depreciation and Amortization Expense of the Mortgagor, and divide the total so obtained by an amount equal to the sum of all payments of principal and interest required to be made on account of Total Long-Term Debt during such calendar year increasing said sum by any addition to interest expense on account of Restricted Rentals as computed with respect to the Times Interest Earned Ratio herein.

* * * * *

Times Interest Earned Ratio (''TIER'') shall mean the ratio determined as follows: for each calendar year: add (i) patronage capital or margins of the Mortgagor and (ii) Interest Expense on Total Long-Term Debt of the Mortgagor and divide the total so obtained by Interest Expense on Total Long-Term Debt of the Mortgagor, *provided, however,* that in computing Interest Expense on Total Long-Term Debt, there shall be added, to the extent not otherwise included, an amount equal to 33–1/3% of the excess of Restricted Rentals paid by the Mortgagor over 2% of the Mortgagor's Equity.

* * * * *

21. Subpart C is added to part 1718 to read as follows:

Subpart C—Loan Contracts With Distribution Borrowers

Sec.
1718.100 General.
1718.101 Applicability.
1718.102 Definitions.
1718.103 Loan contract provisions.
1718.104 Availability of model loan contract.

Appendix A to Subpart C of Part 1718—Model Form of Loan Contract for Electric Distribution Borrowers

Subpart C—Loan Contracts With Distribution Borrowers

§ 1718.100 General.

(a) *Purpose*. The purpose of this subpart is to set forth the policies, requirements, and procedures governing loan contracts entered into between the Rural Utilities Service (RUS) and

distribution borrowers or, in some cases, other electric borrowers.

(b) *Flexibility for individual circumstances.* The intent of this subpart is to provide the flexibility to address the different needs and different credit risks of individual borrowers, and other special circumstances of individual lending situations. The model loan contract contained in Appendix A of this subpart provides an example of what a loan contract with an ''average'' or ''typical'' distribution borrower may look like under ''average'' or ''typical'' circumstances. Depending on the credit risks and other circumstances of individual loans, RUS may execute loan contracts with provisions that are substantially different than those set forth in the model. RUS may develop alternative model loan contract provisions. If it does, such provisions will be made available to the public.

(c) *Resolution of any differences in contractual provisions.* If any provision of the loan contract appears to be in conflict with provisions of the mortgage, the loan contract shall have precedence with respect to the contractual relationship between the borrower and RUS with respect to such provision. If either document is silent on a matter addressed in the other document, the other document shall have precedence with respect to the contractual relationship between the borrower and RUS with respect to such matter.

(d) *Certain loan contract provisions subject to subsequent rulemaking.* If a loan contract provision imposes an obligation or limitation on the borrower whose interpretation or specification is subject to RUS regulations or the discretion of the Administrator or RUS, such interpretation or specification shall be subject to subsequent rulemaking. Such interpretation or specification of the borrower's obligations or limitations may not exceed the authority granted to the Administrator or RUS in the loan contract provision.

§ 1718.101 Applicability.

(a) *Distribution borrowers.* The provisions of this subpart apply to all distribution borrowers that obtain a loan or loan guarantee from RUS approved on or after January 29, 1996. Distribution borrowers that obtain a lien accommodation or any other form of financial assistance from RUS after January 29, 1996, may be required to execute a new loan contract and new mortgage. Moreover, any distribution borrower may submit a request to RUS that a new loan contract and new mortgage be executed. Within the constraints of time and staff resources, RUS will attempt to honor such requests. Borrowers must first obtain the concurrence of any other mortgagees on their existing mortgage before a new mortgage can be executed.

(b) *Other borrowers.* Borrowers other than distribution borrowers may also submit requests for execution of a new loan contract pursuant to this subpart and a new mortgage pursuant to subpart B of this part. RUS may approve such requests if it determines that such approval is in the government's financial interest. If other mortgagees are on the borrower's existing mortgage, their concurrence would be required before a new mortgage could be executed.

§ 1718.102 Definitions.

For the purposes of this subpart:

Borrower means any organization that has an outstanding loan made or guaranteed by the Rural Utilities Service (RUS) or its predecessor, the Rural Electrification Administration, for rural electrification, or that is seeking such financing.

Distribution borrower means a borrower that sells or intends to sell electric power and energy at retail in rural areas, the latter being defined in 7 CFR 1710.2.

Loan documents means the mortgage (or other security instrument acceptable to RUS), the loan contract, and the promissory note entered into between the borrower and RUS.

§ 1718.103 Loan contract provisions.

Loan contracts executed pursuant to this subpart shall contain such provisions as RUS determines are appropriate to further the purposes of the RE Act and to ensure that the security for the loan will be reasonably adequate and that the loan will be repaid according to the terms of the promissory note. Such loan contracts will contain provisions addressing, but not necessarily limited to, the following matters:

(a) Description of the purpose of the loan;

(b) Specification of the interest to be charged on the loan, including the method for determining the interest rate if it is not fixed for the entire term of the loan;

(c) Specification of the method for repaying the loan principal, including the final maturity of the loan;

(d) The conditions under which the loan may be prepaid before its maturity date, including but not limited to requirements regarding the prepayment of loans made concurrently by RUS and another secured lender;

(e) The method for making scheduled payments on the loan;

(f) Accounting principles and system of accounts, and RUS authority to approve the accountant used by the borrower;

(g) The method and time period for advancing loan funds and the conditions precedent to the advance of funds;

(h) Representations and warranties by the borrower as a condition of obtaining the loan, including but not limited to: the legal authority of the borrower to enter into the loan contract and operate its system; that the loan documents will be a legal, valid and binding obligation of the borrower enforceable according to their terms; compliance of the borrower in all material respects with all federal, state, and local laws, regulations, codes, and orders; existence of any pending or threatened legal actions that could have a material adverse effect on the borrower's ability to perform its obligations under the loan documents; the accuracy and completeness of all information provided by the borrower in the loan application and with respect to the loan contract, and the existence of any material adverse change since the information was provided; and the existence of any material defaults under other agreements of the borrower;

(i) Representations, warranties, and covenants with respect to environmental matters;

(j) Reports and notices required to be submitted to RUS, including but not limited to: annual financial statements; notice of defaults; notice of litigation; notice of orders or other directives received by the borrower from regulatory authorities; notice of any matter that has resulted in or may result in a material adverse change in the condition or operations of the borrower; and such other information regarding the condition or operations of the borrower as RUS may reasonably require;

(k) Annual written certification that the borrower is in compliance with its loan contract, note, mortgage, and any other agreement with RUS, or if there has been a default in the fulfillment of any obligation under said agreements, specifying each such default and the nature and status thereof;

(l) Requirement that the borrower design and implement rates for utility services to meet certain minimum coverage of interest expense and/or debt service obligations;

(m) Requirement that the borrower maintain and preserve its mortgaged property in compliance with prudent utility practice and all applicable laws, which may include certain specific actions and certifications set forth in the borrower's loan contract or mortgage;

(n) Requirement that the borrower plan, design and construct its electric system according to standards and other requirements established by RUS, and if directed by the Administrator, that the borrower follow RUS planning, design and construction standards and requirements for other utility systems constructed by the borrower;

(o) Limitations on extensions and additions to the borrower's electric system without approval by RUS;

(p) Limitations on contracts and contract amendments that the borrower may enter into without approval by RUS;

(q) Limitations of the transfer of mortgaged property by the borrower;

(r) Limitations on dividends, patronage refunds, and cash distributions paid by the borrower;

(s) Limitations on investments, loans, and guarantees made by the borrower;

(t) Authority of RUS to approve a new general manager and to require that an existing general manager be replaced if the borrower is in default under its mortgage, loan contract, or any other agreements with RUS;

(u) Description of events of default under the loan contract and the remedies available to RUS;

(v) Applicability of state and federal laws;

(w) Severability of the individual provisions of the loan documents;

(x) Matters relating to the assignment of the loan contract;

(y) Requirements relating to federal laws and regulations, including but not limited to the following matters: area coverage for electric service; civil rights and equal employment opportunity; access to buildings and other matters relating to the handicapped; design and construction standards relating to earthquakes; the National Environmental Policy Act of 1969 and other environmental laws and regulations; flood hazard insurance; debarment and suspension from federal assistance programs; and delinquency on federal debt; and

(z) Special requirements applicable to individual loans, and such other provisions as RUS may require to ensure loan repayment and reasonably adequate loan security.

§ 1718.104 Availability of model loan contract.

Single copies of the model loan contract (RUS Informational Publication 1718 C) are available from the Rural Utilities Service, United States Department of Agriculture, Washington, DC 20250–1533. This document may be reproduced.

Appendix A to Subpart C of Part 1718—Model Form of Loan Contract for Electric Distribution Borrowers

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Loan Contract

AGREEMENT, dated _____, 199____, between _____ (''Borrower''), a corporation organized and existing under the laws of the State of _____ (the ''State'') and the UNITED STATES OF AMERICA acting by and through the Administrator of the Rural Utilities Service (''RUS'').

Recitals

The Borrower has applied to RUS for a loan for the purpose(s) set forth in Schedule 1 hereto.

RUS is willing to make such a loan to the Borrower pursuant to the Rural Electrification Act of 1936, as amended, on the terms and conditions stated herein.

THEREFORE, for and in consideration of the premises and the mutual covenants hereinafter contained, the parties hereto agree and bind themselves as follows:

Article I—Definitions

Capitalized terms that are not defined herein shall have the meanings as set forth in the Mortgage. The terms defined herein include the plural as well as the singular and the singular as well as the plural.

''Act'' shall mean the Rural Electrification Act of 1936, as amended.

''Advance'' or ''Advances'' shall mean advances by RUS to Borrower pursuant to the terms and conditions of this Agreement.

''Agreement'' shall mean this Loan Contract together with all schedules and exhibits and also any subsequent supplements or amendments.

''Business Day'' shall mean any day that RUS is open for business.

''Contemporaneous Loan'' shall mean any loan which the Borrower has used to satisfy RUS Regulations or loan conditions requiring that supplemental financing be obtained in order to obtain a loan from RUS. Any loan used to refinance or refund a Contemporaneous Loan is also considered to be a Contemporaneous Loan.

''Coverage Ratios'' shall mean, collectively, the following financial ratios: (i) TIER of 1.5; (ii) Operating TIER of 1.1; (iii) DSC of 1.25; and Operating DSC of 1.1.

''Debt Service Coverage Ratio'' (''DSC'') shall have the meaning provided in the Mortgage.

''Distributions'' shall mean for the Borrower to, in any calendar year, declare or pay any dividends, or pay or determine to pay any patronage refunds, or retire any patronage capital or make any other Cash Distributions, to its members, stockholders or consumers; provided, however, that for the purposes of this Agreement a ''Cash Distribution'' shall be deemed to include any general cancellation or abatement of charges for electric energy or services furnished by the Borrower, but not the repayment of a membership fee upon termination of a membership or the rebate of an abatement of wholesale power costs previously incurred pursuant to an order of a state regulatory authority or a wholesale power cost adjustment clause or similar power pricing agreement between the Borrower and a power supplier.

''Electric System'' shall have the meaning as defined in the Mortgage.

''Equity'' shall mean the Borrower's total margins and equities computed pursuant to RUS Accounting Requirements but excluding any Regulatory Created Assets.

''Event of Default'' shall have the meaning as defined in Section [7.1].

''Independent'' when used with respect to any specified person or entity means such a person or entity who (1) is in fact independent, (2) does not have any direct financial interest or any material indirect financial interest in the Borrower or in any affiliate of the Borrower and (3) is not connected with the Borrower as an officer, employee, promoter, underwriter, trustee, partner, director or person performing similar functions.

''Interest Expense'' shall mean the interest expense of the Borrower computed pursuant to RUS Accounting Requirements.

''Loan'' shall mean the loan described in Article III which is being made pursuant to the RUS Commitment in furtherance of the objectives of the Act.

''Loan Documents'' shall mean, collectively, this Agreement, the Mortgage and the Note.

''Long-Term Debt'' shall mean the total of all amounts included in the long-term debt of the Borrower pursuant to RUS Accounting Requirements.

''Maturity Date'' shall have the meaning as defined in the Note.

''Monthly Payment Date'' shall have the meaning as defined in the Note.

''Mortgage'' shall have the meaning as described in Schedule 1 hereto.

''Mortgaged Property'' shall have the meaning as defined in the Mortgage.

''Net Utility Plant'' shall mean the amount constituting the Total Utility Plant of the Borrower, less depreciation, computed in accordance with RUS Accounting Requirements.

''Note'' shall mean a promissory note executed by the Borrower in the form of exhibit A hereto, and any note executed and delivered to RUS to refund, or in substitution for such a note.

''Operating DSC'' or ''ODSC'' shall mean Operating Debt Service Coverage calculated as:

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

Where:

All amounts are for the same calendar year and are computed pursuant to RUS Accounting Requirements and RUS form 7;

A=Depreciation and Amortization Expense of the Electric System;

B=Interest Expense on Total Long-Term Debt of the Electric System, except that such Interest Expense shall be increased by ⅓ of the amount, if any, by which the Restricted Rentals of the Electric System exceed 2 percent of the Mortgagor's Equity;

C=Patronage capital & operating margins of the Electric System, (which equals operating revenue and patronage capital of Electric System operations, less total cost of electric service, including Interest Expense on Total Long-Term Debt of the Electric System) plus cash received from the retirement of patronage capital by suppliers of electric power and by lenders for credit extended for the Electric System; and

D=Debt service billed which equals the sum of all payments of principal and interest required to be made on account of Total Long-Term Debt of the Electric System during the calendar year, plus ⅓ of the amount, if any, by which Restricted Rentals of the Electric System exceed 2 percent of the Mortgagor's Equity.

''Operating TIER'' or ''OTIER'' shall mean Operating Times Interest Earned Ratio calculated as:

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

Where:

All amounts are for the same calendar year and are computed pursuant to RUS Accounting Requirements and RUS form 7;

A=Interest Expense on Total Long-Term Debt of the Electric System, except that such Interest Expense shall be increased by 1/3 of the amount, if any, by which Restricted Rentals of the Electric System exceed 2 percent of the Mortgagor's Equity; and

B=Patronage capital & operating margins of the Electric System, (which equals operating revenue and patronage capital of Electric System operations, less total cost of electric service, including Interest Expense on Total Long-Term Debt of the Electric System) plus cash received from the retirement of patronage capital by suppliers of electric power and by lenders for credit extended for the Electric System.

''Payment Notice'' shall mean a notice furnished by RUS to Borrower that indicates the precise amount of each payment of principal and interest and the total amount of each payment.

''Permitted Debt'' shall have the meaning as defined in section [6.13].

''Prior Loan Contracts'' shall have the meaning as defined in section 9.15.

''Regulatory Created Assets'' shall mean the sum of any amounts properly recordable as unrecovered plant and regulatory study costs or as other regulatory assets, computed pursuant to RUS Accounting Requirements.

''RUS Accounting Requirements'' shall mean any system of accounts prescribed by RUS Regulations as such RUS Accounting Requirements exist at the date of applicability thereof.

''RUS Commitment'' shall have the meaning as defined in schedule 1 hereto.

''RUS Regulations'' shall mean regulations of general applicability published by RUS from time to time as they exist at the date of applicability thereof, and shall also include any regulations of other Federal entities which RUS is required by law to implement.

''Special Construction Account'' shall have the meaning as defined in section 5.21.

''Subsidiary'' shall mean a corporation that is a subsidiary of the Borrower and subject to the Borrower's control, as defined by RUS Accounting Requirements.

''Termination Date'' shall have the meaning as defined in the Note.

''Times Interest Earned Ratio'' (''TIER'') shall have the meaning provided in the Mortgage.

''Total Assets'' shall mean an amount constituting the total assets of the Borrower as computed pursuant to RUS Accounting Requirements, but excluding any Regulatory Created Assets.

''Total Utility Plant'' shall mean the amount constituting the total utility plant of the Borrower computed in accordance with RUS Accounting Requirements.

''Utility System'' shall have the meaning as defined in the Mortgage.

Article II—Representations and Warranties

Section 2.1. Representations and Warranties.

To induce RUS to make the Loan, and recognizing that RUS is relying hereon, the Borrower represents and warrants as follows:

(a) *Organization; Power, Etc.* The Borrower: (i) is duly organized, validly existing, and in good standing under the laws of its state of incorporation; (ii) is duly qualified to do business and is in good standing in each jurisdiction in which the transaction of its business makes such qualification necessary; (iii) has all requisite corporate and legal power to own and operate its assets and to carry on its business and to enter into and perform the Loan Documents; (iv) has duly and lawfully obtained and maintained all licenses, certificates, permits, authorizations, approvals, and the like which are material to the conduct of its business or which may be

otherwise required by law; and (v) is eligible to borrow from RUS.

(b) *Authority.* The execution, delivery and performance by the Borrower of this Agreement and the other Loan Documents and the performance of the transactions contemplated thereby have been duly authorized by all necessary corporate action and shall not violate any provision of law or of the Articles of Incorporation or By-Laws of the Borrower or result in a breach of, or constitute a default under, any agreement, indenture or other instrument to which the Borrower is a party or by which it may be bound.

(c) *Consents.* No consent, permission, authorization, order, or license of any governmental authority is necessary in connection with the execution, delivery, performance, or enforcement of the Loan Documents, except (i) such as have been obtained and are in full force and effect and (ii) such as have been disclosed on Schedule 1 hereto.

(d) *Binding Agreement.* Each of the Loan Documents is, or when executed and delivered shall be, the legal, valid, and binding obligation of the Borrower, enforceable in accordance with its terms, subject only to limitations on enforceability imposed by applicable bankruptcy, insolvency, reorganization, moratorium, or similar laws affecting creditors' rights generally.

(e) *Compliance With Laws.* The Borrower is in compliance in all material respects with all federal, state, and local laws, rules, regulations, ordinances, codes, and orders (collectively, ''Laws''), the failure to comply with which could have a material adverse effect on the condition, financial or otherwise, operations, properties, or business of the Borrower, or on the ability of the Borrower to perform its obligations under the Loan Documents, except as the Borrower has disclosed on Schedule 1 attached hereto.

(f) *Litigation.* There are no pending legal, arbitration, or governmental actions or proceedings to which the Borrower is a party or to which any of its property is subject which, if adversely determined, could have a material adverse effect on the condition, financial or otherwise, operations, properties, profits or business of the Borrower, or on the ability of the Borrower to perform its obligations under the Loan Documents, and to the best of the Borrower's knowledge, no such actions or proceedings are threatened or contemplated, except as the Borrower has disclosed to RUS in writing.

(g) *Title to Property.* As to property which is presently included in the description of Mortgaged Property, the Borrower holds good and marketable title to all of its real property and owns all of its personal property free and clear of any Lien except the Liens specifically identified on Schedule 2 attached hereto (the ''Existing Liens''), and Permitted Encumbrances or Liens permitted under the Mortgage.

(h) *Financial Statements; No Material Adverse Change; Etc.* All financial statements submitted to RUS in connection with the application for the Loan or in connection with this Agreement fairly and fully present the financial condition of the Borrower and the results of the Borrower's operations for the periods covered thereby and are prepared in accordance with RUS Accounting Requirements consistently applied. Since the dates thereof, there has been no material adverse change in the financial condition or operations of the Borrower. All budgets, projections, feasibility studies, and other documentation submitted by the Borrower to RUS are based upon assumptions that are reasonable and realistic, and as of the date hereof, no fact has come to light, and no event or transaction has occurred, which would cause any assumption made therein not to be reasonable or realistic.

(i) *Principal Place of Business; Records.* The principal place of business and chief executive office of the Borrower is at the address of the Borrower shown on Schedule 1 attached hereto.

(j) *Location of Properties.* All property owned by the Borrower is located in the counties identified in Schedule 1 hereto.

(k) *Subsidiaries.* The Borrower has no subsidiary, except as the Borrower has disclosed to RUS in writing.

(l) *Defaults Under Other Agreements.* The Borrower is not in default under any agreement or instrument to which it is a party or under which any of its properties are subject that is material to its financial condition, operations, properties, profits, or business.

(m) *Survival.* All representations and warranties made by the Borrower herein or made in any certificate delivered pursuant hereto shall survive the making of the Advances and the execution and delivery to RUS of the Note.

Article III—Loan

Section 3.1. Advances

RUS agrees to make, and the Borrower agrees to request, on the terms and conditions of this Agreement, Advances from time to time in an aggregate principal amount not to exceed the RUS Commitment. On the Termination Date, RUS may stop advancing funds and limit the RUS Commitment to the amount advanced prior to such date. The obligation of the Borrower to repay the Advances shall be evidenced by the Note in the principal amount of the unpaid principal amount of the Advances from time to time outstanding. The Borrower shall give RUS written notice of the date on which each Advance is to be made.

Section 3.2. Interest Rate and Payment

The Note shall be payable and bear interest as follows:

(a) *Payments and Amortization.* Principal shall be amortized in accordance with the method stated in Schedule 1 hereto and more fully described in the form of Note attached hereto as Exhibit A.

(b) *Application of Payments.* All payments which the Borrower sends to RUS on any outstanding obligation owed to RUS shall be applied in the manner provided in the Borrower's loan documents to which such payments relate and in a manner consistent with RUS policies, practices, and procedures for obligations that have been similarly classified by RUS.

(c) *Electronic Funds Transfer.* Except as otherwise prescribed by RUS, the Borrower shall make all payments on the Note utilizing electronic funds transfer procedures as specified by RUS.

(d) *Fixed or Variable Rate.* The Note shall bear interest at either a fixed or variable rate in accordance with the method stated in Schedule 1 hereto and as more particularly described in the form of Note attached hereto as Exhibit A.

Section 3.3. Prepayment

The Borrower has no right to prepay the Note in whole or in part except such rights, if any, as are expressly provided for in the Note. However, prepayment of the Note (and any penalties) shall be mandatory under Section [5.3] hereof if the Borrower has used a Contemporaneous Loan in order to qualify for the RUS Commitment, and later prepays the Contemporaneous Loan.

Article IV—Conditions of Lending

Section 4.1. General Conditions

The obligation of RUS to make any Advance hereunder is subject to satisfaction of each of the following conditions precedent on or before the date of such Advance:

(a) *Legal Matters.* All legal matters incident to the consummation of the transactions hereby contemplated shall be satisfactory to counsel for RUS.

(b) *Loan Documents.* That RUS receive duly executed originals of this Agreement and the other Loan Documents.

(c) *Authorization.* That RUS receive evidence satisfactory to it that all corporate documents and proceedings of the Borrower necessary for duly authorizing the execution, delivery and performance of the Loan Documents have been obtained and are in full force and effect.

(d) *Approvals.* That RUS receive evidence satisfactory to it that all consents and approvals (including without limitation the consents referred to in Section [2.1(c)] of this Agreement) which are necessary for, or required as a condition of, the validity and enforceability of each of the Loan Documents have been obtained and are in full force and effect.

(e) *Event of Default.* That no Event of Default specified in Article VII and no event which, with the lapse of time or the notice and lapse of time specified in Article VII would become such an Event of Default, shall have occurred and be continuing, or shall have occurred after giving effect to the Advance on the books of the Borrower.

(f) *Continuing Representations and Warranties.* That the representations and warranties of the Borrower contained in this Agreement be true and correct on and as of the date of such Advance as though made on and as of such date.

(g) *Opinion of Counsel.* That RUS receive an opinion of counsel for the Borrower (who shall be acceptable to RUS) in form and content acceptable to RUS.

(h) *Mortgage Filing.* The Mortgage shall have been duly recorded as a mortgage on real property, including after-acquired real property, and duly filed, recorded or indexed as a security interest in personal property, including after acquired personal property, wherever RUS shall have requested, all in accordance with applicable law, and the

Borrower shall have caused satisfactory evidence thereof to be furnished to RUS.

(i) *Wholesale Power Contract.* That the Borrower shall not be in default under the terms of, or contesting the validity of, any contract for sales for resale that has been pledged by any entity to RUS as security for the repayment of any loan made or guaranteed by RUS under the Act.

(j) *Material Adverse Change.* That there has occurred no material adverse change in the business or condition, financial or otherwise, of the Borrower and nothing has occurred which in the opinion of RUS materially and adversely affects the Borrower's ability to meet its obligations hereunder.

(k) *Requisitions.* That the Borrower shall requisition all Advances by submitting its requisition to RUS in form and substance satisfactory to RUS. Requisitions shall be made only for the purpose(s) set forth herein. The Borrower agrees to apply the proceeds of the Advances in accordance with its loan application with such modifications as may be mutually agreed.

(l) *Flood Insurance.* That for any Advance used in whole or in part to finance the construction or acquisition of any building in any area identified by the Secretary of Housing and Urban Development pursuant to the Flood Disaster Protection Act of 1973 (the ''Flood Insurance Act'') or any rules, regulations or orders issued to implement the Flood Insurance Act (''Rules'') as any area having special flood hazards, or to finance any facilities or materials to be located in any such building, or in any building owned or occupied by the Borrower and located in such a flood hazard area, the Borrower has submitted evidence, in form and substance satisfactory to RUS, or RUS has otherwise determined, that (i) the community in which such area is located is then participating in the national flood insurance program, as required by the Flood Insurance Act and any Rules, and (ii) the Borrower has obtained flood insurance coverage with respect to such building and contents as may then be required pursuant to the Flood Insurance Act and any Rules.

(m) *Compliance With Loan Contract and Mortgage.* That the Borrower is in material compliance with all provisions of this Agreement and the Mortgage.

Section 4.2. Special Conditions

The obligation of RUS to make any Advance hereunder is also subject to satisfaction, on or before the date of such Advance, of each of the special conditions, if any, listed in Schedule 1 hereto.

Article V—Affirmative Covenants

Section 5.1. Generally

Unless otherwise agreed to in writing by RUS, while this Agreement is in effect, whether or not any Advance is outstanding, the Borrower agrees to duly observe each of the affirmative covenants contained in this Article:

Section 5.2. Annual Certificates

(a) *Performance Under Loan Documents.* The Borrower shall duly observe and perform all of its obligations under each of the Loan Documents.

(b) *Annual Certification.* Within ninety (90) days after the close of each calendar year, commencing with the year following the year in which the initial Advance hereunder shall have been made, the Borrower shall deliver to RUS a written statement signed by its General Manager, stating that during such year the Borrower has fulfilled all of its obligations under the Loan Documents throughout such year in all material respects or, if there has been a default in the fulfillment of any such obligations, specifying each such default known to said person and the nature and status thereof.

Section 5.3. Simultaneous Prepayment of Contemporaneous Loans

If the Borrower shall at any time prepay in whole or in part the Contemporaneous Loan described on Schedule 1, the Borrower shall prepay the RUS Note correspondingly in order to maintain the ratio that the Contemporaneous Loan bears to the RUS Commitment. If the RUS Note calls for a prepayment penalty or premium, such amount shall be paid but shall not be used in computing the amount needed to be paid to RUS under this section to maintain such ratio. In the case of Contemporaneous Loans and RUS Notes existing prior to the date of this Agreement under previous agreements, prepayments shall be treated as if governed by this section. Provided, however, in all cases prepayments associated with refinancing or refunding a Contemporaneous Loan pursuant to Article II of the Mortgage are not considered to be prepayments for purposes of this Agreement if they satisfy each of the following requirements:

(a) *Principal.* The principal amount of such refinancing or refunding loan is not less than the amount of loan principal being refinanced; and

(b) *Weighted Average Life.* The weighted average life of the refinancing or refunding loan is materially equal to the weighted average remaining life of the loan being refinanced.

Section 5.4 Rates to Provide Revenue Sufficient to Meet Coverage Ratios Requirements

(a) *Prospective Requirement.* The Borrower shall design and implement rates for utility service furnished by it to provide sufficient revenue (along with other revenue available to the Borrower in the case of TIER and DSC) (i) to pay all fixed and variable expenses when and as due, (ii) to provide and maintain reasonable working capital, and (iii) to maintain, on an annual basis, the Coverage Ratios. In designing and implementing rates under this paragraph, such rates should be capable of producing at least enough revenue to meet the requirements of this paragraph under the assumption that average weather conditions in the Borrower's service territory shall prevail in the future, including average Utility System damage and outages due to weather and the related costs.

(b) *Retrospective Requirement.* The average Coverage Ratios achieved by the Borrower in the 2 best years out of the 3 most recent calendar years must be not less than any of the following:

TIER=1.5
DSC=1.25
OTIER=1.1
ODSC=1.1

(c) *Prospective Notice of Change in Rates.* The Borrower shall give thirty (30) days prior written notice of any proposed change in its general rate structure to RUS if RUS has requested in writing that it be notified in advance of such changes.

(d) *Routine Reporting of Coverage Ratios.* Promptly following the end of each calendar year, the Borrower shall report, in writing, to RUS the TIER, Operating TIER, DSC and Operating DSC levels which were achieved during that calendar year.

(e) *Reporting Non-achievement of Retrospective Requirement.* If the Borrower fails to achieve the average levels required by paragraph (b) of this section, it must promptly notify RUS in writing to that effect.

(f) *Corrective Plans.* Within 30 days of sending a notice to RUS under paragraph (e) of this section, or of being notified by RUS, whichever is earlier, the Borrower in consultation with RUS, shall provide a written plan satisfactory to RUS setting forth the actions that shall be taken to achieve the required Coverage Ratios on a timely basis.

(g) *Noncompliance.* Failure to design and implement rates pursuant to paragraph (a) of this section and failure to develop and implement the plan called for in paragraph (f) of this section shall constitute an Event of Default under this Agreement in the event that REA so notifies the Borrower to that effect under section [7.1(d)] of this Agreement.

Section 5.5. Depreciation Rates

The Borrower shall adopt as its depreciation rates only those which have been previously approved for the Borrower by RUS.

Section 5.6. Property Maintenance

The Borrower shall maintain and preserve its Utility System in compliance in all material respects with the provisions of the Mortgage, RUS Regulations and all applicable laws.

Section 5.7. Financial Books

The Borrower shall at all times keep, and safely preserve, proper books, records and accounts in which full and true entries shall be made of all of the dealings, business and affairs of the Borrower and its Subsidiaries, in accordance with any applicable RUS Accounting Requirements.

Section 5.8. Rights of Inspection

The Borrower shall afford RUS, through its representatives, reasonable opportunity, at all times during business hours and upon prior notice, to have access to and the right to inspect the Utility System, any other property encumbered by the Mortgage, and any or all books, records, accounts, invoices, contracts, leases, payrolls, canceled checks, statements and other documents and papers of every kind belonging to or in the possession of the Borrower or in

anyway pertaining to its property or business, including its Subsidiaries, if any, and to make copies or extracts therefrom.

Section 5.9. Area Coverage

(a) The Borrower shall make diligent effort to extend electric service to all unserved persons within the service area of the Borrower who (i) desire such service and (ii) meet all reasonable requirements established by the Borrower as a condition of such service.

(b) If economically feasible and reasonable considering the cost of providing such service and/or the effects on consumers' rates, such service shall be provided, to the maximum extent practicable, at the rates and minimum charges established in the Borrower's rate schedules, without the payment of such persons, other than seasonal or temporary consumers, of a contribution in aid of construction. A seasonal consumer is one that demands electric service only during certain seasons of the year. A temporary consumer is a seasonal or year-round consumer that demands electric service over a period of less than five years.

(c) The Borrower may assess contributions in aid of construction provided such assessments are consistent with this section.

Section 5.10. Real Property Acquisition

In acquiring real property, the Borrower shall comply in all material respects with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (the ''Uniform Act''), as amended by the Uniform Relocation Act Amendments of 1987, and 49 CFR part 24, referenced by 7 CFR part 21, to the extent the Uniform Act is applicable to such acquisition.

Section 5.11. ''Buy American'' Requirements

The Borrower shall use or cause to be used in connection with the expenditures of funds advanced on account of the Loan only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States or any eligible country, and only such manufactured articles, materials, and supplies as have been manufactured in the United States or any eligible country substantially all from articles, materials, and supplies mined, produced or manufactured, as the case may be, in the United States or any eligible country, except to the extent RUS shall determine that such use shall be impracticable or that the cost thereof shall be unreasonable. For purposes of this section, an ''eligible country'' is any country that applies with respect to the United States an agreement ensuring reciprocal access for United States products and services and United States suppliers to the markets of that country, as determined by the United States Trade Representative.

Section 5.12. Power Requirements Studies

The Borrower shall prepare and use power requirements studies of its electric loads and future energy and capacity requirements in conformance with RUS Regulations.

Section 5.13. Long Range Engineering Plans and Construction Work Plans

The Borrower shall develop, maintain and use up-to-date long-range engineering plans and construction work plans in conformance with RUS Regulations.

Section 5.14. Design Standards, Construction Standards, and List of Materials

The Borrower shall use design standards, construction standards, and lists of acceptable materials in conformance with RUS Regulations.

Section 5.15. Plans and Specifications

The Borrower shall submit plans and specifications for construction to RUS for review and approval, in conformance with RUS Regulations, if the construction will be financed in whole or in part by a loan made or guaranteed by RUS.

Section 5.16. Standard Forms of Construction Contracts, and Engineering and Architectural Services Contracts

The Borrower shall use the standard forms of contracts promulgated by RUS for construction, procurement, engineering services and architectural services in conformance with RUS Regulations, if the construction, procurement, or services are being financed in whole or in part by a loan being made or guaranteed by RUS.

Section 5.17. Contract Bidding Requirements

The Borrower shall follow RUS contract bidding procedures in conformance with RUS Regulations when contracting for construction or procurement financed in whole or in part by a loan made or guaranteed by RUS.

Section 5.18. Nondiscrimination

(a) *Equal Opportunity Provisions in Construction Contracts.* The Borrower shall incorporate or cause to be incorporated into any construction contract, as defined in Executive Order 11246 of September 24, 1965 and implementing regulations, which is paid for in whole or in part with funds obtained from RUS or borrowed on the credit of the United States pursuant to a grant, contract, loan, insurance or guarantee, or undertaken pursuant to any RUS program involving such grant, contract, loan, insurance or guarantee, the equal opportunity provisions set forth in Exhibit B hereto entitled Equal Opportunity Contract Provisions.

(b) *Equal Opportunity Contract Provisions Also Bind the Borrower.* The Borrower further agrees that it shall be bound by such equal opportunity clause in any federally assisted construction work which it performs itself other than through the permanent work force directly employed by an agency of government.

(c) *Sanctions and Penalties.* The Borrower agrees that it shall cooperate actively with RUS and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations and relevant orders of the Secretary of Labor, that it shall furnish RUS and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it shall otherwise assist the administering agency in the discharge of RUS's primary responsibility for securing compliance. The Borrower further agrees that it shall refrain from entering into any contract or contract modification subject to Executive Order 11246 with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to Part II, Subpart D of Executive Order 11246 and shall carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by RUS or the Secretary of Labor pursuant to Part II, Subpart D of Executive Order 11246. In addition, the Borrower agrees that if it fails or refuses to comply with these undertakings RUS may cancel, terminate or suspend in whole or in part this contract, may refrain from extending any further assistance under any of its programs subject to Executive Order 11246 until satisfactory assurance of future compliance has been received from such Borrower, or may refer the case to the Department of Justice for appropriate legal proceedings.

Section 5.19. Financial Reports

The Borrower shall cause to be prepared and furnished to RUS a full and complete annual report of its financial condition and of its operations in form and substance satisfactory to RUS, audited and certified by Independent certified public accountants satisfactory to RUS and accompanied by a report of such audit in form and substance satisfactory to RUS. The Borrower shall also furnish to RUS from time to time such other reports concerning the financial condition or operations of the Borrower, including its Subsidiaries, as RUS may reasonably request or RUS Regulations require.

Section 5.20. Miscellaneous Reports and Notices

The Borrower shall furnish to RUS:

(a) *Notice of Default.* Promptly after becoming aware thereof, notice of: (i) the occurrence of any default; and (ii) the receipt of any notice given pursuant to the Mortgage with respect to the occurrence of any event which with the giving of notice or the passage of time, or both, could become an ''Event of Default'' under the Mortgage.

(b) *Notice of Non-Environmental Litigation.* Promptly after the commencement thereof,

notice of the commencement of all actions, suits or proceedings before any court, arbitrator, or governmental department, commission, board, bureau, agency, or instrumentality affecting the Borrower which, if adversely determined, could have a material adverse effect on the condition, financial or otherwise, operations, properties or business of the Borrower, or on the ability of the Borrower to perform its obligations under the Loan Documents.

(c) *Notice of Environmental Litigation.* Without limiting the provisions of Section [5.20(b)] above, promptly after receipt thereof, notice of the receipt of all pleadings, orders, complaints, indictments, or other communications alleging a condition that may require the Borrower to undertake or to contribute to a cleanup or other response under laws relating to environmental protection, or which seek penalties, damages, injunctive relief, or criminal sanctions related to alleged violations of such laws, or which claim personal injury or property damage to any person as a result of environmental factors or conditions for which the Borrower is not fully covered by insurance, or which, if adversely determined, could have a material adverse effect on the condition, financial or otherwise, operations, properties or business of the Borrower, or on the ability of the Borrower to perform its obligations under the Loan Documents.

(d) *Notice of Change of Place of Business.* Promptly in writing, notice of any change in location of its principal place of business or the office where its records concerning accounts and contract rights are kept.

(e) *Regulatory and Other Notices.* Promptly after receipt thereof, copies of any notices or other communications received from any governmental authority with respect to any matter or proceeding which could have a material adverse effect on the condition, financial or otherwise, operations, properties, or business of the Borrower, or on the ability of the Borrower to perform its obligations under the Loan Documents.

(f) *Material Adverse Change.* Promptly, notice of any matter which has resulted or may result in a material adverse change in the condition, financial or otherwise, operations, properties, or business of the Borrower, or the ability of the Borrower to perform its obligations under the Loan Documents.

(g) *Other Information.* Such other information regarding the condition, financial or otherwise, or operations of the Borrower as RUS may, from time to time, reasonably request.

Section 5.21. Special Construction Account

The Borrower shall hold all moneys advanced to it by RUS hereunder in trust for RUS and shall deposit such moneys promptly after the receipt thereof in a bank or banks which meet the requirements of Section [6.7] of this Agreement. Any account (hereinafter called ''Special Construction Account'') in which any such moneys shall be deposited shall be insured by the Federal Deposit Insurance Corporation or other federal agency acceptable to RUS and shall be designated by the corporate name of the Borrower followed by the words ''Trustee, Special Construction Account.'' Moneys in any Special Construction Account shall be used solely for the construction and operation of the Utility System and may be withdrawn only upon checks, drafts, or orders signed on behalf of the Borrower and countersigned by an executive officer thereof.

Section 5.22. Additional Affirmative Covenants

The Borrower also agrees to comply with any additional affirmative covenant(s) identified in Schedule 1 hereto.

Article VI—Negative Covenants

Section 6.1. General

Unless otherwise agreed to in writing by RUS, while this Agreement is in effect, whether or not any Advance is outstanding hereunder, the Borrower shall duly observe each of the negative covenants set forth in this Article.

Section 6.2. Limitations on System Extensions and Additions

(a) The Borrower shall not extend or add to its Electric System either by construction or acquisition without the prior written approval of RUS if the construction or acquisition is financed or will be financed, in whole or in part, by a RUS loan or loan guarantee.

(b) The Borrower shall not extend or add to its Electric System with funds from other sources without prior written approval of RUS in the case of:

(1) Generating facilities if the combined capacity of the facilities to be built, procured, or leased, including any future facilities included in the planned project, will exceed the lesser of 5 Megawatts or 30 percent of the Borrower's Equity;

(2) Existing electric facilities or systems in service whose purchase price, or capitalized value in the case of a lease, exceeds ten percent of the Borrower's Net Utility Plant; and

(3) Any project to serve a customer whose annual Kwh purchases or maximum annual Kw demand is projected to exceed 25 percent of the Borrower's total Kwh sales or maximum Kw demand in the year immediately preceding the acquisition or start of construction of facilities.

Section 6.3. Limitations on Changing Principal Place of Business

The Borrower shall not change its principal place of business or keep property in a county not shown on a schedule to the Mortgage if the change would cause the lien in favor of RUS to become unperfected or fail to become perfected, as the case may be, unless, prior thereto, the Borrower shall have taken all steps required by law in order to assure that the lien in favor of RUS remains or becomes perfected, as the case may be, and, in either event, such lien has the priority accorded by the Mortgage.

Section 6.4. Limitations on Employment and Retention of Manager

At any time any Event of Default, or any occurrence which with the passage of time or giving of notice would be an Event of Default, occurs and is continuing the Borrower shall not employ any general manager of the Utility System or the Electric System or any person exercising comparable authority to such a manager unless such employment shall first have been approved by RUS. If any Event of Default, or any occurrence which with the passage of time or giving of notice would be an Event of Default, occurs and is continuing and RUS requests the Borrower to terminate the employment of any such manager or person exercising comparable authority, or RUS requests the Borrower to terminate any contract for operating the Utility System or the Electric System, the Borrower shall do so within thirty (30) days after the date of such notice. All contracts in respect of the employment of any such manager or person exercising comparable authority, or for the operation of the Utility System or the Electric System, shall contain provisions to permit compliance with the foregoing covenants.

Section 6.5. Limitations on Certain Types of Contracts

Without the prior approval of RUS in writing, the Borrower shall not enter into any of the following contracts:

(a) *Construction Contracts.* Any contract for construction or procurement or for architectural and engineering services in connection with its Electric System if the project is financed or will be financed, in whole or in part, by a RUS loan or loan guarantee;

(b) *Large retail power contracts.* Any contract to sell electric power and energy for periods exceeding two (2) years if the kWh sales or kW demand for any year covered by such contract shall exceed 25 percent of the Borrower's total kWh sales or maximum kW demand for the year immediately preceding the execution of such contract;

(c) *Wholesale power contracts.* Any contract to sell electric power or energy for resale and any contract to purchase electric power or energy that, in either case, has a term exceeding two (2) years;

(d) *Power supply arrangements.* Any interconnection agreement, interchange agreement, wheeling agreement, pooling agreement or similar power supply arrangement that has a term exceeding two (2) years;

(e) *System management and maintenance contracts.* Any contract for the management and operation of all or substantially all of its Electric System; or

(f) *Other contracts.* Any contracts of the type described on Schedule 3.

Section 6.6. Limitations on Mergers and Sale, Lease or Transfer of Capital Assets

(a) The Borrower shall not consolidate with, or merge, or sell all or substantially all of its business or assets, to another entity or person except to the extent it is permitted to do so under the Mortgage. The exception contained in this paragraph (a) is subject to the additional limitation set forth in paragraph (b) of this section.

(b) The Borrower shall not, without the written approval of the Administrator, voluntarily or involuntarily sell, convey or dispose of any portion of its business or assets (including, without limitation, any

portion of its franchise or service territory) to another entity or person if such sale, conveyance or disposition could reasonably be expected to reduce the Borrower's existing or future requirements for energy or capacity being furnished to the Borrower under any wholesale power contract which has been pledged as security to RUS.

Section 6.7. Limitations on Using non-FDIC Insured Depositories

Without the prior written approval of RUS, the Borrower shall not place the proceeds of the Loan or any loan which has been made or guaranteed by RUS in the custody of any bank or other depository that is not insured by the Federal Deposit Insurance Corporation or other federal agency acceptable to RUS.

Section 6.8. Limitation on Distributions

Without the prior written approval of RUS, the Borrower shall not in any calendar year make any Distributions (exclusive of any Distributions to the estates of deceased natural patrons) to its members, stockholders or consumers except as follows:

(a) Equity above 30%. If, after giving effect to any such Distribution, the Equity of the Borrower shall be greater than or equal to 30% of its Total Assets; or

(b) Equity above 20%. If, after giving effect to any such Distribution, the aggregate of all Distributions made during the calendar year when added to such Distribution shall be less than or equal to 25% of the prior year's margins.

Provided however, that in no event shall the Borrower make any Distributions if there is unpaid when due any installment of principal of (premium, if any) or interest on its Notes, if the Borrower is otherwise in default hereunder or if, after giving effect to any such Distribution, the Borrower's current and accrued assets would be less than its current and accrued liabilities.

Section 6.9. Limitations on Loans, Investments and Other Obligations

The Borrower shall not make any loan or advance to, or make any investment in, or purchase or make any commitment to purchase any stock, bonds, notes or other securities of, or guaranty, assume or otherwise become obligated or liable with respect to the obligations of, any other person, firm or corporation, except as permitted by the Act and RUS Regulations.

Section 6.10. Depreciation Rates

The Borrower shall not file with or submit for approval of regulatory bodies any proposed depreciation rates which are inconsistent with RUS Regulations.

Section 6.11. Historic Preservation

The Borrower shall not, without approval in writing by RUS, use any Advance to construct any facilities which shall involve any district, site, building, structure or object which is included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior pursuant to the Historic Sites Act of 1935 and the National Historic Preservation Act of 1966.

Section 6.12. Rate Reductions

Without the prior written approval of RUS, the Borrower shall not decrease its rates if it has failed to achieve all of the Coverage Ratios for the calendar year prior to such reduction.

Section 6.13. Limitations on Additional Indebtedness

Except as expressly permitted by Article II of the Mortgage and subject to the further limitations expressed in the next section, the Borrower shall not incur, assume, guarantee or otherwise become liable in respect of any debt for borrowed money and Restricted Rentals (including Subordinated Indebtedness) other than the following: (''Permitted Debt'')

(a) Additional Notes issued in compliance with Article II of the Mortgage;

(b) Purchase money indebtedness in non-Utility System property, in an amount not exceeding 10% of Net Utility Plant;

(c) Restricted Rentals in an amount not to exceed 5% of Equity during any 12 consecutive calendar month period;

(d) Unsecured lease obligations incurred in the ordinary course of business except Restricted Rentals;

(e) Unsecured indebtedness for borrowed money, except when the aggregate amount of such indebtedness exceeds 15% of Net Utility Plant and after giving effect to such unsecured indebtedness the Borrower's Equity is less than 30% of its Total Assets;

(f) Debt represented by dividends declared but not paid; and

(g) Subordinated Indebtedness approved by RUS.

PROVIDED, However, that the Borrower may incur Permitted Debt without the consent of RUS only so long as there exists no Event of Default hereunder and there has been no continuing occurrence which with the passage of time and giving of notice could become an Event of Default hereunder.

PROVIDED, FURTHER, by executing this Agreement any consent of RUS that the Borrower would otherwise be required to obtain under this Section is hereby deemed to be given or waived by RUS by operation of law to the extent, but only to the extent, that to impose such a requirement of RUS consent would clearly violate federal laws or RUS Regulations.

Section 6.14. Limitations on Issuing Additional Indebtedness Secured Under the Mortgage

(a) The Borrower shall not issue any Additional Notes under the Mortgage to finance Eligible Property Additions without the prior written consent of RUS unless the following additional requirements are met in addition to the requirements set forth in the Mortgage for issuing Additional Notes:

(1) The weighted average life of the loan evidenced by such Notes does not exceed the weighted average of the expected remaining useful lives of the assets being financed;

(2) The principal of the loan evidenced by such Notes is amortized at a rate that shall yield a weighted average life that is not greater than the weighted average life that would result from level payments of principal and interest; and

(3) The principal of the loan being evidenced by such Notes has a maturity of not less than 5 years.

(b) The Borrower shall not issue any Additional Notes under the Mortgage to refund or refinance Notes without the prior written consent of RUS unless, in addition to the requirements set forth in the Mortgage for issuing Refunding or Refinancing Notes, the weighted average life of any such Refunding or Refinancing Notes is not greater than the weighted average remaining life of the Notes being refinanced.

(c) Any request for consent from RUS under this section, shall be accompanied by a certificate of the Borrower's manager substantially in the form attached to this Agreement as Exhibit C–1 in the case of Notes being issued under Section [2.01] of the Mortgage and C–2 in the case of Notes being issued under Section [2.02] of the Mortgage.

Section 6.15. Impairment of Contracts Pledged to RUS

The Borrower shall not materially breach any obligation to be paid or performed by the Borrower on any contract, or take any action which is likely to materially impair the value of any contract, which has been pledged as security to RUS by the Borrower or any other entity.

Section 6.16. Additional Negative Covenants

The Borrower also agrees to comply with any additional negative covenant(s) identified in Schedule 1 hereto.

Article VII—Default

Section 7.1. Events of Default

The following shall be Events of Default under this Agreement:

(a) *Representations and Warranties.* Any representation or warranty made by the Borrower in Article II hereof or any certificate furnished to RUS hereunder or under the Mortgage shall prove to have been incorrect in any material respect at the time made and shall at the time in question be untrue or incorrect in any material respect and remain uncured;

(b) *Payment.* Default shall be made in the payment of or on account of interest on or principal of the Note when and as the same shall be due and payable, whether by acceleration or otherwise, which shall remain unsatisfied for five (5) Business Days;

(c) *Borrowing Under the Mortgage in Violation of the Loan Contract.* Default by the Borrower in the observance or performance of any covenant or agreement contained in Section 6.14 of this Agreement.

(d) *Other Covenants.* Default by the Borrower in the observance or performance of any other covenant or agreement contained in any of the Loan Documents, which shall remain unremedied for 30 calendar days after written notice thereof shall have been given to the Borrower by RUS;

(e) *Corporate Existence.* The Borrower shall forfeit or otherwise be deprived of its corporate charter, franchises, permits, easements, consents or licenses required to carry on any material portion of its business;

(f) *Other Obligations.* Default by the Borrower in the payment of any obligation,

whether direct or contingent, for borrowed money or in the performance or observance of the terms of any instrument pursuant to which such obligation was created or securing such obligation;

(g) *Bankruptcy.* A court having jurisdiction in the premises shall enter a decree or order for relief in respect of the Borrower in an involuntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator or similar official, or ordering the winding up or liquidation of its affairs, and such decree or order shall remain unstayed and in effect for a period of ninety (90) consecutive days or the Borrower shall commence a voluntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or under any such law, or consent to the appointment or taking possession by a receiver, liquidator, assignee, custodian or trustee, of a substantial part of its property, or make any general assignment for the benefit of creditors; and

(h) *Dissolution or Liquidation.* Other than as provided in the immediately preceding subsection, the dissolution or liquidation of the Borrower, or failure by the Borrower promptly to forestall or remove any execution, garnishment or attachment of such consequence as shall impair its ability to continue its business or fulfill its obligations and such execution, garnishment or attachment shall not be vacated within 30 days. The term ''dissolution or liquidation of the Borrower'', as used in this subsection, shall not be construed to include the cessation of the corporate existence of the Borrower resulting either from a merger or consolidation of the Borrower into or with another corporation following a transfer of all or substantially all its assets as an entirety, under the conditions permitting such actions.

Article VIII—Remedies

Section 8.1. Generally

Upon the occurrence of an Event of Default, then RUS may pursue all rights and remedies available to RUS that are contemplated by this Agreement or the Mortgage in the manner, upon the conditions, and with the effect provided in this Agreement or the Mortgage, including, but not limited to, a suit for specific performance, injunctive relief or damages. Nothing herein shall limit the right of RUS to pursue all rights and remedies available to a creditor following the occurrence of an Event of Default listed in Article VII hereof. Each right, power and remedy of RUS shall be cumulative and concurrent, and recourse to one or more rights or remedies shall not constitute a waiver of any other right, power or remedy.

Section 8.2. Suspension of Advances

In addition to the rights, powers and remedies referred to in the immediately preceding section, RUS may, in its absolute discretion, suspend making Advances hereunder if (i) any Event of Default, or any occurrence which with the passage of time or giving of notice would be an Event of Default, occurs and is continuing; (ii) there has occurred a change in the business or condition, financial or otherwise, of the Borrower which in the opinion of RUS materially and adversely affects the Borrower's ability to meet its obligations under the Loan Documents, or (iii) RUS is authorized to do so under RUS Regulations.

Article IX—Miscellaneous

Section 9.1. Notices

All notices, requests and other communications provided for herein including, without limitation, any modifications of, or waivers, requests or consents under, this Agreement shall be given or made in writing (including, without limitation, by telecopy) and delivered to the intended recipient at the ''Address for Notices'' specified below; or, as to any party, at such other address as shall be designated by such party in a notice to each other party. Except as otherwise provided in this Agreement, all such communications shall be deemed to have been duly given when transmitted by telecopier or personally delivered or, in the case of a mailed notice, upon receipt, in each case given or addressed as provided for herein. The Address for Notices of the respective parties are as follows:

Rural Utilities Service, United States Department of Agriculture, Washington, DC 20250–1500
Fax: (202) xxx-xxxx

Attention: [Administrator]
The Borrower:
The address set forth in Schedule 1 hereto

Section 9.2. Expenses

To the extent allowed by law, the Borrower shall pay all costs and expenses of RUS, including reasonable fees of counsel, incurred in connection with the enforcement of the Loan Documents or with the preparation for such enforcement if RUS has reasonable grounds to believe that such enforcement may be necessary.

Section 9.3. Late Payments

If payment of any amount due hereunder is not received at the United States Treasury in Washington, DC, or such other location as RUS may designate to the Borrower within five (5) Business Days after the due date thereof or such other time period as RUS may prescribe from time to time in its policies of general application in connection with any late payment charge (such unpaid amount being herein called the ''delinquent amount'', and the period beginning after such due date until payment of the delinquent amount being herein called the ''late-payment period''), the Borrower shall pay to RUS, in addition to all other amounts due under the terms of the Note, the Mortgage and this Agreement, any late-payment charge as may be fixed by RUS Regulations from time to time on the delinquent amount for the late-payment period.

Section 9.4. Filing Fees

To the extent permitted by law, the Borrower agrees to pay all expenses of RUS (including the fees and expenses of its counsel) in connection with the filing or recordation of all financing statements and instruments as may be required by RUS in connection with this Agreement, including, without limitation, all documentary stamps, recordation and transfer taxes and other costs and taxes incident to recordation of any document or instrument in connection herewith. Borrower agrees to save harmless and indemnify RUS from and against any liability resulting from the failure to pay any required documentary stamps, recordation and transfer taxes, recording costs, or any other expenses incurred by RUS in connection with this Agreement. The provisions of this subsection shall survive the execution and delivery of this Agreement and the payment of all other amounts due hereunder or due on the Note.

Section 9.5. No Waiver

No failure on the part of RUS to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof nor shall any single or partial exercise by RUS of any right hereunder preclude any other or further exercise thereof or the exercise of any other right.

Section 9.6. Governing Law

EXCEPT TO THE EXTENT GOVERNED BY APPLICABLE FEDERAL LAW, THE LOAN DOCUMENTS SHALL BE DEEMED TO BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE [IN WHICH THE BORROWER IS INCORPORATED].

Section 9.7. Holiday Payments

If any payment to be made by the Borrower hereunder shall become due on a day which is not a Business Day, such payment shall be made on the next succeeding Business Day and such extension of time shall be included in computing any interest in respect of such payment.

Section 9.8. Rescission

The Borrower may elect not to borrow the RUS Commitment in which event RUS shall release the Borrower from its obligations hereunder, provided the Borrower complies with such terms and conditions as RUS may impose for such release and provided also that if the Borrower has any remaining obligations to RUS for loans made or guaranteed by RUS under any Prior Loan Contracts, RUS may, under Section [9.15] of this Loan Contract, withhold such release until all such obligations have been satisfied and discharged.

Section 9.9. Successors and Assigns

This Agreement shall be binding upon and inure to the benefit of the Borrower and RUS and their respective successors and assigns, except that the Borrower may not assign or transfer its rights or obligations hereunder without the prior written consent of RUS.

Section 9.10. Complete Agreement; Amendments

Subject to RUS Regulations, this Agreement and the other Loan Documents are intended by the parties to be a complete and final expression of their agreement. However, RUS reserves the right to waive its rights to compliance with any provision of this Agreement and the other Loan

Documents. No amendment, modification, or waiver of any provision hereof or thereof, and no consent to any departure of the Borrower herefrom or therefrom, shall be effective unless approved in writing by RUS in the form of either a RUS Regulation or other writing signed by or on behalf of RUS, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

Section 9.11. Headings

The headings and sub-headings contained in the titling of this Agreement are intended to be used for convenience only and do not constitute part of this Agreement.

Section 9.12. Severability

If any term, provision or condition, or any part thereof, of this Agreement or the Mortgage shall for any reason be found or held invalid or unenforceable by any governmental agency or court of competent jurisdiction, such invalidity or unenforceability shall not affect the remainder of such term, provision or condition nor any other term, provision or condition, and this Agreement, the Note, and the Mortgage shall survive and be construed as if such invalid or unenforceable term, provision or condition had not been contained therein.

Section 9.13. Right of Setoff

Upon the occurrence and during the continuance of any Event of Default, RUS is hereby authorized at any time and from time to time, without prior notice to the Borrower, to exercise rights of setoff or recoupment and apply any and all amounts held or hereafter held, by RUS or owed to the Borrower or for the credit or account of the Borrower against any and all of the obligations of the Borrower now or hereafter existing hereunder or under the Note. RUS agrees to notify the Borrower promptly after any such setoff or recoupment and the application thereof, provided that the failure to give such notice shall not affect the validity of such setoff, recoupment or application. The rights of RUS under this section are in addition to any other rights and remedies (including other rights of setoff or recoupment) which RUS may have. Borrower waives all rights of setoff, deduction, recoupment or counterclaim.

Section 9.14. Schedules and Exhibits

Each Schedule and Exhibit attached hereto and referred to herein is each an integral part of this Agreement.

Section 9.15. Prior Loan Contracts

It is understood and agreed that with respect to all loan agreements previously entered into by and between RUS and the Borrower (hereinafter being referred to as ''Prior Loan Contracts'') the Borrower shall be required, after the date hereof, to meet affirmative and negative covenants as set forth in this Agreement rather than those set forth in the Prior Loan Contracts. In addition, any remaining obligation of RUS to make additional advances on promissory notes of the Borrower that have been previously delivered to RUS under Prior Loan Contracts shall, after the date hereof, be subject to the conditions set forth in this Agreement. In the event of any conflict between any provision set forth in a Prior Loan Contract and any provision in this Agreement, the requirements as set forth in this Agreement shall apply. Nothing in this section shall, however, eliminate or modify any special condition, special affirmative covenant or special negative covenant, if any, unless specifically agreed to in writing by RUS.

Section 9.16. Authority of Representatives of RUS

In the case of any consent, approval or waiver from RUS that is required under this Agreement or any other Loan Document, such consent, approval or waiver must be in writing and signed by an authorized RUS representative to be effective. As used in this section, ''authorized RUS representative'' means the Administrator of RUS, and also means a person to whom the Administrator has officially delegated specific or general authority to take the action in question.

Section 9.17. Term

This Agreement shall remain in effect until one of the following two events has occurred:

(a) The Borrower and RUS replace this Agreement with another written agreement; or

(b) All of the Borrower's obligations under the prior loan contracts and this Agreement have been discharged and paid.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

_____

(Name of Borrower)

(SEAL)

By _____

President

Attest: _____

Secretary

RURAL UTILITIES SERVICE

By _____

Administrator

Schedule 1

[citations subject to change]

1. The purpose of this loan is _____ and such other purposes that RUS may agree to in writing in order to carry out the purposes of the Rural Electrification Act.

2. The Mortgage shall mean the Restated Mortgage and Security Agreement, dated as of _____, between the Borrower and RUS, as it may have been or shall be supplemented, amended, consolidated, or restated from time to time.

3. The governmental authority referred to in Section [2.1(c)] is _____.

4. The exception being taken to the representations in Section [2.1(e)] concerning material compliance with laws is as follows: _____.

5. The litigation referred to in Section [2.1(f)] is described as follows: _____.

6. The date of the Borrower's financial information referred to in Section [2.1(h)] is _____.

7. The principal place of business of the Borrower referred to in Section [2.1(i)] is _____.

8. All of the property of the Borrower is located in the counties of _____.

9. The subsidiary (or subsidiaries) referred to in Section [2.1(k)] is (are): _____.

10. The Contemporaneous Loan referred to in Section [5.3] is described as follows: _____.

Lender: _____

Amount: _____

Year of Final Maturity: _____

11. The RUS Commitment referred to in the definitions means a loan in the principal amount of $_____ which is being made by RUS to the Borrower at the _____ Hardship Rate _____ Municipal Rate (CHECK ONE) pursuant to the Rural Electrification Act and RUS Regulations.

12. Amortization of Advance shall be based upon the method indicated below:

_____ level principal

_____ level debt service

_____ other

13. The SPECIAL condition(s) referred to in Section [4.2] is (are): _____.

14. The additional AFFIRMATIVE covenant(s) referred to in Section [5.22] is (are) as follows: _____. 15. The additional NEGATIVE covenant(s) referred to in Section [6.16] is (are) as follows: _____.

16. The address of the Borrower referred to in Section [9.1]. is _____.

Schedule 2—Existing Liens

The Existing Liens referred to in Section [2.1(g)] are as follows:

[INSERT DESCRIPTION OF EXISTING LIENS, IF ANY, HERE]

Schedule 3—Additional Contracts

The additional contracts referred to in Section [6.5(f)] are described as follows:

[INSERT LIST OF ANY ADDITIONAL CONTRACTS HERE]

Exhibit A—Form of Promissory Note

[INSERT EITHER MUNICIPAL or HARDSHIP RATE PROMISSORY NOTE FORM HERE]

Exhibit B—Equal Opportunity Contract Provisions

During the performance of this contract, the contractor agrees as follows:

(a) The contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including

apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(b) The contractor shall, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants shall receive consideration for employment without regard to race, color, religion, sex or national origin.

(c) The contractor shall send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The contractor shall comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations and relevant orders of the Secretary of Labor.

(e) The contractor shall furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and shall permit access to his books, records and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliances with such rules, regulations and orders.

(f) In the event of the contractor's noncompliance with the non-discrimination clauses of this contract or with any of the said rules, regulations or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in said Executive Order or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law.

(g) The contractor shall include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246, dated September 24, 1965, so that such provisions shall be binding upon each subcontractor or vendor. The contractor shall take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

Exhibit C–1—Manager's Certificate Required Under Loan Contract Section 6.14 for Additional Notes

On behalf on _____ [Name of Borrower] _____ I hereby certify that the Additional Note or Notes to be issued under Section [2.01] of the Mortgage on or about _____ [Date Note or Notes are to be Signed] _____ meet all of the requirements of Section [6.14] of the Loan Contract, namely:

(a) The weighted average life of the loan evidenced by such Notes (_____ years) does not exceed the weighted average of the expected remaining useful lives of the assets being financed (_____ years) as evidenced by the attached calculation of said weighted average lives.

(b) The principal of the loan evidenced by such Notes shall either be [check one and provide evidence in the second case]:

_____ (1) repaid based on level payments of principal and interest throughout the life of the loan, or

_____ (2) amortized at a rate that shall yield a weighted average life that is not greater than the weighted average life that would result from level payments of principal and interest throughout the life of the loan as evidenced by the attached analysis of said weighted average lives.

(c) The principal of the loan evidenced by such Notes has a maturity of not less than 5 years.

[Signed] _____

[Dated] _____

[Name] _____

[Title] _____

[Name and Address of Borrower] _____

_____

_____

Exhibit C–2—Manager's Certificate Required Under Loan Contract Section 6.14 for Refinancing Notes

On behalf on _____ [Name of Borrower] _____ I hereby certify that the Additional Note or Notes to be issued under Section [2.02] of the Mortgage on or about _____ [Date Note or Notes are to be Signed] _____ meet the requirement of Section [6.14] of the Loan Contract that the weighted average life of such Notes is not greater than the weighted average remaining life of the Notes being refinanced, as evidenced by the attached calculation of said weighted average lives.

[Signed] _____

[Dated] _____

[Name] _____

[Title] _____

[Name and Address of Borrower] _____

_____

_____

Dated: December 18, 1995.

Jill Long Thompson,

Under Secretary, Rural Economic and Community Development.

[FR Doc. 95–31227 Filed 12–28–95; 8:45 am]

BILLING CODE 3410–15–P

federal register

Friday
December 29, 1995

Part III

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Part 26

Federal Reserve System

12 CFR Part 212

Federal Deposit Insurance Corporation

12 CFR Part 348

Department of the Treasury

Office of Thrift Supervision

12 CFR Part 563f

Management Official Interlocks; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 26

[Docket No. 95–31]

RIN 1557–AB39

FEDERAL RESERVE BOARD

12 CFR Part 212

[Docket No. R–0907]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 348

RIN 3064–AB71

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563f

[Docket No. 95–204]

RIN 1150–AA95

Management Official Interlocks

AGENCIES: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; Office of Thrift Supervision, Treasury.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and Office of Thrift Supervision (OTS) (collectively, the agencies) propose to revise their rules regarding management interlocks. The proposal conforms the interlocks rules to recent statutory changes, modernizes and clarifies the rules, and reduces unnecessary regulatory burdens where feasible, consistent with statutory requirements.

DATES: Comments must be received by February 27, 1996.

ADDRESSES: Comments should be directed to:

OCC: Office of the Comptroller of the Currency, Communications Division, 250 E Street, SW, Washington, DC 20219, Attention: Docket No. 95–31. Comments will be available for public inspection and photocopying at the same location. In addition, comments may be sent by facsimile transmission to FAX number (202) 874–5274 or by internet mail to REG.COMMENTS@OCC.TREAS.GOV.

Board: William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Docket No. R–0907, 20th Street and Constitution Avenue, NW, Washington, DC 20551. Comments addressed to Mr. Wiles may also be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, NW. Comments may be inspected in room MP–500 between 9:00 a.m. and 5:00 p.m., except as provided in § 261.8 of the Board's Rules Regarding Availability of Information, 12 CFR 261.8.

FDIC: Jerry L. Langley, Executive Secretary, Attention: Room F–402, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429. Comments may be delivered to room F–400, 1776 F Street, NW, Washington, DC 20429, on business days between 8:30 a.m. and 5:00 p.m. or sent by facsimile transmission to FAX number 202/898–3838. Internet: COMMENTS@FDIC.GOV. Comments will be available for inspection and photocopying in room 7118, 550 17th Street, NW, Washington, DC 20429, between 8:30 a.m. and 5:00 p.m. on business days.

OTS: Chief, Dissemination Branch, Records Management and Information Policy, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552, Attention Docket No. 95–204. These submissions may be hand delivered to 1700 G Street, NW, from 9:00 A.M. to 5:00 P.M. on business days; they may be sent by facsimile transmission to FAX number (202) 906–7755. Comments over 25 pages in length should be sent to FAX number (202) 906–6956. Comments will be available for inspection at 1700 G Street, NW, from 9:00 A.M. until 4:00 P.M. on business days.

FOR FURTHER INFORMATION CONTACT:

OCC: Sue E. Auerbach, Senior Attorney, Bank Activities and Structure Division (202) 874–5300; Emily R. McNaughton, National Bank Examiner, Credit & Management Policy (202) 874–5170; Jackie Durham, Senior Licensing Policy Analyst (202) 874–5060; or Mark J. Tenhundfeld, Senior Attorney, Legislative and Regulatory Activities (202) 874–5090.

Board: Thomas M. Corsi, Senior Attorney (202/452–3275), or Tina Woo, Attorney (202/452–3890), Legal Division, Board of Governors of the Federal Reserve System. For the hearing impaired only, Telecommunication Device for Deaf (TTD), Dorothea Thompson (202/452–3544), Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington DC 20551.

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SUPPLEMENTARY INFORMATION:

Background

Section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act)

Section 303(a) of the CDRI Act (12 U.S.C. 4803(a)) requires the OCC, OTS, Board, and FDIC to review their regulations in order to streamline and modify the regulations to improve efficiency, reduce unnecessary costs, and eliminate unwarranted constraints on credit availability. Section 303(a) also requires the agencies to work jointly to make uniform all regulations and guidelines implementing common statutory or supervisory policies. The agencies have reviewed their respective management interlocks regulation with these purposes in mind and, as is explained in greater detail in the text that follows, propose to amend the regulations in ways designed to meet the goals of section 303(a).[1]

Summary of Statutory Changes

The CDRI Act amended the Depository Institution Management Interlocks Act (12 U.S.C. 3201–3208) (Interlocks Act) by removing the agencies' broad authority to exempt otherwise impermissible interlocks and replacing it with the authority to exempt interlocks under more narrow circumstances. The CDRI Act also required a depository organization with a ''grandfathered'' interlock to apply for an extension of the grandfather period if the organization wanted to keep the interlock in place.[2]

[1] The National Credit Union Administration has participated in the interagency effort to revise the management interlocks regulations and intends to publish a separate Notice of Proposed Rulemaking revising 12 CFR part 711 in the near future.

[2] The agencies completed their review of requests for extensions by March 23, 1995, as directed by the statute. Therefore, the provision regarding extending the grandfather period is moot for purposes of this regulation.

After the changes made by the CDRI Act, a person subject to the Interlocks Act's restrictions seeking an exemption from those restrictions must qualify either for a ''regulatory standards'' exemption (the Regulatory Standards exemption) or an exemption under a ''management official consignment program'' (the Management Consignment exemption). An applicant seeking a Regulatory Standards exemption must submit a board resolution certifying that no other candidate from the relevant community has the necessary expertise to serve as a management official, is willing to serve, and is not otherwise prohibited by the Interlocks Act from serving. Before granting the exemption request, the appropriate agency must find that the individual is critical to the institution's safe and sound operations, that the interlock will not produce an anticompetitive effect, and that the management official meets any additional requirements imposed by the agency. Under the Management Consignment exemption, the appropriate agency may permit an interlock that otherwise would be prohibited by the Interlocks Act if the agency determines that the interlock would improve the provision of credit to low- and moderate-income areas, increase the competitive position of a minority- or woman-owned institution, or strengthen the management of a newly chartered institution or an institution that is in an unsafe or unsound condition. (*See* text following ''Management Consignment exemption'' in this Preamble for a discussion regarding interlocks involving newly chartered institutions or institutions that are in an unsafe or unsound condition.)

The proposal reflects these statutory changes, and streamlines and clarifies the interlocks regulations in various respects. These changes are discussed in the text that follows. The agencies invite comments on all aspects of this proposal.

Discussion

The following is a section-by-section discussion of the proposed revisions.

Authority, Purpose, and Scope

This section in the agencies' current regulations identifies the Interlocks Act as the statutory authority for the management interlocks regulation. It also states that the purpose of the rules governing management interlocks is to foster competition between unaffiliated institutions. Finally, this section currently identifies the types of institutions to which each agency's regulation applies.

The proposed rule restates these provisions and, in the OCC proposed rule, uses the term ''District bank'' to describe banks operating under the Code of Laws of the District of Columbia. (*See* definition of ''District bank'' at proposed § 26.2(k).)

Definitions

Each of the agencies' current regulations sets forth definitions of key terms used in the regulation.

The proposed regulations change some of the current definitions. A discussion of the substantive differences between the current rules and proposals follows.

Anticompetitive Effect

The current regulations neither use nor define the term ''anticompetitive effect.''

The proposed regulations define the term to mean ''a monopoly or substantial lessening of competition.'' This term is used in the Regulatory Standards exemption. Under that exemption, the appropriate agency may approve a request for an exemption to the Interlocks Act if, among other things, the agency finds that continuation of service by the management official does not produce an anticompetitive effect with respect to the affected institution. The statute does not define the term ''anticompetitive effect,'' nor does the legislative history to the CDRI Act point to a particular definition.

The context of the Regulatory Standards exemption suggests, however, that the agencies should apply the term ''anticompetitive effect'' in a manner that permits interlocks that present no substantial lessening of competition. By prohibiting an interlock that would result in a monopoly or substantial lessening of competition, the proposed definition preserves the free flow of credit and other banking services that the Interlocks Act is designed to protect. Another benefit of the proposed definition is that it is familiar to the banking industry, given that it is derived from the Bank Merger Act (12 U.S.C. 1828(c)). This enables the agencies to accomplish the legislative purpose of the Interlocks Act without imposing unnecessary regulatory burdens.

Area Median Income

The current regulations do not use the term ''area median income,'' and, therefore, do not define this term.

The proposed regulations define ''area median income'' as the median family income for the metropolitan statistical area (MSA) in which an institution is located or the statewide nonmetropolitan median family income if an institution is located outside an MSA. This term is used in the definition of ''low- and moderate-income areas,'' which in turn is used in the implementation of the Management Consignment exemption.

Contiguous or Adjacent Cities, Towns, or Villages

The current regulations define ''adjacent cities, towns, or villages'' as cities, towns, or villages whose borders are within 10 road miles from each other. They also define ''contiguous cities, towns, or villages'' as cities, towns, or villages whose borders touch. The statute and regulations apply these terms to prohibit interlocks involving small institutions that are located in contiguous or adjacent cities, towns, or villages.

The proposed regulations combine these two definitions, given that contiguous cities, towns, or villages necessarily are within 10 miles of each other.

Critical

The current regulations neither use nor define ''critical.''

The proposed regulations define the term in connection with the Regulatory Standards exemption. Under that exemption, the appropriate agency must find that a proposed management official is critical to the safe and sound operations of the affected institution. 12 U.S.C. 3207(b)(2)(A). Neither the statute nor its legislative history define ''critical.''

The agencies are concerned that a narrow interpretation of this term would nullify the Regulatory Standards exemption. If someone were ''critical'' to the safe and sound operations of an institution only if the institution would fail but for the service of the person in question, the exemption would have little relevance because the standard would be practically impossible to meet. Given that Congress clearly intended for the Regulatory Standards exemption to permit interlocks under some circumstances, the question thus becomes how to define those circumstances.

This proposal addresses the issue by stating that the agencies will consider a person to be critical to a depository organization if the person will play an important role in helping the institution either address current problems or maintain safe and sound operations going forward. The agencies believe that this approach is consistent with the

legislative intent by insuring that only persons of demonstrated expertise and importance to the institution will be allowed to serve pursuant to a Regulatory Standards exemption.

Low- and Moderate-Income Areas

The current regulations permit interlocks under certain circumstances involving a depository organization located ''in a low income or other economically depressed area.'' However, the current rules do not define ''low income'' or ''economically depressed.''

Section 209(c)(1)(A) of the Interlocks Act (12 U.S.C. 3207(c)(1)(A)) authorizes the appropriate agency to permit interlocks pursuant to the Management Consignment exemption if the agency determines that the proposed service would ''improve the provision of credit to low- and moderate-income areas.'' The proposed regulations define ''low- and moderate-income areas'' as areas where the median family income is less than 100 percent of the area median income. This definition is consistent with Title I, Subtitle A of the CDRI Act (the Community Development Banking and Financial Institutions Act of 1994) (12 U.S.C. 4701–4718), which, like the Management Consignment exemption affecting institutions in low- and moderate-income areas, is intended to assist the flow of credit into economically depressed areas. Section 103(17) of the CDRI Act (12 U.S.C. 4702(17)) defines ''low income'' to mean not more than 80 percent of the area median income. The agencies believe that Congress, by using the term ''low- and moderate-income'' in the Management Consignment exemption, intended for that term to apply to an area where the median family income exceeds 80 percent of the median income for the area. The agencies have selected 100 percent of the area median income as the cutoff for defining ''low- and moderate-income areas'' because they believe that a higher threshold would permit interlocks that would not improve the provision of credit to low- and moderate-income areas.

Management Official

The current regulations define ''management official'' to include an employee or officer ''with management functions'' (including a branch manager), a director, a trustee of an organization under the control of trustees, or any person who has a representative or nominee serving in such capacity. The definition excludes (1) a person whose management functions relate either exclusively to the business of retail merchandising or manufacturing or principally to business outside the United States of a foreign commercial bank and (2) a person excluded by section 202(4) of the Interlocks Act (12 U.S.C. 3201(4)).

The proposed regulations adopt the definition of ''management official'' set forth in the current rules, except that the phrase ''an employee or officer with management functions'' is removed. It is replaced by the term ''senior executive officer'' as defined by each of the agencies in their regulations pertaining to the prior notice of changes in senior executive officers, which implement section 32 of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831i) as added by section 914 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

The agencies are proposing this change to eliminate the uncertainty and attendant compliance burden created by the ambiguous term ''management functions.'' The proposals incorporate specific illustrative examples of positions at depository organizations that will be treated as senior executive officers. See 12 CFR 5.51(c)(3) (OCC); 12 CFR 225.71(a) (Board); 12 CFR 303.14(a)(3) (FDIC); and 12 CFR 574.9(a)(2) (OTS). The agencies believe that these definitions will allow depository organizations to identify impermissible interlocks with greater certainty and thus will enhance compliance. The agencies request comment on the advisability of defining ''management official'' by using ''senior executive officer'' rather than ''employee or officer with management functions.''

The current definition of ''management official'' exempts those individuals whose management functions relate to retail merchandising or manufacturing. Stated another way, the current exemption applies to a category of persons whose responsibilities are unrelated to the business of a deposit-taking institution.

The agencies specifically ask commenters to address whether the agencies should exempt a broader category of management officials whose duties are unrelated to the provision of financial services by a depository institution or depository holding company, and if so, how the agencies should define that category of excluded officials.

Relevant Metropolitan Statistical Area (RMSA)

The current regulations define ''relevant metropolitan statistical area'' as an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated primary MSAs as defined by the Office of Management and Budget (OMB). This definition is derived from section 203(1) of the Interlocks Act (12 U.S.C. 3202(1)).

The proposed regulations define ''relevant metropolitan statistical area (RMSA)'' as an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated primary MSAs, to the extent that the OMB defines and applies these terms. This change reflects the fact that the OMB defines ''consolidated MSA'' to include two or more primary MSAs. Given that consolidated MSAs, by the OMB's definition, are comprised of primary MSAs, the reference to consolidated MSAs in the Interlocks Act and the agencies' regulations is inappropriate. The proposed change enables the agencies to implement the statute in a way that complies with both the spirit and the letter of the Interlocks Act.

Representative or Nominee

The current regulations define ''representative or nominee'' as a person who serves as a management official and has an express or implied obligation to act on behalf of another person with respect to management responsibilities. The current definition goes on to state that the determination of whether someone is a representative or nominee depends on the facts of a particular case and that certain relationships (such as family, employment, and so on) may evidence an express or implied obligation to act.

The proposed regulations also define ''representative or nominee'' as someone who serves as a management official and has an obligation to act on behalf of someone else. The proposed definition deletes the rest of the current definition, however, and inserts in lieu thereof a statement that the appropriate agency will find that someone has an obligation to act on behalf of someone else *only* if there is an agreement (express or implied) to act on behalf of another. The agencies propose this change to clarify that the determination that a representative or nominee situation exists will depend on whether there is a basis to conclude that an agreement exists to act on someone's behalf. The agencies note that the current definition provides specific guidance for determining when a representative or nominee relationship might be found to exist, and request comment on whether the current definition, the proposed definition, or another definition is preferable.

Prohibitions

The current regulations prohibit interlocks in the following three

instances. First, no two unaffiliated depository organizations may have an interlock if they (or their depository institution affiliates) have depository institution offices in the same community. Second, a depository organization may not have an interlock with any unaffiliated depository organization if either depository organization has assets exceeding $20 million and the depository organizations (or depository institution affiliates of either) have depository institution offices in the same RMSA.[3] Third, if a depository organization has total assets exceeding $1 billion, it (and its affiliates) may not have an interlock with any depository organization with total assets exceeding $500 million (or affiliate thereof), regardless of location.

The proposed regulations amend the rules as they apply to institutions with assets of less than $20 million to better conform to the purposes of the Interlocks Act. Whereas the current rules prohibit interlocks in an RMSA if *one* of the organizations has total assets of $20 million or more, the proposed rules would apply the RMSA-wide prohibition only if *both* organizations have total assets of $20 million or more. Interlocks within a community involving unaffiliated depository organizations would continue to be prohibited.

The agencies believe that this proposed change is consistent with both the language and the intent of the Interlocks Act. While the statute uses the plural ''depository institutions'' in section 203(1) of the Interlocks Act (12 U.S.C. 3202(1)), in context, neither the statute nor its legislative history compels the conclusion that the interlock must involve two institutions with less than $20 million in assets before the less restrictive prohibition applies.

The Interlocks Act seeks to prohibit interlocks that could enable two institutions to engage in anticompetitive behavior. However, an institution with total assets of less than $20 million is likely to derive most of its business from the community in which it is located and is unlikely to compete with institutions that do not have offices in that community. Therefore, interlocks involving one institution with assets under $20 million and another institution with assets of at least $20 million not in the same community are not likely to lead to the anticompetitive conduct that the Interlocks Act is designed to prohibit.

[3] A community as that term is defined in the proposals is smaller than an RMSA. There may be several communities in one RMSA.

The agencies believe, moreover, that the proposed change will promote rather than inhibit competition. Expanding the pool of managerial talent for institutions with assets under $20 million could enhance the ability of smaller institutions to compete by improving the management of these institutions.

The proposed regulations reflect the change affecting depository organizations with less than $20 million in total assets. They also set forth the prohibition against interlocks involving large depository organizations but do not change the substance of that prohibition. The proposed regulations change the style of all three prohibitions in order to make them easier to understand.

The agencies invite comment on any aspect of this proposed section. The agencies specifically seek comment on whether the proposed reinterpretation of 12 U.S.C. 3202(1) might result in anticompetitive effects and thus run counter to the legislative intent of the Interlocks Act. For example, could the proposed change enable a large bank to engage in anticompetitive conduct by creating interlocks with one or more smaller depository institutions located in the same RMSA but not in the same community (a ''hub and spokes'' interlock)? The agencies also seek comment on whether the final rule should specifically address such situations.

Interlocking Relationships Expressly Permitted by Statute

The current regulations restate most of the exemptions that are expressly permitted by the Interlocks Act and list those exemptions that the agencies have permitted by regulation pursuant to the broad exemptive authority that applied before the enactment of the CDRI Act. The current regulations also address interlocks involving diversified savings and loan holding companies.

The proposed regulations state the exemptions found in 12 U.S.C. 3204(1)-(8).[4] The proposals reorder the exemptions set forth in the current regulations in order to conform the list of exemptions to the list set forth in the Interlocks Act.

[4] The Interlocks Act contains an additional exemption for savings associations and savings and loan holding companies that have issued stock in connection with a qualified stock issuance pursuant to section 10(q) of the Home Owners' Loan Act (12 U.S.C. 1467a(q)). *See* 12 U.S.C. 3204(9). The OTS therefore proposes to continue to list an additional exemption in its interlocks regulation which the other agencies do not list. Another exemption provides for interlocks as a result of an emergency acquisition of a savings association authorized in accordance with section 13(k) of the Federal Deposit Insurance Act (12 U.S.C. 1823(k)) if the FDIC has given its approval to the interlock. The FDIC therefore proposes to continue to list an additional exemption in its management interlocks regulation which the other agencies do not list.

Regulatory Standards Exemption

The current regulations contain no Regulatory Standards exemption.

The proposed regulations set forth the standards that a depository organization must satisfy in order to obtain a Regulatory Standards exemption. The proposal implements the requirement regarding certification by allowing a depository organization's board of directors (or the organizers of a depository organization that is being formed) to certify to the appropriate agency that no other qualified candidates have been found after undertaking reasonable efforts to locate other qualified candidates who are not prohibited from service under the Interlocks Act. If read narrowly, the Interlocks Act could require a depository organization to evaluate every person in a given locale that might be qualified and interested. This would create a requirement that, in practice, would be impossible to satisfy. Given that Congress would not have included an exemption that would have no practical application, the agencies believe that the proposed ''reasonableness'' standard is consistent with the legislative intent.

The proposed regulations also set forth presumptions that the agencies will apply when reviewing an application for a Regulatory Standards exemption. First, each agency will presume that an interlock will not have an anticompetitive effect if it involves institutions that, if merged, would not trigger a challenge from the agencies on competitive grounds. This presumption is unavailable, however, for interlocks subject to the Major Assets prohibition.

Generally, the agencies will not object to a merger on competitive grounds if the post-merger Herfindahl-Hirschman Index (HHI) for the market is less than 1800 and the merger increases the HHI by 200 points or less. This presumption will enable applicants to avoid the unnecessary burden of submitting a competitive analysis in several instances. The agencies have found this HHI benchmark to be a useful guide to evaluating anticompetitive effects of interlocks.[5] However, simply analyzing the HHI for the two organizations in a potential interlock does not take into

[5] See, *e.g.*, the OCC's Bank Merger Competitive Analysis Screen (OCC Advisory Letter 95–4, July 18, 1995); Department of Justice Merger Guidelines (49 FR 26823, June 29, 1984) (applied by the Board); FDIC Statement of Policy: Bank Merger Transactions (54 FR 39045, Sept. 22, 1989).

account any anticompetitive effects that might stem from a previously existing interlock. Accordingly, the agencies are requesting comments as to how other interlocks involving depository organizations should be viewed in applying this presumption.

The second presumption to be applied by the agencies is that a person is critical to an institution's safe and sound operations if the agencies also approved that individual under section 914 of FIRREA and the institution in question either was a newly chartered institution, failed to meet minimum capital requirements, or otherwise was in a ''troubled condition'' as defined in the reviewing agency's section 914 regulation at the time the section 914 filing was approved.[6]

The agencies invite comment on the utility of the proposed presumptions and on whether other presumptions also should apply.

The proposed regulations also address the duration of an interlock permitted under the Regulatory Standards exemption. The statute does not require that these interlocks terminate. In light of this open-ended grant of authority, the agencies are not proposing a specific term for a permitted exemption. Instead, the agencies may require an institution to terminate the interlock if an agency determines that the management official in question either no longer is critical to the safe and sound operations of the affected organization or that continued service will produce an anticompetitive effect. The agencies will provide affected organizations an opportunity to submit information before they make a final determination to require termination of an interlock.

Grandfathered Interlocking Relationships—Removed

The current regulations restate the grandfather provisions set forth in section 206 of the Interlocks Act (12 U.S.C. 3205). Section 338(a) of the CDRI Act authorizes the agencies to extend a grandfathered interlock for an additional five years if the management official in question satisfied the statutory criteria for obtaining an extension.

The proposed regulations remove the sections addressing the grandfather exemption because they are unnecessary and redundant in light of the statute. Individuals who wished to extend their exemption already have applied for and received an exemption if they met the statutory criteria. The grandfathered exemptions will expire on November 10, 1998, unless Congress amends the Interlocks Act again to provide another opportunity for an extension.

Management Consignment Exemption

The current regulations set forth a number of instances in which the agencies may permit an exemption to the Interlocks Act. However, the statutory provisions authorizing the agencies to grant exemptions have been amended, thereby requiring that the current regulations be amended as well. The Management Consignment exemption set forth in section 209(c) of the Interlocks Act (12 U.S.C. 3207(c)) is modelled after certain exemptions that appear in the agencies' current regulations.

The proposed regulations implement the Management Consignment exemption, and restate the statutory criteria, with three clarifications. First, the proposed rules state that the agencies consider a ''newly chartered institution'' to be an institution that has been chartered for less than two years at the time it files an application for exemption. This standard is consistent with certain other banking agency thresholds for determining when an institution is considered newly chartered (see, *e.g.*, 12 CFR 5.51(d), 225.72(a)(1); 303.14(b)).

Second, the proposal clarifies that the exemption available for ''minority- and women-owned institutions'' is available for an institution that is owned either by minorities or women. In noting the types of exemptions that the Federal banking agencies have approved, the House Conference Report to the CDRI Act (H.R. Conf. Rep. No. 652, 103d Cong., 2d Sess. 181 (1994)) (Conference Report) states that the types of institutions that have received exemptions include those that are ''owned by women or minorities.'' These exemptions ultimately were codified in the Interlocks Act. Accordingly, the agencies have concluded that Congress intended the Management Consignment exemption to assist institutions owned by women and/or by minorities, but did not intend to require the institution to be owned by both.

Third, the proposal permits an interlock if the interlock would strengthen the management of either a newly chartered institution or an institution that is in an unsafe or unsound condition. Section 209(c)(1)(C) of the Interlocks Act (12 U.S.C. 3207(c)(1)(C)) permits an exemption if the interlock would ''strengthen the management of newly chartered institutions that are in an unsafe or unsound condition.'' However, this provision contains what appears on its face to be an error, given that an exemption limited to situations involving newly chartered institutions that also are in an unsafe and unsound condition would have no practical utility. The chartering agencies do not approve an application for a bank or thrift charter unless the applicant seeking a charter can demonstrate that the proposed new financial institution will operate in a safe and sound manner for the foreseeable future. While there may be an extraordinary instance where a newly chartered institution immediately experiences unforeseen problems so severe that they threaten the safety and soundness of that institution, there is nothing in the legislative history to suggest that Congress intended to limit the Management Consignment exemption to such rare instances.

Moreover, the legislative history of the CDRI Act suggests that the agencies are to apply the Management Consignment exemption in cases involving either newly chartered institutions or institutions that are in an unsafe or unsound condition. The Conference Report notes that the agencies have used their exemptive authority to grant exemptions in limited cases where institutions ''are particularly in need of management guidance and expertise to operate in a safe and sound manner.'' *Id.* The Conference Report goes on to state that ''Examples of exceptions permissible under an agency management official consignment program include improving the provision of credit to low- and moderate-income areas, increasing the competitive position of minority- and women-owned institutions, and strengthening he [sic] management of newly chartered institutions or institutions that are in an unsafe or unsound condition.'' *Id.* at 182 (emphasis added).

Finally, Congress used the exemptions in the agencies' current rules as the model for the Management Consignment exemption. See *id.* at 181–182. These exemptions distinguish newly chartered institutions from institutions that are in an unsafe or unsound condition. The reference in the CDRI Act's legislative history to the current regulatory exemptions suggests that Congress intended to codify these exemptions.

For these reasons, the agencies propose to permit exemptions pursuant

[6] This presumption also applies to individuals whose service as a senior executive officer is approved by the OCC pursuant to the standard conditions imposed on newly chartered national banks and to individuals whose service as a management official is approved by the FDIC as a condition of a grant of deposit insurance prior to the opening of the depository institution.

to the Management Consignment exemption if the management official will strengthen either a newly chartered institution or an institution that is in an unsafe or unsound condition. Commenters are requested to address this approach.

The proposals set forth two presumptions that the agencies will apply in connection with an application for an exemption under the Management Consignment exemption. First, the agencies will presume that an individual is capable of strengthening the management of an institution that has been chartered for less than two years if the reviewing agency approved the individual to serve as a management official of that institution pursuant to section 914 of FIRREA.[7] Second, the agencies will presume that an individual is capable of strengthening the management of an institution that is in an unsafe or unsound condition if the reviewing agency approved the individual to serve under section 914 as a management official of that institution at a time when the institution was not in compliance with minimum capital requirements or otherwise was in a ''troubled condition.''

The agencies believe that presumptions of suitability are less valid when applied to the other Management Consignment exemptions because there is no reason to conclude that a management official approved under section 914 necessarily will improve the flow of credit to low- and moderate-income areas or increase the competitive position of minority- or woman-owned institutions. No presumption regarding effects on competition is proposed, given that this is not a factor to be considered by the agencies when reviewing an application for a Management Consignment exemption.

The agencies seek comment on the utility of the proposed presumptions and on whether additional presumptions should apply as well.

The proposed regulations set forth the limits on the duration of a Management Consignment exemption. The Interlocks Act limits a Management Consignment exemption to two years, with a possible extension for up to an additional two years if the applicant satisfies at least one of the criteria for obtaining a Management Consignment exemption. The proposed regulations implement this limitation by requiring interested parties to submit an application for an extension at least 30 days before the expiration of the initial term of the exemption and by clarifying that the presumptions that apply to initial applications also apply to extension applications.

Change in Circumstances

The current regulations provide a 15-month grace period for nongrandfathered interlocks that become impermissible due to a change in circumstances. This period may be shortened by the agencies under appropriate circumstances.

The proposed regulations revise the style of this section in the current regulations but not its substance.

The agencies seek comment on the proposed continued availability of a grace period.

Enforcement

The current regulations set forth the jurisdiction of the agencies that enforce the Interlocks Act.

The proposed regulations simplify the style of this section in the current regulations but not its substance.

Small Market Share Exemption

In 1994, the OCC, Board, and FDIC published separate notices of proposed rulemaking seeking comment on a proposed exemption for interlocks involving institutions that, on a combined basis, would control less than 20 percent of the deposits in a community or relevant MSA. These agencies published small market share exemption proposals pursuant to the broad exemptive authority vested in the agencies prior to the enactment of the CDRI Act. However, as previously noted, the CDRI Act amended the agencies' broad rulemaking authority by authorizing the agencies to grant exemptions only in more narrow circumstances. In light of this statutory change, the three agencies believe that it would be inappropriate to adopt the proposed small market share exemption. The FDIC already has withdrawn its proposal regarding the small market share exemption (see 60 FR 7139 (February 7, 1995)). The OCC and Board hereby withdraw their respective proposals.

Paperwork Reduction Act

The OCC, FDIC, and OTS invite comment on:

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

(2) The accuracy of each agency'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.

OCC: The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the Office of Management 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 (1557–0196), Washington, DC 20503, with copies to the Legislative and Regulatory Activities Division (1557–0196), 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 26.4(h)(1)(i), 26.5(a)(1), 26.5(a)(2), 26.6(a), and 26.6(c). This information is required to evidence compliance with the requirements of the Interlocks Act by national banks and District banks. The likely respondents are national banks and District banks.

Estimated average annual burden hours per respondent: 3 hours.

Estimated number of respondents: 100.

Start-up costs to respondents: None.

Board: 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. Comments on the collections of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0046, 7100–0134, 7100–0171, 7100–0266), Washington, DC 20503, with copies of such comments to be sent to Mary M. McLaughlin, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 97, Board of Governors of the Federal Reserve System, Washington, DC 20551.

The collection of information requirements in this proposed rulemaking are found in 12 CFR

[7] This presumption also applies to an individual whose service as a senior executive officer of a national bank is approved pursuant to the standard conditions imposed by the OCC on newly chartered national banks and to individuals whose service as a management official is approved by the FDIC as a condition of a grant of deposit insurance prior to the opening of the depository institution.

212.4(h)(1)(i), 212.5(a)(1), 212.5(a)(2), 212.6(a), and 212.6(c). This information is required to evidence compliance with the requirements of the Interlocks Act as amended by section 338 of the CDRI Act. The respondents are state member banks and subsidiary depository institutions of bank holding companies.

Currently, information on management official interlocks is gathered as a part of the following applications: membership in the Federal Reserve System (OMB No. 7100–0046); state member bank mergers (OMB No. 7100–0266); changes in bank control (OMB No. 7100–0134); and bank holding company acquisitions of depository institutions (OMB No. 7100–0171). The estimated portion of burden for each application that is attributable to management interlocks averages 4 hours, and the burden ranges from as much as 6 hours to as little as 0.5 hours. It is estimated that 822 applications are filed annually, with an estimate of 3,288 hours of annual burden. Based on an hourly cost of $20, the annual cost to the public is estimated to be $65,760. The Federal Reserve believes that the proposed rule will have a minimal effect on respondent burden.

The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, these information collections unless they display currently valid OMB control numbers.

No issues of confidentiality under the provisions of the Freedom of Information Act normally arise for the applications.

Comments are invited on: (1) Whether the proposed revised collections of information are necessary for the proper performance of the Federal Reserve's functions, including whether the information has practical utility; (2) the accuracy of the Federal Reserve's estimate of the burden of the proposed information collections, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

FDIC: The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management 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 (3604–0092), Washington, DC 20503, with copies of such comments to be sent to Steven F. Hanft, Office of the Executive Secretary, Room F–453, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

The collection of information requirements in this proposed regulation are found in 12 CFR 348.4(i)(1)(i), 348.5(a)(1), 348.5(a)(2), 348.6(a), and 348.6(c). This information is required to evidence compliance with the requirements of the Interlocks Act as amended by section 338 of the CDRI Act. The likely respondents are insured nonmember banks.

Estimated number of respondents: 6 applicants per year.

Estimated average annual burden per respondent: 4 hours.

Estimated annual frequency of recordkeeping: Not applicable (one-time application).

Estimated total annual recordkeeping burden: 24 hours.

OTS: The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (1550), Washington, DC 20503, with copies to the Business Transactions Division (1550), Office of Thrift Supervision, 1700 G Street, NW, Washington, DC.

The collection of information requirements in this proposed rule are found in 12 CFR 563f.4(h)(1)(i), 563f.5(a)(1), 563f.5(a)(2), 563f.6(a), and 563f.6(c). This information is required to evidence compliance with the requirements of the Interlocks Act by savings associations. The likely respondents are national savings associations.

Estimated average annual burden hours per respondent: 4 hours.

Estimated number of respondents: 8.

Start-up costs to respondents: None.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), the initial regulatory flexibility analysis otherwise required under section 603 of the RFA (5 U.S.C. 603) is not required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and the agency publishes such certification and a succinct statement explaining the reasons for such certification in the Federal Register along with its general notice of proposed rulemaking.

Pursuant to section 605(b) of the RFA, the agencies hereby certify that this proposed rule will not have a significant economic impact on a substantial number of small entities. The agencies expect that this proposal will not (1) have significant secondary or incidental effects on a substantial number of small entities or (2) create any additional burden on small entities. Moreover, the changes to the exemptions available are required by the Interlocks Act. Accordingly, a regulatory flexibility analysis is not required.

Executive Order 12866

OCC and OTS: The OCC and OTS have determined that this proposal is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Act of 1995

OCC and OTS: Section 202 of the Unfunded Mandates Act of 1995 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a proposed rule likely to result in a Federal mandate that may result in the annual expenditure of $100 million or more in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act requires an agency to identify and consider a reasonable number of alternatives before promulgating a proposal.

The OCC and OTS have determined that the proposed 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, neither the OCC nor the OTS has prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects

12 CFR Part 26

Antitrust, Banks, banking, Holding companies, Management official interlocks, National banks.

12 CFR Part 212

Antitrust, Banks, banking, Holding companies, Management official interlocks.

12 CFR Part 348

Antitrust, Banks, banking, Holding companies.

12 CFR Part 563f

Antitrust, Holding companies, Management official interlocks, Savings associations.

Office of the Comptroller of the Currency

12 CFR CHAPTER I

Authority and Issuance

For the reasons set out in the joint preamble, the OCC proposes to revise part 26 of chapter I of title 12 of the Code of Federal Regulations to read as follows:

PART 26—MANAGEMENT OFFICIAL INTERLOCKS

Sec.
26.1 Authority, purpose, and scope.
26.2 Definitions.
26.3 Prohibitions.
26.4 Interlocking relationships permitted by statute.
26.5 Regulatory Standards exemption.
26.6 Management Consignment exemption.
26.7 Change in circumstances.
26.8 Enforcement.

Authority: 12 U.S.C. 93a and 3201–3208.

§ 26.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued under the provisions of the Depository Institution Management Interlocks Act (Interlocks Act) (12 U.S.C. 3201 *et seq.*), as amended, and the OCC's general rulemaking authority in 12 U.S.C. 93a.

(b) *Purpose.* The purpose of the Interlocks Act and this part is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect.

(c) *Scope.* This part applies to management officials of national banks, District banks, and affiliates of either.

§ 26.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Affiliate.* (1) The term *affiliate* has the meaning given in section 202 of the Interlocks Act (12 U.S.C. 3201). For purposes of that section, shares held by an individual include shares held by members of his or her immediate family. ''Immediate family'' includes spouse, mother, father, child, grandchild, sister, brother, or any of their spouses, whether or not any of their shares are held in trust.

(2) For purposes of section 202(3)(B) of the Interlocks Act (12 U.S.C. 3201(3)(B)), an affiliate relationship involving a national bank based on common ownership does not exist if the OCC determines, after giving the affected persons the opportunity to respond, that the asserted affiliation was established in order to avoid the prohibitions of the Interlocks Act and does not represent a true commonality of interest between the depository organizations. In making this determination, the OCC considers, among other things, whether a person, including members of his or her immediate family, whose shares are necessary to constitute the group owns a nominal percentage of the shares of one of the organizations and the percentage is substantially disproportionate with that person's ownership of shares in the other organization.

(b) *Anticompetitive effect* means a monopoly or substantial lessening of competition.

(c) *Area median income* means:

(1) The median family income for the metropolitan statistical area (MSA), if a depository organization is located in an MSA; or

(2) The statewide nonmetropolitan median family income, if a depository organization is located outside an MSA.

(d) *Community* means city, town, or village, and contiguous or adjacent cities, towns, or villages.

(e) *Contiguous or adjacent cities, towns, or villages* means cities, towns, or villages whose borders touch each other or whose borders are within 10 road miles of each other at their closest points. The property line of an office located in an unincorporated city, town, or village is the boundary line of that city, town, or village for the purpose of this definition.

(f) *Critical* means important to restoring or maintaining a depository organization's safe and sound operations.

(g) *Depository holding company* means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of the Interlocks Act (12 U.S.C. 3201)) having its principal office located in the United States.

(h) *Depository institution* means a commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office, including a branch or agency, of a foreign commercial bank is a depository institution.

(i) *Depository institution affiliate* means a depository institution that is an affiliate of a depository organization.

(j) *Depository organization* means a depository institution or a depository holding company.

(k) *District bank* means any State bank operating under the Code of Law of the District of Columbia.

(l) *Low- and moderate-income areas* means areas where the median family income is less than 100 percent of the area median income.

(m) *Management official.* (1) The term *management official* includes:

(i) A director;

(ii) An advisory or honorary director of a depository institution with total assets of $100 million or more;

(iii) A senior executive officer as that term is defined in 12 CFR 5.51(c)(3);

(iv) A branch manager;

(v) A trustee of a depository organization under the control of trustees; and

(vi) Any person who has a representative or nominee serving in any of the capacities in this paragraph (m)(1).

(2) The term *management official* does not include:

(i) A person whose management functions relate exclusively to the business of retail merchandising or manufacturing;

(ii) A person whose management functions relate principally to the business outside the United States of a foreign commercial bank; or

(iii) A person described in the provisos of section 202(4) of the Interlocks Act (12 U.S.C. 3201(4)) (referring to an officer of a State-chartered savings bank, cooperative bank, or trust company that neither makes real estate mortgage loans nor accepts savings).

(n) *Office* means a principal or branch office of a depository institution located in the United States. *Office* does not include a representative office of a foreign commercial bank, an electronic terminal, or a loan production office.

(o) *Person* means a natural person, corporation, or other business entity.

(p) *Relevant metropolitan statistical area (RMSA)* means an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated primary MSAs to the extent that these terms are defined and applied by the Office of Management and Budget.

(q) *Representative or nominee* means a natural person who serves as a management official and has an obligation to act on behalf of another person with respect to management responsibilities. The OCC will find that a person has an obligation to act on

behalf of another person only if the first person has an agreement, express or implied, to act on behalf of the second person with respect to management responsibilities. The OCC will determine, after giving the affected persons an opportunity to respond, whether a person is a *representative or nominee.*

(r) *Total assets.* (1) The term *total assets* means assets measured on a consolidated basis and reported in the most recent fiscal year-end Consolidated Report of Condition and Income.

(2) The term *total assets* does not include:

(i) Assets of a diversified savings and loan holding company as defined by section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) other than the assets of its depository institution affiliate;

(ii) Assets of a bank holding company that is exempt from the prohibitions of section 4 of the Bank Holding Company Act of 1956 pursuant to an order issued under section 4(d) of that Act (12 U.S.C. 1843(d)) other than the assets of its depository institution affiliate; or

(iii) Assets of offices of a foreign commercial bank other than the assets of its United States branch or agency.

(s) *United States* means the United States of America, any State or territory of the United States of America, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

§ 26.3 Prohibitions.

(a) *Community.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same community.

(b) *RMSA.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of $20 million or more.

(c) *Major assets.* A management official of a depository organization with total assets exceeding $1 billion (or any affiliate thereof) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding $500 million (or any affiliate thereof), regardless of the location of the two depository organizations.

§ 26.4 Interlocking relationships permitted by statute.

The prohibitions of § 26.3 do not apply in the case of any one or more of the following organizations or to a subsidiary thereof:

(a) A depository organization that has been placed formally in liquidation, or which is in the hands of a receiver, conservator, or other official exercising a similar function;

(b) A corporation operating under section 25 or section 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.* and 12 U.S.C. 611 *et seq.*, respectively) (Edge Corporations and Agreement Corporations);

(c) A credit union being served by a management official of another credit union;

(d) A depository organization that does not do business within the United States except as an incident to its activities outside the United States;

(e) A State-chartered savings and loan guaranty corporation;

(f) A Federal Home Loan Bank or any other bank organized solely to serve depository institutions (a bankers' bank) or solely for the purpose of providing securities clearing services and services related thereto for depository institutions and securities companies;

(g) A depository organization that is closed or is in danger of closing as determined by the appropriate Federal depository institutions regulatory agency and is acquired by another depository organization. This exemption lasts for five years, beginning on the date the depository organization is acquired; and

(h)(1) A diversified savings and loan holding company (as defined in section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) with respect to the service of a director of such company who also is a director of an unaffiliated depository organization if:

(i) Both the diversified savings and loan holding company and the unaffiliated depository organization notify their appropriate Federal depository institutions regulatory agency at least 60 days before the dual service is proposed to begin; and

(ii) The appropriate regulatory agency does not disapprove the dual service before the end of the 60-day period.

(2) The OCC may disapprove a notice of proposed service if it finds that:

(i) The service cannot be structured or limited so as to preclude an anticompetitive effect in financial services in any part of the United States;

(ii) The service would lead to substantial conflicts of interest or unsafe or unsound practices; or

(iii) The notificant failed to furnish all the information required by the OCC.

(3) The OCC may require that any interlock permitted under this paragraph (h) be terminated if a change in circumstances occurs with respect to one of the interlocked depository organizations that would have provided a basis for disapproval of the interlock during the notice period.

§ 26.5 Regulatory Standards exemption.

(a) *Criteria.* The OCC may permit an interlock that otherwise would be prohibited by the Interlocks Act and § 26.3 if:

(1) The board of directors of the depository organization (or the organizers of a depository organization being formed) that seeks the exemption provides a resolution to the OCC certifying that the organization, after the exercise of reasonable efforts, is unable to locate any other candidate from the community or RMSA, as appropriate, who:

(i) Possesses the level of expertise required by the depository organization and who is not prohibited from service by the Interlocks Act; and

(ii) Is willing to serve as a management official; and

(2) The OCC, after reviewing an application submitted by the depository organization seeking the exemption, determines that:

(i) The management official is critical to the safe and sound operations of the affected depository organization; and

(ii) Service by the management official will not produce an anticompetitive effect with respect to the depository organization.

(b) *Presumptions.* The OCC applies the following presumptions when reviewing any application for a Regulatory Standards exemption:

(1) An interlock has no anticompetitive effect if it involves depository institutions that, if merged, would not cause the post-merger Herfindahl-Hirschman Index (HHI) to exceed 1800 and would not cause the HHI to increase by more than 200 points. This presumption does not apply to institutions subject to the major assets prohibition of § 26.3(c).

(2) A proposed management official is critical to the safe and sound operations of a depository institution if that official is approved by the OCC to serve as a director or senior executive officer of that institution pursuant to 12 CFR 5.51 or pursuant to conditions imposed on a newly chartered national bank and the institution had operated for less than two years, was not in compliance with minimum capital requirements, or otherwise was in a ''troubled condition''

as defined in 12 CFR 5.51 at the time the service under that section was approved.

(c) *Duration of interlock.* An interlock permitted under this section may continue until the OCC notifies the affected organizations otherwise. The OCC may require a national bank to terminate any interlock permitted under this section if the OCC concludes, after giving the affected persons the opportunity to respond, that the determinations under paragraph (a)(2) of this section no longer may be made.

§ 26.6 Management Consignment exemption.

(a) *Criteria.* The OCC may permit an interlock that otherwise would be prohibited by the Interlocks Act and § 26.3 if the OCC, after reviewing an application submitted by the depository organization seeking an exemption, determines that the interlock would:

(1) Improve the provision of credit to low- and moderate-income areas;

(2) Increase the competitive position of a minority- or woman-owned depository organization;

(3) Strengthen the management of a depository institution that has been chartered for less than two years at the time an application is filed under this part; or

(4) Strengthen the management of a depository institution that is in an unsafe or unsound condition as determined by the OCC on a case-by-case basis.

(b) *Presumptions.* The OCC applies the following presumptions when reviewing any application for a Management Consignment exemption:

(1) A proposed management official is capable of strengthening the management of a depository institution described in paragraph (a)(3) of this section if that official is approved by the OCC to serve as a director or senior executive officer of that institution pursuant to 12 CFR 5.51 or pursuant to conditions imposed on a newly chartered national bank and the institution had operated for less than two years at the time the service under 12 CFR 5.51 was approved; and

(2) A proposed management official is capable of strengthening the management of a depository institution described in paragraph (a)(4) of this section if that official is approved by the OCC to serve as a director or senior executive officer of that institution pursuant to 12 CFR 5.51 and the institution was not in compliance with minimum capital requirements or otherwise was in a ''troubled condition'' as defined under 12 CFR 5.51 at the time service under that section was approved.

(c) *Duration of interlock.* An interlock granted under this section may continue for a period of two years from the date of approval. The OCC may extend this period for one additional two-year period if the depository organization applies for an extension at least 30 days before the current exemption expires and satisfies one of the criteria specified in paragraph 26.6(a) of this section. The provisions set forth in paragraph (b) of this section also apply to applications for extensions.

§ 26.7 Change in circumstances.

(a) Termination. A management official shall terminate his or her service or apply for an exemption to the Interlocks Act if a change in circumstances causes the service to become prohibited under that Act. A change in circumstances may include, but is not limited to, an increase in asset size of an organization, a change in the delineation of the RMSA or community, the establishment of an office, an acquisition, a merger, a consolidation, or any reorganization of the ownership structure of a depository organization that causes a previously permissible interlock to become prohibited.

(b) *Transition period.* A management official described in paragraph (a) of this section may continue to serve the depository institution involved in the interlock for 15 months following the date of the change in circumstances. The OCC may shorten this period under appropriate circumstances.

§ 26.8 Enforcement.

Except as noted in this section, the OCC administers and enforces the Interlocks Act with respect to national banks, District banks, and affiliates of either, and may refer any case of a prohibited interlocking relationship involving these institutions to the Attorney General of the United States to enforce compliance with the Interlocks Act and this part. If an affiliate of a national bank or a District bank is subject to the primary regulation of another Federal depository organization supervisory agency, then the OCC does not administer and enforce the Interlocks Act with respect to that affiliate.

Dated: November 27, 1998.

Eugene A. Ludwig,

Comptroller of the Currency.

Federal Reserve System

12 CFR CHAPTER II

Authority and Issuance

For the reasons set forth in the joint preamble, the Board proposes to revise part 212 of chapter II of title 12 of the Code of Federal Regulations to read as follows:

PART 212—MANAGEMENT OFFICIAL INTERLOCKS

Sec.
212.1 Authority, purpose, and scope.
212.2 Definitions.
212.3 Prohibitions.
212.4 Interlocking relationships permitted by statute.
212.5 Regulatory Standards exemption.
212.6 Management Consignment exemption.
212.7 Change in circumstances.
212.8 Enforcement.
212.9 Effect of Interlocks Act on Clayton Act.

Authority: 12 U.S.C. 3201–3208; 15 U.S.C. 19.

§ 212.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued under the provisions of the Depository Institution Management Interlocks Act (Interlocks Act) (12 U.S.C. 3201 *et seq.*), as amended.

(b) *Purpose.* The purpose of the Interlocks Act and this part is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect.

(c) *Scope.* This part applies to management officials of state member banks, bank holding companies, and their affiliates.

§ 212.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Affiliate.* (1) The term affiliate has the meaning given in section 202 of the Interlocks Act (12 U.S.C. 3201). For purposes of that section, shares held by an individual include shares held by members of his or her immediate family. ''Immediate family'' includes spouse, mother, father, child, grandchild, sister, brother, or any of their spouses, whether or not any of their shares are held in trust.

(2) For purposes of section 202(3)(B) of the Interlocks Act (12 U.S.C. 3201(3)(B)), an affiliate relationship based on common ownership does not exist if the Board determines, after

giving the affected persons the opportunity to respond, that the asserted affiliation was established in order to avoid the prohibitions of the Interlocks Act and does not represent a true commonality of interest between the depository organizations. In making this determination, the Board considers, among other things, whether a person, including members of his or her immediate family, whose shares are necessary to constitute the group owns a nominal percentage of the shares of one of the organizations and the percentage is substantially disproportionate with that person's ownership of shares in the other organization.

(b) *Anticompetitive effect* means a monopoly or substantial lessening of competition.

(c) *Area median income* means:

(1) The median family income for the metropolitan statistical area (MSA), if a depository organization is located in an MSA; or

(2) The statewide nonmetropolitan median family income, if a depository organization is located outside an MSA.

(d) *Community* means city, town, or village, or contiguous and adjacent cities, towns, or villages.

(e) *Contiguous or adjacent cities, towns, or villages* means cities, towns, or villages whose borders touch each other or whose borders are within 10 road miles of each other at their closest points. The property line of an office located in an unincorporated city, town, or village is the boundary line of that city, town, or village for the purpose of this definition.

(f) *Critical*, as used in § 212.5, means important to restoring or maintaining a depository organization's safe and sound operations.

(g) *Depository holding company* means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of the Interlocks Act (12 U.S.C. 3201)) having its principal office located in the United States.

(h) *Depository institution* means a commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office, including a branch or agency, of a foreign commercial bank is a depository institution.

(i) *Depository institution affiliate* means a depository institution that is an affiliate of a depository organization.

(j) *Depository organization* means a depository institution or a depository holding company.

(k) *Low- and moderate-income areas* means areas where the median family income is less than 100 percent of the area median income.

(l) *Management official*. (1) The term *management official* includes:

(i) A director;

(ii) An advisory or honorary director of a depository institution with total assets of $100 million or more;

(iii) A senior executive officer as that term is defined in 12 CFR 225.71(a);

(iv) A branch manager;

(v) A trustee of a depository organization under the control of trustees; and

(vi) Any person who has a representative or nominee, as defined in paragraph (p) of this section, serving in any of the capacities in this paragraph (l) (1).

(2) The term *management official* does not include:

(i) A person whose management functions relate exclusively to the business of retail merchandising or manufacturing;

(ii) A person whose management functions relate principally to a foreign commercial bank's business outside the United States; or

(iii) A person described in the provisos of section 202(4) of the Interlocks Act (referring to an officer of a State-chartered savings bank, cooperative bank, or trust company that neither makes real estate mortgage loans nor accepts savings).

(m) *Office* means a principal or branch office of a depository institution located in the United States. *Office* does not include a representative office of a foreign commercial bank, an electronic terminal, a loan production office.

(n) *Person* means a natural person, corporation, or other business entity.

(o) *Relevant metropolitan statistical area (RMSA)* means an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated Primary MSAs to the extent that these terms are defined and applied by the Office of Management and Budget.

(p) *Representative or nominee* means a natural person who serves as a management official and has an obligation to act on behalf of another person with respect to management responsibilities. The Board will find that a person has an obligation to act on behalf of another person only if the first person has an agreement, express or implied, to act on behalf of the second person with respect to management responsibilities. The Board will determine, after giving the affected persons an opportunity to respond, whether a person is a *representative or nominee*.

(q) *Total assets*. (1) The term *total assets* means assets measured on a consolidated basis and reported in the most recent fiscal year-end Consolidated Report of Condition and Income.

(2) The term *total assets* does not include:

(i) Assets of a diversified savings and loan holding company as defined by section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) other than the assets of its depository institution affiliate;

(ii) Assets of a bank holding company that is exempt from the prohibitions of section 4 of the Bank Holding Company Act of 1956 pursuant to an order issued under section 4(d) of that Act (12 U.S.C. 1843(d)) other than the assets of its depository institution affiliate; or

(iii) Assets of offices of a foreign commercial bank other than the assets of its United States branch or agency.

(r) *United States* means the United States of America, any State or territory of the United States of America, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

§ 212.3 Prohibitions.

(a) *Community*. A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same community.

(b) *RMSA*. A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of $20 million or more.

(c) *Major assets*. A management official of a depository organization with total assets exceeding $1 billion (or any affiliate thereof) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding $500 million (or any affiliate thereof), regardless of the location of the two depository organizations.

§ 212.4 Interlocking relationships permitted by statute.

The prohibitions of § 212.3 do not apply in the case of any one or more of

the following organizations or to a subsidiary thereof:

(a) A depository organization that has been placed formally in liquidation, or which is in the hands of a receiver, conservator, or other official exercising a similar function;

(b) A corporation operating under section 25 or section 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.* and 12 U.S.C. 611 *et seq.*, respectively) (Edge Corporations and Agreement Corporations);

(c) A credit union being served by a management official of another credit union;

(d) A depository organization that does not do business within the United States except as an incident to its activities outside the United States;

(e) A State-chartered savings and loan guaranty corporation;

(f) A Federal Home Loan Bank or any other bank organized solely to serve depository institutions (a bankers' bank) or solely for the purpose of providing securities clearing services and services related thereto for depository institutions and securities companies;

(g) A depository organization that is closed or is in danger of closing as determined by the appropriate Federal depository institutions regulatory agency and is acquired by another depository organization. This exemption lasts for five years, beginning on the date the depository organization is acquired; and

(h)(1) A diversified savings and loan holding company (as defined in section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) with respect to the service of a director of such company who also is a director of an unaffiliated depository organization if:

(i) Both the diversified savings and loan holding company and the unaffiliated depository organization notify their appropriate Federal depository institutions regulatory agency at least 60 days before the dual service is proposed to begin; and

(ii) The appropriate regulatory agency does not disapprove the dual service before the end of the 60-day period.

(2) The Board may disapprove a notice of proposed service if it finds that:

(i) The service cannot be structured or limited so as to preclude an anticompetitive effect in financial services in any part of the United States;

(ii) The service would lead to substantial conflicts of interest or unsafe or unsound practices; or

(iii) The notificant failed to furnish all the information required by the Board.

(3) The Board may require that any interlock permitted under this paragraph (h) be terminated if a change in circumstances occurs with respect to one of the interlocked depository organizations that would have provided a basis for disapproval of the interlock during the notice period.

§ 212.5 Regulatory Standards exemption.

(a) *Criteria.* The Board may permit an interlock that otherwise would be prohibited by the Interlocks Act and § 212.3 if:

(1) The board of directors of the depository organization (or the organizers of a depository organization being formed) that seeks the exemption provides a resolution to the Board certifying that the organization, after the exercise of reasonable efforts, is unable to locate any other candidate from the community or RMSA, as appropriate, who:

(i) Possesses the level of expertise required by the depository organization and who is not prohibited from service by the Interlocks Act; and

(ii) Is willing to serve as a management official; and

(2) The Board, after reviewing an application submitted by the depository organization seeking the exemption, determines that:

(i) The management official is critical to the safe and sound operations of the affected depository organization; and

(ii) Service by the management official will not produce an anticompetitive effect with respect to the depository organization.

(b) *Presumptions.* The Board applies the following presumptions when reviewing any application for a Regulatory Standards exemption:

(1) An interlock has no anticompetitive effect if it involves depository institutions that, if merged, would not cause the post-merger Herfindahl-Hirschman Index (HHI) to exceed 1800 and would not cause the HHI to increase by more than 200 points. This presumption does not apply to institutions subject to the major assets prohibition of § 212.3(c).

(2) A proposed management official is critical to the safe and sound operations of a depository institution if the official is approved by the Board to serve as a director or senior executive officer of the institution pursuant to 12 CFR 225.71 and the institution had operated for less than two years, was not in compliance with minimum capital requirements, or otherwise was in a ''troubled condition'' as defined in 12 CFR 225.71 at the time the service under that section was approved.

(c) *Duration of interlock.* An interlock permitted under this section may continue until the Board notifies the affected organizations otherwise. The Board may require termination of any interlock permitted under this section if the Board concludes, after giving the affected persons the opportunity to respond, that the determinations under paragraph (a)(2) of this section no longer may be made.

§ 212.6 Management Consignment exemption.

(a) *Criteria.* The Board may permit an interlock that otherwise would be prohibited by the Interlocks Act and § 212.3 if the Board, after reviewing an application submitted by the depository organization seeking an exemption, determines that the interlock would:

(1) Improve the provision of credit to low- and moderate-income areas;

(2) Increase the competitive position of a minority- or woman-owned depository organization;

(3) Strengthen the management of a depository institution that has been chartered for less than two years at the time an application is filed under this part; or

(4) Strengthen the management of a depository institution that is in an unsafe or unsound condition as determined by the Board on a case-by-case basis.

(b) *Presumptions.* The Board applies the following presumptions in reviewing any application for a Management Consignment exemption:

(1) A proposed management official is capable of strengthening the management of a depository institution described in paragraph (a)(3) of this section if that official is approved by the Board to serve as a director or senior executive officer of that institution pursuant to 12 CFR 225.71 and the institution had operated for less than two years at the time the service was approved; and

(2) A proposed management official is capable of strengthening the management of a depository institution described in paragraph (a)(4) of this section if the official is approved by the Board to serve as a director or senior executive officer of the institution pursuant to 12 CFR 225.71 and the institution was not in compliance with minimum capital requirements or otherwise was in a ''troubled condition'' as defined under 12 CFR 225.71 at the time service was approved.

(c) *Duration of interlock.* An interlock granted under this section may continue for a period of two years from the date of approval. The Board may extend this period for one additional two-year

period if the depository organization applies for an extension at least 30 days before the current exemption expires and satisfies one of the criteria specified in paragraph (a) of this section. The provisions set forth in paragraph (b) of this section also apply to applications for extensions.

§ 212.7 Change in circumstances.

(a) *Termination.* A management official shall terminate his or her service or apply for an exemption to the Interlocks Act if a change in circumstances causes the service to become prohibited under that Act. A change in circumstances may include, but is not limited to, an increase in asset size of an organization, a change in the delineation of the RMSA or community, the establishment of an office, an acquisition, a merger, a consolidation, or any reorganization of the ownership structure of a depository organization that causes a previously permissible interlock to become prohibited.

(b) *Transition period.* A management official described in paragraph (a) of this section may continue to serve the state member bank or bank holding company involved in the interlock for 15 months following the date of the change in circumstances. The Board may shorten this period under appropriate circumstances.

§ 212.8 Enforcement.

Except as noted in this section, the Board administers and enforces the Interlocks Act with respect to state member banks, bank holding companies, and affiliates of either, and may refer any case of a prohibited interlocking relationship involving these institutions to the Attorney General of the United States to enforce compliance with the Interlocks Act and this part. If an affiliate of a state member bank or a bank holding company is subject to the primary regulation of another Federal depository organization supervisory agency, then the Board does not administer and enforce the Interlocks Act with respect to that affiliate.

§ 212.9 Effect of Interlocks Act on Clayton Act.

The Board regards the provisions of the first three paragraphs of section 8 of the Clayton Act (15 U.S.C. 19) to have been supplanted by the revised and more comprehensive prohibitions on management official interlocks between depository organizations in the Interlocks Act.

Dated: December 14, 1995.

William W. Wiles,

Secretary of the Board.

Federal Deposit Insurance Corporation

12 CFR CHAPTER III

Authority and Issuance

For the reasons set forth in the joint preamble, pursuant to its authority under section 209 of the Depository Institution Management Interlocks Act (12 U.S.C. 3207), the Board of Directors of the FDIC proposes to revise part 348 of chapter III of title 12 of the Code of Federal Regulations to read as follows:

PART 348—MANAGEMENT OFFICIAL INTERLOCKS

Sec.
348.1 Authority, purpose, and scope.
348.2 Definitions.
348.3 Prohibitions.
348.4 Interlocking relationships permitted by statute.
348.5 Regulatory Standards exemption.
348.6 Management Consignment exemption.
348.7 Change in circumstances.
348.8 Enforcement.

Authority: 12 U.S.C. 3207, 12 U.S.C. 1823(k).

§ 348.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued under the provisions of the Depository Institution Management Interlocks Act (Interlocks Act) (12 U.S.C. 3201 *et seq.*), as amended.

(b) *Purpose.* The purpose of the Interlocks Act and this part is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect.

(c) *Scope.* This part applies to management officials of insured nonmember banks and their affiliates.

§ 348.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Affiliate.* (1) The term *affiliate* has the meaning given in section 202 of the Interlocks Act (12 U.S.C. 3201). For purposes of that section, shares held by an individual include shares held by members of his or her immediate family. ''Immediate family'' includes spouse, mother, father, child, grandchild, sister, brother or any of their spouses, whether or not any of their shares are held in trust.

(2) For purposes of section 202(3)(B) of the Interlocks Act (12 U.S.C. 3201(3)(B)), an affiliate relationship involving an insured nonmember bank based on common ownership does not exist if the FDIC determines, after giving the affected persons the opportunity to respond, that the asserted affiliation was established in order to avoid the prohibitions of the Interlocks Act and does not represent a true commonality of interest between the depository organizations. In making this determination, the FDIC considers, among other things, whether a person, including members of his or her immediate family whose shares are necessary to constitute the group, owns a nominal percentage of the shares of one of the organizations and the percentage is substantially disproportionate with that person's ownership of shares in the other organization.

(b) *Anticompetitive effect* means a monopoly or substantial lessening of competition.

(c) *Area median income* means:

(1) The median family income for the metropolitan statistical area (MSA), if a depository organization is located in an MSA; or

(2) The statewide nonmetropolitan median family income, if a depository organization is located outside an MSA.

(d) *Community* means city, town, or village, and contiguous or adjacent cities, towns, or villages.

(e) *Contiguous or adjacent cities, towns, or villages* means cities, towns, or villages whose borders touch each other or whose borders are within 10 road miles of each other at their closest points. The property line of an office located in an unincorporated city, town, or village is the boundary line of that city, town, or village for the purpose of this definition.

(f) *Critical* means important to restoring or maintaining a depository organization's safe and sound operations.

(g) *Depository holding company* means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of the Interlocks Act (12 U.S.C. 3201)) having its principal office located in the United States.

(h) *Depository institution* means a commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office, including a branch or agency, of a foreign commercial bank is a depository institution.

(i) *Depository institution affiliate* means a depository institution that is an affiliate of a depository organization.

(j) *Depository organization* means a depository institution or a depository holding company.

(k) *Low- and moderate-income areas* means areas where the median family income is less than 100 percent of the area median income.

(l) *Management official.* (1) The term *management official* includes:

(i) A director;

(ii) An advisory or honorary director of a depository institution with total assets of $100 million or more;

(iii) A senior executive officer as that term is defined in 12 CFR 303.14(a)(3);

(iv) A branch manager;

(v) A trustee of a depository organization under the control of trustees; and

(vi) Any person who has a representative or nominee serving in any of the capacities in this paragraph (l)(1).

(2) The term *management official* does not include:

(i) A person whose management functions relate exclusively to the business of retail merchandising or manufacturing;

(ii) A person whose management functions relate principally to the business outside the United States of a foreign commercial bank; or

(iii) A person described in the provisos of section 202(4) of the Interlocks Act (12 U.S.C. 3201(4)) (referring to an officer of a State-chartered savings bank, cooperative bank, or trust company that neither makes real estate mortgage loans nor accepts savings).

(m) *Office* means a principal or branch office of a depository institution located in the United States. *Office* does not include a representative office of a foreign commercial bank, an electronic terminal, or a loan production office.

(n) *Person* means a natural person, corporation, or other business entity.

(o) *Relevant metropolitan statistical area (RMSA)* means an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated Primary MSAs to the extent that these terms are defined and applied by the Office of Management and Budget.

(p) *Representative or nominee* means a natural person who serves as a management official and has an obligation to act on behalf of another person with respect to management responsibilities. The FDIC will find that a person has an obligation to act on behalf of another person only if the first person has an agreement, express or implied, to act on behalf of the second person with respect to management responsibilities. The FDIC will determine, after giving the affected persons an opportunity to respond, whether a person is a *representative or nominee.*

(q) *Total assets.* (1) The term *total assets* includes assets measured on a consolidated basis and reported in the most recent fiscal year-end Consolidated Report of Condition and Income.

(2) The term *total assets* does not include:

(i) Assets of a diversified savings and loan holding company as defined by section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) other than the assets of its depository institution affiliate;

(ii) Assets of a bank holding company that is exempt from the prohibitions of section 4 of the Bank Holding Company Act of 1956 pursuant to an order issued under section 4(d) of that Act (12 U.S.C. 1843(d)) other than the assets of its depository institution affiliate; or

(iii) Assets of offices of a foreign commercial bank other than the assets of its United States branch or agency.

(r) *United States* means the United States of America, any State or territory of the United States of America, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

§ 348.3 Prohibitions.

(a) *Community.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same community.

(b) *RMSA.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of $20 million or more.

(c) *Major assets.* A management official of a depository organization with total assets exceeding $1 billion (or any affiliate thereof) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding $500 million (or any affiliate thereof), regardless of the location of the two depository organizations.

§ 348.4 Interlocking relationships permitted by statute.

The prohibitions of § 348.3 do not apply in the case of any one or more of the following organizations or to a subsidiary thereof:

(a) A depository organization that has been placed formally in liquidation, or which is in the hands of a receiver, conservator, or other official exercising a similar function;

(b) A corporation operating under section 25 or section 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.* and 12 U.S.C. 611 *et seq.*, respectively) (Edge Corporations and Agreement Corporations);

(c) A credit union being served by a management official of another credit union;

(d) A depository organization that does not do business within the United States except as an incident to its activities outside the United States;

(e) A State-chartered savings and loan guaranty corporation;

(f) A Federal Home Loan bank or any other bank organized solely to serve depository institutions (a bankers' bank) or solely for the purpose of providing securities clearing services and services related thereto for depository institutions and securities companies;

(g) A depository organization that is closed or is in danger of closing as determined by the appropriate Federal depository institutions regulatory agency and is acquired by another depository organization. This exemption lasts for five years, beginning on the date the depository organization is acquired;

(h) A savings association whose acquisition has been authorized on an emergency basis in accordance with section 13(k) of the Federal Deposit Insurance Act (12 U.S.C. 1823(k)) with resulting dual service by a management official that would otherwise be prohibited under the Interlocks Act which may continue for up to 10 years from the date of the acquisition provided that the FDIC has given its approval for the continuation of such service; and

(i)(1) A diversified savings and loan holding company (as defined in section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) with respect to the service of a director of such company who is also a director of an unaffiliated depository organization if:

(i) Both the diversified savings and loan holding company and the unaffiliated depository organization notify their appropriate Federal depository institutions regulatory agency at least 60 days before the dual service is proposed to begin; and

(ii) The appropriate regulatory agency does not disapprove the dual service before the end of the 60-day period.

(2) The FDIC may disapprove a notice of proposed service if it finds that:

(i) The service cannot be structured or limited so as to preclude an anticompetitive effect in financial services in any part of the United States;

(ii) The service would lead to substantial conflicts of interest or unsafe or unsound practices; or

(iii) The notificant failed to furnish all the information required by the FDIC.

(3) The FDIC may require that any interlock permitted under this paragraph (h) be terminated if a change in circumstances occurs with respect to one of the interlocked depository organizations that would have provided a basis for disapproval of the interlock during the notice period.

§ 348.5 Regulatory Standards exemption.

(a) *Criteria.* The FDIC may permit an interlock that otherwise would be prohibited by the Interlocks Act and § 348.3 if:

(1) The board of directors of the depository organization (or the organizers of a depository organization being formed) that seeks the exemption provides a resolution to the FDIC certifying that the organization, after the exercise of reasonable efforts, is unable to locate any other candidate from the community or RMSA, as appropriate, who:

(i) Possesses the level of expertise required by the depository organization and who is not prohibited from service by the Interlocks Act; and

(ii) Is willing to serve as a management official; and

(2) The FDIC, after reviewing an application submitted by the depository organization seeking the exemption, determines that:

(i) The management official is critical to the safe and sound operations of the affected depository organization; and

(ii) Service by the management official will not produce an anticompetitive effect with respect to the depository organization.

(b) *Presumptions.* The FDIC applies the following presumptions when reviewing any application for a Regulatory Standards exemption:

(1) An interlock has no anticompetitive effect if it involves depository institutions that, if merged, would not cause the post-merger Herfindahl-Hirschman Index (HHI) to exceed 1800 and would not cause the HHI to increase by more than 200 points. This presumption shall not apply to institutions subject to the major assets prohibition of § 348.3(c).

(2) A proposed management official is critical to the safe and sound operations of a depository institution if that official is approved by the FDIC to serve as a director or a senior executive officer of that institution pursuant to 12 CFR 303.14 and the institution had operated for less than two years, was not in compliance with minimum capital requirements, or otherwise was in a ''troubled condition'' as defined by 12 CFR 303.14(a)(4) at the time the service under that section was approved.

(c) *Duration of interlock.* An interlock permitted under this section may continue until the FDIC notifies the affected organizations otherwise. The FDIC may require termination of any interlock permitted under this section if the FDIC concludes, after giving the affected persons the opportunity to respond, that the determinations under paragraph (a)(2) of this section no longer may be made.

§ 348.6 Management Consignment exemption.

(a) *Criteria.* The FDIC may permit an interlock that otherwise would be prohibited by the Interlocks Act and § 348.3 if the FDIC, after reviewing an application submitted by the depository organization seeking an exemption, determines that the interlock would:

(1) Improve the provision of credit to low- and moderate-income areas;

(2) Increase the competitive position of a minority- or woman-owned depository organization;

(3) Strengthen the management of a depository institution that has been chartered for less than two years at the time an application is filed under this part; or

(4) Strengthen the management of a depository institution that is in an unsafe or unsound condition as determined by the FDIC on a case-by-case basis.

(b) *Presumptions.* The FDIC applies the following presumptions when reviewing any application for a Management Consignment exemption:

(1) A proposed management official is capable of strengthening the management of a depository institution described in paragraph (a)(3) of this section if that official is approved by the FDIC to serve as a director or a senior executive officer of that institution pursuant to 12 CFR 303.14 and the institution had operated for less than two years at the time the service under 12 CFR 303.14 was approved; and

(2) A proposed management official is capable of strengthening the management of a depository institution described in paragraph (a)(4) of this section if that official is approved by the FDIC to serve as a director or a senior executive officer of that institution pursuant to 12 CFR 303.14 and the institution was not in compliance with minimum capital requirements or otherwise was in a ''troubled condition'' as defined under 12 CFR 303.14 at the time service under that section was approved.

(c) *Duration of interlock.* An interlock granted under this section may continue for a period of two years from the date of approval. The FDIC may extend this period for one additional two-year period if the depository organization applies for an extension at least 30 days before the current exemption expires and satisfies one of the criteria specified in paragraph (a) of this section. The provisions set forth in paragraph (b) of this section also apply to applications for extensions.

§ 348.7 Change in circumstances.

(a) *Termination.* A management official shall terminate his or her service or apply for an exemption to the Interlocks Act if a change in circumstances causes the service to become prohibited under that Act. A change in circumstances may include, but is not limited to, an increase in asset size of an organization, a change in the delineation of the RMSA or community, the establishment of an office, an acquisition, a merger, a consolidation, or any reorganization of the ownership structure of a depository organization that causes a previously permissible interlock to become prohibited.

(b) *Transition period.* A management official described in paragraph (a) of this section may continue to serve the insured nonmember bank involved in the interlock for 15 months following the date of the change in circumstances. The FDIC may shorten this period under appropriate circumstances.

§ 348.8 Enforcement.

Except as noted in this section, the FDIC administers and enforces the Interlocks Act with respect to insured nonmember banks and their affiliates and may refer any case of a prohibited interlocking relationship involving these institutions to the Attorney General of the United States to enforce compliance with the Interlocks Act and this part. If an affiliate of an insured nonmember bank is subject to the primary regulation of another federal depository organization supervisory agency, then the FDIC does not administer and enforce the Interlocks Act with respect to that affiliate.

By order of the Board of Directors.

Dated at Washington, DC, this 12th day of December, 1995.

Federal Deposit Insurance Corporation.

Jerry L. Langley,

Executive Secretary.

Office of Thrift Supervision

12 CFR CHAPTER V

Authority and Issuance

For the reasons set out in the joint preamble, the OTS proposes to revise part 563f of chapter V of title 12 of the Code of Federal Regulations to read as follows:

PART 563f—MANAGEMENT OFFICIAL INTERLOCKS

Sec.
563f.1 Authority, purpose, and scope.
563f.2 Definitions.
563f.3 Prohibitions.
563f.4 Interlocking relationships permitted by statute.
563f.5 Regulatory Standards exemption.
563f.6 Management Consignment exemption.
563f.7 Change in circumstances.
563f.8 Enforcement.
563f.9 Interlocking relationships permitted pursuant to Federal Deposit Insurance Act.

Authority: 12 U.S.C. 3201–3208.

§ 563f.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued under the provisions of the Depository Institution Management Interlocks Act (Interlocks Act) (12 U.S.C. 3201 *et seq.*), as amended.

(b) *Purpose.* The purpose of the Interlocks Act and this part is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect.

(c) *Scope.* This part applies to management officials of savings associations, savings and loan holding companies, and affiliates of either.

§ 563f.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Affiliate.* (1) The term *affiliate* has the meaning given in section 202 of the Interlocks Act (12 U.S.C. 3201). For purposes of that section, shares held by an individual include shares held by members of his or her immediate family. ''Immediate family'' includes spouse, mother, father, child, grandchild, sister, brother, or any of their spouses, whether or not any of their shares are held in trust.

(2) For purposes of section 202(3)(B) of the Interlocks Act (12 U.S.C. 3201(3)(B)), an affiliate relationship involving a savings association or savings and loan holding company based on common ownership does not exist if the OTS determines, after giving the affected persons the opportunity to respond, that the asserted affiliation was established in order to avoid the prohibitions of the Interlocks Act and does not represent a true commonality of interest between the depository organizations. In making this determination, the OTS considers, among other things, whether a person, including members of his or her immediate family, whose shares are necessary to constitute the group owns a nominal percentage of the shares of one of the organizations and the percentage is substantially disproportionate with that person's ownership of shares in the other organization.

(b) *Anticompetitive effect* means a monopoly or substantial lessening of competition.

(c) *Area median income* means:

(1) The median family income for the metropolitan statistical area (MSA), if a depository organization is located in an MSA; or

(2) The statewide nonmetropolitan median family income, if a depository organization is located outside an MSA.

(d) *Community* means city, town, or village, and contiguous or adjacent cities, towns, or villages.

(e) *Contiguous or adjacent cities, towns, or villages* means cities, towns, or villages whose borders touch each other or whose borders are within 10 road miles of each other at their closest points. The property line of an office located in an unincorporated city, town, or village is the boundary line of that city, town, or village for the purpose of this definition.

(f) *Critical* means important to restoring or maintaining a depository organization's safe and sound operations.

(g) *Depository holding company* means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of the Interlocks Act (12 U.S.C. 3201)) having its principal office located in the United States.

(h) *Depository institution* means a commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office, including a branch or agency, of a foreign commercial bank is a depository institution.

(i) *Depository institution affiliate* means a depository institution that is an affiliate of a depository organization.

(j) *Depository organization* means a depository institution or a depository holding company.

(k) *Low- and moderate-income areas* means areas where the median family income is less than 100 percent of the area median income.

(l) *Management official.* (1) The term *management official* includes:

(i) A director;

(ii) An advisory or honorary director of a depository institution with total assets of $100 million or more;

(iii) A senior executive officer as that term is defined in 12 CFR 574.9(a)(2);

(iv) A branch manager;

(v) A trustee of a depository organization under the control of trustees; and

(vi) Any person who has a representative or nominee serving in any of the capacities in this paragraph (l)(1).

(2) The term *management official* does not include:

(i) A person whose management functions relate exclusively to the business of retail merchandising or manufacturing;

(ii) A person whose management functions relate principally to the business outside the United States of a foreign commercial bank; or

(iii) A person described in the provisos of section 202(4) of the Interlocks Act (12 U.S.C. 3201(4)) (referring to an officer of a State-chartered savings bank, cooperative bank, or trust company that neither makes real estate mortgage loans nor accepts savings).

(m) *Office* means a principal or branch office of a depository institution located in the United States. *Office* does not include a representative office of a foreign commercial bank, an electronic terminal, or a loan production office.

(n) *Person* means a natural person, corporation, or other business entity.

(o) *Relevant metropolitan statistical area (RMSA)* means an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated Primary MSAs to the extent that these terms are defined and applied by the Office of Management and Budget.

(p) *Representative or nominee* means a natural person who serves as a management official and has an obligation to act on behalf of another person with respect to management responsibilities. The OTS will find that a person has an obligation to act on behalf of another person only if the first person has an agreement, express or implied, to act on behalf of the second

person with respect to management responsibilities. The OTS will determine, after giving the affected persons an opportunity to respond, whether a person is a *representative or nominee.*

(q) *Savings association* means:

(i) Any Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2));

(ii) Any state savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3)) the deposits of which are insured by the Federal Deposit Insurance Corporation; and

(iii) Any corporation (other than a bank as defined in section 3(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(a)(1)) the deposits of which are insured by the Federal Deposit Insurance Corporation, that the Board of Directors of the Federal Deposit Insurance Corporation and the Director of the Office of Thrift Supervision jointly determine to be operating in substantially the same manner as a savings association.

(r) *Total assets.* (1) The term *total assets* means assets measured on a consolidated basis and reported in the most recent fiscal year-end Consolidated Report of Condition and Income.

(2) The term *total assets* does not include:

(i) Assets of a diversified savings and loan holding company as defined by section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) other than the assets of its depository institution affiliate;

(ii) Assets of a bank holding company that is exempt from the prohibitions of section 4 of the Bank Holding Company Act of 1956 pursuant to an order issued under section 4(d) of that Act (12 U.S.C. 1843(d)) other than the assets of its depository institution affiliate; or

(iii) Assets of offices of a foreign commercial bank other than the assets of its United States branch or agency.

(s) *United States* means the United States of America, any State or territory of the United States of America, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

§ 563f.3 Prohibitions.

(a) *Community.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same community.

(b) *RMSA.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of $20 million or more.

(c) *Major assets.* A management official of a depository organization with total assets exceeding $1 billion (or any affiliate thereof) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding $500 million (or any affiliate thereof), regardless of the location of the two depository organizations.

§ 563f.4 Interlocking relationships permitted by statute.

The prohibitions of § 563f.3 do not apply in the case of any one or more of the following organizations or to a subsidiary thereof:

(a) A depository organization that has been placed formally in liquidation, or which is in the hands of a receiver, conservator, or other official exercising a similar function;

(b) A corporation operating under section 25 or section 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.* and 12 U.S.C. 611 *et seq.*, respectively) (Edge Corporations and Agreement Corporations);

(c) A credit union being served by a management official of another credit union;

(d) A depository organization that does not do business within the United States except as an incident to its activities outside the United States;

(e) A State-chartered savings and loan guaranty corporation;

(f) A Federal Home Loan Bank or any other bank organized solely to serve depository institutions (a bankers' bank) or solely for the purpose of providing securities clearing services and services related thereto for depository institutions and securities companies;

(g) A depository organization that is closed or is in danger of closing as determined by the appropriate Federal depository institutions regulatory agency and is acquired by another depository organization. This exemption lasts for five years, beginning on the date the depository organization is acquired;

(h)(1) A diversified savings and loan holding company (as defined in section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) with respect to the service of a director of such company who also is a director of an unaffiliated depository organization if:

(i) Both the diversified savings and loan holding company and the unaffiliated depository organization notify their appropriate Federal depository institutions regulatory agency at least 60 days before the dual service is proposed to begin; and

(ii) The appropriate regulatory agency does not disapprove the dual service before the end of the 60-day period.

(2) The OTS may disapprove a notice of proposed service if it finds that:

(i) The service cannot be structured or limited so as to preclude an anticompetitive effect in financial services in any part of the United States;

(ii) The service would lead to substantial conflicts of interest or unsafe or unsound practices; or

(iii) The notificant failed to furnish all the information required by the OTS.

(3) The OTS may require that any interlock permitted under this paragraph be terminated if a change in circumstances occurs with respect to one of the interlocked depository organizations that would have provided a basis for disapproval of the interlock during the notice period; and

(i) Any savings association or any savings and loan holding company (as defined in section 10(a)(1)(D) of the Home Owners' Loan Act) which has issued stock in connection with a qualified stock issuance pursuant to section 10(q) of such Act, except that this paragraph (i) shall apply only with regard to service by a single management official of such savings association or holding company, or any subsidiary of such savings association or holding company, by a single management official of the savings and loan holding company which purchased the stock issued in connection with such qualified stock issuance, and shall apply only when the OTS has determined that such service is consistent with the purposes of the Interlocks Act and the Home Owners' Loan Act.

§ 563f.5 Regulatory Standards exemption.

(a) *Criteria.* The OTS may permit an interlock that otherwise would be prohibited by the Interlocks Act and § 563f.3 if:

(1) The board of directors of the depository organization (or the organizers of a depository organization being formed) that seeks the exemption provides a resolution to the OTS certifying that the organization, after the exercise of reasonable efforts, is unable to locate any other candidate from the community or RMSA, as appropriate, who:

(i) Possesses the level of expertise required by the depository organization and who is not prohibited from service by the Interlocks Act; and

(ii) Is willing to serve as a management official; and

(2) The OTS, after reviewing an application submitted by the depository organization seeking the exemption, determines that:

(i) The management official is critical to the safe and sound operations of the affected depository organization; and

(ii) Service by the management official will not produce an anticompetitive effect with respect to the depository organization.

(b) *Presumptions.* The OTS applies the following presumptions when reviewing any application for a Regulatory Standards exemption:

(1) An interlock has no anticompetitive effect if it involves depository institutions that, if merged, would not cause the post-merger Herfindahl-Hirschman Index (HHI) to exceed 1800 and would not cause the HHI to increase by more than 200 points. This presumption shall not apply to institutions subject to the major assets prohibition of § 563f.3(c).

(2) A proposed management official is critical to the safe and sound operations of a depository institution if that official is approved by the OTS to serve as a director or senior executive officer of that institution pursuant to 12 CFR 574.9 and the institution had operated for less than two years, was not in compliance with minimum capital requirements, or otherwise was in a ''troubled condition'' as defined in 12 CFR 574.9 at the time the service under that section was approved.

(c) *Duration of interlock.* An interlock permitted under this section may continue until the OTS notifies the affected organizations otherwise. The OTS may require termination of any interlock permitted under this section if the OTS concludes, after giving the affected persons the opportunity to respond, that the determinations under paragraph (a)(2) of this section no longer may be made.

§ 563f.6 Management Consignment exemption.

(a) *Criteria.* The OTS may permit an interlock that otherwise would be prohibited by the Interlocks Act and § 563f.3 if the OTS, after reviewing an application submitted by the depository organization seeking an exemption, determines that the interlock would:

(1) Improve the provision of credit to low- and moderate-income areas;

(2) Increase the competitive position of a minority- or woman-owned depository organization;

(3) Strengthen the management of a depository institution that has been chartered for less than three years at the time an application is filed under this part; or

(4) Strengthen the management of a depository institution that is in an unsafe or unsound condition as determined by the OTS on a case-by-case basis.

(b) *Presumptions.* The OTS applies the following presumptions when reviewing any application for a Management Consignment exemption:

(1) A proposed management official is capable of strengthening the management of a depository institution described in paragraph (a)(3) of this section if that official is approved by the OTS to serve as a director or senior executive officer of that institution pursuant to 12 CFR 574.9 and the institution had operated for less than two years at the time the service under 12 CFR 574.9 was approved; and

(2) A proposed management official is capable of strengthening the management of a depository institution described in paragraph (a)(4) of this section if that official is approved by the OTS to serve as a director or senior executive officer of that institution pursuant to 12 CFR 574.9 and the institution was not in compliance with minimum capital requirements or otherwise was in a ''troubled condition'' as defined under 12 CFR 574.9 at the time service under that section was approved.

(c) *Duration of interlock.* An interlock granted under this section may continue for a period of two years from the date of approval. The OTS may extend this period for one additional two-year period if the depository organization applies for an extension at least 30 days before the current exemption expires and satisfies one of the criteria specified in paragraph (a) of this section. The provisions set forth in paragraph (b) of this section also apply to applications for extensions.

§ 563f.7 Change in circumstances.

(a) *Termination.* A management official shall terminate his or her service or apply for an exemption to the Interlocks Act if a change in circumstances causes the service to become prohibited under that Act. A change in circumstances may include, but is not limited to, an increase in asset size of an organization, a change in the delineation of the RMSA or community, the establishment of an office, an acquisition, a merger, a consolidation, or any reorganization of the ownership structure of a depository organization that causes a previously permissible interlock to become prohibited.

(b) *Transition period.* A management official described in paragraph (a) of this section may continue to serve the depository institution involved in the interlock for 15 months following the date of the change in circumstances. The OTS may shorten this period under appropriate circumstances.

§ 563f.8 Enforcement.

Except as noted in this section, the OTS administers and enforces the Interlocks Act with respect to savings associations, savings and loan holding companies, and affiliates of either, and may refer any case of a prohibited interlocking relationship involving these institutions to the Attorney General of the United States to enforce compliance with the Interlocks Act and this part. If an affiliate of a savings association or savings and loan holding company is subject to the primary regulation of another Federal depository organization supervisory agency, then the OTS does not administer and enforce the Interlocks Act with respect to that affiliate.

§ 563f.9 Interlocking relationships permitted pursuant to Federal Deposit Insurance Act.

A management official or prospective management official of a depository organization may enter into an otherwise prohibited interlocking relationship with another depository organization for a period of up to 10 years if such relationship is approved by the Federal Deposit Insurance Corporation pursuant to section 13(k)(1)(A)(v) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1823(k)(1)(A)(v)).

Dated: December 13, 1995.

Jonathan L. Fiechter,

Acting Director.

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Part IV

Department of Agriculture

Food Safety and Inspection Service

9 CFR Part 301, et al.

Meat and Poultry Inspection; Final Rule and Proposed Rules

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 306, 317, 320, 327, and 381

[Docket No. 92–012F]

RIN 0583–AB92

Prior Labeling Approval System

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending the Federal meat and poultry products inspection regulations by expanding the types of labeling, authorized for use on meat and poultry products by official establishments in the United States and foreign establishments certified under foreign inspection systems, which would not require submittal to FSIS for approval prior to use. In addition, FSIS is amending the Federal meat and poultry products inspection regulations to permit the submission of only sketch labeling, except for temporary approvals, in those instances where labeling is required to be submitted for approval and to require retention of certain labeling records. This final rule eliminates unnecessary duplication in the labeling approval system, and contributes to President Clinton's initiatives for greater efficiency in government services, (e.g., it is consistent with the principles of the National Performance Review to cut red tape, put customers first, and eliminate what is not needed).

EFFECTIVE DATE: July 1, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. Cheryl Wade, Director, Food Labeling Division, Regulatory Programs, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, Area Code (202) 254–2590.

SUPPLEMENTARY INFORMATION:

Background

Introduction

The Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*) direct the Secretary of Agriculture to maintain meat and poultry inspection programs designed to assure consumers that meat and poultry products distributed to them (including imports) are safe, wholesome, not adulterated, and properly marked, labeled, and packaged.

Section 2 of the FMIA (21 U.S.C. 602) and section 2 of the PPIA (21 U.S.C. 451) state that unwholesome, adulterated, or misbranded meat or meat food products and poultry products are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly marked, labeled, and packaged products, and result in sundry losses to producers and processors of meat and poultry products, as well as injury to consumers. Therefore, Congress has granted the Secretary broad authority to protect consumers' health and welfare. Section 7(d) of the FMIA (21 U.S.C. 607(d)) states: ''No article subject to this title shall be sold or offered for sale by any person, firm, or corporation, in commerce, under any name or other marking or labeling which is false or misleading, or in any container of a misleading form or size, but established trade names and other marking and labeling and containers which are not false or misleading and which are approved by the Secretary are permitted.'' The PPIA contains similar language in section 8(c) (21 U.S.C. 457(c)).

Under the latter provisions, the Department has a longstanding interpretation of the language to mean that the Secretary of Agriculture or his or her representative has the responsibility to approve all labels or other labeling to be used on federally inspected and imported products prior to the distribution of such products from establishments that distribute such products in interstate or foreign commerce. Without approved labeling, products may not be sold or offered for sale or otherwise distributed in commerce. The term ''labeling,'' as defined in section 1(p) of the FMIA and section 4(s) of the PPIA (21 U.S.C. 601(p) and 453(s), respectively), means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

The aforementioned provisions also apply to establishments that operate solely within designated States. A State is designated if it does not have or is not effectively enforcing with respect to establishments within its jurisdiction at which livestock or poultry are slaughtered, or their carcasses, or products thereof, are prepared for use as human food solely for distribution within such State, requirements at least equal to titles I and IV of the FMIA and specified sections of the PPIA as applicable. Once a State is designated, the inspection requirements of the FMIA and PPIA apply to establishments that slaughter livestock and poultry and/or prepare or process meat and/or poultry products therefrom, solely for distribution within the State.

Section 1(m)(8) of the FMIA (21 U.S.C. 601(m)(8)) and section 4(g)(8) of the PPIA (21 U.S.C. 453(g)(8)) provide that any carcass, part thereof, meat or meat food product or any poultry product is adulterated ''* * * if any valuable constituent has been in whole or in part omitted or abstracted therefrom; or if any substance has been substituted, wholly or in part therefor; or if damage or inferiority has been concealed in any manner; or if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is* * * .'' Furthermore, section 1(n)(1) of the FMIA (21 U.S.C. 601(n)(1)) and section 4(h)(1) of the PPIA (21 U.S.C. 453(h)(1)) prescribe that any carcass, part thereof, meat or meat food product or poultry product is considered misbranded if its labeling is false or misleading in any particular.

In order to prevent product adulteration and misbranding, the FMIA and PPIA further authorize the Secretary to prescribe, whenever he or she determines such action is necessary for the protection of the public, (1) the styles and sizes of type to be used with respect to material required to be incorporated in labeling to avoid false or misleading labeling, and (2) definitions and standards of identity or composition for meat and poultry products (section 7(c) of the FMIA, 21 U.S.C. 607(c), and section 8(b) of the PPIA, 21 U.S.C. 457(b)).

Current Regulations

The labeling provisions of the meat and poultry products inspection regulations specify the required features of meat and poultry product labels for immediate containers of domestic product (9 CFR part 317 and 9 CFR part 381, subpart N) and for imported product (9 CFR part 327 and 9 CFR part 381, subpart T). These include: (1) The standardized, common or usual, or descriptive name of the product; (2) an ingredients statement containing the common or usual name of each ingredient listed in descending order of predominance; (3) the name and place of business of the manufacturer, packer, or distributor; (4) an accurate statement of the net quantity of contents; (5) the inspection legend; and (6) special handling instructions if product is perishable; i.e., ''Keep Frozen'' and ''Keep Refrigerated.'' These essential labeling features must be prominently and informatively displayed on the principal display panel or the information panel of the product label.

The regulations contain other provisions to ensure that no statement, word, picture, design, or device which is false or misleading in any particular or conveys any false impression or gives any false indication of origin, identity, or quality, appears in any marking or other labeling (9 CFR 317.8 and 381.129).

Any marking or labeling which is determined to be false or misleading within the meaning of the FMIA or the PPIA and the regulations promulgated thereunder causes the article to which it relates to be misbranded, and, pursuant to the authority contained in section 7(e) of the FMIA (21 U.S.C. 607(e)) and section 8(d) of the PPIA (21 U.S.C. 457(d)), and 9 CFR 335.12 and 381.233 of the Federal meat and poultry products inspection regulations, the Administrator, FSIS, may withhold the use of such marking or labeling.

In addition to providing substantive labeling requirements, the Federal meat and poultry products inspection regulations provide specific information regarding permitted and nonpermitted uses of various substances (9 CFR part 318 and part 381, subpart 0). These provisions prohibit the use of any food additive, color additive, pesticide chemical, or other added poisonous or deleterious substance, or any other substance in or on meat and poultry products that would cause such articles to be adulterated or misbranded within the meaning of the FMIA and PPIA.

The Federal meat and poultry products inspection regulations also prescribe definitions and standards of identity or composition for certain meat and poultry products (9 CFR part 319 and part 381, subpart P). Standards of composition identify the minimum amount of meat and/or poultry required in a product's recipe. Standards of identity set specific product requirements for a product's makeup. These standards often specify (1) the kind and minimum amount of meat and/or poultry; (2) the maximum amount of nonmeat ingredients, such as fat or moisture; and (3) any other ingredients allowed or expected in the final product.

Current Prior Label Approval System

In order to assure that meat and poultry products comply with the FMIA and PPIA and the regulations promulgated thereunder, FSIS conducts a prior approval program for labels and other labeling as specified in 9 CFR 317.4, 317.5, 327.14, 327.15, 381.132, 381.134, and 381.205 to be used on federally inspected meat and poultry products and imported products. This program is administered by the Food Labeling Division (FLD), Regulatory Programs, FSIS, in Washington, DC.

To obtain labeling approval, domestic meat and poultry processors and certified foreign establishments, or their representatives, must submit final labels and other final labeling, except under certain conditions. Such foreign establishments are certified by responsible officials of foreign meat and poultry inspection systems, to the Department, in accordance with parts 327 and 381, subpart T, of the Federal meat and poultry products inspection regulations as fully complying with requirements at least equal to those imposed on domestic products and establishments. Such foreign establishments are then eligible to have their meat and poultry products imported into the United States, unless the Administrator terminates their eligibility to import products in accordance with parts 327 and 381, subpart T, of the Federal meat and poultry products inspection regulations.

Meat and poultry processors and certified foreign meat establishments may submit sketch labeling (a printer's proof or other version which clearly shows all required labeling features, size, location, and indication of final color), accompanied by FSIS Form 7234, ''Application for Approval of Labels, Marking or Device,'' to FLD for review. Certified foreign poultry establishments are required to submit sketch and finished (final) labels of immediate containers for review and approval. The labeling application and sketch or final printed labeling to be used on domestic meat and poultry products and on imported meat products must be submitted to FLD in triplicate. Certified foreign poultry establishments must submit two copies of sketch and four copies of final labeling to FLD. In addition to the required information, any special claims the processor intends to make (e.g., quality claims or nutrient content claims) must also be included on the labeling. The labeling application must contain the processing procedures (sufficient to support the accuracy of the label) and handling information, including the following as indicated on the form:

1. Product name;
2. Formulation information;
3. Firm name and address;
4. How the labeling is to be used;
5. Size and type of container; and
6. Size of the principal display panel.

All such information is reviewed by an FSIS label review specialist who is responsible for assuring that the labeling complies with all Federal regulations and labeling policies.

In 1983, the Agency promulgated regulations that granted limited labeling approval authority to the inspector-in-charge (IIC) of official establishments and established limited types of generically approved labeling for official establishments (48 FR 11410). This rulemaking did not establish analogous provisions for certified foreign establishments. This rulemaking was intended to reduce the number of labels and other labeling reviewed and processed by FLD, thereby improving the efficiency of the labeling approval system by expediting the process for specific types of labeling and reducing the paperwork burden on official establishments. As a result of these regulations, the IIC currently has authority to approve the types of labeling identified in 9 CFR 317.4(e) and 381.132(c), (e.g., labeling for single ingredient products without additional claims), provided certain requirements are satisfied. However, under current regulations, official establishments are not required to submit labeling that comes within the categories of labeling the IIC can approve to the IIC for approval, but rather have the option of submitting the labeling to FLD for approval.

The regulations also specify limited types of labeling that can be approved generically. The generically approved labeling provisions allow establishments to make certain modifications to their previously approved labeling. These modifications can be designed, developed, printed, and applied to a product without submission for approval to FSIS, provided the labeling shows all mandatory information in a sufficiently prominent manner and is not false or misleading in any particular. Generically approved labeling is labeling which contains one or more of the modifications identified in 9 CFR 317.5(b) and 381.134(b), (e.g., all features of the labeling are proportionately enlarged or reduced). Under the current regulations, official establishments may submit labeling that comes within the generic approval category, at their option, to FSIS for approval. The IIC is also currently authorized to approve those types of labeling.

Currently, official establishments may submit sketch labeling to FLD for approval, but must submit final labeling to FLD for approval, except for generic or IIC approvals. Even though the IIC has the authority to approve certain final labeling, many official establishments continue to submit all final labeling to FLD for approval.

During the development of the 1983 rule, FSIS estimated the number of labels and other labeling reviewed by FLD at approximately 130,000. During fiscal year 1991, FLD processed approximately 167,500 labels—87,500 final labels and 60,000 sketch labels were reviewed and approved, 20,000 labels were reviewed but not approved, and about 43,000 labels were approved by IIC's. No records are maintained on numbers of temporary approvals, generically approved labels, or labeling inserts.

The continuing increase in the numbers of labels and other labeling submitted to FLD and limited Agency resources led to an Agency assessment of the prior labeling approval system in 1990. In exploring options for an improved labeling approval system, the Agency decided to institute a plan to automate the labeling review process and to revise internal procedures.

Advance Notice of Proposed Rulemaking

On March 25, 1992, FSIS published an Advance Notice of Proposed Rulemaking (ANPR) (57 FR 10300) on the Agency's prior labeling approval system. The ANPR presented the following two options for making additional changes to the current prior labeling approval system: (1) Revise the current system by significantly reducing the scope of review through expanding the categories of generically approved labeling and replacing the current general requirement of FSIS approval of sketch and final labeling with one for sketch labeling only; and (2) replace the current system with a system in which all labeling would be generically approved and used without prior submission to FSIS.

FSIS sought comments on these two options and welcomed comments on other options. FSIS also sought comments on the role of the IIC with regard to review or enforcement of labeling, and on whether generic approval should be provided for labeling that includes geographical, quality, health, nutrient content, or negative claims, or guarantees.

FSIS received 110 comments in response to the ANPR. After review and consideration of the comments received on the ANPR, FSIS issued a proposed rule which is discussed in the following section.

Proposed Rule

On November 23, 1993, FSIS published a proposed rule (58 FR 62014) to amend the Federal meat and poultry products inspection regulations by expanding the types of labeling currently authorized for use on meat and poultry products by official establishments in the United States and foreign establishments certified under foreign inspection systems which would be generically approved. The rule was proposed as a first step in the gradual streamlining and modernization of the labeling approval system. In the proposal, the Agency sought comments on a long-term plan to implement an all-generic system.

Under the proposed rule, official establishments and establishments certified by responsible officials of foreign inspection systems would be required to submit only sketch labeling in those instances where labeling was required to be submitted to FLD for approval. FSIS proposed to limit the types of labeling submitted for review and approval for domestic and imported products and to revise 9 CFR 317.4, 317.5, 381.132, 381.133, 327.14, 381.205, and 381.206. No final labeling would be approved by FLD, except temporary labeling approvals. The proposal defined a sketch label as a printer's proof or equivalent which clearly shows all labeling features (as set forth in 9 CFR 317.2 and part 381, subpart N), as well as size, location, and indication of final color and is no larger than 8½ x 14 inches. The proposed size requirement was a result of the Agency's efforts to automate the review process and to use scanning technology to record certain information from the labeling application. The proposal provided that a parent company for a corporation need only submit one labeling application for a product produced in other establishments which were owned by the corporation. The proposal indicated that this provision for corporations would reduce the burdens on the industry and the Agency in submitting and revising such applications without posing any apparent risk of misbranding. The proposal also provided that once a sketch was approved, the establishment would have the authority to print a final copy and use the labeling without any further authorization from the Agency.

Also, under the proposed rule, establishments would still be required to assure that the labeling was not false or misleading in any particular. If an establishment chose to modify an approved sketch, the establishment would be authorized to use the final labeling if such labeling complied with the requirements proposed in 9 CFR 317.5, 327.14, 381.133, and 381.205. If the labeling was not in accord with these proposed provisions, the labeling would be required to be resubmitted as a sketch for approval by FLD.

FSIS proposed to revise the IIC and generic approval authorities prescribed in 9 CFR 317.4(e), 317.5, 381.132(c), and 381.134 to alleviate the burden of labeling approval imposed upon IIC's. The IIC would retain, however, the authority to approve meat carcass ink brands and meat food product ink and burning brands. All other provisions of 9 CFR 317.4(e), 317.5, 381.132(c), and 381.134 would be combined to permit establishments to use final labeling for products in certain circumstances without the submission of a sketch to FLD and to use final labeling for products for which a sketch had been approved. FSIS proposed to add to this authority a few other provisions including the permitted use of labeling for standardized products prescribed in 9 CFR parts 319 and 381, subpart P, provided such labeling did not contain special claims, such as quality claims, nutrient content or health claims, geographical origin claims, negative claims, and guarantees, and was not a domestic product labeled with a foreign language.

FSIS proposed to permit official establishments and foreign establishments certified by officials of foreign inspection systems to use the following generically approved labeling without the submission of sketches for approval by FSIS:

1. Labeling for a product which has a standard of identity or composition as specified in 9 CFR part 319 or part 381, subpart P, and which does not contain any special claims, such as quality claims, nutrient content claims, health claims, negative claims, geographical origin claims, or guarantees, or which is not a domestic product labeled with a foreign language;

2. Labeling for single-ingredient products (such as beef steak, lamb chops, chicken legs, or turkey breasts) which does not contain special claims, such as quality claims, nutrient content claims, health claims, negative claims, geographical origin claims, or guarantees, or which is not a domestic product labeled with a foreign language;

3. Labeling for products marked ''For Export Only'' in U.S. establishments which does not contain any special claims, such as quality claims, nutrient content claims, health claims, negative claims, geographical origin claims, or guarantees;

4. Labeling for containers of meat and meat food products and poultry products sold under contract specifications to Federal Government agencies, when such product is not offered for sale to the general public, provided the contract specifications include specific requirements with

respect to labeling, and are made available to the IIC;

5. Labeling for shipping containers which contain fully labeled immediate containers, provided such labeling complies with 9 CFR 316.13 or 381.127.

6. Labeling for products not intended for human food, provided they comply with 9 CFR part 325 or 9 CFR 381.152(c) and 381.193, and labeling for poultry heads and feet for export for processing as human food if they comply with 9 CFR 381.190(b);

7. Inspection legends, which comply with 9 CFR parts 312 and 316 and 9 CFR part 381, subpart M; and

8. Inserts, tags, liners, pasters, and like devices containing printed or graphic matter and for use on, or to be placed within containers, and coverings of products, provided such devices contain no reference to product and bear no misleading feature.

The proposed rule would also permit official establishments and foreign establishments certified by officials of foreign inspection systems to use final labeling, without further authorization from FSIS, that was approved by FSIS, FLD, in sketch form if the final labeling was prepared without modification or with the following modifications:

1. All features of the labeling are proportionately enlarged or reduced, provided that all minimum size requirements specified in applicable regulations are met and the labeling is legible;

2. A substitution of the abbreviation ''lb.'' for ''pound,'' or ''oz.'' for ''ounce,'' or of the word ''pound'' for ''lb.'' or ''ounce'' for ''oz.'';

3. A master or stock label has been approved from which the name and address of the distributor are omitted and such name and address are applied before being used (in such case, the words ''prepared for'' or similar statement must be shown together with the blank space reserved for the insertion of the name and address when such labels are offered for approval);

4. During holiday seasons, wrappers or other covers bearing floral or foliage designs or illustrations of rabbits, chicks, fireworks, or other emblematic holiday designs are used with approved labeling (the use of such designs will not make necessary the application of labeling not otherwise required);

5. A change in the language or the arrangement of directions pertaining to the opening of containers or the serving of the product;

6. The addition, deletion, or amendment of a dated or undated coupon, a cents-off statement, cooking instructions, packer product code information, or UPC product code information;

7. Any change in the name or address of the packer, manufacturer or distributor that appears in the signature line;

8. Any change in the net weight, provided the size of the net weight statement complies with 9 CFR 317.2 or 381.121;

9. The addition, deletion, or amendment of recipe suggestions for the product;

10. Any change in punctuation;

11. Newly assigned or revised establishment numbers for a particular establishment for which use of the labeling has been approved by the FLD;

12. The addition or deletion of open dating information;

13. A change in the type of packaging material on which the label is printed;

14. Brand name changes, provided that there are no design changes, the brand name does not use a term that connotes quality or other product characteristics, the brand name has no geographic significance, and the brand name does not affect the name of the product;

15. The deletion of the word ''new'' on new product labeling;

16. The addition, deletion, or amendment of special handling statements, such as ''Keep Refrigerated'' or ''Keep Frozen,'' provided that the change is consistent with 9 CFR 317.2(k) or 381.125(a);

17. The addition of safe handling instructions as required by 9 CFR 317.2(l) or 381.125(b).

18. Changes reflecting a change in the quantity of an ingredient shown in the formula without a change in the order of predominance shown on the label, provided that the change in quantity of ingredients complies with any minimum or maximum limits for the use of such ingredients prescribed in 9 CFR parts 318 and 319, or 9 CFR 381.147 or 9 CFR part 381, subpart P;

19. Changes in the color of the labeling, provided that sufficient contrast and legibility remain;

20. The addition, deletion, or substitution of the official USDA grade shield on labels of poultry products;

21. A change in the product vignette, provided the change does not affect mandatory labeling information or misrepresent the content of the package; or

22. A change in an establishment number by a corporation or parent company for an establishment under its ownership.

Section 327.15 of the Federal meat inspection regulations (9 CFR 327.15) requires that all labeling used with outside containers of foreign meat product must be approved in accordance with 9 CFR part 317. However, 9 CFR 381.206 dealing with shipping containers of imported poultry products does not include such a provision. FSIS proposed to clarify 9 CFR 381.206 to indicate that shipping containers of imported poultry products would be approved in accordance with 9 CFR part 381, subpart N of the poultry products inspection regulations. This is merely a clarification of our labeling approval procedures.

FSIS proposed to transfer the responsibility of maintaining updated generically approved labeling records from the IIC to the official establishment in the United States and to require establishments certified by officials of a foreign inspection system to maintain such records. FSIS also proposed to require establishments to maintain records of labeling approved by FLD. In order to monitor compliance of regulatory labeling requirements, FSIS proposed that establishments maintain records on all labeling used and make such records available to any authorized USDA official upon request. Each record would consist of a copy of the labeling and the product formulation and processing procedure. Under the proposed rule, official establishments would not have to present to the IIC a copy of the generically approved labeling prior to its use, as is currently required under 9 CFR 317.5 and 381.134.

Sections 306.5, 327.24, 381.35 and 381.202(d) of the meat and poultry regulations (9 CFR 306.5, 327.24, 381.35, and 381.202(d)) specify the appeal procedures to be followed for decisions made by program employees or inspectors. These sections also state that denial of a labeling application by the IIC or inspector is not a basis for appeal under these sections. Since the proposed rule would not maintain the IIC's authority to approve labeling applications, there would no longer be a need to retain this provision. Therefore, the proposed rule proposed to remove these provisions from these sections.

FSIS proposed to randomly select samples of generically approved labeling from official establishments and establishments certified under a foreign inspection system in order to determine compliance with labeling requirements. If the Agency found that any such labeling was false or misleading in any particular, FSIS would initiate the proceedings set forth in 9 CFR 335.12 and 381.233 for domestic and imported products.

Although FSIS did not propose to change the general authority for temporary labeling approvals currently specified in 9 CFR 317.4(d) and 381.132(b), provisions for temporary approvals were proposed at 9 CFR 317.4(f)(1) and 381.132(f)(1). FSIS proposed that final labeling deficient in some particular could be granted a temporary approval for up to 180 days, provided, among other things, that the product was not misrepresented. FSIS also proposed that such an approval could be extended under certain circumstances. Temporary labeling approval requests would continue to be handled the same as sketch labeling approvals through submission of labeling applications to FLD.

FSIS also proposed to remove the provision set forth in 9 CFR 317.4(b) that required that paper takeoffs of lithographed labels, in lieu of sections of the metal containers, be submitted to the Agency for approval. This provision was intended to assist producers of canned products when submitting final labeling. However, because FLD would no longer review final labeling, such provision would no longer be needed.

Alternative Option Considered

In developing the proposal, FSIS considered the alternative of proposing a system where all labeling for domestic and imported products would be generically approved. Under this alternative, there would not be any labeling review and approval conducted by program employees, either at headquarters or in the field. Establishments would be authorized to design, develop, print, and apply labeling without any submission to FSIS, provided that the labeling complied with existing labeling regulations. As with generically approved labeling under the proposed rule, establishments would be required to maintain records for all labeling. These records would include a copy of the labeling used on the product and a record of the product formulation and processing procedure. In addition, similar to the proposed rule, under this alternative there would be an enhanced sampling program to assure that labeling was accurate and not misleading. It was envisioned that this sampling program would supplement, but not replace, the existing in-plant inspection task that directs inspectors of official establishments and analogous personnel of certified foreign establishments to check a sample of labeling to determine if the labeling is correct and used as intended.

After reviewing the comments received in response to the proposed rule (see following discussion), and in light of FSIS' ongoing reassessment of its labeling policies, FSIS has decided to proceed, at this time, with the gradual streamlining and modernization of the prior labeling approval system. Therefore, FSIS will expand the types of labeling that will be generically approved, as opposed to instituting at this time a system where all labeling would be generically approved. FSIS anticipates making further changes after completing the reassessment of the prior label approval system.

Discussion of Comments

FSIS received 122 comments in response to the proposed rule. The majority of the comments (88) were submitted by food manufacturers, while 13 were received from industry trade associations, 12 from food industry consultants, 5 from consumers, 3 from foreign governments, and 1 from another Federal agency. The following discussion is a summary of the major issues and comments received.

1. ''Sketch Only'' System of Approval

Many commenters supported the streamlining of the current prior labeling approval process which would eliminate the need to submit final labeling for approval, and which, in turn, would eliminate unnecessary duplication in the labeling approval system. However, a few commenters opposed a ''sketch only'' system of approval and wanted to maintain the existing system of approval. These commenters appeared to be concerned about their lack of understanding of all the existing labeling regulations and their ability to keep abreast of any future changes to the regulations. They expressed concern about the possible extent of their liability if a product were misbranded and severity of penalties that might occur as a result of an unintentionally misbranded product entering the marketplace.

FSIS believes that requiring a sketch-only system of approval for most labeling situations will alleviate unnecessary duplication in the labeling approval system. Conformance with labeling policies and regulations will be verified when labeling is submitted as a sketch. FSIS does not believe it is necessary to reverify conformance of final labeling in order to prevent mislabeling of products, and, therefore, will permit final labeling that has been approved in sketch form to be used without further authorization from FSIS, where the final labeling is prepared without modification. Final labeling, however, that is altered from the approved sketch must be resubmitted as a ''sketch'' to FSIS for approval, unless the changes made to the final labeling conform with modifications included in the generic approval category.

A few commenters suggested that a numbering system, similar to the system that is currently used to identify final approved labeling, should be developed for sketch approvals when the Agency implements a sketch-only system of approval. FSIS intends to assign formal approval numbers to approved sketches. The numbering system will be similar to the system currently used for final approvals. The sketches will be processed and filed permanently for future reference.

2. Printer's Proof for Sketch Approval

While many commenters supported a sketch-only system of approval, in many cases, the support was contingent upon the Agency clarifying its definition for a sketch as a ''printer's proof or equivalent.''

It was not the intent of the Agency to limit sketch submittals solely to actual ''printer's proofs.'' FSIS believes that the term ''equivalent,'' as used in the proposed definition of ''sketch,'' conveys that methods of sketch preparation, other than an actual ''printer's proof,'' would also be acceptable. Accordingly, FSIS will accept a printer's proof or equivalent, such as sketches that are hand drawn or computer generated or other reasonable facsimiles that clearly represent the final version of the labeling. FSIS has added examples of what would be considered equivalent to a printer's proof in the final regulation. FSIS believes it is appropriate to leave in the phrase ''or equivalent'' in order to provide the needed flexibility to meet the requirement of submission of a sketch. As FSIS moves to a sketch-only system of approval, the Agency believes it is necessary to emphasize the importance of submitting sketches prepared in a manner that clearly indicates all labeling features, including their size, location, and an indication of final colors so that final printed labeling will be accurately and correctly prepared.

3. Final Color Indication on Sketches

A few commenters objected to the need for an indication of final color on the sketch. However, after reviewing these comments, FSIS believes that these commenters may have believed that the requirement of indicating final colors on the sketch meant that FSIS would accept only color proofs or color sketches.

FSIS is not requiring that a color proof or sketch be submitted. However, FSIS

believes it is necessary to continue to require an indication of final color to ensure that the labeling requirements for proper contrast and legibility will be met on final printed labeling. In light of the comments received, FSIS has clarified the final regulations to make it clear that the requirement of indicating final colors can be met in a numbers of ways. The requirements of indication of final color may be met by: Submission of a color sketch, submission of a sketch which indicates by descriptive language the final colors, or submission with a sketch of previously approved final labeling that indicates the final colors.

4. Size Limitations for Sketch Submittals

A few commenters objected to the size limitations for sketch submittals (i.e., 8½ x 14 inches) that was proposed in an effort to accommodate the expected automation and modernization of the labeling approval process.

Although the Agency continues to move toward a more automated, modernized approval system, the Agency is not yet at the stage of development that such restrictions are necessary. Therefore, FSIS will not limit sketch submittals to the proposed size requirement of no larger than 8½ x 14 inches.

5. Temporary Approval

Several commenters requested that temporary labeling approval be extended beyond 6 months.

FSIS grants and proposed to continue to grant temporary approval for labeling deemed deficient in some particular for a period of time not to exceed 6 months, provided that (1) the proposed labeling would not misrepresent the product, (2) use of the labeling would not present any potential health, safety, or dietary problems to the consumer, (3) denial of the request would create undue economic hardship, and (4) an unfair competitive advantage would not result from granting the temporary approval.

FSIS continues to believe that changes to labeling that must be made as a result of these conditions can be accomplished within a 6-month timeframe. In certain circumstances, the current and proposed regulations allow temporary approvals to be extended beyond the 6-month timeframe. Therefore, FSIS has not extended the maximum time granted to temporary approval requests beyond that which currently exists in the regulations.

6. Expansion of the Generic Label Approval Category

Commenters concurred with the Agency's proposed expansion of the generically approved labeling categories to include those categories of labeling presently approved by the IIC. However, most commenters did not agree that standardized products should be included in the generic category. Commenters stated that not all of the existing product standards provide enough guidance to ensure labeling compliance. In addition, several commenters stated that few standards are actually codified in the Federal meat and poultry products inspection regulations, and that numerous informal standards are contained in the Standards and Labeling Policy Book.

Although FSIS acknowledges the concerns expressed, FSIS continues to believe that standardized products should be included in the generic approval category. Permitting the generic approval of labeling for these products will not affect the safety of the products. Consumers will continue to receive the information they need about the products from the ingredients statement and the Nutrition Facts panel. FSIS' prior review of these labels does not provide any additional benefits and requires resources that could be used in overseeing other areas more directly related to health and safety. In addition, including standardized products under generic approvals streamlines and makes more efficient the label review process, without compromising product safety. Furthermore, this action is consistent with the Agency's focus on using resources to reduce actual risks to the public as discussed in its February 3, 1995, HACCP proposal.

FSIS has also determined that standardized products contained in the Standards and Labeling Policy book should be eligible for generic approval.

Therefore, FSIS has modified the provison for generic approval of standardized products in two ways. First, FSIS will grant manufacturers the flexibility to generically approve labeling for standardized products found in 9 CFR part 319 or part 381, subpart P, and the Standards and Labeling Policy Book, provided such labeling does not contain any special claims or the product is not a domestic product labeled in a foreign language. Second, FSIS will allow the submission of sketch labeling for review and approval if manufacturers so desire. FSIS believes that the above modification will alleviate the concerns expressed by the commenters.

FSIS is currently reassessing the role of regulatory and policy standards in promoting meat and poultry products with better nutritional profiles (e.g., lower in fat and cholesterol). FSIS is also currently reassessing its labeling regulations. Additionally, an assessment is planned that will involve public input regarding modification or elimination of the informal policy standards in the Standards and Labeling Policy Book.

A few commenters expressed concern that labeling prepared for the Child Nutrition (CN) Program, conducted by USDA's Food and Nutrition Service, would not receive adequate review under the proposed approval system and opposed the inclusion of these product labels in the generic approval category. FSIS views CN information on the labeling as if it were a claim. Therefore, CN labeling will not be included in a generic approval category and will require review and sketch approval by FSIS.

As stated in the proposal, several commenters to the ANPR believed that the generic approval category could be expanded beyond those situations specifically identified in the ANPR. In the past, FSIS had been reluctant to expand the generic approval category further, until it could be demonstrated that this method of labeling approval would continue to provide the public with accurate, non-misleading labeling information. However, these suggestions were brought up again among the comments to the proposal. The Agency is now convinced that its present position is unnecessarily restrictive and now agrees that there are some other labeling categories that should be included in the generic approval category which would result in little, if any, risk of misbranding. Also, FSIS believes that the scope of some generic approval categories should be broadened.

After reviewing the suggestions presented by the commenters, FSIS agrees that it is appropriate to include additional categories of labeling under the generic approval category and to broaden the scope of some of the generic approval categories. Therefore, the following categories of labeling that will be generically approved have been either added or broadened in this final rule for the reasons explained below.

a. Quantitative adjustments to the nutrition labeling information, except for serving sizes, provided the changes do not affect the accuracy and consistency of the nutrition labeling information, (e.g., revising the fat content from 10 to 7 grams), for labeling that was previously approved by FLD as sketch labeling.

Meat and poultry companies will periodically need to revise nutrition information on their labeling as a result of ongoing nutrition monitoring programs. Several commenters

recognized that this particular labeling situation was not adequately addressed by the nutrition labeling regulations and suggested that quantitative nutrition labeling changes could be included in the expanded generic approval category.

FSIS never intended to require manufacturers to resubmit labeling for approval to make quantitative changes to the nutrition labeling information. Since the manufacturers are responsible for declaring accurate nutrition information, FSIS believes that quantitative nutrition information labeling changes will have little impact on the accuracy of the labeling. Requiring such labeling changes to be resubmitted through the approval process would undermine the Agency's efforts to streamline the approval process and reduce the volume of labeling submitted to FSIS for review. Furthermore, the accuracy of nutrition labeling will be monitored through the Agency's planned compliance, audit, and sampling activities. However, FSIS does not believe that it is appropriate to allow quantitative changes for serving sizes to be included in the expanded generic approval category. The need to maintain uniform serving sizes for specific products is very critical to the overall integrity of the nutrient profile of products. Thus, quantitative nutrition information labeling changes, except for serving sizes, may be generically approved for labeling that was previously approved by FLD as sketch labeling, provided the changes in no way render the labeling false or misleading in any particular.

b. Labeling for consumer test products not intended for sale.

Historically, products prepared for consumer test purposes have not presented FSIS with regulatory problems. These products are produced under controlled conditions and in limited quantities, and are not broadly distributed in the marketplace. In addition, all of the product's ingredients must be listed on the labeling and conform with all regulatory restrictions on their use. FSIS believes that permitting the generic approval of labeling for consumer test products will allow processors to more expeditiously develop and produce new, safe, wholesome products while testing consumer acceptance. Accordingly, FSIS will allow generic approval of labeling for consumer test products that will not be sold.

c. Deletion of any claim or other nonmandatory feature or information on labeling that was previously approved in sketch form, provided the deletion of the information will not render the labeling false or misleading in any particular.

Companies often delete claims and other nonmandatory information on the labeling (e.g., promotional information, cooking instructions, and recipes) as a part of their overall marketing strategy. Some examples of these situations are already included in the existing generic approval category (e.g., deletion of the word ''new'' and modification of cooking instructions (9 CFR 317.5 and 381.134)). FSIS believes there is little, if any, risk of misbranding by broadening the generic approval category to allow the deletion of any claim or other nonmandatory information, for labeling previously approved in sketch form.

d. The addition or deletion of a direct translation of the English language into a foreign language for products marked ''for export only,'' for labeling previously approved by FLD as sketch labeling.

Traditionally, the responsibility of accurately making a direct translation of the English language into a foreign language for products marked ''for export only'' has rested with manufacturers. FSIS believes that the addition or deletion of a direct translation of the English language into a foreign language for products marked ''for export only'' will not compromise the accuracy of the labeling of those products. Furthermore, FSIS is of the opinion that the inclusion of such labeling modifications in the generically approved category is consistent with the intent of this final rule. Thus, FSIS will permit generic approval of the addition or deletion of a direct translation of the English language into a foreign language for products marked ''for export only,'' whose labeling was previously approved in sketch form.

e. The substitution of any unit of measurement with its abbreviation or the substitution of an abbreviation with its unit of measurement.

In its proposal, FSIS proposed that the substitution of the abbreviation ''lb.'' for ''pound,'' or ''oz.'' for ''ounce,'' or the substitution of the word ''pound'' for ''lb.,'' or ''ounce'' for ''oz.'' on labeling would be generically approved. FSIS now believes, after reviewing the comments, that broadening the scope of this category to include the substitution of any unit of measurement with its abbreviation or the substitution of an abbreviation with its unit of measurement will not compromise the accuracy of product labeling. Thus, FSIS will permit the substitution of any unit of measurement with its abbreviation and substitution of an abbreviation with its unit of measurement, e.g., ''lb.'' for ''pound'' or ''teaspoon'' for ''tsp.''

f. Wrappers or other covers bearing pictorial designs, emblematic designs or illustrations, e.g., floral arrangements, illustrations of animals, fireworks, etc. are used with approved labeling (the use of such designs will not make necessary the application of labeling not otherwise required);

FSIS had proposed to allow generic approval during holiday seasons of wrappers or other coverings bearing floral or foliage designs, illustrations, or other emblematic holiday designs.

FSIS now believes, after reviewing the comments, that allowing the generic approval of only holiday designs on wrappers or other covers is too restrictive. Therefore, FSIS has broadened the scope of this category to permit the use of any pictorial or emblematic design, or illustration on wrappers or other covers, provided such design will not render the labeling to be false or misleading. FSIS is of the opinion that the inclusion of such labeling modification in the generically approved category is consistent with the intent of this final rule.

7. Voluntary Approval for Labeling Eligible For Generic Approval

Some of the commenters who expressed support for the expansion of the generic approval category wanted to retain the option of submitting labeling to FSIS for review and approval, even when the labeling is eligible for generic approval.

As previously stated, FSIS is aware that there are some concerns about the provision to include standardized products within the generically-approved labeling category. The intent of this rulemaking is to improve the overall efficiency of the labeling approval process by limiting the amount of labeling submitted to FSIS for review and approval, which cannot be achieved if all labeling authorized to be generically approved were permitted to be submitted for review and approval. Further, permitting all labeling authorized for generic approval to be submitted for review and approval would take away from the limited resources FSIS has at its disposal which it needs to review those aspects of labeling requirements that involve potential public health concerns. Nonetheless, FSIS has always provided, and will continue to provide advice and counsel to the industry and to the public at-large concerning labeling issues. To make very clear that FSIS remains committed to providing needed advice in appropriate circumstances, FSIS has modified the proposed rule to allow manufacturers to voluntarily submit sketch labeling for standardized

products for review and approval. Many of these products have complex compositional and minimum content requirements. FSIS is also providing this option for standardized products contained in the Standards and Labeling Policy Book because many of these products also have complex compositional and minimum content requirements. FSIS has determined that manufacturers should have the option, at this time, of submitting sketch labeling for standardized products for review. However, as FSIS begins a more indepth review of its labeling requirements and practices, FSIS may propose in a future rulemaking to remove this voluntary submittal option. This would be consistent with the intent of this rulemaking, which is to limit the types of labeling submitted for review so that FSIS resources can be focused on issues that bear directly on public health and food safety.

8. Generic System of Labeling Approval

Under an all-generic system, establishments would design, develop, print, and apply labeling without submission to FSIS for review and approval. A few commenters supported the proposed concept of an all-generic labeling approval system, citing reductions in costs and improved efficiency. However, the majority of the commenters opposed an all-generic system of approval because of concerns with their ability to fully understand and consistently interpret the existing labeling policies and regulations, the potential for misbranded product to enter the marketplace, and concern with penalties for misbranding and product recalls.

FSIS is currently reassessing the proposed all-generic labeling system of approval as an alternative option in an effort to streamline and modernize the label review process.

9. Preemption Concerns

Several commenters expressed concern that the proposal acknowledged ''concurrent jurisdiction'' (i.e., the States and local governments may exercise concurrent jurisdiction over meat and poultry products that are outside official establishments for the purpose of preventing distribution of meat and poultry products that are misbranded or adulterated under the FMIA or PPIA). The comments indicated that FSIS should clearly state that the new labeling requirements will have a preemptive effect on the requirements of the various States and local governments.

The provisions of the FMIA and PPIA preclude any State or local jurisdiction from imposing ingredient, marking, or labeling requirements on products produced in federally inspected establishments that are different or in addition to Federal requirements. In this regard, State and local jurisdictions cannot impose different or additional requirements, regardless of whether the labeling is approved in sketch form by FSIS or generically approved by FSIS.

10. The IIC's Role Under a Generic Approval System

Many commenters were concerned about the responsibilities of the IIC with respect to product packaged in generically approved labeling. Commenters repeatedly stated that the role of the IIC must be clearly defined for these proposed changes to be implemented efficiently. Most commenters contended that the IIC's limited knowledge and expertise on labeling regulations and policies may lead to unwarranted interference or retention of product. In addition, some commenters stated that labeling interpretations made by individual inspectors would not contribute toward uniformity in labeling decisions.

FSIS believes some of the concerns raised by commenters will be alleviated since the Agency will issue a notice to field personnel that will clearly describe how to respond to and report label deficiencies.

FSIS is currently conducting a top to bottom review of how the Agency defines its regulatory roles, allocates resources, and is organized (60 FR 32127). The IIC's role with regard to monitoring product formulations and processing procedures will be addressed in that review but will not change or be diminished as a result of this regulation. Inspection personnel will continue to observe and monitor product formulations and processing procedures to assure conformance with general labeling requirements. If inspection personnel observe that products are not being manufactured in accordance with their formulation or believe that a situation may have health or safety significance, they are to take the appropriate action necessary to ensure that misbranded and/or adulterated product does not enter commerce. In addition, inspection personnel are to immediately contact FLD, through appropriate channels, for technical assistance.

11. Recordkeeping

FSIS proposed that domestic establishments and establishments certified by officials of a foreign inspection system maintain records on all labeling used, and make such records available to any authorized USDA official, upon request. Each record would consist of the product's labeling, formulation, and processing procedure. Several commenters requested clarification about the location and content of the required records.

Manufacturers of meat and poultry products will be required to maintain records of all labeling used, along with the product's formulation and processing procedure in accordance with 9 CFR part 320 of the meat inspection regulations for meat products, and in accordance with 9 CFR part 381, subpart Q of the poultry products inspection regulations for poultry products. This means that records of the actual labeling used on a product, along with the product's formulation and processing procedures must be maintained.

In regard to where the required records must be located, i.e., maintained, the final regulations, as did the proposal, require, as previously stated, the records to be maintained in accordance with 9 CFR part 320 for meat products, and in accordance with 9 CFR part 381, subpart Q for poultry products. In accordance with section 320.2 of the meat inspection regulations and section 381.176 of the poultry products inspection regulations, required records must be maintained by a person, including a corporation at the place of business where the business is conducted, except that if a person, including a corporation conducts business at multiple locations, records may be maintained at the headquarters office. FSIS does not believe it is necessary to require all establishments at multiple locations to maintain copies of the labeling records required by this final rule. However, the IIC will retain his or her authority to request the labeling records to verify the accuracy of the labeling of products as it relates to official business.

Any existing labeling files maintained by inspection personnel at federally inspected establishments will be returned to plant management at the time this regulation is implemented.

This final rule will eliminate the requirement that inspection personnel maintain labeling files. FSIS has determined, after further examination of the regulations, that the elimination of this requirement will necessitate changes in other related provisions of the meat and poultry inspection regulations (9 CFR 317.14, 381.141, and 381.137). FSIS inadvertently omitted these provisions in the proposed rule but believes such provisions must be amended to avoid confusion among inspection personnel regarding their

labeling responsibilities and to make the regulations consistent. The current provisions in 9 CFR 317.14 and 381.141 require the inspector, upon notification of an obsolete label, to return the label that is in the official labeling file to the establishment and to forward the label transmittal to FLD for further data processing. This procedure will become unnecessary because the final rule, as did the proposal, no longer, in general, requires inspection personnel to maintain labeling files. Thus, FSIS is eliminating 9 CFR 317.14 and 381.141 to relieve inspection personnel of the responsibility of handling obsolete labeling records. In addition, the provision in 9 CFR 381.137 states that no inspector shall authorize the use of any labeling or device unless he or she has on file evidence that such labeling or device has been approved in accordance with the appropriate provisions. Because inspection personnel will no longer maintain labeling files, the IIC's responsibility for authorizing the use of labeling will not be required. Thus, FSIS is revising 9 CFR 381.137 to delete the IIC's responsibility for authorizing the use of approved labeling based on evidence maintained in official labeling files. FSIS believes that amending the aforementioned provisions is consistent with the intent of this final rule.

12. Auditing the Accuracy of Generically Approved Labeling

To monitor compliance with the Federal meat and poultry products inspection regulations, FSIS proposed to select samples of generically approved labeling.

In addition to routine compliance and inspection activities, FSIS will develop and implement a sampling plan for the expanded types of labeling under the generic approval category. The sampling plan will be directed from FSIS headquarters in Washington. FSIS inspection personnel will collect all pertinent labeling records corresponding to each selected sample. These samples would be collected and forwarded to FLD for audit. FLD will evaluate the samples to determine if they comply with labeling regulations and policies.

13. Modernization of the Labeling Review System

All of the commenters responding to this issue of modernizing the labeling review system were in support of the Agency's efforts. Such commenters included those who supported sketch only approval, as well as those who supported generic approval. The commenters stated that an electronic communications system would be cost effective by eliminating unnecessary paperwork and taking advantage of new information, collection, and storage technologies.

FSIS will continue to make incremental improvements in automation as budget constraints allow. Furthermore, FSIS believes that its current efforts to automate its labeling review system are consistent with the President's initiatives for greater efficiency in government services.

Miscellaneous Changes

The proposal stated that products labeled ''for export only'' in U.S. establishments that do not contain any special claims would be permitted to be labeled with generically approved labeling and thus labeling for such products would not have to be submitted in sketch form to FSIS for approval. However, after further consideration, FSIS has concluded that products designated ''for export only'' and destined to foreign countries should be reviewed and approved under the same provisions proposed for other products manufactured in U.S. establishments. FSIS acknowledges its responsibility for ensuring the accuracy of all labeling of meat and poultry products manufactured in Federal establishments, regardless of the product's destination. Also, most countries that receive product from the United States do not have label review programs. Therefore, these countries depend on FSIS review and approval as their assurance that imported products are accurately labeled. Thus, FSIS has decided to withdraw this provision of its proposal, and to require, as it did prior to its proposal, that labeling designated ''for export only'' be submitted to FSIS for approval, except when such labeling comes within the categories of labeling that will be generically approved. As FSIS reforms its prior labeling approval system, more of these labels will be considered for inclusion in the generic approval category. Although FSIS is continuing to provide labeling review services for these exporters, it will explore the possibility of charging user fees in the future for such services.

As stated in the proposal, where sketch labeling is required to be submitted to FLD for review and approval, a parent company for a corporation may submit only one labeling application for a product produced in other establishments, which are owned by the corporation. FSIS has clarified this matter in the Federal meat and poultry products regulations.

On August 8, 1994, FSIS published in the Federal Register a final rule on the placement of nutrition labeling and other mandatory labeling on meat and poultry products (59 FR 40209). That rule included a provision identifying as generically approved, final labeling bearing nutrition labeling information which was approved in sketch form or other version that clearly shows all required features, size, location, and identification of final color, by FSIS (9 CFR 317.5(c) and 381.134(c)). This final rule on prior labeling approval, as did the proposed rule, identifies as generically approved, final labeling, which would include labeling bearing nutrition information, that was submitted for approval and approved by FSIS in sketch form. Therefore, the current provisions in 9 CFR 317.5(c) and 381.134(c) are no longer needed. Accordingly, FSIS is amending the Federal meat and poultry products inspection regulations to eliminate 9 CFR 317.5(c) and 381.134(c).

This final rule, as did the proposal, will eliminate the need for FSIS inspection personnel to maintain labeling records. Consequently, FLD will no longer need labeling applications to be submitted in triplicate form. Accordingly, FSIS is clarifying this requirement in the Federal meat and poultry products inspection regulations 9 CFR 317.4(c) and 381.132(c) to reflect that labeling applications only need to be submitted in duplicate form.

Effective Date

After careful consideration of the changes necessary to implement the revised labeling system, FSIS has decided to make this rule effective 6 months from the date of publication. The Agency believes that a longer implementation period will alleviate unnecessary delays in the labeling review process. This longer implementation period will also minimize burdens related to the transfer of labeling records from the IIC's to the establishments, inspection personnel and industry orientation to new procedures, the auditing of generically approved labels, and various other miscellaneous changes. In addition, the longer implementation period will allow the Agency time to develop and issue to its inspection personnel, official guidelines for implementing this regulation.

Executive Order 12866

The final rule has been reviewed under Executive Order 12866 and has been determined to be significant. FSIS has assessed the impacts of its final rule

that expands the types of labeling, used on meat and poultry products, that are generically approved; i.e., establishments will be able to use certain labeling on meat and poultry products without submission of the labeling to FSIS for approval by the IIC or FLD, in Washington, DC. This rule eliminates unnecessary duplication in the labeling approval system.

Benefits of the Final Rule

This regulation will benefit consumers, the meat and poultry industry, and the Agency. The final rule will reduce market inefficiencies caused by delays in new product introduction attributable to the labeling application and review process. Industry will be able to be more responsive to their consumers. Consumers will also benefit because new products will be introduced into the marketplace faster.

This final rule will reduce requirements for the submission of labeling for review and approval by FSIS. The final rule will streamline the label submission process from two steps (sketch and final) to a one step process (sketch only). Also, meat and poultry manufacturers will be able to make numerous labeling modifications without submitting certain labels for approval. This streamlined process will reduce the burden on industry by making the labeling approval process more convenient and cost-effective. Furthermore, those establishments that use representatives to present their labels to FLD for review will also save time and money. These savings will be realized because fewer labels will be required to be submitted to FLD. It is estimated that the reduction in the submission of labeling will save the meat and poultry establishments at least 20,000 hours.

This final rule will result in a savings of approximately $3 million in direct label application costs to the industry. This $3 million was derived by estimating that approximately 82,600 fewer labels, at a cost of $37 per label, would be submitted to FLD annually as a result of this final rule. Unknown additional savings will be realized by the industry, depending on the degree to which industry uses the generic approval authority for labeling for standardized products. This $3 million savings estimate differs from the savings that were attributed to the elimination of labeling application costs stated in the proposed rule ($5 million) because this final rule contains provisions for either generic approval or voluntary submission for review and approval of labeling for standardized products. The proposed rule contained provisions for mandatory generic approval of labeling for standardized products. This rule will reduce the paperwork burdens of industry by eliminating the application process for specific types of labeling.

Shifting responsibility for maintaining labeling records from the inspector will enable FSIS to redirect its inspection resources to areas more directly related to food safety. In addition, this rule is consistent with FSIS' February 3, 1995, Pathogen Reduction; Hazard Analysis and Critical Control Point Systems proposal and FSIS' other regulatory reform initiatives that are intended to focus inspection and other Agency resources on activities that have a direct bearing on food safety.

Costs of the Final Rule

This final rule requires that establishments submit only one labeling application for FSIS approval (sketch labeling) instead of two applications in those instances where labeling must be approved by FSIS. This final rule also expands the types of labeling that can be generically approved. For standardized products, this rule permits the voluntary submittal of sketch labeling for review, if desired by the manufacturer.

FSIS estimates that this final rule will result in $3 million annual savings in direct labeling application costs. The final rule does require, however, that establishments maintain copies of all labeling used, along with the product formulations and a description of the processing procedures used to formulate the product in accordance with 9 CFR 320.2 and part 381, subpart Q, for all labeling submitted for review and approval by FSIS, as well as for labeling in the generic approval category. This requirement should not impose any additional cost burden on establishments because most establishments already maintain copies of their labeling.

The labeling records maintained by the establishments must be made available to Agency officials upon request. FSIS will conduct periodic sampling of generically approved labeling from the records maintained by the establishments. This sampling will be conducted to monitor compliance of generically approved labeling with all labeling requirements. Activities related to the generic labeling sampling program will be absorbed into existing Agency resources, and, thus, will not impose additional Agency costs.

Executive Order 12778

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. States and local jurisdictions are preempted under the FMIA and the PPIA from imposing any marking, labeling, packaging, or ingredient requirements on federally inspected meat and poultry products that are in addition to, or different from, those imposed under the FMIA or PPIA. States and local jurisdictions may, however, exercise concurrent jurisdiction over meat and poultry products that are outside official establishments for the purpose of preventing the distribution of meat and poultry products that are misbranded or adulterated under the FMIA or PPIA, or, in the case of imported articles, which are not at such an establishment, after their entry into the United States. Under the FMIA and PPIA, States that maintain meat and poultry inspection programs must impose requirements that are at least equal to those required under the FMIA and PPIA. The States may, however, impose more stringent requirements on such State inspected products and establishments.

No retroactive effect will be given to this final rule. The administrative procedures specified in 9 CFR 306.5 and 381.35 must be exhausted prior to any judicial challenge of the application of the provisions of this rule, if the challenge involves any decision of an inspector relating to inspection services provided under the FMIA or PPIA. The administrative procedures specified in 9 CFR parts 335 and 381, subpart W, must be exhausted prior to any judicial challenge of the application of the provision of this rule with respect to labeling decisions.

Effect on Small Entities

The Administrator, FSIS, has determined that this final rule will not have a significant economic impact on a substantial number of small entities. This rule will affect small meat and poultry establishments, and other small entities involved in various label consulting activities, including those entities who specialize in obtaining label approval from FSIS. Most small meat and poultry establishments will benefit from the provisions in this rule as direct costs involved with the labeling application and approval process will be reduced. Costs involved with label design and printing will not change and would be incurred even without this final rule.

The affect of this final rule on those entities known as label expediters will depend on the percentage of their business directly involved with obtaining expedited approvals of product labels. There are about 13 firms that are involved on a consistent basis with obtaining label approvals. Eight of these 13 firms provide services other

than expedited label approvals. A reduction in the need for this service is not expected to significantly affect these entities. In addition, these firms will likely expand existing services not related to expediting label approvals. Also, certain types of labels will continue to need approval by the Food Labeling Division before they may be used. Therefore, firms whose primary service involves obtaining label approval will be able to continue providing this service.

Any impacts of this final rule on small entities will be mitigated because the Agency is providing a 6-month period before the final rule will be effective. Therefore, affected entities will be given time to adjust their current practices and/or to modify their businesses to lessen any possible negative affects of the final rule.

Paperwork Requirements

Abstract: This final rule expands the types of generically approved labeling currently authorized for use by meat and poultry establishments and certified foreign establishments. (Generically approved labeling is not required to be submitted to FSIS for review and approval.) The rule also permits the submission of only sketch labeling, except for temporary approvals, in those instances where labeling is required to be submitted for approval. The rule also requires the retention of certain records at the establishment.

Estimate of Burden: This final rule substantially reduces ''reporting'' requirements for official establishments. FSIS estimates that label submissions sent to Washington for review and approval will decrease by about 50 percent. For such submissions, FSIS estimates that 15 minutes will be the response time to prepare the label application form, submit it, along with the label, to FSIS or to a label expediter who will deliver the form and label to FSIS, and to file the records this rule requires establishments to maintain, which is approximately the same amount of time establishments currently utilize to meet paperwork requirements. FSIS believes that there will be no change in the time FSIS estimates, 60 minutes, it takes to design and develop labels in accordance with the regulations. In total, the burden associated with label approval submissions will decrease by 22,921 hours.

For generically approved labeling, FSIS estimates the addition of new generic labeling categories will result in a 50 percent increase of generically approved labels. Before this final rule, a copy of generically approved labeling was required to be filed with the inspector, and FSIS had estimated a 1 minute response time for this activity. The final rule eliminates this requirement and instead requires that a copy of the label and supporting information be maintained at the establishment. FSIS estimates it will take 2 minutes for the establishment to file this information. Therefore, there will be an increase in burden hours relating to generically approved labels by 2,691 hours.

Copies of this information collection assessment can be obtained from Lee Puricelli, Paperwork Specialist, Food Safety and Inspection Service, USDA, South Agriculture Building, Room 3812, Washington, DC 20250.

Send comments regarding the need and usefulness of the requirements, the accuracy of our burden hour estimate, ways to minimize the burden, including through the use of automated collection techniques or other forms of information technology, or any other aspect of this collection of information, to Lee Puricelli, Paperwork Specialist, see address above.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

List of Subjects

9 CFR Part 306

Appeals, Meat inspection.

9 CFR Part 317

Food labeling, Meat inspection, Reporting and recordkeeping requirements.

9 CFR Part 320

Reporting and recordkeeping requirements.

9 CFR Part 327

Food labeling, Imports, and Meat inspection.

9 CFR Part 381

Appeals, Food labeling, Imports, Poultry and poultry products, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, FSIS is amending 9 CFR parts 306, 317, 320, 327, and 381 as follows:

PART 306—ASSIGNMENT AND AUTHORITIES OF PROGRAM EMPLOYEES

1. The authority citation for part 306 is revised to read as follows:

Authority: 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

2. Section 306.5 is amended by removing the last sentence.

PART 317—LABELING, MARKING DEVICES, AND CONTAINERS

3. The authority citation for part 317 is revised to read as follows:

Authority: 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

4. Section 317.4 is revised to read as follows:

§ 317.4 Labeling approval.

(a) No final labeling shall be used on any product unless the sketch labeling of such final labeling has been submitted for approval to the Food Labeling Division, Regulatory Programs, Food Safety and Inspection Service, and approved by such division, accompanied by FSIS form, Application for Approval of Labels, Marking, and Devices, except for generically approved labeling authorized for use in § 317.5(b). The management of the official establishment or establishment certified under a foreign inspection system, in accordance with part 327 of this subchapter, must maintain a copy of all labeling used, along with the product formulation and processing procedure, in accordance with part 320 of this subchapter. Such records shall be made available to any duly authorized representative of the Secretary upon request.

(b) The Food Labeling Division shall permit submission for approval of only sketch labeling, as defined in § 317.4(d), for all products, except as provided in § 317.5(b) (2)–(9) and except for temporary use of final labeling as prescribed in paragraph (f) of this section.

(c) All labeling required to be submitted for approval as set forth in § 317.4(a) shall be submitted in duplicate to the Food Labeling Division, Regulatory Programs, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. A parent company for a corporation may submit only one labeling application (in duplicate form) for a product produced in other establishments that are owned by the corporation.

(d) ''Sketch'' labeling is a printer's proof or equivalent which clearly shows all labeling features, size, location, and indication of final color, as specified in § 317.2. FSIS will accept sketches that are hand drawn, computer generated or other reasonable facsimiles that clearly reflect and project the final version of the labeling. Indication of final color may be met by: submission of a color sketch, submission of a sketch which indicates by descriptive language the final colors, or submission with the sketch of previously approved final labeling that indicates the final colors.

(e) Inserts, tags, liners, pasters, and like devices containing printed or graphic matter and for use on, or to be placed within, containers and coverings of product shall be submitted for approval in the same manner as provided for labeling in § 317.4(a), except that such devices which contain no reference to product and bear no misleading feature shall be used without submission for approval as prescribed in § 317.5(b)(7).

(f)(1) Consistent with the requirements of this section, temporary approval for the use of a final label or other final labeling that may otherwise be deemed deficient in some particular may be granted by the Food Labeling Division. Temporary approvals may be granted for a period not to exceed 180 calendar days, under the following conditions:

(i) The proposed labeling would not misrepresent the product;

(ii) The use of the labeling would not present any potential health, safety, or dietary problems to the consumer;

(iii) Denial of the request would create undue economic hardship; and

(iv) An unfair competitive advantage would not result from the granting of the temporary approval.

(2) Extensions of temporary approvals may also be granted by the Food Labeling Division provided that the applicant demonstrates that new circumstances, meeting the above criteria, have developed since the original temporary approval was granted.

(g) The inspector-in-charge shall approve meat carcass ink brands and meat food product ink and burning brands, which comply with parts 312 and 316 of this subchapter.

5. Section 317.5 is revised to read as follows:

§ 317.5 Generically approved labeling.

(a)(1) An official establishment or an establishment certified under a foreign inspection system, in accordance with part 327 of this subchapter, is authorized to use generically approved labeling, as defined in paragraph (b) of this section, without such labeling being submitted for approval to the Food Safety and Inspection Service in Washington or the field, provided the labeling is in accordance with this section and shows all mandatory features in a prominent manner as required in § 317.2, and is not otherwise false or misleading in any particular.

(2) The Food Safety and Inspection Service shall select samples of generically approved labeling from the records maintained by official establishments and establishments certified under foreign inspection systems, in accordance with part 327 of this subchapter, as required in § 317.4, to determine compliance with labeling requirements. Any finding of false or misleading labeling shall institute the proceedings prescribed in § 335.12.

(b) Generically approved labeling is labeling which complies with the following:

(1) Labeling for a product which has a product standard as specified in part 319 of this subchapter or the Standards and Labeling Policy Book and which does not contain any special claims, such as quality claims, nutrient content claims, health claims, negative claims, geographical origin claims, or guarantees, or which is not a domestic product labeled in a foreign language;

(2) Labeling for single-ingredient products (such as beef steak or lamb chops) which does not contain any special claims, such as quality claims, nutrient content claims, health claims, negative claims, geographical origin claims, or guarantees, or which is not a domestic product labeled with a foreign language;

(3) Labeling for containers of products sold under contract specifications to Federal Government agencies, when such product is not offered for sale to the general public, provided that the contract specifications include specific requirements with respect to labeling, and are made available to the inspector-in-charge;

(4) Labeling for shipping containers which contain fully labeled immediate containers, provided such labeling complies with § 316.13;

(5) Labeling for products not intended for human food, provided they comply with part 325 of this subchapter;

(6) Meat inspection legends, which comply with parts 312 and 316 of this subchapter;

(7) Inserts, tags, liners, pasters, and like devices containing printed or graphic matter and for use on, or to be placed within containers, and coverings of products, provided such devices contain no reference to product and bear no misleading feature;

(8) Labeling for consumer test products not intended for sale; and

(9) Labeling which was previously approved by the Food Labeling Division as sketch labeling, and the final labeling was prepared without modification or with the following modifications:

(i) All features of the labeling are proportionately enlarged or reduced, provided that all minimum size requirements specified in applicable regulations are met and the labeling is legible;

(ii) The substitution of any unit of measurement with its abbreviation or the substitution of any abbreviation with its unit of measurement, e.g., ''lb.'' for ''pound,'' or ''oz.'' for ''ounce,'' or of the word ''pound'' for ''lb.'' or ''ounce'' for ''oz.'';

(iii) A master or stock label has been approved from which the name and address of the distributor are omitted and such name and address are applied before being used (in such case, the words ''prepared for'' or similar statement must be shown together with the blank space reserved for the insertion of the name and address when such labels are offered for approval);

(iv) Wrappers or other covers bearing pictorial designs, emblematic designs or illustrations, e.g., floral arrangements, illustrations of animals, fireworks, etc. are used with approved labeling (the use of such designs will not make necessary the application of labeling not otherwise required);

(v) A change in the language or the arrangement of directions pertaining to the opening of containers or the serving of the product;

(vi) The addition, deletion, or amendment of a dated or undated coupon, a cents-off statement, cooking instructions, packer product code information, or UPC product code information;

(vii) Any change in the name or address of the packer, manufacturer or distributor that appears in the signature line;

(viii) Any change in the net weight, provided the size of the net weight statement complies with § 317.2;

(ix) The addition, deletion, or amendment of recipe suggestions for the product;

(x) Any change in punctuation;

(xi) Newly assigned or revised establishment numbers for a particular establishment for which use of the labeling has been approved by the Food Labeling Division, Regulatory Programs;

(xii) The addition or deletion of open dating information;

(xiii) A change in the type of packaging material on which the label is printed;

(xiv) Brand name changes, provided that there are no design changes, the brand name does not use a term that connotes quality or other product characteristics, the brand name has no geographic significance, and the brand name does not affect the name of the product;

(xv) The deletion of the word ''new'' on new product labeling;

(xvi) The addition, deletion, or amendment of special handling

statements, provided that the change is consistent with § 317.2(k);

(xvii) The addition of safe handling instructions as required by § 317.2(l);

(xviii) Changes reflecting a change in the quantity of an ingredient shown in the formula without a change in the order of predominance shown on the label, provided that the change in quantity of ingredients complies with any minimum or maximum limits for the use of such ingredients prescribed in parts 318 and 319 of this subchapter;

(xix) Changes in the color of the labeling, provided that sufficient contrast and legibility remain;

(xx) A change in the product vignette, provided that the change does not affect mandatory labeling information or misrepresent the content of the package;

(xxi) A change in the establishment number by a corporation or parent company for an establishment under its ownership;

(xxii) Changes in nutrition labeling that only involve quantitative adjustments to the nutrition labeling information, except for serving sizes, provided the nutrition labeling information maintains its accuracy and consistency;

(xxiii) Deletion of any claim, and the deletion of non-mandatory features or non-mandatory information; and

(xxiv) The addition or deletion of a direct translation of the English language into a foreign language for products marked ''for export only.''

§ 317.4 [Removed and reserved]

6. Section 317.14 is removed and reserved.

PART 320—RECORDS, REGISTRATION, AND REPORTS

7. The authority citation for part 320 is revised to read as follows:

Authority: 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

8. Section 320.1 is amended by adding a new paragraph (b)(11) to read as follows:

§ 320.1 Records required to be kept.

* * * * *

(b) * * *

(11) Records of all labeling, along with the product formulation and processing procedures, as prescribed in § 317.4 and § 317.5.

PART 327—IMPORTED PRODUCTS

9. The authority citation for part 327 is revised to read as follows:

Authority: 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

10. Section 327.14(c) is revised to read as follows:

§ 327.14 Marking of products and labeling of immediate containers thereof for importation.

* * * * *

(c) All marks and other labeling for use on or with immediate containers, as well as private brands on carcasses or parts of carcasses, shall be approved by the Food Safety and Inspection Service in accordance with part 317 of this subchapter before products bearing such marks, labeling, or brands will be entered into the United States. The marks of inspection of foreign systems embossed on metal containers or branded on carcasses or parts thereof need not be submitted to the Food Safety and Inspection Service for approval, and such marks of inspection put on stencils, box dies, labels, and brands may be used on such immediate containers as tierces, barrels, drums, boxes, crates, and large-size fiberboard containers of foreign products without such marks of inspection being submitted for approval, provided the markings made by such articles are applicable to the product and are not false or misleading.

§ 327.24 [Amended]

11. Section 327.24 is amended by removing the last sentence.

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

12. The authority citation for part 381 is revised to read as follows:

Authority: 7 U.S.C. 138f; 7 U.S.C. 450, 21 U.S.C. 451–470; 7 CFR 2.18, 2.53.

13. Section 381.35 is amended by revising the last sentence to read as follows:

§ 381.35 Appeal inspections; how made.

* * *. The poultry or poultry products involved in any appeal shall be identified by U.S. retained tags and segregated in a manner approved by the inspector pending completion of an appeal inspection.

14. Section 381.132 is revised to read as follows:

§ 381.132 Labeling approval.

(a) No final labeling shall be used on any product unless the sketch labeling of such final labeling has been submitted for approval to the Food Labeling Division, Regulatory Programs, Food Safety and Inspection Service, and approved by such division, accompanied by FSIS Form, Application for Approval of Labels, Marking, and Devices, except for generically approved labeling authorized for use in § 381.133(b) (2)–(9). The management of the official establishment or establishment certified under a foreign inspection system, in accordance with subpart T of this part, must maintain a copy of all labeling used, along with the product formulation and processing procedure, in accordance with subpart Q of this part. Such records shall be made available to any duly authorized representative of the Secretary upon request.

(b) The Food Labeling Division shall permit submission for approval of only sketch labeling, as defined in § 381.132(d), for all products, except as provided in § 381.133(b) (2)–(9) and except for temporary use of final labeling as prescribed in paragraph (f) of this section.

(c) All labeling required to be submitted for approval as set forth in § 381.132(b) shall be submitted in duplicate to the Food Labeling Division, Regulatory Programs, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. A parent company for a corporation may submit only one labeling application (in duplicate) for a product produced in other establishments that are owned by the corporation.

(d) ''Sketch'' labeling is a printer's proof or equivalent which clearly shows all labeling features, size, location, and indication of final color, as specified in subpart N of this part. FSIS will accept sketches that are hand drawn, computer generated or other reasonable facsimiles that clearly reflect and project the final version of the labeling. Indication of final color may be met by: submission of a color sketch, submission of a sketch which indicates by descriptive language the final colors, or submission with the sketch of previously approved final labeling that indicates the final colors.

(e) Inserts, tags, liners, pasters, and like devices containing printed or graphic matter and for use on, or to be placed within, containers and coverings of product shall be submitted for approval in the same manner as provided for labeling in § 381.132(a), except that such devices which contain no reference to product and bear no misleading feature shall be used without submission for approval as prescribed in § 381.133(b)(9).

(f)(1) Consistent with the requirements of this section, temporary approval for the use of a final label or other final labeling that may otherwise be deemed deficient in some particular may be granted by the Food Labeling Division. Temporary approvals may be granted for a period not to exceed 180 calendar days under the following conditions:

(i) The proposed labeling would not misrepresent the product;

(ii) The use of the labeling would not present any potential health, safety, or dietary problems to the consumer;

(iii) Denial of the request would create undue economic hardship; and

(iv) An unfair competitive advantage would not result from the granting of the temporary approval.

(2) Extensions of temporary approvals may also be granted by the Food Labeling Division, provided that the applicant demonstrates that new circumstances, meeting the above criteria, have developed since the original temporary approval was granted.

15. Section 381.133 is redesignated as § 381.134, and § 381.134 is redesignated as § 381.133 and revised to read as follows:

§ 381.133 Generically approved labeling.

(a)(1) An official establishment or an establishment certified under a foreign inspection system, in accordance with subpart T of this part, is authorized to use generically approved labeling, as defined in paragraph (b) of this section, without such labeling being submitted for approval to the Food Safety and Inspection Service in Washington or the field, provided the labeling is in accord with this section and shows all mandatory features in a prominent manner as required in subpart N of this part, and is not otherwise false or misleading in any particular.

(2) The Food Safety and Inspection Service shall select samples of generically approved labeling from the records maintained by official establishments and establishments certified under foreign inspection systems, in accordance with subpart T of this part, as required in § 381.132, to determine compliance with labeling requirements. Any finding of false or misleading labeling shall institute the proceedings prescribed in § 381.233.

(b) Generically approved labeling is labeling which complies with the following:

(1) Labeling for a product which has a product standard as specified in subpart 381 of this subchapter or the Standards and Labeling Policy Book and which does not contain any special claims, such as quality claims, nutrient content claims, health claims, negative claims, geographical origin claims, or guarantees, or which is not a domestic product labeled in a foreign language;

(2) Labeling for single-ingredient products (such as chicken legs or turkey breasts) which does not contain any special claims, such as quality claims, nutrient content claims, health claims, negative claims, geographical origin claims, or guarantees, or which is not a domestic product labeled with a foreign language;

(3) Labeling for containers of products sold under contract specifications to Federal Government agencies, when such product is not offered for sale to the general public, provided that the contract specifications include specific requirements with respect to labeling, and are made available to the inspector-in-charge;

(4) Labeling for shipping containers which contain fully labeled immediate containers, provided such labeling complies with § 381.127;

(5) Labeling for products not intended for human food, provided they comply with §§ 381.152(c) and 381.193, and labeling for poultry heads and feet for export for processing as human food if they comply with § 381.190(b);

(6) Poultry inspection legends, which comply with subpart M of this part;

(7) Inserts, tags, liners, pasters, and like devices containing printed or graphic matter and for use on, or to be placed within containers, and coverings of products, provided such devices contain no reference to product and bear no misleading feature;

(8) Labeling for consumer test products not intended for sale; and

(9) Labeling which was previously approved by the Food Labeling Division as sketch labeling, and the final labeling was prepared without modification or with the following modifications:

(i) All features of the labeling are proportionately enlarged or reduced, provided that all minimum size requirements specified in applicable regulations are met and the labeling is legible;

(ii) The substitution of any unit of measurement with its abbreviation or the substitution of any abbreviation with its unit of measurement, e.g., ''lb.'' for ''pound,'' or ''oz.'' for ''ounce,'' or of the word ''pound'' for ''lb.'' or ''ounce'' for ''oz.'';

(iii) A master or stock label has been approved from which the name and address of the distributor are omitted and such name and address are applied before being used (in such case, the words ''prepared for'' or similar statement must be shown together with the blank space reserved for the insertion of the name and address when such labels are offered for approval);

(iv) Wrappers or other covers bearing pictorial designs, emblematic designs or illustrations, e.g., floral arrangements, illustrations of animals, fireworks, etc. are used with approved labeling (the use of such designs will not make necessary the application of labeling not otherwise required);

(v) A change in the language or the arrangement of directions pertaining to the opening of containers or the serving of the product;

(vi) The addition, deletion, or amendment of a dated or undated coupon, a cents-off statement, cooking instructions, packer product code information, or UPC product code information;

(vii) Any change in the name or address of the packer, manufacturer or distributor that appears in the signature line;

(viii) Any change in the net weight, provided that the size of the net weight statement complies with § 381.121;

(ix) The addition, deletion, or amendment of recipe suggestions for the product;

(x) Any change in punctuation;

(xi) Newly assigned or revised establishment numbers for a particular establishment for which use of the labeling has been approved by the Food Labeling Division, Regulatory Programs;

(xii) The addition or deletion of open dating information;

(xiii) A change in the type of packaging material on which the label is printed;

(xiv) Brand name changes, provided that there are no design changes, the brand name does not use a term that connotes quality or other product characteristics, the brand name has no geographic significance, and the brand name does not affect the name of the product;

(xv) The deletion of the word ''new'' on new product labeling;

(xvi) The addition, deletion, or amendment of special handling statements, provided that the change is consistent with § 381.125(a);

(xvii) The addition of safe handling instructions as required by § 381.125(b);

(xviii) Changes reflecting a change in the quantity of an ingredient shown in the formula without a change in the order of predominance shown on the label, provided that the change in quantity of ingredients complies with any minimum or maximum limits for the use of such ingredients prescribed in § 381.147 and subpart P of this part;

(xix) Changes in the color of the labeling, provided that sufficient contrast and legibility remain;

(xx) A change in the product vignette, provided that the change does not affect mandatory labeling information or misrepresent the content of the package;

(xxi) The addition, deletion, or substitution of the official USDA poultry grade shield; (xxii) A change in the establishment number by a corporation or parent company for an establishment under its ownership;

(xxiii) Changes in nutrition labeling that only involve quantitative adjustments to the nutrition labeling information, except for services sizes, provided the nutrition labeling information maintains its accuracy and consistency;

(xxiv) Deletion of any claim, and the deletion of non-mandatory features or non-mandatory information;

(xxv) The addition or deletion of a direct translation of the English language into a foreign language for products marked ''for export only''; and

(xxvi) The addition of a descriptive term as required by § 381.129(b)(6).

16. Section 381.137 is revised to read as follows:

§ 381.137 Evidence of labeling and devices approval.

No inspector shall authorize the use of any device bearing any official inspection legend unless he or she has on file evidence that such device has been approved in accordance with the provisions of this subpart.

§ 381.141 [Removed and reserved]

17. Section 381.141 is removed and reserved.

18. Section 381.175 is amended by adding a new paragraph (b)(6) to read as follows:

§ 381.175 Records required to be kept.

* * * * *

(b) * * *

(6) Records of all labeling, along with the product formulation and processing procedures, as prescribed in §§ 381.132 and 381.133.

19. Section 381.202(d) is amended by removing the last sentence and by revising the next to the last sentence to read as follows:

§ 381.202 Poultry products offered for entry; reporting of findings to customs; handling of articles refused entry; appeals, how made; denaturing procedures.

* * * * *

(d) * * *. The poultry or poultry products involved in any appeal shall be identified by U.S. retained tags and segregated in a manner approved by the inspector pending completion of an appeal inspection.

* * * * *

20. Section 381.205(c) is revised to read as follows:

§ 381.205 Labeling of immediate containers of poultry products offered for entry.

* * * * *

(c) All marks and other labeling for use on or with immediate containers shall be approved for use by the Food Safety and Inspection Service in accordance with §§ 381.132 and 381.133 before products bearing such marks and other labeling will be permitted for entry into the United States.

21. Section 381.206 is amended by adding to the end thereof the following sentence:

§ 381.206 Labeling of shipping containers of poultry products offered for entry.

* * *. All labeling used with a shipping container of imported poultry products must be approved in accordance with subpart N of this part.

Done at Washington, DC, on: December 21, 1995.

Michael R. Taylor,

Acting Under Secretary for Food Safety.

[FR Doc. 95–31392 Filed 12–26–95; 3:36 pm]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 310, 318, 319, and 381

[Docket No. 88–026P]

RIN 0583–AB02

Substances Approved for Use in the Preparation of Meat and Poultry Products

AGENCY: Food Safety and Inspection Service (FSIS), USDA.

ACTION: Proposed rule.

SUMMARY: FSIS is proposing to amend the Federal meat and poultry inspection regulations to harmonize and improve the efficiency of the procedures used by FSIS and the Food and Drug Administration (FDA) for reviewing and approving the use of substances in meat and poultry products. Under the proposed procedures, FSIS would no longer issue its own regulations listing substances it finds suitable for use in meat and poultry products. Instead, by agreement between USDA and the FDA, future FDA regulations would specify whether a substance approved for use in foods under the Federal Food, Drug, and Cosmetic Act (FFDCA) may be used in or on meat or poultry products. Current FDA regulations that approve the use of substances in foods generally and do not preclude meat and poultry uses will confer authority to use such substances in meat and poultry products unless expressly prohibited by USDA regulation.

Requests for meat and poultry uses of substances not permitted under title 9 or title 21 of the Code of Federal Regulations (CFR) would have to be made to FDA in the form of a petition for FDA approval. FDA is simultaneously publishing in this issue of the Federal Register a proposal that would amend the FDA regulations governing the review of petitions for the approval of food additives to provide for simultaneous review of such petitions by FSIS when meat or poultry product uses are indicated. This would permit FDA listings to specify whether, and if so under what conditions, such substances may be used in USDA-inspected meat and poultry products. Such listings would eliminate the need for separate FSIS rulemaking.

FSIS would limit any future, substance-specific rulemaking to prohibitions or limitations on meat or poultry uses of specific substances that may be necessary to protect the public under the Federal Meat Inspection Act (FMIA) or Poultry Products Inspection Act (PPIA). FSIS would continue to provide evaluations upon request as to whether substances permitted for general use under current regulations are suitable for specific uses in meat and poultry products.

FSIS proposes to adopt the position that substances that are listed in title 21, CFR, Parts 182 and 184, as generally recognized as safe (GRAS) for use in food generally, with no limitation other than good manufacturing practice, would be accepted by USDA as GRAS for use in meat, meat food products, and poultry products generally, unless otherwise restricted for such use by regulation in title 9, CFR. Other GRAS substances currently permitted for general food use would be evaluated by FSIS as to their suitability for specified uses in meat food products and poultry products on a case-by-case basis, in consultation with FDA as appropriate.

DATES: Comments must be received by February 27, 1996.

ADDRESSES: Written comments to: Diane Moore, Docket Clerk, Room 4352, South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. Oral comments, as provided under the Poultry Products Inspection Act (PPIA), should be directed to Mr. Ralph Stafko at (202) 720–8168. (See also ''Comments'' under **SUPPLEMENTARY INFORMATION**.)

FOR FURTHER INFORMATION CONTACT: Mr. Ralph Stafko, Deputy Director, Policy Evaluation and Planning Staff, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250; (202) 720–8168.

SUPPLEMENTARY INFORMATION:

Comments

Interested persons are invited to submit comments concerning this proposal. An original and two copies of written comments should be sent to the Docket Clerk's office at the address shown above and should refer to docket number 88–026P. Any person desiring opportunity for oral presentation of views, as provided under the PPIA, should make such request to Mr. Stafko at (202) 720–8168 so that arrangements may be made for such views to be presented. Copies of all comments submitted in response to this proposal will be available for public inspection in the office of the Docket Clerk between 8:30 and 1:00 a.m. and between 2:00 and 4:00 p.m., Monday through Friday.

Background

FDA and FSIS are both regulatory agencies mandated to protect consumers from adulterated or misbranded food products. FDA, under the FFDCA, is responsible for regulating foods generally. FSIS, under the FMIA and the PPIA, regulates products consisting wholly or in part of meat or poultry.

Products regulated by FSIS, for the most part, include those containing at least 2 percent cooked or 3 percent raw poultry or red meat. Products that contain meat or poultry only in condimental quantities or that historically have not been regarded as meat or poultry products are not regulated under the inspection Acts. Examples of such products are some cheese spreads with meat, close-faced sandwiches, bouillon cubes, and dried or dehydrated meat soups.

Even though FDA and FSIS have a common food safety mission, they have differing statutory mandates and carry out their individual statutory mandates in different ways. FDA relies primarily on the promulgation of and compliance with regulations to implement its mandate concerning substances intentionally added to food, such as food additives and color additives. FDA also relies on inspections of food manufacturing and storage facilities to enforce its statutory mandates relating to sanitation and conditions of manufacture and storage. Detection and seizure of violative products, and sanctions imposed on producers or manufacturers responsible for violations are based on evidence that violative product (or a component of the product) was introduced into interstate commerce.

The FMIA and PPIA (21 U.S.C. 601 et seq.; 21 U.S.C. 451 *et seq.*) require that meat and poultry products be inspected, and USDA inspection program personnel inspect such products before the products are placed in commerce. The USDA mark of inspection is placed only on those products found by USDA to be unadulterated and properly labeled. Thus, FSIS's primary enforcement activity is the conduct of inspection activities designed to prevent the production and distribution of adulterated or misbranded products. FSIS regulations on products under its jurisdiction are enforced primarily by inspectors and inspection program support staff on a plant-by-plant basis. Inplant FSIS personnel may retain suspect product and condemn adulterated product. In egregious cases, FSIS may withdraw inspection from plants.

This different approach to regulation, based on the statutes governing the activities of the respective agencies, has required FSIS and FDA, and their predecessor agencies, to work together closely to minimize the potential for

conflict, duplication of effort, or gaps in their regulatory schemes that could result in inadequate or inappropriate regulation.

Over the years, FDA has generally deferred to FSIS in matters concerning the regulation of meat, meat food products, and poultry products, despite its broad jurisdiction over all food. This approach is consistent with the proposition that in cases of possible jurisdictional overlap, an agency with a broad grant of statutory authority will normally defer to an agency with a more specific grant of authority. FSIS employs veterinarians, trained inspectors, and technical support staff to carefully and continuously oversee the production of these products. FSIS regulations and guidelines govern all aspects of meat and poultry food product that are subject to such inspection. These include regulations and guidance on substances that may be added to those products.

Since the 1958 Food Additives Amendment to the FFDCA, FSIS has come to rely on FDA in most matters concerning the safety of food and color additives and other substances that may be used in foods—including meat and poultry products. FDA has developed the scientific staff, the institutional expertise, and the regulatory structure to ensure the safety of substances that may be added to foods.

Over the years, FDA and FSIS have cooperated on food-ingredient issues on an as-needed, substance-specific, case-by-case basis. Nonetheless, because of their different regulatory needs, the two agencies' regulations governing the use of these substances in foods are cast in formats and terms that are not fully consistent with one another. This inconsistency causes difficulty and inconvenience to persons who need to refer to both agencies' regulations on approved substances and approved uses.

Furthermore, it is not clear from the regulations where one agency's jurisdiction ends and the other's begins. The public frequently sends FSIS requests for the use of new substances or new uses of substances that must be referred to FDA, and sends FDA requests involving meat or poultry uses that must be referred to FSIS.

Finally, FSIS's current regulations require that substances used in meat or poultry products be listed in FSIS regulations for those uses. The regulations further require that those wishing to establish a rule permitting meat or poultry product uses of a substance first must establish that it is safe for the intended use under the FFDCA, and second, that it is suitable for the intended use under the FMIA or PPIA (9 CFR 318.7(a) and 381.147(f)). As a result, both agencies conduct separate reviews and undertake separate rulemakings, sequentially, before a new meat or poultry use of a substance can be permitted. This proposed rule and a concurrent FDA proposed rule, appearing elsewhere in this issue of the Federal Register, are intended to harmonize and simplify the agencies' regulations on food ingredients by allowing FSIS to rely on FDA's listings for food ingredients, and to provide a basis for the eventual elimination of FSIS's separate listings from the CFR. There would be a single petition, joint reviews, and a single rulemaking procedure, as well as continuing consultation on related issues, to replace the current time-consuming, duplicative, sequential rulemaking procedures. The agencies would enter into a Memorandum of Understanding (MOU) concerning the specifics of the agencies' working relationship. A draft of this MOU appears as an appendix to this notice of proposed rulemaking.

The following review of the laws and regulations of the two agencies explains in more detail the agencies' relationship in this area of regulation.

History of Food Additive Regulation

The Food and Drugs Act of 1906 declared that food containing ''any added poisonous or other added deleterious ingredient which may render such article injurious to health'' was adulterated (PL 59–384, 34 Stat. 770), and that sale of adulterated food was a violation of law. The Meat Inspection Act, passed at the same time as companion legislation, mandated Federal inspection of meat and meat food products. Responsibility for implementing and enforcing both these laws was vested in the Secretary of Agriculture.

In 1938, the FFDCA expanded the scope of the Food and Drugs Act by, among other things, prohibiting the sale of foods that may be adulterated by substances other than added ingredients, such as by environmental contaminants, that could render the food injurious to the health of the consumer.

In 1940, responsibility for implementation and enforcement of the FFDCA was removed from the Secretary of Agriculture and was vested in the Administrator of the Federal Security Agency, which later became the Department of Health, Education, and Welfare (today, the Department of Health and Human Services). However, the authority to implement the meat inspection system was retained by USDA.

By the 1950's, it had become apparent that there were certain limitations in the authorities provided by the FFDCA. Among these was the lack of a provision requiring industry to pretest substances intended for use in food to determine the safety of such use. Also, in an enforcement action against a violative food, the burden of proof was on the Government to show that use of a food additive caused the food to be adulterated or misbranded.

To correct these and other problems, the Food Additives Amendment was passed in 1958. Processors were thenceforth required to prove that food additives were safe for their intended use before they could be used in food. FDA was required to determine the safety of food additives and regulate their use in foods.

The Food Additives Amendment of 1958 applies to substances added to all foods, including meat and poultry products subject to USDA inspection under the FMIA and the PPIA. The FMIA (21 U.S.C. 601 *et seq.*) and the PPIA (21 U.S.C. 451 *et seq.*) give USDA primary jurisdiction over meat and poultry products to a ensure product entering commerce is not adulterated or misbranded. FSIS has interpreted the Food Additives Amendment as giving FDA primary jurisdiction for the approval of food additives for use in meat and poultry products, while not precluding continued exercise of USDA/FSIS jurisdiction to *further* regulate the use of those substances in meat and poultry products under the FMIA and PPIA.

Section 1(m)(2) of the FMIA (21 U.S.C. 601(m)(2)) and section 4(g)(2) of the PPIA (21 U.S.C. 453(g)(2)) provide the Secretary of Agriculture with authority to regulate the use of food and color additives in meat and poultry products. Section 1(m)(2)(C) of the FMIA and section 4(g)(2)(C) of the PPIA provide that any meat or poultry carcass, part, or product is adulterated ''if it bears or contains any food additive which is unsafe within the meaning of section 409 of the Federal Food, Drug, and Cosmetic Act (FFDCA).'' Under section 409 of the FFDCA (21 U.S.C. 348), all food additives are deemed unsafe unless the FDA finds, by regulation, that they are safe for a particular use. Section 1(m)(2)(D) of the FMIA (21 U.S.C. 601(m)(2)(D)) and section 4(g)(2)(D) of the PPIA (21 U.S.C. 453(g)(2)(D)) provide that any meat or poultry carcass, part, or product is adulterated ''if it bears or contains any color additive which is unsafe within the meaning of section 721 of the

FFDCA.'' Under section 721 of the FFDCA (21 U.S.C. 379e), all color additives are deemed unsafe unless the FDA finds, by regulation, that they are safe for a particular use. Section 1(m)(2) of the FMIA (21 U.S.C. 601(m)(2)) and section 4(g)(2) of the PPIA (21 U.S.C. 453(g)(2)) also provide that the Secretary of Agriculture may issue regulations prohibiting the use of a food additive or color additive in a meat or poultry article in establishments receiving Federal meat or poultry inspection services.

The Secretary of Agriculture's authority under the FMIA to prohibit the use of substances in meat products that are otherwise permitted in foods by FDA was tested in *Chip Steak Co.* v. *Clifford Hardin* (332 F. Supp. 1084 (N.D. Cal. 1971), *aff'd.*, 467 F.2d 481 (9th Cir. 1972)). The plaintiffs demanded injunctive relief from the prohibition at 9 CFR 318.7(d)(2) against the use of sorbic acid and sorbates in cooked sausage. The court held that the legislative history of the FMIA showed that it was the intent of Congress to vest the Secretary of Agriculture with the authority to prohibit the use of substances in meat food products notwithstanding their designation as GRAS. The court noted that under the FMIA, the Secretary had the power to prohibit a substance for use in meat and meat products even if the substance is not adulterative under the food additive provisions of the FFDCA. Thus, the Secretary of Agriculture could impose restrictions for food ingredients in meat and meat food products that exceeded restrictions imposed by the Secretary of HHS.

At about the same time that this case was in progress, the Agency was involved in rulemaking to implement the Wholesome Meat Act (81 Stat. 584) and the Wholesome Poultry Products Act (82 Stat 791–808). Among the provisions in the new regulations were requirements for listing substances in the 9 CFR regulations before they could be used in meat, meat food, or poultry products. The relevant provisions, at 9 CFR 318.7(a)(1) and 381.147(f)(1) in the existing regulations, were adopted October 3, 1970, and May 16, 1972, respectively. They had the effect, along with the favorable district court decision, of strengthening the Administrator's authority to control the use of substances in meat and poultry products. Nothing in the current proposal would diminish that authority.

FDA Regulations

Meat and poultry product ingredients are subject to regulation by the FDA under the FFDCA. Such ingredients may be food additives, substances that are generally recognized as safe (GRAS) for use in food, color additives, or ingredients covered by prior sanctions.

The FFDCA defines a food additive as ''any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food * * *'' (21 U.S.C. 321(s)). Anyone wishing to use a new food additive must petition the FDA and obtain approval before using the substance in food. The sponsor must provide FDA with information demonstrating safety under the proposed conditions of use. The extent or amount of the data submitted will depend primarily on the nature of the substance and its intended uses.

FDA's food additive regulations are codified in several parts of title 21 of the Code of Federal Regulations. Part 170 contains general provisions. Part 171 specifies how food additive petitions are submitted and processed. Part 172 lists food additives approved for direct addition to food. Part 173 lists food additives permitted in food, e.g., enzyme preparation, microorganisms, solvents, and lubricants. Part 179 covers sources of radiation used to process food, included in the statutory definition of a food additive (21 U.S.C. 321(s)). Part 180 lists certain food additives to be used on an interim basis until such time as studies can be completed and data made available to resolve those safety issues if the Commissioner of Food and Drugs determines that the continued use of those substances presents no public health concern.

The definition of ''food additive'' excludes certain substances that are ''prior sanctioned,'' ''generally recognized as safe,'' or ''color additive'' substances. Prior sanctioned ingredients are those used in accordance with explicit sanctions or approvals granted prior to the enactment of the Food Additives Amendment in 1958. These prior sanctions may have been granted by FDA under the FFDCA (21 U.S.C. 321(s)(4)) or by USDA under the FMIA or the PPIA. Such ingredients, e.g., nitrites used in cured pork products, are exempt from the food additive provisions of the FFDCA.

A second exemption from the definition of ''food additive'' is ''generally recognized as safe'' or ''GRAS'' substances. These are defined by the FFDCA as substances generally recognized as safe among experts qualified by scientific training and experience to evaluate their safety. Designation as GRAS can come about in either of two ways: (1) By demonstration of common use of the substance in food prior to 1958 or (2) by scientific procedures.

GRAS substances include a variety of common food ingredients. Although FDA advises that it would be impracticable to list all substances that are generally recognized as safe for their intended use, many GRAS substances are specifically listed in Part 182 of title 21. In addition, FDA has formally affirmed certain substances as GRAS, and has listed their GRAS uses in Part 184 of title 21.

FDA may also find that a substance or a particular use of a substance is not generally recognized by qualified experts as safe for use in food. Such substances or uses may continue to be used under an ''interim food additive'' regulation (21 CFR 180) while specified studies are performed to resolve the safety question.

A ''color additive'' is a material that, ''* * * when added or applied to a food, drug, * * * or cosmetic, or to the human body or any part thereof, is capable * * * of imparting color thereto'' (21 U.S.C. 321(t)). As with food additives, only those color additives listed for use in food may be so used. Petitions must be submitted to FDA for any new color additive or uses along with appropriate safety data and other pertinent information.

FSIS Regulations

FSIS inspectors oversee the production of meat and poultry products and must assure that product is not adulterated or misbranded by the addition of unsafe or otherwise improper ingredients, or by contamination with substances used for other purposes in the plant. To assist in this activity, FSIS headquarters staff reviews and approves substances that may be used in meat and poultry products regulated under the FMIA and PPIA.

Substances added directly to products are strictly regulated. FSIS regulations provide that no substance may be used in the preparation of any meat or poultry product unless the use of the substance is approved by the Administrator and listed in the regulations, or the Administrator has approved use of the substance in a specific case (9 CFR 318.7(a)(1) and 381.147(f)(1)). The tables of substances in 9 CFR 318.7 and 381.147 list a variety of substances along with their general classification (e.g., ''antioxidant''), their intended function, the categories of products in which they may be used, and the permitted use levels. The tables supplement or complement the product

standards set forth in 9 CFR 319 and 9 CFR 381.155–171. In order to add a new substance to these listings, increase the permitted use level, or expand the category of products in which an approved substance may be used, FSIS amends these listings by notice-and-comment rulemaking.

FSIS provides guidance on the regulatory status of substances used in inspected establishments. In the course of day-to-day operations, FSIS staffs must respond to inquiries, from inspectors and others, about new uses of substances already approved, or the use of new substances not previously approved, and must determine whether such substances are safe and suitable before they are used in specific meat food or poultry products. Responses to these inquiries generally are made after review by FSIS's Product Assessment Division (PAD), or, if appropriate, the Facilities, Equipment, and Sanitation Division (FESD).

The PAD will assess the safety and suitability of direct and indirect additives. Its assessment involves primarily a determination of whether the substance has been previously approved for safety by FDA or USDA. If the substance is a food additive or color additive the safe use of which has not been approved by FDA, the inquiring party is directed to petition FDA. If it is a GRAS substance or is asserted to be prior-sanctioned, a determination of its status is made by PAD, in consultation with FDA, if appropriate.

PAD will also determine the functionality of substances proposed to be added to meat or poultry products, and reviews data on amounts needed to achieve the intended technical effect. PAD looks at the consistency of the proposed use with standards of identity that may apply, and whether the substance may be misused in some way to make product adulterated or misbranded. The Division will restrict uses as appropriate to prevent adulteration or misbranding.

PAD reviews labels for compliance with FSIS regulations, including ingredient and additive requirements, and must approve them before they are used on the packaging of meat and poultry products (9 CFR 317.4, 381.132). The Division is thus in a position to monitor, by looking at formulations, the ingredients intended to be used with each product. In addition, the Division conducts a voluntary review of proprietary mixes intended for use in meat food or poultry products.

Similarly, PAD reviews food-contact materials, such as processing aids, scalding agents, and chill tank additives. If these substances are found to be food additives or color additives as defined by the FFDCA, they also must be approved by FDA before USDA will approve them for use with inspected products. Other substances, some of which are not regulated under the FFDCA's food additive provisions, are nonetheless reviewed by FSIS on an ''as needed'' basis, before their use in or about inspected products is sanctioned. Inspectors, meat and poultry processors, food chemical and equipment manufacturers, and others require guidance on whether inspectors may view substances as potential adulterants of inspected product. Prior review by FSIS's technical staff normally will resolve the question. For example, review and approval for use in official establishments of specific sanitizing and cleaning agents, and of food-contact equipment and utensils, is done by the FESD.

FDA Rulemaking Processes

Current FDA rulemaking for food additive and GRAS listings is essentially a four-part process:

1. A petition for use of a new food additive, a new use or use level of an existing food additive is received with data demonstrating the safety of the intended use of the substance, or a petition for affirmation of a substance as GRAS is received with data or information demonstrating that the substance is GRAS;
2. A notice of proposed rulemaking (or a notice of the filed petition—the functional equivalent of a proposed rule) is published in the FR;
3. A review for safety and technical effect of the new substance, new use, or new use level of the substance is conducted by the FDA; and,
4. A final rule is published if FDA determines that the food additive use or use level is safe or if the substance is GRAS.

FDA listings normally do not specify whether permitted uses include uses in meat and poultry products or, if so, what conditions or restrictions apply to such uses. Because USDA has always (prior to the 1958 food additive amendments) regulated the safe use of substances in meat and poultry products, and because of the need for inspected establishments, inspection program personnel and others to have uniform guidance on what substances may be added to inspected product, USDA has historically listed such substance uses in its own regulations in title 9 of the CFR.

FSIS Rulemaking Procedures

Before July 1983, FSIS conducted its own notice-and-comment rulemaking, as needed, for the listing of substances approved for use in meat and poultry products. Industry representatives complained that these FSIS rulemakings largely duplicate FDA rulemaking. They asserted that FDA's food additive and GRAS substance affirmation proceedings address and fully resolve all questions regarding safety, if not functionality, of ingredients intended to be used in meat and poultry products. They argued that additional rulemaking by FSIS generated needless delays and expense, and often resulted in the withholding of ingredients from the marketplace for months or even years after all serious questions of safety had been resolved.

Furthermore, notice-and-comment rulemaking by FSIS duplicated FDA's rulemaking (concerning safety), resulting in needless expenditure of USDA resources. FSIS concluded that these complaints had merit and that, if a substance was already listed in title 21, the safety of such uses had, by law, already been determined by competent authority. The addition of a substance to title 9 should not require a full reassessment for the safety of such use by USDA. For those reasons, FSIS proposed to amend its procedures.

In July 1983, FSIS issued a final rule, ''Meat and Poultry Products; Approval of Substances'' (proposed June 2, 1982, 47 FR 23941; final July 19, 1983, 48 FR 32749). Under this rule, full notice-and-comment rulemaking was no longer required for FSIS to list in its regulations substance uses or use levels if such uses or use levels were consistent with those already approved by FDA. A final rule listing the substance use or use-levels could be promulgated without first proposing it for comment, provided that:

1. The substance was an approved food additive, color additive, or substance affirmed as GRAS and permitted for use in food under title 21;
2. The intended use was in accordance with any conditions specified in the FDA approval and would not violate any other applicable FDA requirement; and,
3. The Administrator of FSIS determined:

a. That FSIS concurred with FDA regarding the safety of the substance;

b. That the available data indicated that the use of the substance would have an appropriate technical effect on the product; and,

c. That the available data indicated that the substance would be used only in the amount reasonably required to accomplish its intended technical effect. (9 CFR 318.7 and 381.147.)

All products in which the substance would be used would be required to be properly labeled and subject to other applicable requirements of the meat and poultry products inspection regulations.

This ''fast-track'' listing procedure did result in time and resource savings by both FSIS and the industry. In August 1988, however, FSIS discontinued its fast-track procedures because of concerns that the procedures might not satisfy the requirements of the Administrative Procedure Act.

While reverting to notice-and-comment procedures for these rulemaking proceedings, FSIS also decided to investigate other means of reducing the rulemaking burden. FSIS concluded that duplicative rulemaking could be avoided if all relevant FMIA and PPIA issues could be resolved in the context of the rulemaking proceeding already required under the FFDCA and conducted by FDA. This proposed rule was conceived at that time, was agreed upon in principle by FDA, and is now being published for public comment.

Comments submitted in response to USDA's February 25, 1992, notice (57 FR 6483) requesting public comments on how Departmental regulations can be improved, updated, or streamlined, support the Agency's decision to initiate this proposed rulemaking. In a March 13, 1992, letter, the American Meat Institute (AMI), an organization representing meat packers and processors of meat and meat food products, noted that the ''industry's current inability to use a wide variety of safe food ingredients'' because of the Agency's regulatory procedures prevents the use of least-cost formulations and impedes product development. The organization estimated that ''direct costs associated with pursuing unnecessary regulatory changes may exceed $100,000, and such proceedings generally delay introductions of new products for several years.''

Proposed New Policy

FDA and FSIS have agreed on a proposed new procedure for regulating substances intended for use in meat and poultry products. Under this new procedure, FSIS inspection program personnel will permit meat and poultry use of substances if such uses are permitted under FDA regulations, unless otherwise restricted or prohibited by other FDA regulations or FSIS regulations.

FSIS will no longer issue regulations to list substances found by the Agency to be acceptable for certain uses in meat and poultry product. Instead, the Agency will refer to FDA regulations in order to determine whether a substance may legally be used in or on a meat or poultry product.

A key point of this new procedure, reflecting provisions of the FMIA and PPIA and the intent of previous rulemakings, is that substances added to meat and poultry products, including GRAS or prior-sanctioned substances, must be permitted under the FFDCA and be used consistently with any applicable regulations.

Under the proposed procedure, FSIS will be exercising the same authority and continuing the same reviews that it has been conducting all along.

FSIS, in carrying out the mandates of the FMIA and PPIA, has published regulatory requirements and guidelines in the areas of facilities, equipment, sanitation, and production and process controls that apply to establishments where meat, meat food, and poultry products are prepared for distribution in interstate or foreign commerce. As it has in the past, when FSIS must decide on the acceptability of a substance approved by FDA for general food use, it will seek FDA concurrence.

In its future regulatory listings of substances and after consultation with FSIS, FDA will include, as appropriate, the amounts and uses of substances permitted for use in meat and poultry products.

This is consistent with current FDA listing format. FDA's determination of the acceptability of any food additive or GRAS substance use is conditioned on the substance being used in accordance with GMP. The general regulations for determining GMP criteria are set forth in 21 CFR part 110. These regulations set minimum general requirements for buildings, facilities, equipment, sanitation, and production and process controls to be observed in food plants where products are prepared for distribution in interstate or foreign commerce. Further GMP criteria are set forth in 21 CFR part 172 for food additives, 21 CFR part 182 for GRAS substances, and 21 CFR part 184 for substances affirmed as GRAS.

FSIS's title 9 listing of authorized substances is incomplete, inconsistent with, and duplicative of FDA's listings. The Agency plans to eliminate its current listings over time by rulemaking, as listings are determined to be duplicative of FDA regulations. However, FSIS will retain its own regulations on specific substance use prohibitions and will add new prohibitions as necessary.

To provide guidance to its inspectors, inspected establishments, and other interested persons, FSIS will maintain a comprehensive listing, in its directive system, of substances authorized for meat and poultry uses under title 9 or title 21, CFR. FSIS's listing will include:

a. Substances currently listed in title 9;

b. Substances currently listed for meat or poultry uses in FDA food additive, GRAS, or prior-sanction listings;

c. Approved color additives currently listed in 21 CFR Parts 73, 74, and 82, food additives listed in 21 CFR Parts 172–173 and 180, prior sanctioned substances listed under part 181, GRAS substances listed in 21 CFR 182 and 184, if permitted for general use in or on foods (which includes meat and poultry) in accordance with good manufacturing practice, unless meat or poultry uses of the substances are otherwise precluded;

d. GRAS substances found by FSIS to be suitable for specified meat and poultry uses on the basis of information and data submitted by petitioners to FSIS. Factors affecting FSIS findings of suitability include:

(1) Existing FDA GRAS listings, which need not explicitly permit but may not preclude the specific use in meat or poultry products; and

(2) Concurrence of FSIS with the petitioner and FDA acceptance of FSIS's determination.

e. FDA food additive, color additive, GRAS, and prior-sanctioned substance listings promulgated after this proposal becomes final that provide for meat and poultry uses.

Requests for use of substances not authorized for use in meat and poultry products must be made to FDA in the form of a petition to amend FDA food additive, color additive, or GRAS affirmation regulations, as appropriate. Specifically, this is required when the substance: (1) is not expressly listed for meat and poultry uses in title 9, CFR, or in title 21, CFR, Parts 172–180; (2) is not a GRAS substance listed in Part 182 or 184 of title 21 for general use in foods; and (3) cannot be demonstrated to FSIS to be GRAS for particular meat or poultry uses.

The working relationship between the two agencies, as set forth in the memorandum of understanding (MOU) between them, would ensure FDA and FSIS collaboration on any petition that includes a use in meat or poultry products.

The Administrator of FSIS would retain legal authority to prohibit or restrict the use of specific substance(s) in meat or poultry products by notice-and-comment rulemaking, but is not expected to have to exercise that authority on a regular basis because FDA's statutory authority, exercised in

accord with the MOU, would provide a basis for appropriate limitations on uses in meat and poultry products.

The Proposed Rule

Under this proposal, FSIS would discontinue duplicative rulemaking activity regarding food additive and GRAS substance uses in meat and poultry products. FSIS would amend the Federal meat and poultry products inspection regulations in 9 CFR, Parts 310, 318, 319, and 381 to include appropriate cross-references to title 21 listings of food additive and GRAS substances permitted for use in meat and poultry products.

Substances whose use is GRAS are exempt from the premarket approval requirements of the FFDCA and need not be listed in title 21 of the Code of Federal Regulations. For substances that have not been listed by FDA as GRAS in Parts 182 or 184 of title 21, FSIS will continue to consider, in consultation with FDA, a manufacturer's basis for claiming GRAS status and suitability for use in meat, meat food, or poultry products. Likewise, a manufacturer has the option of seeking advice from FSIS regarding the suitability for specific uses in meat, meat food, or poultry products for substances listed in title 21 only for general use in foods, or for use in meat, meat food, or poultry products generally. FSIS's responses and related correspondence would be available to the public, except that the formulation and process data for proprietary mixtures would be kept confidential. Parties requesting such evaluations would be advised to petition FDA when the requested use is not permitted under FDA's regulations.

In keeping with this approach, FSIS proposes that, as a matter of policy, all substances currently listed by FDA as GRAS in title 21 of the CFR, Parts 182 and 184, for use in food generally, with no limitation other than good manufacturing practice, be considered by USDA to be GRAS for use in meat, meat food product, and poultry product, unless otherwise restricted for such use by regulation in title 9 of the CFR. Uses of substances may be restricted by FSIS standards of identity or composition, or in specific cases where the inspection program determines that use may adulterate the product.

Existing FSIS regulations in 9 CFR 318.7 and 381.147 listing substances for various meat and poultry uses would not be immediately affected. However, FSIS plans to review its title 9 listings within the next 3 to 5 years, and to eliminate those that duplicate FDA's title 21 listings. FSIS and FDA believe that the public will be better served by having all permitted uses for food additives and GRAS substances consolidated in one place—listings in title 21 of the CFR—and intend to work toward that end. Because of resource constraints, at the present time FDA regulations in title 21 will be amended to accommodate meat and poultry uses only in response to a food additive, color additive, or GRAS affirmation petition.

All petitions for rulemaking to permit new substances or new uses or use levels of substances in foods—including meat and poultry products—would be sent to FDA. FDA would evaluate the petitions in consultation with FSIS if any prospective use of a food additive, color additive, or GRAS substance includes use in meat, meat food, or poultry products.

The proposed revisions of 9 CFR 310.20 and 318.1 are intended only for the purpose of including appropriate references to substance listings in title 21, CFR. They would not change the substantive requirements governing the saving of livestock blood or the labeling of containers. Similarly, the proposed revision of 9 CFR 318.7(d)(2) is intended only for the purpose of adding a reference to title 21, CFR, and would not change the prohibitions of and restrictions on the substance uses provided in that paragraph.

The proposed 9 CFR 318.7(a)(4), 318.7(a)(5) and 381.147(f)(2)(iv) are intended to provide addresses for inquiries concerning food or color additive status of substances intended for use in or in contact with meat or poultry products. The proposed 9 CFR 318.79(a)(5) and 381.147(f)(2)(v) are intended to provide addresses for inquiries on the suitability for use in meat or poultry products, of substances not listed in the title 21 regulations. These provisions are not intended as requirements for a petitioning or petition review process.

Appended to this proposed regulation is a copy of the draft Memorandum of Understanding between FDA and FSIS, which would provide for the administration of these provisions.

Executive Order 12866

This proposed rule has been reviewed under Executive Order 12866 and found to be significant, but not economically significant, within the meaning of the Executive Order (sec. 3(f)). It is significant because it is a novel, collaborative, inter-Agency approach to streamlining regulation. It decreases regulatory and paperwork burdens on society by proposing an alternative to the current Government process of approving substances for use in foods.

This proposal would replace the current Government processes for approving substances and their uses in meat and poultry products, involving consecutive rulemakings by FDA and FSIS, with a ''one-stop'' procedure whereby sponsors of new food additive or other substance uses in meat and poultry products would have to petition only the FDA. FDA would conduct any required rulemaking on the matter in consultation with FSIS. FDA's rule would then specify any uses or use restrictions unique to meat or poultry products, thereby permitting use of the substance under the FMIA and PPIA.

This proposal embodies the regulatory philosophy and principles of Section 1 of the Executive Order and was the result of a review of existing regulations consistent with the direction in section 5. It modifies existing FSIS regulations concerning the approval of substances to be added to meat, meat food, and poultry products that have been found to result in needless duplication of effort and expenditures by Government and the regulated industry. These regulations necessitate sequential rulemakings by FDA and FSIS to permit a new substance or a new use of a previously approved substance to be used in meat, meat food, or poultry products. The costs to industry and Government of these rulemaking procedures includes the costs to industry arising from a several years' delay in the introduction of new food additives or new food products. These costs create a disincentive for technological innovation and new product development. The existing process, therefore, has a negative effect on economic growth.

Benefit-Cost Assessment

The public benefits conferred by the rulemaking include, principally, those associated with the more timely regulatory approval of substances added to foods and the benefits of the substances themselves. The benefits of substances added to meat and poultry products include the technical effects on the characteristics of food products, the uses of the substances in food processing, and a greater variety of foods in the marketplace. Public health benefits can include the greater availability of food through preservation techniques and improved food safety through, for example, antimicrobial treatment of raw product and the use of curing solutions in processed products. The benefits conferred by the availability of substances and their uses would be marginally increased by this rulemaking.

The public benefits of regulating food additives generally would not change. These include, principally, the prevention of adulteration or misbranding of food products. Consumers are provided assurance that the products they buy do not contain substances whose use ought, for various reasons, to be prohibited, or substances that have been approved have not been used improperly in foods. Such benefits would not be affected by this proposed rulemaking because FDA would continue to conduct food safety reviews of substances proposed for use in foods, including—in consultation with FSIS—meat and poultry products, and FSIS would continue to exercise its in-plant inspection and other regulatory authorities to prevent the marketing of adulterated or misbranded meat and poultry products.

Therefore, elimination of the duplicative FSIS rulemaking process involved in approving substances for use in meat and poultry products could save the regulated industry about $600,000 a year over and above the savings the Government itself would realize in administrative costs.

Other, albeit less calculable benefits arise through the removal of a disincentive to innovate. With the potential expansion of uses of approved food additives and other substances that could result from the easing of the current regulatory burden, new product development and marketing could be encouraged.

Executive Order 12778

This proposed rule has been reviewed pursuant to Executive Order 12778, Civil Justice Reform. This proposed rule would provide for the use in meat and poultry products of substances approved by FDA and listed in 21 CFR for such uses, and would eliminate the requirement in the current 9 CFR 318.7(a) and 381.147(a) listing of such uses in 9 CFR 318.7(c)(4) or 381.147(f)(4).

States and local jurisdictions are preempted under the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) from imposing any requirements with respect to federally inspected premises and facilities, and operations of such establishments, that are in addition to, or different than, those imposed under the FMIA or PPIA. States and local jurisdictions are also preempted under the FMIA and PPIA from imposing any marking, labeling, packaging, or ingredient requirements on federally inspected meat or poultry products that are in addition to, or different than, those imposed under the FMIA or the PPIA. States and local jurisdictions may, however, exercise concurrent jurisdiction over meat and poultry products that are outside official establishments for the purpose of preventing the distribution of meat or poultry products that are misbranded or adulterated under the FMIA or PPIA or, in the case of imported articles, which are not at such an establishment, after their entry into the United States. States and local jurisdictions may also make requirements or take other actions that are consistent with the FMIA and PPIA, with respect to any other matters regulated under the FMIA and PPIA.

Under the FMIA and the PPIA, States that maintain meat and poultry inspection programs must impose requirements on State-inspected products and establishments that are at least equal to those required under the FMIA or PPIA. These States may, however, impose more stringent requirements on such State-inspected products and establishments.

In the event of its adoption, no retroactive effect would be given to this proposed rule, and applicable administrative procedures must be exhausted before any judicial challenge to the application of these provisions. Those administrative procedures are set forth in 9 CFR 306.5, 318.21(h), 381.35, and 381.153(h).

Effect on Small Entities

The Administrator, FSIS, has determined that the proposed amendments would not have a significant economic impact on a substantial number of small entities. Obtaining approval for the use in meat and poultry products of new substances or for new uses of previously approved substances would be simpler, faster, and less costly for both industry and the Federal Government than under the current system.

FSIS now may approve for use in meat or poultry products only those substances that have been previously reviewed for safety and approved for such use by FDA. Under the proposed amendments, separate petitions to FSIS would no longer have to be submitted. FSIS would permit substances to be used in products under its jurisdiction on the basis of FDA's title 21 regulations permitting such uses. Those substances not authorized for meat and poultry use under existing FDA regulations would require only one petition for rulemaking—to FDA. (For a substance that is not affirmed by FDA as GRAS or otherwise listed in 21 CFR part 182 or 184, or a substance listed by FDA for general food use, manufacturers would have the option of requesting that FSIS evaluate the manufacturer's assertion of the GRAS status of the substance and its suitability for a specified use in meat and poultry products.)

FSIS is currently receiving about six petitions per year for the approval of substances for use in meat and poultry products. Most of these petitions are from large commercial entities. Although the reduction in costs from the proposed rule would be significant, but unknown, for prospective petitioners, the number of such entities is not substantial. Therefore, the proposed amendments would not have a significant effect on a substantial number of small entities.

Furthermore, all users of the Federal regulations concerning the addition of substances to foods should benefit by having fewer, clearer regulations. Thus, there would be a reduction in the duplication of effort and attendant costs for all concerned.

Paperwork Reduction Act

FSIS has determined that the proposed rulemaking would entail no new information collection from the regulated industry or other private entities. Rather, the effect of the rulemaking would be to substantially reduce the information collection from private sources concerning proposed uses of substances in meat or poultry products. Persons seeking Federal Government approval of substances for use in meat or poultry foods would only have to petition FDA, rather than both FDA and FSIS, as they now do. Thus, a current, duplicative information collection requirement would be eliminated.

List of Subjects

9 CFR Part 310

Animal diseases, Meat inspection.

9 CFR Part 318

Food additives, Meat inspection.

9 CFR Part 319

Food grades and standards, Meat inspection.

9 CFR Part 381

Food grades and standards, Meat inspection, Poultry and poultry products.

For the reasons set forth in the preamble, FSIS proposes to amend Parts 310, 318, 319, and 381 of title 9, Code of Federal Regulations, as follows:

PART 310—POST-MORTEM INSPECTION

1. The authority citation for Part 310 would be revised to read as follows:

Authority: 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

2. Section 310.20 would be revised to read as follows:

§ 310.20 Saving of blood from livestock as an edible product.

Blood may be saved for edible purposes at official establishments provided it is derived from livestock, the carcasses of which are inspected and passed, and the blood is collected, defibrinated, and handled in a manner so as not to render it adulterated under the Federal Meat Inspection Act and regulations issued pursuant thereto. The defibrination of blood intended for human food purposes shall not be done with the hands. Anticoagulants specified in title 21 of the Code of Federal Regulations or in this subchapter may be used in lieu of defibrination.

PART 318—ENTRY INTO OFFICIAL ESTABLISHMENTS; REINSPECTION AND PREPARATION OF PRODUCTS

3. The authority citation for Part 318 would be revised to read as follows:

Authority: 7 U.S.C. 450, 1901–1906; 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

4. Section 318.1(d) would be revised to read as follows:

§ 318.1 Products and other articles entering official establishments.

* * * * *

(d) Containers of preparations which enter any official establishment for use in hog scalding water or in denuding of tripe shall bear labels showing the chemical names of the preparations. In the case of any preparation containing any of the chemicals which are specifically limited by title 21 of the Code of Federal Regulations, Parts 73, 74, 81, 172, 173, 179, 182, or 184, or by a regulation in this subchapter, as to amount permitted to be used, the labels on the containers must also show the percentage of each such chemical in the preparation and must provide dilution directions which prescribe the maximum allowable use concentration of the preparations.

* * * * *

5. Section 318.7 would be amended by revising the heading, paragraph (a) and paragraph (d)(2) to read as follows:

§ 318.7 Restrictions on the use of substances in meat and meat food products.

(a) (1) Substances permitted for use in meat and meat food product in title 21, CFR, shall be permitted for such use under this subchapter, subject to declaration requirements in Parts 316 and 317 of this subchapter, unless precluded from such use or further restricted in Parts 318 or 319 of this subchapter, or by the Administrator in specific cases.

(2) (i) No substance may be used in the preparation of any product, for any purpose, unless its use is authorized under title 21, CFR, as a direct food additive (Part 172), a secondary direct food additive (Part 173), source of radiation (Part 179), an interim-listed direct food additive (Part 180), a prior-sanctioned substance (Part 181), or listed as a Generally Recognized As Safe (GRAS) substance or (Part 182 or 184), or by a regulation in this subchapter.

(ii) No substance the intended use of which is to impart color in any product shall be used unless such use is authorized under title 21, CFR, as a color additive (Parts 73, 74, and 81), or by a regulation in this subchapter.

(3) Petitions to amend title 21 regulations to provide for meat or meat food product uses of substances used in the preparation of product, or substances used to impart color to product, shall be filed with the Food and Drug Administration, in accordance with the provisions of title 21 CFR part 71 or 171, as appropriate.

(4) Inquiries concerning the regulatory status under the Federal Food, Drug, and Cosmetic Act of any articles intended for use as components of, or in contact with, meat or meat food product, should be addressed to the Department of Health and Human Services, Food and Drug Administration, Center for Food Safety and Applied Nutrition, 200 C Street, SW., Washington, DC 20204.

(5) Inquiries concerning the suitability for use in specific meat or meat food products of substances that are not affirmed by FDA as GRAS or otherwise listed in 21 CFR part 182 or part 184, or of substances listed in title 21 regulations for general use in foods, or for use in meat or meat food products generally, including mixtures of such substances, should be addressed in writing to the Department of Agriculture, Food Safety and Inspection Service, Product Assessment Division, USDA, FSIS, RP, West End Court Building, Washington, DC 20250–3700. Copies of such correspondence, except for information on proprietary mixtures, will be placed in the public record. A list of proprietary substances and non-food compounds determined suitable for specified uses also may be obtained from the Product Assessment Division, at the same address.

* * * * *

(d) * * *

(2) Sorbic acid, calcium sorbate, sodium sorbate, and other salts of sorbic acid shall not be used in cooked sausage or any other product; sulfurous acid and salts of sulfurous acid shall not be used in or on any product, and niacin or nicotinamide shall not be used in or on fresh product, except that potassium sorbate, propylparaben (propyl p-hydroxybenzoate), calcium propionate, sodium propionate, benzoic acid, and sodium benzoate may be used in or on any product only as provided in 21 CFR or by a regulation in this subchapter.

* * * * *

PART 319—DEFINITIONS AND STANDARDS OF IDENTITY OR COMPOSITION

6. The authority citation for 9 CFR Part 319 would be revised to read as follows:

Authority: 7 U.S.C. 450, 1901–1906; 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

§ 319.100 [Amended]

7. Section 319.100 would be amended by removing ''§ 318.7(c) (1) and (4) of this subchapter'' in the first sentence and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B.''

§ 319.106 [Amended]

8. Section 319.106 would be amended by removing ''in accordance with 318.7(c)(4) of this subchapter'' in paragraph (d)(2) and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B.''

§ 319.140 [Amended]

9. Section 319.140 would be amended by removing ''§ 318.7(c)(4) of this subchapter'' in the second and third sentences and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B.''

§ 319.145 [Amended]

10. Section 319.145 would be amended by removing ''in the chart following § 318.7(c)(4),'' in paragraph (a)(4) and replacing it with ''in a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B'' and in paragraph (b)(6) by removing ''the chart of substances in § 318.7(c)(4) of this subchapter.'' and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B.''

§ 319.180 [Amended]

11. Section 319.180 would be amended by removing ''§ 318.7(c)(4) of

this chapter,'' in the first sentence of paragraph (a) and the first sentence of paragraph (b) and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B.'' and by removing ''§ 318.7(c)(4) of this subchapter.'' in the first sentence of paragraph (e) and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B.''

§ 319.303 [Amended]

12. Section 319.303 would be amended by removing ''§ 318.7(c)(4) of this subchapter'' from the second sentence of paragraph (a)(3) and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B.''

§ 319.700 [Amended]

13. Section 319.700 would be amended by removing ''§ 318.7(c)(4) of this chapter'' in paragraph (a)(4), paragraph (a)(5), and paragraph (a)(6), and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B''; by removing ''§ 318.7(c)(4) of this chapter,'' from the first sentence of paragraph (a)(7) and replacing it with ''21 CFR Parts 73, 74, or 82,''; and removing ''§ 318.7(c)(4) of this chapter,'' from the first sentence of paragraph (a)(9) and the first sentence of paragraph (a)(10) and replacing it with ''a regulation permitting that use in 21 CFR Chapter I, Subchapter B.''

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

14. The authority citation for 9 CFR Part 381 would be revised to read as follows:

Authority: 21 U.S.C. 450, 21 U.S.C. 451–470, 7 CFR 2.18, 2.53.

15. Section 381.147 would be amended by revising paragraph (f) to read as follows:

§ 381.147 Restrictions on the use of substances in poultry products.

* * * * *

(f)(1) Substances permitted for use in poultry product in 21 CFR chapter I shall be permitted for such use under this subchapter, subject to declaration requirements in Subparts M and N of this subchapter, unless precluded from such use or further restricted in Subparts O and P of this subchapter, or by the Administrator in specific cases.

(2)(i) No substance may be used in the preparation of any product, for any purpose, unless its use is permitted under 21 CFR chapter I as a direct food additive (Part 172), a secondary direct food additive (Part 173), a source of radiation (Part 179), an interim-listed direct food additive (Part 180), or is a prior-sanctioned substance (Part 181), or is a GRAS substance listed in Part 182 or Part 184, or is otherwise permitted by a regulation in this subchapter.

(ii) No substance the intended use of which is to impart color in any product shall be used unless such use is authorized under 21 CFR chapter I as a color additive (Parts 73, 74, and 82), or by a regulation in this subchapter.

(iii) Petitions to amend title 21 regulations to provide for poultry product uses of substances used in the preparation of product, or substances used to impart color to product, should be sent to FDA, in accordance with the provisions of 21 CFR part 71 or 171, as appropriate.

(iv) Inquiries concerning the food or color additive status under the Federal Food, Drug, and Cosmetic Act of any articles intended for use as components of, or in contact with, poultry product, should be addressed to the Department of Health and Human Services, Food and Drug Administration, Center for Food Safety and Applied Nutrition, 200 C St., SW, Washington, DC 20204.

(v) Inquiries concerning the suitability for use in specific poultry products of substances that are not affirmed by FDA as GRAS or otherwise listed in 21 CFR part 182 or part 184, or of substances listed in title 21 regulations for general use in foods, or for use in poultry products generally, including mixtures of such substances, should be addressed in writing to the Department of Agriculture, Food Safety and Inspection Service, Product Assessment Division, USDA, FSIS, RP, West End Court Building, Washington DC 20250. Copies of such correspondence will be placed in the public record, except for correspondence concerning proprietary mixtures. A list of proprietary substances and non-food compounds determined suitable for specified uses may be obtained from the Product Assessment Division, at the same address.

* * * * *

§ 381.120 [Amended]

16. Section 381.120 would be amended by removing ''§ 381.147'' from the fourth sentence and from the sixth sentence and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B.''

§ 381.132 [Amended]

17. Section 381.132 would be amended by removing ''§ 381.147'' from paragraph (c)(3)(iii)(D) and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B.''

§ 381.171 [Amended]

18. Section 381.171 would be amended by removing ''§ 381.147 of this part'' from the first and second sentences of paragraph (b) and replacing it with ''a regulation permitting that use in this subchapter or in 21 CFR Chapter I, Subchapter B.''

Done, at Washington, DC, on: December 21, 1995.

Michael R. Taylor,

Acting Under Secretary for Food Safety.

Appendix

Note: This appendix will not appear in the Code of Federal Regulations.

Memorandum of Understanding (MOU) Between the Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture (USDA) and the U.S. Food And Drug Administration (FDA), U.S. Department of Health and Human Services (USDHHS)

Regarding the Approval of Food Additives, Color Additives, and other Substances Used in Meat and Poultry Products

I. Purpose

This agreement establishes the working relationship and procedures to be followed by FSIS and FDA in responding to requests for the approval of the use of substances subject to regulation by the FDA and intended for use in meat and meat food products (hereinafter known collectively as meat products) and poultry products regulated by FSIS.

II. Background

The Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA), and the Federal Food, Drug, and Cosmetic Act (FFDCA) provide FSIS and FDA, respectively, with the authority to determine the safety, wholesomeness, and accurate labeling of foods. The Food Additives Amendment of 1958 to the FFDCA (21 U.S.C. 348) gives FDA the authority to determine the safety of food additives prior to their marketing. The Color Additives Amendment of 1960 (21 U.S.C. 379e) grants FDA premarket review authority comparable with these amendments to the FFDCA for color additives intended for use in foods, drugs, cosmetics, and medical devices. FDA has assumed primary authority over the approval of the use of food additives and color additives used in foods. FSIS has retained authority under the FMIA and PPIA to further regulate uses of such FDA-approved substances in meat and poultry products, respectively, as needed, to ensure inspected products are not adulterated or misbranded.

The process for documenting approved uses of substances intended for use in meat and poultry products has required that such ingredients first be reviewed and approved by FDA (in the form of an FDA regulation), and then subsequently be reviewed and incorporated into FSIS regulations. FDA's

approval of food additives and color additives is based on reviews of data and other information establishing the safety of the substance for its intended use in food. To approve a food additive, the Agency must also determine that the food additive achieves its intended technical effect; to approve a color additive, the Agency must also determine that the color additive is suitable for its indended use. However, these criteria are not sufficient to establish the suitability of such additives for use in meat or poultry products. Subsequent FSIS approval is based primarily on review of data regarding the efficacy and suitability of the substance for its intended use in meat and poultry products that FSIS regulates under the FMIA and PPIA. FSIS requires data that support the lowest level of the subject substance(s) needed to achieve the intended effect. FSIS is charged with ensuring the safety of inspected products. However, with respect to the safety of food and color additives that may be used in those products, FSIS defers to FDA determinations under the FFDCA.

In light of the foregoing regulatory context, FDA and USDA/FSIS have concluded:

A. The duplicative, sequential approval process for substances intended for use in meat and poultry products is unnecessarily cumbersome, time-consuming, and costly to all parties involved, and has fostered confusion over the relationship between FDA and FSIS regulations.

B. Consolidation and harmonization of the Agencies' approvals in this regard will result in fewer and more consistent Federal approval regulations for substances used in food, and will provide simpler and less expensive procedures for petitioners seeking approval of substances under the FMIA and PPIA.

C. This Memorandum of Understanding should clarify the Agencies' working relationship and, in particular, provide procedures whereby:

1. In situations where FSIS's Title 9 and FDA's Title 21 regulations do not specifically address the intended use of a particular substance for meat or poultry products, any interested party may request that FSIS evaluate the status of such use. FSIS will conduct a review and determine whether the use is acceptable in meat or poultry products, including whether the use is approved under the FFDCA. Under the terms of this MOU, FSIS would seek FDA's concurrence with FSIS's review and conclusions. If FDA does not concur that the use is approved under the FFDCA, the petitioner would be required to submit a food additive or color additive petition to FDA requesting that FDA's regulations be amended to accommodate the requested use.

2. In situations in which FDA receives a petition for the use of a substances or a use of a substance that is not approved under the FFDCA, a petitioner shall prepare and submit a food additive petition or a color additive petition only to FDA. FDA will consult with FSIS regarding petitions for meat and poultry use and, under the terms of this MOU, FSIS concurrence would be required for the approval of the use of substances intended for use in meat and poultry and that are codified in Title 21 of the Code of Federal Regulations.

D. This agreement and these procedures are not intended to erode the existing authority of FDA or of FSIS to provide guidance on the status and conditions of use of substances intended for use in meat and poultry.

III. Scope

This agreement between FSIS and FDA concerns procedures for Federal approval of food additives, color additives, and other food ingredients that are regulated by FDA under the FFDCA and may be used in meat and poultry products that are subject to the FMIA and the PPIA. This agreement further provides for the review and classification, as needed, of substances asserted to be exempt from regulation under the FFDCA because they are generally recognized as safe, or are covered by a prior sanction.

IV. Collaborative FSIS—FDA Approvals of Substances Intended for Use in Meat and Poultry Products

A. Petitions for FDA approval of Substances Intended for Use in Meat and Poultry Products.

Relevant portions of petitions submitted to FDA for the use of new substances or new uses of approved substances will be shared with FSIS by FDA when the proposed use specifically includes use in meat and poultry products. FSIS will provide advice to FDA, in writing, on any criteria, restrictions, conditions of use, or prohibitions FSIS believes necessary concerning use of the substance in products subject to the FMIA and the PPIA.

B. Requests for FSIS Determination on Acceptability of Substance Uses in Meat and Poultry Products.

FSIS routinely provides advice and counsel to individuals and issues guidance on the status and conditions of use of substances in products under its regulatory purview. Requests for a determination of the acceptability of substances may result in the need for rulemaking when: (1) FSIS standards of identity and composition preclude the use of a substance; or (2) there is concern about the suitability of a substance for the intended use because the substance has never been used in meat or poultry before, or the applications of the substance are new, e.g., a new meat, meat food, or poultry product category.

Requests for a determination of acceptability of new substances and new uses of substances in meat and poultry products are currently submitted by the requester (e.g., an ingredient manufacturer, meat or poultry processor, or trade group) to FSIS. FSIS will continue to require that a request for an acceptability determination for the use of a new substance in meat or poultry or for the new use of an approved substance be supported by information and technical data that establish that: (1) the use of the substance will not render the product in which it is used adulterated or misbranded and (2) the proposed use of the substance is at the lowest level necessary to accomplish the intended technical effect(s) in each category of the product in which the substance will be used.

Under the terms of this memorandum, when FSIS receives a request for a determination on whether the use of a substance in meat or poultry will be permitted, FSIS will evaluate the request and render a determination of acceptability (i.e., safety and suitability). In instances where the use of the requested substance is not explicitly authorized by FDA regulations, FSIS will consult with FDA concerning FSIS's evaluation of the regulatory status of the food ingredient. If FDA has no objection to FSIS's determination, FSIS, through its Product Assessment Division (PAD), will amend Agency directives and other guidance materials to reflect the approved use. If FDA objects to FSIS's determination, the request will be denied and the requester will be advised to petition FDA to amend FDA's regulations to permit the use of the substance at issue.

V. The Agreement

A. FSIS will:

1. Receive requests for evaluation of the acceptability of new substances and new uses of approved substances for use in meat and poultry products subject to the FMIA and PPIA.

2. Through the activities of the PAD, review all data submitted in support of requests for ingredient use and, in consultation with FDA, make acceptability determinations on use in meat and poultry products. FSIS's Regulatory Programs will seek written concurrence from FDA's Center for Food Safety and Applied Nutrition on FSIS acceptability determinations before use is granted and the substance is listed in FSIS directives or other guidance material. If use of a substance is not found to be acceptable, the requester will be advised to submit a petition to FDA to approve the use of substance in meat or poultry products.

3. Forward to FDA all food and color additive petitions and petitions for affirmation of GRAS status for use of such substances in meat or poultry products.

4. Respond in a timely manner to inquiries from FDA regarding petitions or requests for approval of the use of food additives, color additives, or GRAS substances or new uses of such substances in meat and poultry products regulated under the FMIA and PPIA.

5. Continue to provide advice and counsel on, and clarification of, the acceptability and uses permitted under the FMIA and PPIA of substances used in meat and poultry products.

B. FDA will:

1. Receive petitions for approval of substances intended for use in foods, including meat or poultry products regulated under the FMIA and PPIA.

2. Advise interested persons if a petition is needed to amend FDA regulations to accommodate the requested uses.

3. Advise FSIS of any new substance listings in Title 21 concerning use restrictions or conditions of use, and common or usual names of substances intended for use, in meat or poultry products.

4. Provide FSIS, PAD, with copies of relevant information from petitions and accompanying data submitted by petitioners

requesting approval of the use of substances in meat or poultry products.

5. When petitioned, conduct rulemaking that would permit under the FFDCA use of a substance in meat or poultry, including those restrictions or conditions of use in meat or poultry products that are recommended in writing by FSIS, and for which there are data or other information establishing that the use of the substance is safe and not deceptive. FDA will also consult with FSIS on any comments received on petitions regarding meat or poultry uses.

C. FSIS and FDA jointly agree:

1. That the officials of the two Agencies responsible for implementing the Agreement are:

At FSIS: the Administrator and Deputy Administrators (as may be designated); Director, Product Assessment Division; Branch Chief, Food Standards and Ingredients Branch.

At FDA: Director, Center for Food Safety and Applied Nutrition; Director, Office of Pre-Market Approval.

2. That the responsible officials will concur on rulemaking documents that, when published by FDA, will list or amend listings of substances permitted for use in meat and poultry products.

3. That the Administrator of FSIS and the Director, CFSAN, FDA, shall resolve problems and make decisions by consensus in areas of disagreement.

VI. Conflict Resolution

Each Agency reserves the authority to review, independently of the other, matters of concern to their respective authorities. However, written notice will be provided to the Commissioner of Food and Drugs and to the Under Secretary for Food Safety, USDA, of any rulemaking initiative not in keeping with the provisions of this MOU or about which there is an interagency disagreement, prior to public announcement of the rulemaking.

VII. Other Agreements

A. The provisions of this MOU are not intended to add to or detract from any of the authorities provided to either FDA or FSIS by the FFDCA, FMIA, or the PPIA, or the regulations by which these laws are implemented.

B. FSIS and FDA may enter into additional, separate agreements with each other as they deem appropriate to achieve the objectives of this MOU.

VIII. Duration of MOU

This Agreement becomes effective upon acceptance by both Agencies and will continue indefinitely. It may be modified by mutual written consent or terminated by either agency with a 30-day written notice to the other agency.

Signed:

_____

Director, CFSAN, FDA

_____

Date

_____

Administrator, FSIS

Guidelines for Acceptability Determinations for New Substances and New Uses of Substances in Meat and Poultry Products

The evaluation by FSIS of the acceptable use of a new substance or new use of a substance in meat and poultry products subject to this MOU will be based on the following conditions that must be addressed by the requester. The conditions set forth are in accordance with the provisions for use of substances in 9 CFR and 21 CFR.

1. The substance has a documented history of use in foods.

2. The substance is derived from food or a food ingredient and is not considered to be a chemical or synthesized additive.

3. The process for manufacturing the substance does not result in a severe alteration of the molecular structure resulting in the formation of a chemical residue whose safety has not been shown.

4. The safety of the substance has been evaluated by an independent authority and adequate safety data have been presented.

5. The suitability and efficacy of the substance have been shown through adequate data submission. The lowest level of the substance necessary to achieve the intended functional effect must be shown and the use cannot render the products to which the substance is intended for use adulterated or misbranded.

6. The FDA has determined the common or usual name of the substance(s).

7. FDA must concur with FSIS's determination of acceptability in order to allow use.

[FR Doc. 95–31390 Filed 12–26–95; 3:36 pm]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 301, 304, 305, 306, 307, 318, 325, and 381

[Docket No. 95–008A]

RIN 0583–AB89

FSIS Agenda for Change: Regulatory Review

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Advance Notice of Proposed Rulemaking; Request for Comments.

SUMMARY: The Food Safety and Inspection Service (FSIS) has begun a comprehensive review of its regulatory procedures and requirements to determine which are still needed and which ought to be modified, streamlined, or eliminated. This review is an integral part of the FSIS initiative to improve the safety of meat and poultry products by modernizing the Agency's system of food safety regulation. It also moves beyond the page-by-page review of FSIS regulations carried out earlier this year under the President's Reinvention of Government Initiative. A thorough review of FSIS's regulations is needed to prepare for implementation of the Agency's proposed Hazard Analysis and Critical Control Points (HACCP) regulations and a new food safety strategy that will reduce reliance on command-and-control regulations and increase reliance on science-based preventive measures and performance standards to improve food safety. This review and any changes in FSIS regulations that are necessary to make them compatible with HACCP will be completed prior to implementation of HACCP. FSIS invites comment from the public and all interested parties on the Agency's preliminary review of its regulations and specific suggestions on which regulations need to be eliminated or changed to be compatible with HACCP, and how they should be changed, or to achieve Reinvention of Government goals of having fewer, clearer, and more user-friendly regulations.

Some of the rulemakings needed to streamline existing requirements and carry out the FSIS food safety strategy are being initiated or effectuated in documents that appear elsewhere in this issue of the Federal Register: A proposed rule that would eliminate the FSIS prior approval system for substances added to meat and poultry products; a proposed rule that would facilitate marketing of nutritionally improved alternatives to standardized meat and poultry food products; and a final rule streamlining the prior approval system for meat and poultry labels.

As FSIS progresses in its comprehensive regulatory review, FSIS will publish further proposals to eliminate unnecessary regulations and modify remaining regulations, replacing, to the extent possible, command-and-control regulations with performance standards, clarifying the role of inspectors in enforcing those standards, and reorganizing and simplifying the regulations to make them easier to understand and use.

DATES: Comments must be received on or before February 27, 1996.

ADDRESSES: Please send an original and two copies of written comments to Policy, Evaluation, and Planning Staff, Attn: FSIS Docket Clerk, DOCKET No. 95–008A, Room 4352 South Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. Oral comments, as permitted under the Poultry Products Inspection Act, should be directed to the person listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Dr. Paula M. Cohen, Director, Regulations Development, at (202) 720–7164.

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I. FSIS Regulatory Reform Strategy

The Food Safety and Inspection Service is responsible for carrying out the mandates of the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and most recently, the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*), by ensuring that meat, meat food, poultry, and egg products are safe, wholesome, not adulterated, and properly marked, labeled, and packaged. FSIS and its predecessor agencies have protected consumers for nearly a century primarily through in-plant inspection procedures to assure that raw animal tissues are free of disease and visible contamination, that further processed products are processed under appropriate controls and meet applicable composition requirements, and that all products are produced under sanitary conditions and are packaged and labeled in a manner that is not misleading.

The Agency's inspection programs have contributed significantly to the safety and quality of meat and poultry products consumed in this country. Increasingly, however, the need to reassess these programs and to reshape them to meet the challenges of the future has become apparent. Today, FSIS is confronting three imperatives: (1) The need to improve food safety to meet persistent as well as changing threats to public health; (2) the need to make better use of scarce resources in meeting those public health challenges; and (3) the need to reexamine its regulations, culling out or reforming those that are obsolete, impose unnecessary burdens or are inconsistent with Agency food safety initiatives, and restructure the essential regulations that remain to make them easier to understand and use.

Need To Improve Food Safety

The need to take steps to improve food safety has been underscored by events of recent years. The early-1993 outbreak of illness in the Western United States, linked to hamburger patties contaminated with the bacterium *E. coli* O157:H7, showed that there are gaps in the inspection system—most significantly the lack of measures to target, control, and reduce contamination of raw meat and poultry products with pathogenic microorganisms. Since 1993, the Agency has adopted regulatory control, research, and education measures to help fill these gaps in the system and address the public health problem of foodborne illness associated with such contamination. Among these measures are regulations mandating safe handling labels on all raw, not ready-to-eat, meat and poultry products (9 CFR 317.2(l); 381.125(b)(1)(i)). The Agency has strongly encouraged the regulated industry to find ways of reducing and controlling the levels of microbial pathogens on meat and poultry products. The Agency also has begun a program to test raw ground beef for *E. coli* O157:H7 and to take regulatory action on product found to be adulterated with this dangerous organism.

Pathogen Reduction/HACCP Proposal

On February 3, 1995, FSIS published a rulemaking proposal, ''Pathogen Reduction; Hazard Analysis Critical Control Point (HACCP) Systems'' (60 FR 6774), which begins a fundamental transformation of the Agency's program designed to reduce significantly the incidence of foodborne illness associated with meat and poultry products. The notice enunciated the FSIS food safety goal: To reduce the risk of foodborne illness associated with the consumption of meat and poultry products to the extent possible by ensuring that appropriate and feasible measures are taken at each step in the food production process where hazards can enter and where procedures and technologies exist or can be developed to prevent the hazard or reduce the likelihood it will occur.

HACCP is conceptually a simple system by which food processors identify and evaluate hazards to the production of safe products, institute controls necessary to reduce or eliminate these hazards, monitor the performance of these controls, and maintain records of this monitoring, as a matter of routine. HACCP embodies the principle that the management of every plant is responsible for building into its food production process systematic measures to ensure the safety of the food the plant produces.

For HACCP to be successful, it must be accompanied by appropriate food safety performance standards, which can provide a means to determine whether a plant's HACCP plan is adequate and working effectively to achieve an acceptable level of food safety performance. Such standards have long existed for chemical food additives and pesticide residues, in the form of tolerances or legal limits on the level of additive or residue that may be safely present in food. FSIS has also maintained performance standards for pathogenic microorganisms on cooked or ready-to-eat meat and poultry products, typically in the form of zero tolerances (or prohibitions) on the presence of such harmful bacteria as *Salmonella* and *Listeria monocytogenes*. In conjunction with HACCP and the Agency's new food safety strategy, FSIS is now moving for the first time toward performance standards for pathogenic microorganisms on raw products.

With this approach, slaughter plants will have an additional incentive to improve their processes to reduce the risk of harmful contamination and greater flexibility to adopt innovative new pathogen reduction procedures and technologies in a more efficient and effective manner than under the current system.

Where appropriate and useful, and to mitigate any negative impact of proposed rules, FSIS intends to propose performance standards which, while affording plants the freedom to innovate, could be met by following the procedures in the current regulations.

Performance standards are consistent with the HACCP philosophy, which more clearly delineates the roles and responsibilities of industry and Government than does the current regulatory approach. With establishments free to develop plant-specific means of achieving FSIS-defined food safety objectives, the Agency will be able to better focus inspection resources on essential HACCP-related functions and other tasks more focused on process than product.

II. Comprehensive Review and Reorganization of FSIS Regulations

To be better prepared to pursue its food safety goals, FSIS has thoroughly reexamined its regulatory oversight roles, resource allocation, and organizational structure. This top-to-bottom review of the Agency was conducted in parallel with and in support of the Pathogen Reduction/HACCP rulemaking. FSIS made the preliminary reports on this review available to the public and, in a Federal Register notice (60 FR 47346; September 12, 1995), invited comment on the analysis and options that had been developed. How to redeploy inspectional resources to more

productively focus on food safety objectives was a key component of the top-to-bottom review, and continues to engage the Agency.

The inspection regulations have accumulated over many years. The meat inspection regulations (9 CFR subchapter A), the poultry inspection regulations (9 CFR subchapter C), and the egg product inspection regulations, under FSIS jurisdiction since June 1995 (7 CFR part 59), were developed independently of one another; all began separately as programs administered by different agencies. These distinct sets of regulations have retained their separate identities in the Code of Federal Regulations, despite the fact that they are now administered by the same agency and a large proportion of the regulations are virtually identical. Because of this structure, when a change is made to one of these inspection programs, the same or a similar change must usually be made to the others.

Many of the provisions in the meat and poultry (and now egg products) regulations should be, but are not, identical. The differences in the provisions addressing similar topics are largely historical artifacts which should be eliminated. These differences frequently cause confusion, making the administration of inspection more difficult and resource-intensive than it ought to be. For example, a time limit for appealing inspection decisions exists under the poultry regulations but not under the meat regulations (9 CFR 306.5; 381.35). Similarly, there is a 180°F temperature requirement for water used to clean and disinfect meat slaughterhouses (9 CFR 308.3(d)(4), 308.8) but not poultry establishments (9 CFR 381.50(b), 381.58(a)).

Although there are necessary differences in how products of the different industries are regulated, there are many differences for which there is no clear necessity. In some cases, it is argued, these differences are not only unjustified, but they are unfair in favoring one industry at the expense of the other.

In 1992, FSIS contracted with the Research Triangle Institute (RTI) to conduct a review and comparison of the Agency's meat and poultry regulations. The report, delivered to the Agency in June 1993, found 12 areas with substantive differences in the regulations that might be ''potentially significant in terms of relative costs of administering the two regulatory programs.''

A review of that report suggests at least three areas of regulation where this may currently be the case: slaughter inspection controls (only poultry has detailed finished product standards, which permit faster line speeds and other plant efficiencies), removal of contamination (poultry can be reprocessed by washing, but meat must be trimmed), and exemptions from inspection (there are more categories of exempted poultry establishments than there are exempted meat establishments, and the poultry regulations are more definitive in describing products not subject to inspection). Significant differences in a fourth area, ''mechanically separated product,'' were resolved in a final rule published in the Federal Register on November 3, 1995 (60 FR 55962).

FSIS will carefully scrutinize all meat, poultry, and egg inspection regulations with a view to merging and restructuring the regulations and to unifying most of the provisions that are common to them. As each regulatory area is reviewed, FSIS will carefully consider the validity of any differences in how the industries are regulated and will keep separate only those provisions that must remain separate. The merging and restructuring would simplify the regulations; enhance administrative efficiency; and remove unnecessary, often confusing, and sometimes burdensome, differences in the regulatory treatment of FSIS-inspected establishments and their products.

During the next few years, the Agency will review and restructure all of its regulations to make them easier to use. This reflects the Agency's position that its regulations could be more clearly understood if better organized and written in ''plain English.''

In conjunction with the comprehensive regulatory review now in progress, FSIS is undertaking a review of its manuals, bulletins, directives, notices, and instructions to its employees on how to implement specific regulations. FSIS will address longstanding concerns that, as the inspection program has evolved, procedural changes have been introduced without systematic consideration of whether the new procedures overlap or are inconsistent with other procedures. The result has been the creation of redundant or conflicting procedures on top of one another, causing confusion and the potential for nonuniform application of inspection requirements from place to place. Further, FSIS questions whether the many kinds of issuances continue to be useful, and requests comment on how the Agency can best communicate instructions for implementing regulations.

III. Initial Review of Regulations; Consistency With HACCP

As discussed in conjunction with the FSIS regulatory proposal of February 3, 1995 (60 FR 6774), FSIS does not intend simply to add the new HACCP system to the current system of inspection and regulation. FSIS intends to integrate HACCP into a modernized system of inspection and regulation that will harness the power of prevention and performance standards to improve food safety and make better use of the Agency's resources. To accomplish this, FSIS must review all of its existing regulatory requirements and procedures and modify, streamline, or eliminate them, as appropriate, to be compatible with the new food safety strategy. FSIS has already targeted a number of its regulations for elimination or reform and is seeking in this document public input as a first step in the rulemaking required to achieve the needed changes.

Earlier this year, partly to identify rule changes needed for HACCP-based inspection and partly to meet requirements of the President's Reinventing Government Initiative, FSIS conducted an initial page-by-page review of existing regulations. The Agency identified for possible revision or elimination more than 400 pages of regulations. Almost three-quarters of the regulations administered by FSIS were projected to be eliminated or changed to make them simpler, less burdensome, or more performance-based.

As part of its overall food safety initiative, the Agency is committed to moving beyond that initial review to making specific proposals for the near term and to comprehensive regulatory reform to be completed during the next few years.

Reporting and Recordkeeping

Further, in line with the Administration's policy to reduce reporting requirements in Government programs, FSIS invites comment on its paperwork or recordkeeping requirements. The Agency seeks specific recommendations for eliminating, simplifying, or otherwise changing information collection requirements. FSIS also seeks recommendations for improving or eliminating currently required forms (FSIS Form 7234–1, the form accompanying label submissions, for example, or FSIS Form 8820–2, the form meat and poultry establishment personnel complete if inspectors find deficiencies in processing operations).

Questions of particular concern include the following:

- Despite efforts to prevent this, has FSIS issued duplicative or redundant

requirements? Do FSIS' information and recordkeeping requirements overlap with those of other Federal, State, or local agencies?

• Should individual FSIS forms be modified or combined? If so, how?

• Should FSIS allow respondents to use facsimiles, computers, or other automated collection systems or information transfer technologies? If so, for which information requirements?

• Would it be helpful for FSIS to accompany information requirements with format suggestions?

• Generally, how might FSIS make information collection activities less burdensome?

Current Activity

FSIS has decided to publish the following documents at this time:

• Rulemaking to make FSIS food safety regulations compatible with HACCP and to eliminate redundant or unnecessary rules, initiated in this Advance Notice of Proposed Rulemaking (ANPR);

• Rulemaking to eliminate the FSIS prior-approval system for substances added to meat and poultry products, a process initiated in a proposed rule, ''Substances Approved for Use in the Preparation of Meat and Poultry Products,'' docket #88–026P, published elsewhere in this issue of the Federal Register;

• Rulemaking to amend existing standards of identity to give manufacturers greater flexibility in marketing nutritionally improved (e.g., reduced-fat) meat and poultry products, ''Food Standards: Processed Meat and Poultry Products Named by Use of an Expressed Nutrient Content Claim and Standardized Name'' (docket #92–024P), published elsewhere in this issue of the Federal Register); and

• A final rule streamlining the prior-approval system for meat and poultry labels, ''Prior Labeling Approval System,'' docket #92–012F, published elsewhere in this issue of the Federal Register.

Further, FSIS is actively developing the following: a proposal to convert remaining rules as much as possible from command-and-control prescriptions to performance standards (''Performance Standards for the Production of Certain Cooked Meat and Poultry Products''); a proposal to eliminate prior-approval programs for facility blueprints, processing equipment, and most quality control plans (''Elimination of Prior Approval Requirements for Establishment Drawings and Specifications, Equipment, and Certain Partial Quality Control Programs''); and an advance notice of proposed rulemaking soliciting comments and information on whether to modify or eliminate specific standards and whether, and if so how, to modify the Agency's overall approach to product standards (''Meat and Poultry Standards of Identity and Composition'').

Planned Actions

• Review of all prior-approval regulations not addressed in the above-mentioned documents, with related rulemaking proposals projected for publication during 1996;

• Restructuring of FSIS meat inspection regulations and poultry inspection regulations, which are currently in different subchapters of the Code of Federal Regulations, to eliminate duplicative and redundant requirements and make the regulations easier to use (initiated in this ANPR).

FSIS invites public comment on all aspects of this regulatory reform initiative based on the discussion contained in the ANPR and in the companion rulemaking proposals.

Command-and-Control Regulations and Consistency With HACCP

The Pathogen Reduction/HACCP proposal referred to above reflects a basic shift in FSIS's approach to overseeing the safety of meat and poultry products. FSIS intends to rely less on command-and-control requirements, which specify, often in great detail, how a plant is to achieve a particular food safety objective, and more on performance standards, which state an objective or level of performance plants are expected to achieve, and allow for greater flexibility on the part of the plant in determining how to achieve them. This shift to performance standards and greater flexibility for meat and poultry plants is the basis of FSIS's intention to further stimulate the innovative capacity of the meat and poultry industry to improve the safety of its products.

This shift is also compelled by the philosophy underlying HACCP. HACCP enables plant management to build science-based controls to prevent food safety hazards into its food production processes, and recognizes that the specific controls and related measures—the HACCP plans—required to ensure food safety can vary from plant to plant.

Where appropriate, command-and-control regulations must be changed to provide greater flexibility for industry to design and implement processes and HACCP systems of control, tailored to the circumstances of each plant. This is consistent with the HACCP approach, which clearly delineates industry and Government responsibility for food safety, with plants establishing procedures they will follow to ensure the production of safe food. FSIS must carefully reconsider all of its regulations that mandate specific actions, techniques, or processing parameters designed to achieve a food safety objective and determine whether they should be eliminated or modified to provide the flexibility required to be consistent with HACCP. However, any changes will not compromise food safety standards or objectives required to protect public health.

FSIS must also modify its regulations in varying respects to reflect the anticipated changes in the roles FSIS inspectors will play in plants operating under HACCP.

Table 1 lists the regulations FSIS has identified as candidates for modification or elimination to be consistent with HACCP. Comments submitted during that public comment period also identified candidates for modification or elimination. The comments are being evaluated by FSIS and will be taken into account as the Agency proceeds with the necessary rulemaking. Any changes in these or other FSIS regulations that are required to be consistent with HACCP will be completed before plants are required to comply with new HACCP requirements.

Notably, the following categories of regulations in title 9 of the CFR are being reviewed for consistency with HACCP:

• Definitions (§§ 301.2 and 381.1);

• Inauguration, suspension, and withdrawal of inspection (§§ 305.4, 305.5, and 381.19–381.21, and 381.29);

• Appeals procedures and related administrative procedures (§§ 306.5, 335.40, and 381.35);

• Reinspection of product entering establishments, and retention and disposition of product (§§ 318.2 and 381.145);

• Restrictive, command-and-control-type regulations which delimit processing and treatment methods intended to eliminate specific food safety hazards such as trichinae in pork; mechanically separated product, and various poultry products; and the potential hazards of improper thermal processing of meat and poultry products and irradiation of poultry (§§ 318.6, 318.10, 318.12–318.20, 318.22–318.24, and 318.300–318.311; and 381.148–381.152 and 318.300–381.311); and

• Recordkeeping and access to records under the Freedom of Information Act (§§ 320.5–320.7, 381.179–381.181; 390.1–390.8).

FSIS is also reviewing all of its regulations, policies, and inspection

procedures concerning plant sanitation (§§ 308.3–308.16 and §§ 381.45–381.61). Although implementation of the requirement proposed on February 3, 1995, for sanitation standard operating procedures (SOP's) would not depend on revisions to the Agency's sanitation regulations, the Agency recognizes the need to more clearly state the performance standards in this area. Basic sanitation and plant hygiene practices are, from a food-safety perspective, among the most important requirements in the regulations. The Agency believes that the regulations can be made much clearer in describing the establishments' roles and their responsibility for much of the routine work in this area, so that Federal inspection resources can be allocated to new, HACCP-related functions.

FSIS also invites comment on the relationship between HACCP and the existing regulations governing postmortem inspection in slaughter plants (9 CFR parts 310 and 381.76 *et seq.*). HACCP is intended to address all significant avenues of hazard affecting the safety of meat and poultry products. The FSIS postmortem inspection program, which carries out the statutory mandate for carcass-by-carcass examination by Federal inspectors, is designed to achieve an array of consumer protection values, including exclusion of diseased animals from the food supply and enforcement of standards regarding visible carcass defects and contamination with visible filth, fecal matter, or other extraneous materials, some of which affect the safety of the product and some of which do not. HACCP plans for slaughter plants will include one or more critical control points in the slaughter and carcass dressing process, which will require inspectional oversight by FSIS and, possibly, some modification of the current postmortem inspection regulations. FSIS invites comment on what the relationship should be between HACCP and the current postmortem inspection regulations and activity, including specific suggestions for the manner in which current regulations should be modified to be consistent with HACCP.

TABLE 1.—REGULATIONS THAT ARE CANDIDATES FOR REVISION OR REMOVAL PRIOR TO HACCP IMPLEMENTATION

Regulations—FMIA, PPIA	Subject	Possible action
9 CFR Part		
301, 381, Subpart A	Definitions	Include general HACCP-related terms and redefine inspection organization and activity terms.
304, 381, Subpart D	Application for and grant or refusal of inspection.	Revise prior approval procedures (*e.g.*, eliminating provisions of § 381.19); shift to performance standards.
305 and 306, 381, Subparts E and F.	Inauguration and withdrawal of inspection; inspection program employees.	Clarify role of inspection program. (See, *e.g.*, § 305.4). Integrate §§ 305.5 and 381.29 with rules for suspending and withdrawing inspection. (See Part 335 and Part 381, Subpart W.)
		Assure that appeal procedures in §§ 306.5 and 381.35 comport with enforcement under HACCP.
307, 381, Subpart G	Facilities for inspection	Clarify standards for essential facilities. (See, *e.g.*, §§ 307.1, 307.2, and 381.36.)
		Convert requirements for sanitation and facilities to performance standards or decision criteria; supplement with guidelines as needed. (See, *e.g.*, §§ 308.3, 308.4, and 381.46–381.52.)
		Simplify detailed requirements for equipment and cleanliness, for example; convert to performance standards and/or decision criteria; supplement with guidelines as needed. (See §§ 308.6–308.9, 308.12, 308.13, and 308.16.)
		Convert equipment and cleaning requirements to performance standards and/or decision criteria; supplement with guidelines as needed. (See §§ 381.54–381.61.)
		Remove obsolete provisions for slack barrels, similar containers and means of conveyance, and burlap wrapping. (See §§ 308.10 and 308.11.)
		Clarify decision criteria concerning employment of diseased persons. (See § 308.14.)
		Convert tagging insanitary equipment, utensils, rooms, and compartments provisions to performance standards; clarify role of inspection program employees. (See §§ 308.15 and 381.99.)
		Update rules for temperatures and chilling and freezing procedures for poultry and make changes to accommodate HACCP (*i.e.*, changes in addition to pathogen reduction amendments proposed 2/3/95). (See § 381.66 paragraphs (c)(5) and (c)(6).)
318, 381, Subparts O and X.	Entry into official establishments; reinspection; reinspections, preparing and processing establishments.	Convert rules for articles entering establishments, and product disposal to performance standards and clarify role of inspection program employees. (See §§ 318.3 and 381.45(a),(b), and (i).)
		Eliminate prior approval procedures for total quality control systems. (See §§ 318.4(c)–(h) and 381.145(c)–(g).)
		Convert requirements for processing procedures and articles used in preparing products to performance standards and clarify role of inspection program employees. (See §§ 318.5, 318.6, 318.8, and 381.148.)

TABLE 1.—REGULATIONS THAT ARE CANDIDATES FOR REVISION OR REMOVAL PRIOR TO HACCP IMPLEMENTATION—Continued

Regulations—FMIA, PPIA	Subject	Possible action
		Eliminate command-and-control type requirements for the use of nitrite and sodium ascorbate or erythorbate in bacon; convert these requirements to performance standards and clarify role of inspection program employees. (See § 318.7(b).) Convert requirements for the treatment of pork and pork products to destroy trichinae in to performance standards; supplement with guidelines as needed. (See § 318.10.) Convert requirements for preparing articles not for use as human food (*e.g.*, dog food) to performance standards; clarify role of inspection program employees; eliminate command-and-control type requirements. (See §§ 318.12 and 381.152.) Eliminate redundancy with other provisions (mixtures containing product that are not classed as meat food products). (See § 318.13.) Convert procedure for handling product adulterated by polluted water to performance standards and decision criteria; supplement with guidelines as needed. (See §§ 318.14 and 381.151.) Convert requirements for tagging chemicals, preservatives, cereals, spices, etc., to performance standards; clarify role of inspection program employees. (See § 318.15.) Convert rules for substances such as pesticide chemical residues, food additives, and color additives to performance standards and role of inspection program employees. (See § 318.16.) Make requirements for handling of certain material for mechanical deboning consistent with any new time-temperature requirements. (See § 318.18.) Convert compliance procedures for meat derived from advanced meat/bone separation machinery and recovery systems to performance standards and clarify role of inspection program employees. (See § 318.24.) Convert requirements for canning and canned products to performance standards and clarify role of inspection program employees. (See §§ 318.300–318.311 and 381.300–381.311.)
325, 381, Subpart S	Transportation	Eliminate obsolete provisions; focus on and clarify policies and performance standards.

IV. Request for Comments

This ANPR is intended to elicit comments, suggestions, and information that will enable FSIS to provide more efficient and effective service and to focus its organizational resources more closely on health and safety matters, which are of vital concern to all Americans. FSIS specifically requests comment on its efforts to transform its regulations from heavy reliance on command-and-control approaches to greater reliance on performance standards, and solicits detailed suggestions concerning which existing regulations need to be changed to be consistent with HACCP, and how those regulations should be changed. The Agency notes that several individuals and groups, including at least one trade association, responded to a similar request in the February 3, 1995, proposal. FSIS would also appreciate comments on the economic burdens and the paperwork, recordkeeping, or other information collection burdens associated with the regulations discussed in this document.

Comments supported by scientific or other data on the impacts, such as the public health effects, of changing or eliminating existing regulations, would be especially valuable.

Executive Order 12866

This advance notice of proposed rulemaking has been reviewed under Executive Order 12866. This rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

FSIS does not have data necessary to assess how the regulatory changes discussed in this document might affect various sectors of the meat and poultry industries. Therefore, the Agency invites comment on potential effects, including economic costs or benefits, of any specific changes that may be suggested.

Done, at Washington, D.C., on December 21, 1995.

Michael R. Taylor,

Acting Under Secretary for Food Safety.

[FR Doc. 95–31393 Filed 12–26–95; 3:36 pm]

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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR PART 319 and 381

[Docket No. 92–024P]

RIN: 0583–AB51

Food Standards: Requirements for Processed Meat and Poultry Products Named by Use of an Expressed Nutrient Content Claim and a Standardized Term

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is proposing to amend the Federal meat and poultry products inspection regulations to establish a general definition and standard of identity for standardized meat food and poultry food products that have been modified to qualify for use of an expressed nutrient content claim in their product name. These products would be identified by an expressed nutrient content claim, such as ''Fat Free,'' ''Low Fat,'' and ''Light,'' in conjunction with an appropriate standardized product name. FSIS is taking this action to: (1) Assist consumers in maintaining healthy dietary practices by providing for substitute versions of standardized processed meat food and poultry food products that have reductions of certain constituents that are of health concern to consumers, such as fat and cholesterol, (2) increase regulatory flexibility and support product innovation in accord with Executive Orders 12861 and 12866 and with President Clinton's Memorandum to Heads of Departments and Agencies, ''Regulatory Reinvention Initiative,'' dated March 4, 1995, and (3) provide consumers with an informative nutrition labeling system.

DATES: Comments must be received on or before February 27, 1996.

ADDRESSES: Written comments should be sent in triplicate to, Policy, Evaluation and Planning Office, Attn: FSIS Docket Clerk, DOCKET No. 92–024P, Room 4352, South Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. Oral comments as provided by the Poultry Products Inspection Act should be directed to Mr. Charles R. Edwards, Director, Product Assessment Division, at (202) 254–2565. (See also ''Comments'' under **SUPPLEMENTARY INFORMATION.**)

FOR FURTHER INFORMATION CONTACT: Mr. Charles R. Edwards, Director, Product Assessment Division, Regulatory Programs, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 254–2565.

SUPPLEMENTARY INFORMATION:

Background

I. Introduction

The Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*) authorize the Secretary of Agriculture to establish and maintain inspection programs designed to assure consumers that meat and poultry products distributed in commerce or within designated States are wholesome, not adulterated, and are properly marked, labeled and packaged.

Under section 7(c) of the FMIA (21 U.S.C. 607 (c)) and section 8(b) of the PPIA (21 U.S.C. 457(b)), FSIS develops and promulgates regulations that prescribe definitions and standards of identity and composition for meat and poultry products (9 CFR parts 319 and 381, subpart P). FSIS also promulgates regulations that prescribe the content and design of labels for meat and poultry products (9 CFR parts 317 and 381, subpart N). Food and Drug Administration (FDA) has responsibility for all other food products.

Food standards have existed in various forms since food was first produced for distribution in commerce to people. In fact, the U.S. Department of Agriculture, which was established in 1862, promulgated about 200 ''standards of purity'' by 1906, which included definitions of adulteration and misbranding. Meat and poultry standards have been developed for various reasons, including (1) to prevent nutritional and economic dilution (i.e., economic adulteration) of the expected, characterizing, or valued components of meat and poultry products, such as the amount of beef needed for a product to be considered a ''beef stew,'' and (2) to establish standardized names for products, such as ''frankfurter,'' ''bologna,'' ''hamburger,'' ''chili con carne,'' and ''corned beef hash,'' that consumers can understand and, in turn, to establish standardized requirements for the composition of these products to assure, in general, that the products will contain certain expected compositional components. For example, a product named ''corned beef hash'' is expected to contain cured beef, potatoes, and seasonings. Providing standards for meat and poultry products serves the needs of industry to produce, and the desires of consumers to purchase products that contain the characteristics and ingredients that are expected in a product represented by a particular name.

Parts 319 and 381, subpart P, of the meat and poultry inspection regulations (9 CFR parts 319 and 381, subpart P, respectively) contain standards of identity or composition for about 60 meat and poultry product categories. Standards of identity and composition can be like a recipe and may establish specific requirements for a product such as the kind of ingredients and/or the amount of ingredients allowed in it; and/or the methods by which the product must be prepared; and/or the criteria the finished product must meet, such as a specified salt content of 4 percent that can affect the wholesomeness or shelf-life of a product, such as a dried ham.

The standard for ''pizza'' (9 CFR 319.600), for example, defines the product ''pizza with meat'' as ''a bread base meat food product with tomato sauce, cheese, and meat topping,'' and indicates the minimum amount of the meat it must be made from, which is not less than 15 percent raw meat. The standard for corned beef hash (9 CFR 319.303) sets the minimum amount of meat (i.e., meat content) that this product must contain, and in addition, lists other required and optional ingredients for the product. The standard for ''Country Ham'' (9 CFR 319.106) states that this product is an uncooked, cured, dried, smoked or unsmoked meat food product made up of a single piece of meat from a pork ''ham'' (i.e., hind leg of a hog) or pork shoulder. This standard also states that a ''Country Ham'' must be prepared using a dry application of salt and curing agents in order to have a prescribed salt, brine concentration, or water activity in the finished product. The standard for ''meat pies'' (9 CFR 319.500), for example, a beef or pork pie, requires that the product have not less than 25 percent meat based on the amount of all the product's ingredients. Hereafter, in this document, ''standards'' will refer to both the meat and poultry product standards of identity or composition codified in 9 CFR parts 319 and 381, subpart P.[1]

Meat and poultry products that are subject to FSIS' regulatory standards make up a substantial portion of the nation's food supply. The Agency believes that there is a desire among consumers to be able to purchase healthful, alternative standardized meat and poultry food products that have been modified to reduce the level of constituents that are of health concern to some people, such as fat, cholesterol, or sodium, below that which occurs under existing FSIS regulatory

[1] FSIS has also established policy guides in its Standards and Labeling Policy Book for many processed meat and poultry food products for which there are no specific regulatory standards, e.g., ''Chinese Pepper Steak.'' These policy guides address the criteria, the characteristics, and/or the expected composition of a particular poultry or meat food product that is associated with a particular product name. These policy guides may identify minimum meat and/or poultry contents, maximum fat and water contents, methods of processing or cooking, expected or characterizing ingredients, and/or finished product criteria (such as salt content or cooking yield) for various meat or poultry products. A copy of the Standards and Labeling Policy Book is available for inspection in the FSIS Docket Clerk's Office, Room 4352, South Agriculture Building, Washington, DC 20250.

standards. Industry has previously petitioned FSIS for permission to market these products. The Agency's objective, through this proposal, is to help facilitate the industry's ability to produce these substitute standardized products and, in turn, to facilitate consumers' selections of a variety of alternative products that are wholesome and properly labeled, as required by the FMIA and the PPIA.

II. IOM Report

Federal regulatory agencies responsible for food safety and food labeling have been interested in modernizing labeling and food standards for some time. In 1989, FSIS and the Public Health Service, U.S. Department of Health and Human Services, which includes FDA, jointly sponsored a study by the Institute of Medicine (IOM) of the National Academy of Sciences (NAS), to provide options for improving food labeling. The NAS in its 1990 final report, Nutrition Labeling, Issues and Directions for the 1990's [2] (IOM Report), expressed the concern that some of FDA's standards of identity impeded a manufacturer's ability to offer more nutritious foods.

Although both FSIS and FDA were encouraged to review their food standards, the IOM Report pointed out that there was a distinct difference between FDA standards and those of FSIS. FDA standards for certain products in which fat has traditionally been considered a valuable or characterizing ingredient require a minimum amount of fat to be present in a product before the product can be identified by the standardized name established in FDA regulations. On the other hand, generally speaking, FSIS standards set maximum limits on fat, water, or other added substances that can be present in a product in order to use the name established by the standards. For example, in FDA's standards, a product using the name ''ice cream'' is required by regulation (21 CFR 135.110) to have a minimum of 10 percent milkfat in order to bear that name. However, FSIS standards for products identified by the names ''Frankfurter,'' ''Wieners,'' or ''Hot Dog'' (9 CFR 319.180(b)), for example, limit the combination of fat and added water to no more than 40 percent of the product's formulation. The IOM Report noted that, historically, a high milkfat content was considered a desirable characteristic in dairy products, whereas, in meat and poultry products, an excess amount of fat, water, and other added substances were considered to dilute the protein contributed by the meat or poultry portion (which was the ''valued'' component of a meat and poultry product).

The Agency agrees with the IOM Report, which stated, ''In 1990, less skepticism exists about consumers' abilities, aided by informative labeling, to protect themselves against debased or diluted products * * * Attention is now focused on the consumption of too much fat rather than the possibility that some products will be made using less of an ingredient [less fat] than was historically considered a valuable constituent. Accordingly, it seems clear to the [IOM] Committee that any system that significantly impedes the marketing of reduced-, low-, and non- or no-fat substitutes should be examined and, presumably, changed.''

Processed meat and poultry products are important sources of many nutrients, especially protein, vitamin B–6, vitamin B–12, iron, and zinc. Meat is rich in heme iron, which is more readily absorbed by the body than is iron from many other foods. Heme iron also enhances the absorption of iron from other sources. Meat and poultry products will continue to be an important part of the total American diet. FSIS believes that it is appropriate to provide consumers with the largest variety of processed meat and poultry products that can be made available to them, from which consumers can then make healthful food purchasing choices. Therefore, FSIS believes that reform of labeling for meat and poultry products and reform of regulatory standards for these products should include implementing the regulatory changes needed to provide the meat and poultry industry the flexibility necessary to create and market an increased variety of healthful processed meat and poultry products, such as those lower in fat, which have the beneficial nutrients, flavor, texture and appearance desired by consumers.

III. NLEA and Regulatory Actions

As a result of increased interest in the benefits of more healthful diets, consumer groups, Congress, the FDA, and FSIS began to actively focus on food label reform during the late 1980's and early 1990's. In November 1990, Congress passed the ''Nutrition Labeling and Education Act of 1990'' (NLEA). The NLEA, which applies to foods under FDA's jurisdiction, gave legislative emphasis to an already on-going effort by the FDA and FSIS to reform food labeling. It included direction for improving ingredient labeling and addressing issues concerning standards of identity reform.

The NLEA addressed food labeling only for foods under the jurisdiction of the FDA. However, in the interest of providing consumers with uniform nutrition labeling for all foods, FSIS published an advance notice of proposed rulemaking (ANPR) in the Federal Register on April 2, 1991 (56 FR 13564), advising of its intent to publish a proposed rule for nutrition labeling of meat and poultry products. In regard to meat and poultry product standards of identity, FSIS stated that it would reassess this issue after completing its rulemaking on nutrition labeling.

Final nutrition labeling rules for food under the jurisdiction of FDA and FSIS were published in the January 6, 1993, Federal Register. The January 6, 1993 Federal Register contained final rules for nutrition labeling for most meat and poultry products under FSIS' jurisdiction (58 FR 632), and FDA final nutrition labeling rules for most food products under its jurisdiction. The nutrition labeling rules were comprehensive. They addressed both required nutrients and food components which were to be listed in the ''Nutrition Facts'' panel of food products, as well as optional nutrient and food components that could be listed on the panel. Rules were also issued that specified food product labeling formats and food category serving sizes, as well as defined nutrient content claims such as ''Low,'' ''Light,'' and ''Free.''

In the same Federal Register (58 FR 2431), FDA published a final rule that affected many FDA standardized foods. Section 130.10 (21 CFR 130.10), prescribes conditions under which foods that substitute for a standardized food can deviate from the standard of identity and still use the standardized name as part of the product name. Provisions in 21 CFR 130.10 prescribe a general definition and standard of identity for foods that substitute for FDA-regulated standardized foods and use the name of the standardized food in their statement of identity but do not comply with the standard of identity because of a deviation that is described by an expressed nutrient content claim defined by FDA's regulations. These foods are named by use of an expressed nutrient content claim, such as ''Fat Free'' ''Light,'' and ''Lean,'' in conjunction with an applicable standardized name. Based on an informal market review conducted by FSIS, FDA's rule has resulted in the appearance in supermarkets of an array of new food products that qualify for use of an expressed nutrient content

[2] This report is available for public inspection in the FSIS Docket Clerk's office.

claim and standardized names, e.g., ''Fat Free Ice Cream,'' ''Low Fat Cheddar Cheese,'' and ''Reduced Fat Egg Nog,'' because of allowable deviations from FDA food standards permitted by 21 CFR 130.10.

The FDA regulation requires that the performance characteristics of the substitute standardized food be similar to those of the standardized food, except as discussed below. Performance characteristics are the physical properties (e.g., the ability to freeze), flavor, functional properties (e.g., spreadability), and shelf-life (i.e., the time the product exists in a wholesome condition under acceptable handling practices) of a food. If, however, there are any significant differences in the performance characteristics of the modified version of the standardized food that materially limit the uses of the food, as compared to the uses of the standardized food, these must be disclosed on the product's labeling. For example, if a ''Fat Free Cream Cheese'' cannot be used in baking, that fact must be stated on the product's labeling, e.g., ''not recommended for baking.''

The FDA regulation also provides that the ingredients used in the substitute food product must be those ingredients provided for by the standard, except that safe and suitable ingredients may be used to improve texture, add flavor, prevent syneresis, extend shelf life, improve appearance, or add sweetness so that the product is not inferior in performance characteristics to the standardized food. The FDA regulation also requires that ingredients not provided for, and ingredients used in excess of those levels provided for by the standards, must be identified by an asterisk in the ingredients statement of a product and the meaning of the asterisk must be explained immediately following the ingredients statement.

The FDA regulation facilitated new markets and new opportunities for FDA-regulated food companies to develop modified versions of standardized foods. Although 21 CFR 130.10 addressed only FDA-regulated foods, meat and poultry food manufacturers were quick to respond to the potential market for modified standardized meat and poultry products. According to the meat and poultry industries, they intensified their research and development activities in order to be able to respond to potential consumer demands for meat and poultry products with reductions in various constituents, such as fat and cholesterol, where current standards may limit the marketing of such products. Technological developments and new ingredient uses now allow the industry to develop new meat and poultry products, including substitute standardized products with decreased amounts of fat, such as, ''Fat Free Bologna.''

Manufacturers of these new meat and poultry products wanted to market them without labeling them by what they considered to be pejorative terms such as ''alternative,'' ''replacement,'' and ''substitute.'' The manufacturers indicated that such products were not of lesser value compared to their traditional standardized counterparts. They asserted that these products, including new lower fat products, were better and should be allowed to be identified with an appropriate nutrient content descriptor and a commonly understood standardized name that would be familiar to consumers. They requested that FSIS allow labeling for these products similar to that provided for in FDA's general standard of identity in 21 CFR 130.10 for modified standardized products.

FSIS responded to this request by issuing Policy Memo 123[3] (dated January 20, 1995) as an interim policy to allow some standardized or traditional meat and poultry food products that have been formulated to reduce their fat content to enter the marketplace while appropriate regulatory actions related to the modernization of standards were developed. Policy Memo 123 allowed modified versions of cooked sausage (e.g., frankfurters), fermented sausages (e.g., pepperoni, salami) and breakfast sausage products to be identified by a nutrient content claim that reflected a reduction in fat content in conjunction with a standardized or traditional name, e.g., ''Fat Free Bologna,'' ''Low Fat Pepperoni.'' Policy Memo 123 included provisions for labeling which were similar to those established by FDA's general standard of identity in 21 CFR 130.10. In a prior related policy, on May 10, 1991, FSIS issued Policy Memo 121, ''Labeling of Low Fat Ground Beef and Low Fat Hamburger Containing Added Ingredients.'' Policy Memo 121 allowed for such products to be named with a standardized name along with other descriptive labeling, e.g., ''Low Fat Hamburger With a X% Solution of Water and Carrageenan'' or ''Low Fat Hamburger, Water and Carrageenan Product.'' Policy Memo 121 has been updated (See Policy Memo 121B, dated January 20, 1995)[4] to reflect current changes in nutrition labeling regulations.

Both Policy Memo 121B and Policy Memo 123 were issued as interim policies intended to accommodate certain lower fat substitute meat and poultry products until such time that rulemaking was completed. Both of these policy memoranda will be rescinded if provisions proposed in 9 CFR 319.10 and 381.172 become final rules.

FSIS is now, in this rulemaking, proposing to establish a general regulatory standard of identity for modified meat and poultry products which substitute for meat and poultry food products defined by a regulatory standard of identity or composition in 9 CFR parts 319 and 381, subpart P. FSIS believes that this general standard of identity will be beneficial to consumers because it will (1) assist consumers by providing for substitute versions of standardized processed meat and poultry products that have reductions of certain constituents that are of health concern to consumers, such as fat and cholesterol, and which bear accurate descriptive names that are meaningful to consumers, (2) increase regulatory flexibility and support product innovation in accord with Executive Orders 12861 and 12866 and with President Clinton's Memorandum to Heads of Departments and Agencies, entitled ''Regulatory Reinvention Initiative,'' dated March 4, 1995, and (3) provide consumers with an informative nutrition labeling system that will parallel, to a significant extent, the nutrition food labeling initiatives of FDA. FSIS believes that this proposed general standard of identity is fully consistent with FSIS's statutory responsibilities under the FMIA and PPIA to assure that the labeling of meat and poultry products is accurate and truthful and not false or misleading. The substitute meat food and poultry food products covered by this proposal will be identified by familiar product names and will be labeled to inform consumers about their general compositional changes from standardized products by use of a nutrient content claim as part of the product's name.

IV. Discussion of Regulatory Proposal

FSIS is proposing to amend the Federal meat and poultry products inspection regulations to establish a definition and general standard of identity for modified versions of standardized meat and poultry food products, i.e., ''substitute standardized products.'' These products will be formulated and processed with ingredients otherwise not in or in

[3] This paper is available for public inspection in the FSIS Docket Clerk's office.

[4] This paper is available for public inspection in the FSIS Docket Clerk's office.

amounts greater than that allowed by FSIS regulatory food standards in 9 CFR parts 319 and 381, subpart P, in order that the product's make-up is consistent with the nutrient content claim made about the product. The names of these products will be composed of an expressed nutrient content claim that, in general, reflects the necessary ingredient modifications made for the product to be accurately identified by such a claim, along with an established appropriate standardized term.

This proposed rule would: (1) Define ''substitute processed meat or poultry food products''; (2) allow an expressed nutrient content claim to be used to identify substitute meat and poultry products, in conjunction with the name of a standardized product; (3) require substitute processed meat and poultry food products to have similar performance characteristics such as physical and functional properties to the standardized products for which they substitute, except for significant differences that materially limit the use of the product as compared to the use of the standardized food, which will be allowed if the differences are identified by special labeling statements next to the product's name; (4) require that ingredients used in substitute standardized products be those provided for use by the regulatory standard for which the product is a substitute, except that safe and suitable ingredients approved for use in meat and poultry food products will be allowed to be used at the minimum level necessary to improve texture and prevent syneresis, in order that the product does not have inferior performance characteristics to the standardized product it modifies; (5) require other ingredient requirements for the substitute product including not replacing or exchanging an ingredient specifically required by the standard with a similar ingredient from another source and requiring such required ingredients to be present in the same amounts as required by the standard; (6) prescribe nomenclature for identifying substitute standardized processed meat and poultry products; and (7) establish labeling requirements for identifying ingredients used in the substitute standardized processed meat and poultry products that are not provided for or are used in excess of the level provided for by the standard for which the product substitutes.

FSIS believes that this proposed action is needed to provide consumers with accurate, descriptive, and fully informative labeling that will promote honesty and fair dealing in the distribution of products of interest to consumers. This proposed rule is needed to facilitate the development and availability of substitute processed meat and poultry products that have reductions in constituents that are of health concern to some people, e.g, fat, cholesterol, and sodium. The proposed rule would enable FSIS to rely more on labeling requirements, and less on recipe-type standards that are restrictive, in carrying out its mandate to assure that the labels of meat and poultry food products are accurate and not misleading to consumers. FSIS believes that today's consumer is better able to evaluate the merits of standardized processed meat and poultry food products when provided with labeling that is guided by rules that require, for most products (1) a commonly recognized product name, (2) nutritional information about what one serving of the food contains (i.e., Nutrition Facts), and (3) a listing of ingredients in the order of predominance by weight used to make the product (i.e., the ingredients statement).

Meat and poultry food products that satisfy the criteria for use of nutrient content claims defined in 9 CFR parts 317 and 381 can also make claims other than those that reflect reductions of constituents of health concern to some people, such as ''high in'' or ''good source of.'' FSIS believes current meat and poultry product standards do not preclude the making and marketing of substitute products that qualify to use these claims. Therefore, FSIS is not, in this proposal, proposing regulations to provide for the production and distribution of these products, since it believes new regulations are not needed for these products to be manufactured and distributed. FSIS would, however, like comments from members of the public, including consumers, industry, and scientists as to whether or not current regulatory standards prevent the distribution of products with nutrient content claims, other than those that reflect a reduction of constituents of health concern to some people. If after a review of this issue, FSIS determines its standards impede the development of these products, FSIS will consider amending the scope of coverage in its proposal.

A. General Standard

FSIS recognizes that valuable and helpful information concerning the nutrient content of meat and poultry food products can be conveyed to consumers if defined nutrient content claims can be used in a consistent and accurate manner in the names of certain substitute meat and poultry food products. Substitute meat and poultry products are defined in FSIS nutrition labeling regulations in 9 CFR 317.313(d) and 381.413(d), respectively. These products are defined as a product that may be used interchangeably with another product that it resembles, i.e., that it is organoleptically, physically, and functionally (including shelf-life) similar to, and that it is not nutritionally inferior to unless it is labeled as an ''imitation.'' Those same regulations provide that products that have performance characteristics that materially limit the use of the product may still be considered a substitute product if the label of the product includes a disclaimer informing the consumer of such a difference, such as ''not suitable for frying.''

As part of its nutrition labeling regulations (9 CFR parts 317 and 381, subpart Y), the Agency defined the terms for certain expressed nutrient content claims, including terms such as ''free,'' ''low,'' ''reduced,'' and ''light'' (9 CFR 317.313, 317.356, 317.361, 317.362, 381.413, 381.456, 381.461, and 381.462) that are associated with reductions in constituents of health concern to some people. These claims are useful in helping consumers choose a healthy diet. Manufacturers that wish to use other nutrient content claims on labels of meat and poultry products that are not currently defined by FSIS regulations can utilize the procedures set forth in 9 CFR 317.369 and 381.469, ''Labeling Applications for Nutrient Content Claims,'' respectively to seek permission to use other nutrient content claims on labels of meat and poultry products.

Given these developments, FSIS believes that it is now appropriate to set forth general requirements governing the establishment of a general standard of identity for substitute meat and poultry food products. The proposed general requirements in 9 CFR 319.10 and 381.172 specify the conditions under which names of standardized foods set forth in 9 CFR parts 319 and 381, subpart P, and appropriate expressed nutrient content claims may be used to identify new substitute standardized meat and poultry food products.

FSIS recognizes that the establishment of individual new standards may, in some cases, be necessary for certain meat and poultry food products, but, it believes, that in general, the promulgation of a large number of individual regulations for substitute meat and poultry food products would be an unnecessarily wasteful use of the Agency's resources. FSIS believes that the development of a

general standard applicable to the vast majority of substitute meat and poultry food products offers the most reasonable and effective regulatory approach for substitute products that contain reductions of constituents of health concern for various people. Proposed provisions 9 CFR 319.10 and 381.172 describe the conditions under which a variety of substitute meat and poultry food products may use expressed nutrient content claims and standardized terms.

B. Substitute Meat and Poultry Food Products Defined by This Proposal

FSIS is proposing to define substitute processed meat and poultry products as: any processed meat and/or poultry product whose formulation has been minimally modified to enable it to be used as a substitute for another meat and/or poultry product that it resembles and which has a standard of identity in the regulations (9 CFR parts 319 and 381, subpart P). The substitute meat or poultry food product would be eligible to use an expressed nutrient content claim to identify it; would resemble the standardized product in appearance, form, taste, and texture; and, would use safe, suitable, and approved substitute ingredients at proper levels and functions, i.e., the lowest level necessary to satisfy the criteria for use of the expressed nutrient content claim provided in regulations.

The substitute meat or poultry product will substantially meet the regulatory requirements and consumer expectations of the standardized product for which it substitutes (i.e., the product will not be dissimilar in general appearance, form, taste, and texture and will be prepared with the ingredients used in the standard of identity or composition identified in 9 CFR parts 319 and 381, subpart P), unless the product is labeled in a manner that conveys allowable ingredient differences to consumers. The ingredient differences that will be allowed relate to the use of ingredients needed to make a product that complies with the specific expressed nutrient content claim related to a reduction in a constituent that has negative health implications that is used, i.e., fat, cholesterol, and sodium. The substitute meat or poultry food product will be allowed to be named using a standardized term because it either will be similar to the standardized product in its performance characteristics and the ingredients used, or it will, through appropriate labeling terminology, describe how it differs from the standardized product for which it substitutes. The Agency believes that consumers will be protected from false or misleading labeling by requiring labeling for the substitute product that reflects its deviations from the standardized product for which it substitutes.

When a Product Will Not Be Considered a Substitute Standardized Product. There are certain aspects of the standards that are essential to the identity of the standardized product and deviations from these aspects would result in products that would not meet FSIS's definition of substitute products set forth in 9 CFR 317.313(d) and 381.413(d). In this regard, some of the standards in 9 CFR parts 319 and 381, subpart P, specify that the standardized product must be prepared using meat or poultry from a specific anatomical location and/or of a specific kind and/or amount, and must undergo specified processing procedures that are essential to the identity of the product. Deviations from these types of requirements would result in a product that does not come within the established definition for substitute products because they would result in a product that is physically dissimilar and, thus, not a substitute product. Therefore, modified versions of standardized products which purport to be substitutes of them must adhere to the original regulatory standards requirements set forth in parts 319 and 381, subpart P regarding the use of meat and poultry from specified anatomical locations, the use of a specific kind and/or amount of meat or poultry tissue to prepare the product, and the use of specified processing procedures. It is FSIS' belief that deviation from these specified meat or poultry requirements and processing procedures would result in products that do not meet the definition of substitute products. To allow such products to affirmatively represent themselves as substitute standardized products would be false and misleading labeling in violation of the provisions of the FMIA and PPIA.

For example, in 9 CFR 319.304, beef stew must contain at least 25 percent meat (i.e., beef). Since the meat or poultry content of such a product is integral to its identity, the label for a substitute of this product would be false or misleading if the substitute was named, in part, by a standardized term, but contained less than the amount of meat and/or poultry required by the standard. Consumers have come to expect certain meat and/or poultry contents of products they purchase that bear a standardized term. For example, a product identified with the standardized name ''Chicken A-La-King'' is required to contain a minimum of 20% cooked chicken meat and a substitute for this product would also be required to contain the same amount of chicken meat. Furthermore, a product identified with the standardized name ''Beef Stew'' would continue to be required to contain not less than 25% meat computed on the weight of the fresh meat. In addition, for example, in 9 CFR 381.171, ''Turkey Ham'' must be made from turkey thigh meat and be cured, and in 9 CFR 319.107, ''Bacon'' must be made from pork bellies and be cured and substitute products would be required to be made from those same anatomical parts and by the same processing procedures.

Although this proposal would not alter the minimum meat and poultry content requirements in current FSIS standards, FSIS is considering broader reform of its standards system that would provide firms greater flexibility in product formulation while fully informing consumers regarding the meat or poultry content of the product. FSIS plans to invite comment on possible alternative regulatory approaches in this area in an ANPR to be published in the Federal Register.

C. Expressed Nutrient Content Claims

FSIS believes that an issue of importance to many consumers is the lowering of the amount of fat, cholesterol, and/or sodium in meat and poultry food products. FSIS has the responsibility, under the FMIA and PPIA to assure that meat and poultry products with reduced amounts of such constituents are accurately and truthfully labeled. FSIS is, therefore, proposing in 9 CFR 319.10 and 381.172 the conditions under which substitute meat and poultry products (as defined in 9 CFR 317.313(d) and 381.469(d)) that do not comply with a standard of identity in 9 CFR parts 319 and 381, subpart P, because of a deviation that is described by an expressed nutrient content claim, that represents reductions in constituents associated with negative health implications, i.e., fat, cholesterol, and sodium, may be named using an expressed nutrient content claim and a standardized term.

Final FSIS nutrition labeling regulations published in the January 6, 1993, Federal Register (58 FR 632) provided definitions for various nutrient content claims that can be used on the label of meat and poultry products, e.g., ''Fat Free,'' ''Low Fat,'' and ''Low Cholesterol.'' Those same regulations, which were recodified in January 3, 1995, (60 FR 174), define an expressed nutrient content claim as any direct statement about the level (or range) of a nutrient in the product, e.g., ''low fat''

or ''reduced fat turkey ham.'' Since the proposed product name of a substitute standardized product is intended to distinguish it from the standardized product based on its improved nutritional attribute, a nutrient content claim along with a standardized term must be used to name the substitute products in order for consumers to understand how the modified product differs from the standardized product. FSIS is proposing that only expressed nutrient content claims, i.e., claims that have been defined and are related to reductions in constituents having negative health implications, be permitted in conjunction with the standardized name, in the name of the substitute meat and poultry products provided for in this proposal. Because such products cannot be formulated under some existing regulatory standards, FSIS is proposing to allow additional flexibility for industry to manufacture meat and poultry products whose compositions has been modified to qualify for use of an expressed nutrient content claim that asserts that a constituent of a product, of health concern to some people, has been reduced in amount. Examples of the applicable nutrient content claims are: ''low,'' ''lower,'' ''lite,'' ''reduced,'' ''lean,'' ''extra lean,'' and ''free,'' as defined in 9 CFR 317.313, 317.356, 317.361, 317.362, 381.413, 381.456, 381.461, and 381.462.

D. Performance Characteristics of Substitute Foods

FSIS believes that in order for a product that bears a standardized name to be considered to be accurately labeled it must not only resemble the traditional standardized meat and poultry food product but also must perform similarly to the traditional standardized products unless, the product is specifically labeled to show any significant performance usage differences it has, such as a frankfurter not being suitable for freezing. Unless this is done, consumers might assume that the substitute product could be used interchangeably with the traditional standardized food in all applications.

Therefore, in order not to mislead consumers, FSIS is proposing in 9 CFR 319.10(b) and 381.172(b) to require that a substitute standardized product that bears a standardized name have similar performance characteristics to the standardized meat and poultry food product defined in 9 CFR parts 319 and 381, subpart P for which it substitutes, except as discussed below. FSIS is proposing that the performance characteristics by which a substitute food be judged in terms of its similarity include its physical properties (e.g., texture, cooking qualities, freezing qualities, its functional properties (e.g., body, spreadability), and shelf-life.

FSIS recognizes, however, that when a standardized product is modified so that its composition accurately supports the nutrient content claim intended to be made, it may not be possible, in all cases, to produce a substitute product that performs similarly in regard to all uses of the regulated standardized meat or poultry food product of which it is a modification. The product would be considered a substitute product allowed under this proposal if the limitation on use does not affect the fundamental nature of the product and is disclosed in labeling.

The FMIA and PPIA require that the label or labeling of a meat or poultry food product must be accurate and not misleading and that such labels and labeling must accurately disclose to consumers what they are buying when they purchase any meat and poultry food product. Information disclosing differences in use performance characteristics (e.g., cooking quality, freezing quality, spreadability of product, and shelf-life) of substitute standardized products is a fact FSIS believes should be specifically disclosed on labels of substitute products identified partially by a standardized term because without such labeling consumers would be misled about the uses the product has in comparison to the standardized product for which it substitutes. Accordingly, this information must be communicated to consumers on the product's label, or the label would be misleading, and the product would be misbranded under the FMIA and PPIA.

Therefore, the provision in proposed 9 CFR 319.10(d) and 381.172(d) that requires disclosure of material differences in uses in regard to the performance characteristics between the substitute product and the standardized product for which it is a substitute is fully consistent with FSIS statutory responsibility under the FMIA and PPIA to prevent false or misleading labeling. If there is a difference in performance characteristics that materially limits the use of the product, the product may still be considered a substitute if the label includes a disclaimer adjacent to the most prominent claim in accordance with 9 CFR 317.313(d) (1) and (2) and 381.413(d) (1) and (2), informing the consumer of such difference. The statement must appear on the label with such conspicuousness and in such terms as to render it likely to be read and understood by the consumer under customary conditions of purchase and use, in accordance with requirements of 9 CFR 317.313(d) (1) and (2) and 381.413(d) (1) and (2).

For example, according to the provisions of this proposal, a product identified as a ''fat free frankfurter'' would have to meet the criteria for using the nutrient content claim ''fat free'' and would have to have similar performance characteristics to a ''frankfurter,'' unless a statement of any difference(s) in uses appears on the label of the substitute frankfurter product; and if it does not, the product would be considered to be misbranded. A ''frankfurter'' produced according to the standard for frankfurters would be expected by consumers to have certain physical and functional characteristics, such as a ''link'' form, a cured pink color, a spongy texture, and the ability for refrigeration or freezing for an appropriate time period to keep the product wholesome. It would also be expected that it could be prepared in a variety of ways, i.e., by boiling, broiling, grilling, and frying.

When fat, however, in a frankfurter or another standardized product is replaced by one or more other ingredients, it may not be possible, in all cases, to produce substitute products that perform identically to the traditional standardized meat and poultry products. Successful fat reduction in meat and/or poultry products requires a firm understanding of the functions of fat in a product, i.e., to provide texture, flavor, and palatability, and how those functions can be replicated with nonfat ingredients. Fats exhibit unique physical properties in meat and poultry products, e.g., their ability to combine with protein to form emulsions and their ability to enhance tenderness. In order to make a substitute product that qualifies for a ''fat free'' nutrient content claim, it may be necessary to replace fat with water and binders (i.e., additives that hold water and protein) which may result in a substitute meat or poultry food product with limitations in performance related to product uses because water and binders may not provide all of the physical and functional properties related to product use that are associated with fat, e.g., ability to be stored frozen. In products such as frankfurters, the increase in moisture which may be a direct result of fat replacement, and the way water is held by binders and dispersed in the product, can lead to the formation of large ice crystals because a higher level of available moisture makes the product less stable when thawed from the frozen state, i.e., water leaks from the product. Therefore, if a ''fat free frankfurter'' does

not tolerate frozen storage for long periods of time, because the ingredients needed to make the substitute product do not withstand the same conditions of storage as the standardized product for which it is a substitute, a non-performance statement would inform the consumer of that fact, e.g, ''Do Not Freeze.''

E. Ingredients Used in Substitute Products

1. *Ingredients Provided for by Proposed Regulation.* FSIS believes that the ingredients used in a substitute version of a standardized product should be those ingredients provided for by the traditional standard with only those deviations necessary to attain an acceptable substitute product that meets the requirements of the expressed nutrient content claim that is intended to be used to reflect a reduction in a constituent that has negative health implication, e.g. fat, cholesterol, and sodium. Therefore, FSIS is proposing in 9 CFR 319.10(c) and 381.172(c) that ingredients used in a substitute product be those ingredients provided for by the traditional standard except that, in addition, ''safe and suitable'' ingredients, as defined in 9 CFR 318.7 and 381.147, may be used to improve texture and prevent syneresis so that the product has similar characteristics to the traditional standardized meat or poultry food product, e.g., taste and appearance.

This proposed rule would have the most significant impact on the use of water and binders as a ''fat replacement system'' for substitute products intending to use nutrient content claims related to reductions in fat and cholesterol. FSIS is providing the following list as examples of ''fat replacing'' binders, i.e., ingredients or additives historically classified as binders by food scientists, to aid commenters in understanding the types of ingredients the Agency believes are applicable to making substitute products that have reductions in fat and associated cholesterol. These ingredients have typically been restricted in standardized meat and poultry food product formulations, but will now be allowed in substitute products under the conditions described in this proposal. Examples of these substances are: Agar-agar; Algin; Sodium alginate; calcium carbonate, lactic acid, and calcium lactate (or glucono delta-lactone); Calcium reduced dried skim milk; Carrageenan; Carboxymethyl cellulose (Cellulose gum); Dried milk; Enzyme (rennet)-treated calcium reduced dried skim milk and calcium lactate; Food starch modified; Gelatin; Guar gum; Methyl cellulose; Isolated soy protein; Sodium caseinate; Dry or dried whey; Reduced lactose whey; Reduced minerals whey; Whey protein concentrate; Starchy vegetable flour (e.g., potato flour, rice flour, and pea flour); Vegetable starch (e.g., corn starch, potato starch, and wheat starch); Wheat gluten; Tapioca dextrin; Soy flour; Soy protein concentrate; and Xanthan gum.

Emulsifying agents also aid water and binders in replacing fat and associated cholesterol by holding water, binders, and muscle tissue together. Therefore, they will be permitted in combination with water and binders as part of a fat-replacement system. Emulsifying agents identified in 9 CFR 318.7(c)(4) and 381.147(f)(4), e.g., lecithin, mono and diglycerides, and polyglycerol esters of fatty acids, commonly used as emulsifying agents in shortenings and margarines, can be used as part of the fat-replacement system in combination with approved binders and water, but are not considered to be ''fat replacing'' ingredients when used alone. This is because such substances are derived from fat and do not, themselves, mimic fat. However, emulsifying agents approved for use in meat and poultry products can be used in amounts consistent with the regulations, in combination with approved binders and water, and functioning as part of the ''fat replacing system.''

Humectants are another class of substances that assist water and binders to mimic fat. They are substances that attract and hold water, e.g., glycerine and corn syrup solids. Humectants would not be considered by themselves to be fat replacers, but would be allowed as part of a ''fat-replacement system.'' Humectants do not by themselves mimic the functions of fat, but assist in fat-replacement systems by enhancing water binding.

2. *Use of Similar Ingredients.* The provision for the use of safe and suitable ingredients in substitute standardized meat and poultry products, which is proposed in 9 CFR 319.10(c)(1) and 381.172(c)(1), is not intended to allow for replacement or exchange of any required ingredients or component of a required ingredient in the standardized product with functionally similar ingredients from other sources not provided for by the standard. This intent is reflected in the provisions proposed in 9 CFR 319.10(c)(2) and 381.172(c)(2).

For example, FSIS believes that replacing the expected meat or poultry ingredient(s) of a standardized product with textured vegetable protein (TVP) to meet the requirements of a lower fat nutrient content claim of a substitute standardized product should not be allowed because it would be misleading since such food ingredients are meat analogues. FSIS believes that consumers expect the meat or poultry in a meat or poultry product to be its primary source of protein and they view the meat as the valued component in a meat or poultry product. The Agency views textured vegetable protein as a ''meat or poultry replacer.'' A multitude of ''meat substitute'' or ''meat alternative'' foods are currently marketed, e.g., ''Veggie Burgers,'' ''Veggie Patties,'' ''Garden Links,'' and ''Vegetarian Meat Loaf,'' and are primarily composed of textured vegetable protein. Textured vegetable protein is used as a meat or poultry alternative because it looks like and has texture like meat or poultry, and is virtually indistinguishable from meat or poultry in mixtures. FSIS believes that the use of textured vegetable protein as a ''fat replacing'' ingredient in a substitute product would be inappropriate because its use in such a product would change the nature of the product to such an extent that it would no longer be a substitute product within the parameters of this regulatory proposal.

In a similar manner, FSIS also considers foods, such as bread, rice, potatoes, cheese, fruits, and vegetables, to be characterizing ingredients that replace or exchange meat or poultry ingredients in meat or poultry food products. The Agency is aware that products currently exist that use such food ingredients because they blend in with the meat or poultry component of the product and ''look like'' the meat or poultry component. For example, cherries or beets used in a fresh ground beef mixture would have the appearance of lean beef. Rice or grits used in a ground sausage product would give the appearance of fat. Because these food ingredients have virtually no fat, their presence in products would result in a finished product with a lowered fat content. However, the lowered fat content would be a result of the food ''filling'' or ''extending'' the product rather than as a result of the food merely functioning as a fat replacer.

3. *Ingredients Prohibited by the Standard.* Ingredients that are prohibited from use in standardized products identified in 9 CFR parts 319 and 381, subpart P, would also be prohibited from use in substitute meat and poultry food products, e.g., poultry kidneys or sex glands are prohibited from use in certain cooked sausages (9 CFR 319.180(b)) and would likewise be prohibited for modified versions of traditional standardized products.

Ingredients that are restricted from use in formulating *any* meat or poultry food product, as addressed in 9 CFR 318.7 and 381.147, would continue to be prohibited in substitute meat and poultry food products because they are not approved as safe or suitable for use in meat and poultry. For example, 9 CFR 318.7(d)(2) prohibits sorbic acid and its salts from use in formulating meat products and, thus, would continue to be prohibited in substitute products.

F. Nomenclature

How Substitute Meat and Poultry Food Products are Named. FSIS is proposing in 9 CFR 319.10(d) and 381.172(d) that the name of a substitute meat or poultry food product that complies with 9 CFR 319.10 and 381.172 will be an appropriate expressed nutrient content claim, in conjunction with (i.e., next to) the respective appropriate standardized term (e.g., fat free bologna). If a food meets the requirements of 9 CFR 319.10 and 381.172, it is itself a standardized food. Therefore, even though it does not meet all of the requirements of the standard underlying the term included in its name, its name will not be required to contain the term ''substitute'' or ''alternate.'' These meat and poultry food products will not purport to be the traditional standardized meat or poultry food product currently defined in 9 CFR parts 319 and 381, subpart P. Rather, these products will purport to be a food that satisfies the requirement of the standard in 9 CFR 319.10 and 381.172. Thus, these products will be appropriately named by use of an expressed nutrient content claim and the appropriate standardized term.

FSIS believes that the labeling for substitute meat and poultry food products should distinguish them from traditional standardized products for which they are substitutes in order to provide consumers with accurate and nonmisleading information, as required by the FMIA and PPIA, with which to make a purchase decision. Because the substitute product's identity is the expressed nutrient content claim adjacent to the standardized term, these words must be presented in the same style, color, and size of type, to further distinguish the substitute meat and poultry food product from other products that bear nutrient content claims, but that are not substitute meat and poultry products meeting the requirements presented in this proposal. Furthermore, the substitute product must comply with general labeling provisions established by regulations in 9 CFR 317 and 381, subpart N in order to assure that its labeling is not false or misleading.

G. Ingredient Labeling

FSIS is proposing in 9 CFR 319.10(e) and 381.172(e) that each of the ingredients used in the substitute meat and poultry food product shall be declared on the label as required by applicable regulations in 9 CFR parts 317 and 381, subpart N. Under 9 CFR parts 317 and 381, subpart N, in general, all ingredients must be listed by common or usual name in descending order of predominance by weight on either the principal display panel or the information panel.

To assist the consumer in differentiating between the traditional standardized meat or poultry food product and the substitute version of the traditional standardized product, FSIS is proposing in 9 CFR 319.10(e) and 381.172(e) that all ''safe and suitable'' ingredients not provided for by the traditional standard, as well as permitted ingredients added at levels in excess of those allowed by the traditional standard, must be appropriately identified as such with an asterisk in the ingredients statement to assure that the labeling of the substitute product will not be false or misleading. Therefore, the statement ''Ingredients not in regular (name of the traditional standardized food),'' or ''Ingredients in excess of amount permitted in regular (name of the traditional standardized food),'' or both statements as appropriate, shall immediately follow the ingredients statement in the same type size. The asterisk statements must clearly distinguish between ''those ingredients not permitted in'' and ''those ingredients used in excess of amounts permitted'' in a standardized product.

FSIS believes that the product name on the principal display panel of the substitute meat and poultry food product, as well as its ingredients statement, are the pertinent labeling features that identify the difference between the traditional standardized product and the modified version bearing the standardized name. The following simplified label sketches illustrate how labeling of a standardized product (Figure 1, GROUND BEEF) would differ from labeling of a substitute version (Figure 2, LOW FAT GROUND BEEF) and how labeling of a standardized product (Figure 3, BEEF FRANKS) would differ from a substitute version (Figure 4, REDUCED FAT BEEF FRANKS) according to provisions proposed by this rule.

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Figure 1.—Illustration of a Label for a Standardized Product—GROUND BEEF, according to 9 CFR 319.15

GROUND BEEF
Made with 100% Beef

(Voluntary Nutrition Labeling)

Figure 2.—Illustration of Label for Substitute Product—LOW FAT GROUND BEEF, according to Proposed 9 CFR 319.10

LOW FAT GROUND BEEF

Ingredients Statement: Beef, Water,* Carrageenan,*
***Ingredients not in regular ground beef**

Nutrition Facts

[redacted]

Figure 3.—Illustration of Label for a Standardized Product—BEEF FRANKS, according to 9 CFR 319.180

BEEF FRANKS

Ingredients Statement: Beef, Water, Pea Flour, Dextrose, Salt, Corn Syrup, Dried Milk Flavorings, Sodium Phosphate, Sodium Erythorbate, Sodium Nitrite

Nutrition Facts

[redacted]

Figure 4.—Illustration of Label for Substitute Product—REDUCED FAT BEEF FRANKS, according to Proposed 9 CFR 319.10

REDUCED FAT BEEF FRANKS
50% less fat than our beef and pork franks
Fat has been lowered from 16 g to 8 g per serving

Ingredients Statement: Beef, Water, Wheat Flour, Guar Gum*, Dextrose, Salt, Corn Syrup, Flavorings, Sodium Phosphate, Sodium Erythorbate, Sodium Nitrite**

*** Ingredient not in regular beef frank**
**** Ingredient in excess of amounts permitted in regular beef frank**

Nutrition Facts

[redacted]

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Nutrition labeling and the listing of ingredients in order of predominance for substitute products, along with its product name and special ingredient labeling for certain differences between it and a traditional standardized product will allow consumers to be able to evaluate the merits of substitute meat and poultry food products using an expressed nutrient content claim and a standardized name. As discussed, this labeling approach for establishing a general standard of identity is similar to the labeling scheme established by FDA in final rules (21 CFR 130.10) published January 6, 1993 (58 FR 2431).

V. Advance Notice of Proposed Rulemaking on Standards Reform

The Agency is planning to publish an ANPR that explores alternative approaches to defining and standardizing meat and poultry products to assure that they bear truthful and accurate names, are labeled in a manner that is not false or misleading, and contain only safe and suitable ingredients. The ANPR will consider the broader issues concerning the role regulatory standards of identity and composition should play in today's market.

Executive Order 12866

This proposed rule has been determined to be significant for purposes of Executive Order 12866. This proposed rule would allow for substitute meat and poultry food products to deviate from current standards, provided certain conditions are met.

FSIS issued Policy Memo 121B and Policy Memo 123 as interim policies to accommodate development and distribution of certain lower fat substitute meat and poultry products while undergoing this rulemaking process. To date, industry already has taken advantage of this policy by introducing new products. This rule is necessary to encourage and continue the development of more meat and poultry products with reductions in food constituents having health implications, e.g., lower in fat and cholesterol.

Today's consumers are looking for versions of popular standardized processed meat and poultry food products that have reductions in fat and cholesterol. To take advantage of advances in ingredient and processing technologies, meat and poultry food processors would be provided with the flexibility to formulate and market new meat and poultry products with reductions in fat content, cholesterol, and sodium—constituents which are of concern to today's health conscious consumers—and identify them by an expressed nutrient content claim and by names that are familiar to consumers.

If the proposed rule encourages firms to market a greater variety of nutritious meat and poultry products, then consumers will enjoy the benefit of greater product choices. Consumers will also benefit from a healthier diet by the availability of products with lower fat and cholesterol contents if the market is sufficiently strong to sustain increased sales of these products. Research conducted by the Economic Research Service of the U.S. Department of Agriculture has shown that when healthier diets lead to reductions in incidence of heart disease, cancer, stroke, diabetes, or other health problems, then economic benefits accrue in the form of reduced medical costs and productivity losses due to medical infirmity and premature death. While it is not yet possible to determine the extent to which the rule would lead to healthier diets and lower medical costs, there could be a benefit to society.

This proposed rule would not mandate any changes to the way meat and poultry products must be labeled, but would provide the meat and poultry industry with the option of producing

substitute meat and poultry food products. Therefore, any cost incurred would be voluntary.

If firms chose to make ingredient substitutions to bring newer, healthful products to market, they may incur some short run costs. However, these are the normal costs of marketing and production. If they are incurred, they arise because a firm expects the new product to be profitable. The costs of bringing these new products to market would, in the long run, be less than the benefits to firms of increased sales and profits. If the market for substitute foods is substantial enough for firms to successfully market these new products, then there may be a net economic benefit to the industry.

The net effect of the proposed rule would be beneficial to the meat and poultry industry as a whole and would provide consumers with a greater diversity of meat and poultry products. Consumers would benefit from the proposed rule because it is expected to increase the variety of processed meat and poultry products that would be available from which to make the most healthful dietary choices for each individual. At the same time, the proposed rule would safeguard the integrity of traditional standardized meat and poultry food products that have served the market well and for which there is expected to continue to be a strong demand. Consumers would be informed by the product labeling of the differences between the traditional standardized product and the modified version.

Executive Order 12778

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. States and local jurisdictions are preempted under the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) from imposing any marking, labeling, packaging, or ingredient requirement on federally inspected meat and poultry products that are in addition to, or different than, those imposed under the FMIA or PPIA. States and local jurisdictions may, however, exercise concurrent jurisdiction over meat and poultry products that are outside official establishments for the purpose of preventing the distribution of meat and poultry products that are misbranded or adulterated under the FMIA or PPIA, or, in the case of imported articles, which are not at such an establishment, after their entry into the United States. Under the FMIA and PPIA, States that maintain meat and poultry inspection programs must impose requirements that are at least equal to those required under the FMIA and PPIA. The States may, however, impose more stringent requirements on such State inspected products and establishments.

No retroactive effect will be given to this proposed rule. The administrative procedures specified in 9 CFR 306.5 and 381.35 must be exhausted prior to any judicial challenge of the application of the provisions of this proposed rule, if the challenge involves any decision of an inspector relating to inspection services provided under the FMIA or PPIA. The administrative procedures specified in 9 CFR parts 335 and 381, subpart W, must be exhausted prior to any judicial challenge of the application of the provisions of this proposed rule with respect to labeling decisions.

Effect on Small Entities

The Administrator, FSIS, has made an initial determination that this proposed rule would not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). Small manufacturers would be provided the flexibility to create more meat and poultry products that have reductions in certain food constituents that have health implications. Small businesses who choose to market the new substitute meat and poultry food products would be required to design new labels or make certain revisions to their existing product labels, thereby, incurring some costs. These costs could be outweighed by the potential revenue increases from sales of the new substitute products.

Paperwork Requirements

Abstract: FSIS has reviewed the paperwork and recordkeeping requirements in this proposed rule in accordance with the Paperwork Reduction Act. This proposed rule would require manufacturers producing new meat and poultry products in accordance with the definition and general standard of identity for modified processed meat and poultry products to design their new product labels and submit such labeling to FSIS for approval.

Estimate of Burden: Meat and poultry establishments must develop product labels in accordance with the regulations. To receive approval of the labels, establishments must complete FSIS Form 7234–1. FSIS program employees review FSIS Form 7234–1 to ensure that information on the labels complies with the regulations. FSIS estimates that it will take 60 minutes to design and develop modified product labels in accordance with the proposed regulations and 15 minutes to prepare FSIS Form 7234–1 and submit it, along with the label, to FSIS or to a label expediter who will deliver the form and label to FSIS.

Respondents: Meat and poultry product establishments.

Estimated Number of Respondents: FSIS estimates that at this time 100 establishments would have to develop new labels.

Estimated Number of Responses per Respondent: FSIS estimates that each establishment would modify about 5 product labels.

Estimated Total Annual Burden on Respondents: 625 hours.

Copies of this information collection assessment can be obtained from Lee Puricelli, Paperwork Specialist, Food Safety and Inspection Service, USDA, South Agriculture Building, Room 3812, Washington, DC 20250.

Comments regarding the need for and usefulness of the proposed requirements, the accuracy of FSIS's burden hour estimate, ways to minimize the estimated burden, including through the use of automated collection techniques or other forms of information collection technology, or any other aspect of this collection of information discussion, to Lee Puricelli, Paperwork Specialist, at the address above.

All responses to this notice will be summarized and included in FSIS's request for the Office Management and Budget (OMB) approval of the proposed regulation's paperwork requirements. All comments submitted will also become a matter of public record.

Comments

Interested persons may submit an original and two copies of written comments concerning this proposed rule to: FSIS Docket Clerk, DOCKET #92–024P, Room 4352, South Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. Any person desiring an opportunity for an oral presentation of views should make such a request to Mr. Charles R. Edwards so that arrangements can be made for such views to be presented. A record will be made of all views orally presented. All comments submitted in response to this proposal will be available for public inspection in the FSIS Docket Room, Room 4352, South Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, 8:30 a.m. to 1:00 p.m., and from 2:00 p.m. to 4:30 p.m., Monday through Friday.

List of Subjects

9 CFR Part 319

Food grades and standards, Meat inspection.

9 CFR Part 381

Food grades and standards, Meat inspection, Poultry and poultry products.

Proposed Rule

For the reasons discussed in the preamble, FSIS is proposing to amend 9 CFR parts 319 and 381 as follows:

PART 319—DEFINITIONS AND STANDARDS OF IDENTITY OR COMPOSITION

1. The authority citation for part 319 would continue to read as follows:

Authority: 7 U.S.C. 450, 1901–1906; 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

2. Part 319, Subpart A would be amended by adding a new § 319.10 to read as follows:

§ 319.10 Requirements for substitute processed meat food products named by use of an expressed nutrient content claim and a standardized term.

(a) *Description.* The meat food products prescribed by this general definition and standard of identity are those products that substitute, in accordance with § 317.313(d) for a standardized food defined in this part and use the name of that standardized food in their statement of identity, but that do not comply with the established standard because of a compositional deviation that results from reduction of a constituent that is described by an expressed nutrient content claim that has been defined by regulation in part 317, subpart B of this subchapter. The expressed nutrient content claim shall comply with the requirements of § 317.313 of this subchapter and with the requirements of part 317, subpart B of this subchapter that define the particular nutrient content claim that is used. The meat food product shall comply with the relevant standard in this part in all other respects, except as provided in paragraphs (b) and (c) of this section.

(b) *Performance characteristics.* The performance characteristics, such as physical properties, functional properties and shelf-life, of the meat food product shall be similar to those of the standardized meat food product produced under this part. If there is a significant difference in performance characteristics that materially limits the uses of the food compared to the uses of the standardized food defined in this part, the label shall include, adjacent to the product name, a statement in accordance with § 317.313(d) (1) and (2) of this subchapter, informing the consumer of such differences (e.g., if appropriate, ''not recommended for frozen storage'' or ''not suitable for roller grilling''). Deviations from ingredient provisions of the standard that must be the minimum necessary to qualify for the nutrient content claim, while maintaining similar performance characteristics.

(c) *Ingredients Used in Substitute Foods.* (1) Ingredients used in the product shall be those ingredients provided for by the standard as defined in this part, except that safe and suitable ingredients approved for use in meat food products as described in § 318.7 of this subchapter may be used at the minimum level necessary to improve texture and prevent syneresis, so that the substitute product is not inferior in performance characteristics from the standardized product defined in this part for which it is a substitute.

(2) An ingredient or component of an ingredient that is specifically required by the standard prescribed in this part shall not be replaced or exchanged with a similar ingredient from another source, for example, textured vegetable protein shall not replace meat, and turnips shall not replace potatoes in corned beef hash.

(3) An ingredient or component of an ingredient that is specifically prohibited from use in any meat food product by this part shall not be added to the substitute meat food product under this section.

(4) All ingredients that are specifically required by a standard of identity or composition as defined in this part shall be present in the substitute product in the same amounts as required by the standard for which the product is a substitute. The meat portion of the substitute product must come from the same anatomical location, be of the same kind and amount, and undergo the same basic processing procedures as the standardized product in this part for which it substitutes.

(5) Water and fat-replacers (i.e., binders), in combination, may be added to replace fat in accordance with paragraph (c) of this section.

(d) *Nomenclature.* The name of a substitute meat food product that complies with this section is the appropriate expressed nutrient content claim and the applicable standardized term, which shall be in the same style, color, and size of type.

(e) *Label declaration.* (1) Each of the ingredients used in the substitute meat food product shall be declared on the label as required by this section and part 317 of this subchapter.

(2) Ingredients not provided for, and ingredients used in excess of those levels provided for, by the standard as defined in this part, shall be identified as such with an asterisk in the ingredients statement. The statement ''*Ingredient(s) not in regular xxxx'' (The blank shall be filled in with the name of the traditional standardized product) or ''**Ingredient(s) in excess of amounts permitted in regular _____'' (The blank shall be filled in with the name of the traditional standardized product), or both as appropriate shall immediately follow the ingredients statement in the same type and size.

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

3. The authority citation for part 381 would continue to read as follows:

Authority: 7 U.S.C. 138f; 450, 21 U.S.C. 451–470, 7 CFR 2.18, 2.53.

4. Part 381, subpart P would be amended by adding a new § 381.172 to read as follows:

§ 381.172 Requirements for substitute processed poultry food products named by use of an expressed nutrient content claim and a standardized term.

(a) *Description.* The poultry food products prescribed by this general definition and standard of identity are those products that substitute in accordance with § 381.413(d) for a standardized food defined in this subpart and use the name of that standardized food in their statement of identity, but that do not comply with the established standard because of a compositional deviation that results from reduction of a constituent that is described by an expressed nutrient content claim that has been defined by regulation in this subpart. The expressed nutrient content claim shall comply with the requirements of § 381.413 and with the requirements in subpart Y of this part that define the particular nutrient content claim that is used. The poultry food product shall comply with the relevant standard in this part in all other respects, except as provided in paragraphs (b) and (c) of this section.

(b) *Performance characteristics.* The performance characteristics, such as physical properties, functional properties and shelf-life, of the poultry food product shall be similar, except in regard to uses, to those of the standardized poultry food product produced under subpart P of this part. If there is a significant difference in performance characteristics that

materially limits the use of the food compared to the use of the standardized food defined in subpart P of this part, the label shall include, adjacent to the product name, a statement in accordance with § 317.313(d) (1) and (2) of this part, informing the consumer of such differences (e.g., if appropriate, ''not recommended for frozen storage'' or ''not suitable for roller grilling''). Deviations from ingredient provisions of the standard that must be the minimum necessary to qualify for the nutrient content claim, while maintaining similar performance characteristics.

(c) *Ingredients Used in Substitute Foods.* (1) Ingredients used in the product shall be those ingredients provided for by the standard as defined in subpart P of this part, except that safe and suitable ingredients approved for use in poultry food products as described in § 381.147 of this part may be used at the minimum level necessary to improve texture and prevent syneresis, so that the substitute product is not inferior in performance characteristics from the standardized product defined in subpart P of this part, for which it is a substitute.

(2) An ingredient or component of an ingredient that is specifically required by the standard prescribed in subpart P of this part shall not be replaced or exchanged with a similar ingredient from another source, for example, textured vegetable protein shall not replace poultry, and turnips shall not replace potatoes in corned beef hash.

(3) An ingredient or component of an ingredient that is specifically prohibited from use in any poultry food product by subpart P of this part shall not be added to the substitute poultry food product under this section.

(4) All ingredients that are specifically required by a standard of identity or composition as defined in subpart P of this part shall be present in the substitute product in the same amounts as required by the standard for which the product is a substitute. The poultry portion of the substitute product must come from the same anatomical location, be of the same kind and amount, and undergo the same basic processing procedures as the standardized in subpart P of this part product for which it substitutes.

(5) Water and fat-replacers (i.e., binders), in combination, may be added to replace fat in accordance with paragraph (c) of this section.

(d) *Nomenclature.* The name of a substitute poultry food product that complies with this section is the appropriate expressed nutrient content claim and the applicable standardized term, which shall be in the same style, color, and size of type.

(e) *Label declaration.* (1) Each of the ingredients used in the substitute poultry food product shall be declared on the label as required by this section and subpart N of this part.

(2) Ingredients not provided for, and ingredients used in excess of those levels provided for, by the standard as defined in subpart P of this part, shall be identified as such with an asterisk in the ingredients statement. The statement ''*Ingredient(s) not in regular _____'' (The blank shall be filled in with the name of the traditional standardized product) or ''**Ingredient(s) in excess of amounts permitted in regular _____'' (The blank shall be filled in with the name of the traditional standardized product), or both as appropriate shall immediately follow the ingredients statement in the same type and size.

Done at Washington, DC, on: December 21, 1995.

Michael R. Taylor,

Acting Under Secretary for Food Safety.

[FR Doc. 95–31391 Filed 12–26–95; 3:36 pm]

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federal register

Friday
December 29, 1995

Part V

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 71, et al.

Substances Approved for Use in the Preparation of Meat and Poultry Products; Food Standards of Identity, Quality and Fill of Container; Common or Usual Name Regulations; Proposed Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 71, 170, and 171

[Docket No. 95N–0220]

RIN 0910–AA66

Substances Approved for Use in the Preparation of Meat and Poultry Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its regulations governing the review of petitions for the approval of food and color additives and substances generally recognized as safe (GRAS) to provide for joint review of such petitions by the Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture (USDA), when meat or poultry product uses are proposed. By agreement between USDA and FDA, such listings would eliminate the need for a separate FSIS rulemaking to allow the use in meat and poultry products of FDA-approved substances.

DATES: Written comments by March 14, 1996.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: George H. Pauli, Center for Food Safety and Applied Nutrition (HFS–200), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3090.

SUPPLEMENTARY INFORMATION:

I. Background

FDA, under the Federal Food, Drug, and Cosmetic Act (the act), is responsible for regulating foods generally. FSIS, under the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA), regulates products consisting wholly or in part of meat or poultry.

Over the years, FDA has generally deferred to FSIS in matters concerning the regulation of meat and meat food products (hereinafter referred to collectively as meat products) and poultry products, despite FDA's broad jurisdiction over all food. This approach is consistent with the proposition that in cases of possible jurisdictional overlap, an agency with a broad grant of statutory authority will normally defer to an agency with a more specific grant of authority. FSIS has primary jurisdiction over meat and poultry products and is tasked with ensuring that all those products are inspected before they are permitted in commerce. FSIS regulations and guidelines govern all aspects of meat and poultry products that are subject to such inspection. These include regulations and guidance on substances that may be added to those products.

Since the 1958 Food Additives Amendment to the act, FSIS has come to rely on FDA in most matters concerning the safety of food and color additives and other substances that may be used in meat and poultry products. FDA regulates food additives and color additives through a premarket approval system established respectively by sections 409 and 721 of the act (21 U.S.C. 348 and 379e). FDA has developed the scientific staff, the institutional expertise, and the regulatory structure to ensure the safety of substances that may be added to foods. The act requires that both food additives and color additives be shown to be safe before marketing (21 U.S.C. 348(c)(3) and 379e(b)(4)). In addition, FDA may not approve any use of a food additive that would ''promote deception of the consumer * * * or would otherwise result in adulteration or misbranding of food * * * '' (21 U.S.C. 348(c)(3)(B)). Similarly, a color additive must also be shown to be suitable for its intended use (21 U.S.C. 379e(b)(1)).

Over the years, the two agencies have cooperated on food ingredient issues on an as-needed, substance-specific, and case-by-case basis. Nonetheless, because of their different regulatory needs, the two agencies' regulations governing the use of these substances in foods are cast in formats and terms that are not fully consistent with one another. This absence of consistency causes difficulty and inconvenience to persons who need to refer to both agencies' regulations on approved substances and substance uses.

Furthermore, it is not clear from the regulations where one agency's jurisdiction ends and the other's begins. The public frequently sends FSIS requests for approval of the use of substances in food that must be referred to FDA, and sends FDA requests involving meat or poultry uses that must be referred to FSIS.

Finally, FSIS's current regulations require that those seeking approval of a substance for use in or on meat or poultry products first establish that the substance is safe for the intended use under section 409 or section 721 of the act, and second, that it is suitable for the intended use under the FMIA or PPIA (9 CFR 318.7(a) and 381.147(f)). As a result, both agencies conduct separate, sequential reviews and rulemakings before a new meat or poultry use can be permitted. Many years can elapse between the time a manufacturer petitions FDA for the approval of a food additive or a color additive under the act and the appearance in FSIS's regulations of approval for meat and poultry uses.

FDA and FSIS have also concluded that their respective regulations concerning food and color additives and other substances that may be added to meat and poultry products should be more consistent with one another and easier to use and access.

II. The Proposal

This proposed rule, together with an FSIS proposed rule appearing elsewhere in this issue of the Federal Register, would require a single petition, joint reviews, and a single rulemaking procedure to replace the current time consuming, duplicative, sequential rulemaking procedures governing the use in meat or poultry products of food additives, color additives, and GRAS substances. It is intended to clarify the two agencies' responsibilities and regulatory interests. Future FSIS listings for meat and poultry uses would be harmonized with those of FDA and incorporated into FDA's regulations in Title 21 of the Code of Federal Regulations (CFR), providing a basis for the eventual elimination of FSIS's separate listings from Title 9 CFR.

Substances would be authorized for use in products under the jurisdiction of FSIS on the basis of FDA's regulations permitting such uses. For a substance *not* authorized for meat or poultry use under existing FDA regulations, only one petition for rulemaking—to FDA—would be required. Future FDA food additive, color additive, and GRAS substance listings would specify any approved meat or poultry product uses, and any conditions of such uses, in accord with FSIS recommendations, to the extent those recommendations are consistent with the act.

Substances whose use is GRAS, however, are exempt from the premarket approval requirements of the act and need not be listed in FDA's regulations in 21 CFR. For a substance that is not affirmed by FDA as GRAS or otherwise listed in part 182 or 184 (21 CFR part 182 or 184) of FDA's regulations, or for a GRAS substance listed by FDA for general food use, where meat or poultry uses are neither specified nor prohibited, FSIS would continue to

consider a manufacturer's basis for claiming GRAS status and suitability for use in meat or poultry products. In such cases, FSIS would make the determination in consultation with FDA as needed to ensure that appropriate advice is given and that FDA has notice of the determination.

This proposal would require, and lead to, greater harmonization, i.e., closer and more consistent cooperation, between FDA and FSIS. The agencies propose to enter into a memorandum of understanding (MOU) concerning the specifics of the agencies' working relationship under the proposed regulations. A draft of the MOU is appended to the FSIS proposal appearing elsewhere in this issue of the Federal Register.

FSIS and FDA believe that the public will be better served by having all permitted uses for food additives, color additives, and GRAS substances consolidated in one place—in Title 21 CFR—and intend to work toward that end. However, existing regulations on specific substances and substance uses in Titles 9 and 21 CFR would not be immediately affected by this proposal. Because of resource constraints, current FDA regulations would be amended to accommodate meat and poultry uses only in response to a food additive, color additive, or GRAS petition. FSIS will review its listings accordingly and eliminate those that are redundant with FDA's Title 21 listings.

This proposed rule would amend FDA regulations to provide for: (1) Specifying any meat, meat food product, or poultry product uses of substances approved by FDA for food use and listed in 21 CFR; and (2) petitioning FDA for listing in 21 CFR of substances intended to be used in meat, meat food products, or poultry products. FDA's regulations would be amended so that all petitions to permit new substances, new uses, or new use levels of substances in meat, meat food products, or poultry products would be filed only with FDA. FDA's regulations governing color additive petitions, petitions to affirm substances as GRAS, and food additive petitions in parts 71, 170, and 171 (21 CFR parts 71, 170, and 171), respectively, would be revised to provide for joint review by FSIS of petitions filed with FDA that propose use of the substance in meat or poultry products. (In the agencies' view, it is the petitioner's burden to identify the intended meat and poultry uses of a substance.)

III. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(8) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IV. Analysis of Impacts

FDA has examined the impacts of the proposed rule to amend 21 CFR parts 71, 170, and 171 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 effects; distributive impacts; and equity). The Regulatory Flexibility Act requires analysis of options for regulatory relief for small entities.

The principal benefit of this proposed rule is to eliminate duplicative Federal effort. Under the proposed amendments and amendments FSIS is concurrently proposing to its regulations published elsewhere in this issue of the Federal Register, separate petitions to FSIS for use of substances in meat or poultry products would no longer be required. Obtaining approval for the use in meat and poultry products of new substances or for new uses of previously approved substances would be simpler, faster, and less costly for both industry and the Federal Government than under the current system.

With this proposed rule, those substances *not* authorized for meat and poultry use under existing FDA regulations would require only one petition for rulemaking—to FDA. (For a substance that is not affirmed as GRAS by FDA or otherwise listed in 21 CFR part 182 or 184, or a substance listed by FDA for general food use, FSIS would continue to consider the manufacturer's basis for claiming GRAS status of the substance and its suitability for a specified use in meat or poultry products.) Furthermore, all users of the Federal regulations concerning the addition of substances to foods should benefit by having fewer, clearer regulations. Thus, there would be a reduction in the duplication of effort and attendant costs for all concerned.

Therefore, FDA finds that this proposed rule would not have a significant adverse economic impact. In addition, FDA certifies that there is not a significant impact on a substantial number of small entities.

Nevertheless, 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 as defined by section 3(f)(4) of Executive Order 12866 because it raises novel legal and/or policy issues arising out of the President's priorities, namely the reinvention of government and regulatory reform initiatives. Therefore, this proposed rule has been formally reviewed by OIRA in accordance with the provisions of Executive Order 12866.

V. Paperwork Reduction Act of 1995

This proposed rule contains information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Information collection requirements have been approved by OMB for color additive petitions, petitions to affirm substances as GRAS, and food additive petitions under OMB Nos. 0910–0185, 0910–0132, and 0910–0016, respectively. FDA has determined that the proposed rulemaking would entail no new information collection from the regulated industry or other private entities. Persons seeking Federal Government approval of substances for use in meat or poultry foods would not have to submit any information not currently required for approval. However, such persons would only have to submit petitions to FDA, rather than to both FDA and FSIS, as they do now. Thus, a current, duplicative information collection requirement would be eliminated.

FDA requests comments regarding its tentative conclusions on the paperwork burden.

VI. Comments

Interested persons may, on or before March 14, 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.

List of Subjects

21 CFR Part 71

Administrative practice and procedure, Color additives, Confidential business information, Cosmetics, Drugs, Reporting and recordkeeping requirements.

21 CFR Part 170

Administrative practice and procedure, Food additives, Reporting and recordkeeping requirements.

21 CFR Part 171

Administrative practice and procedure, Food additives.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 71, 170, and 171 be amended as follows:

PART 71—COLOR ADDITIVE PETITIONS

1. The authority citation for 21 CFR part 71 continues to read as follows:

Authority: Secs. 201, 402, 409, 501, 505, 506, 507, 510, 512–516, 518–520, 601, 701, 721, 801 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 351, 355, 356, 357, 360, 360b–360f, 360h–360j, 361, 371, 379e, 381); secs. 215, 351 of the Public Health Service Act (42 U.S.C. 216, 262).

2. Section 71.1 is amended in paragraph (c) in the petition by revising the introductory paragraph preceding paragraph A., and by adding new paragraph (j) to read as follows:

§ 71.1 Petitions.

* * * * *

(c) * * *

Attached hereto in triplicate (quadruplicate, if intended uses include use in meat, meat food product, or poultry product), and constituting a part of this petition are the following:

* * * * *

(j)(1) If intended uses of the color additive include uses in meat, meat food product, or poultry product subject to regulation by the U.S. Department of Agriculture (USDA) under the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*) or Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), FDA shall, upon filing of the petition, forward a copy of the petition or relevant portions thereof to the Food Safety and Inspection Service, USDA, for simultaneous review under the PPIA and FMIA.

(2) FDA will ask USDA to advise whether the proposed meat and poultry uses comply with the FMIA and PPIA, or if not, whether use of the substance would be permitted in products under USDA jurisdiction under specified conditions or restrictions.

3.Section 71.20 is amended by adding new paragraph (a)(3) to read as follows:

§ 71.20 Publication of regulation.

* * * * *

(a) * * *

(3) The regulation shall list any use or uses in meat, meat food product, or poultry product subject to the Federal Meat Inspection Act (FMIA)(21 U.S.C. 601 *et seq.*) or Poultry Products Inspection (PPIA)(21 U.S.C. 451 *et seq.*) for which the color additive has been found suitable and for which it may safely be employed.

* * * * *

PART 170—FOOD ADDITIVES

4. The authority citation for 21 CFR part 170 continues to read as follows:

Authority: Secs. 201, 401, 402, 408, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 341, 342, 346a, 348, 371).

5. Section 170.35 is amended by redesignating paragraphs (c)(3) through (c)(6) as paragraphs (c)(4) through (c)(7), respectively, and by adding new paragraph (c)(3) to read as follows:

§ 170.35 Affirmation of generally recognized as safe (GRAS) status.

* * * * *

(c) * * *

(3)(i) If intended uses of the substance include uses in meat, meat food product, or poultry product subject to regulation by the U. S. Department of Agriculture (USDA) under the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*) or Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), FDA shall, upon filing of the petition, forward a copy of the petition or relevant portions thereof to the Food Safety and Inspection Service, USDA, for simultaneous review under the PPIA and FMIA.

(ii) FDA will ask USDA to advise whether the proposed meat and poultry uses comply with the FMIA and PPIA, or if not, whether use of the substance would be permitted in products under USDA jurisdiction under specified conditions or restrictions.

* * * * *

PART 171—FOOD ADDITIVE PETITIONS

6. The authority citation for 21 CFR part 171 continues to read as follows:

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

7. Section 171.1 is amended in paragraph (c) in the petition by revising the introductory paragraph preceding paragraph A., and by adding new paragraph (n) to read as follows:

§ 171.1 Petitions.

* * * * *

(c) * * *

Attached hereto, in triplicate (quadruplicate, if intended uses include use in meat, meat food product, or poultry product), and constituting a part of this petition, are the following:

* * * * *

(n) (1) If intended uses of the food additive include uses in meat, meat food product, or poultry product subject to regulation by the U.S. Department of Agriculture (USDA) under the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*) or Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), FDA shall, upon filing of the petition, forward a copy of the petition or relevant portions thereof to the Food Safety and Inspection Service, USDA, for simultaneous review under the PPIA and FMIA.

(2) FDA will ask USDA to advise whether the proposed meat and poultry uses comply with the FMIA and PPIA, or if not, whether use of the substance would be permitted in products under USDA jurisdiction under specified conditions or restrictions.

8. Section 171.100 is amended by redesignating paragraph (b) as paragraph (c) and by adding new paragraph (b) to read as follows:

§ 171.100 Regulation based on petition.

* * * * *

(b) The regulation shall describe the conditions under which the substance may be safely used in any meat product, meat food product, or poultry product subject to the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*) or the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*).

* * * * *

Dated: October 11, 1995.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 95–31491 Filed 12–26–95; 3:37 pm]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 102, 130, 131, 133, 135, 136, 137, 139, 145, 146, 150, 152, 155, 156, 158, 160, 161, 163, 164, 165, 166, 168, and 169

[Docket No. 95N–0294]

Food Standards of Identity, Quality and Fill of Container; Common or Usual Name Regulations; Request for Comments on Existing Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is announcing that it intends to review its regulations pertaining to identity, quality, and fill of container for standardized foods and its common or usual name regulations for nonstandardized foods. As part of this review, the agency is soliciting comments from all interested parties on whether these regulations should be retained, revised, or revoked. FDA solicits comments on the benefits or lack of benefits of such regulations in facilitating domestic, as well as international, commerce and on the value of these regulations to consumers. The agency also solicits comments on alternative means of accomplishing the statutory objective of food standards, i.e., to promote honesty and fair dealing in the interest of consumers in the manufacture and sale of food products covered by these regulations. This review responds in part to President Clinton's memorandum to heads of departments and agencies, entitled ''Regulatory Reinvention Initiative,'' dated March 4, 1995.

DATES: Written comments by April 29, 1996.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Nannie H. Rainey, Center for Food Safety and Applied Nutrition (HFS–158), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–5099.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

On March 4, 1995, the President issued a memorandum to heads of departments and agencies, entitled ''Regulatory Reinvention Initiative'' (RRI memorandum) that, among other things, directed them to continue to work toward making Government more effective. In the RRI memorandum, the President noted that all Americans want the benefits of effective regulation, such as clean water, safe work places, wholesome food, and sound financial institutions, but stated that too often the rules are drafted with such detailed lists of do's and don'ts that the objectives they seek to achieve are undermined. Thus, the RRI memorandum directed that departments and agencies conduct a page-by-page review of all of their regulations and eliminate or revise those that are outdated or otherwise in need of reform.

A prime focus of FDA's review under the RRI memorandum has been the agency's food standard and common or usual name regulations. These provisions, which cover approximately 260 pages in the Code of Federal Regulations, appear to be exactly the kind of regulations that need reform. Intended to protect the integrity of the food supply, these regulations provide detailed definitions of various types of food, ranging from milk to canned fruits and vegetables to seafood cocktails. Some are extremely detailed and have the potential to limit technological advances. Virtually all of these regulations were adopted before the passage of the Nutrition Labeling and Education Act of 1990 (Pub. L. 101–535) (the 1990 amendments) and, thus, were developed without reference to the significant informational function that the food label can play. Therefore, the food standards and common or usual name regulations are a candidate for revision or reform.

As a result of its page-by-page review of its regulations in response to the RRI memorandum, FDA tentatively concluded that several food standards of identity should be revoked for various reasons including that they are obsolete, or that their provisions are being adequately covered by other regulations. On November 9, 1995 (60 FR 56513), FDA published a final rule repealing a stayed standard (canned fruit nectars, formerly codified as § 146.113 (21 CFR 146.113)). In that same issue of the Federal Register (60 FR 56541), the agency published a proposed rule to revoke the standards of identity for certain lower-fat milk, sour cream, and yogurt products in part 131 (21 CFR part 131) and the standard of identity for lowfat cottage cheese in part 133 (21 CFR part 133) so that these foods can be produced and labeled under the general standard in § 130.10 (21 CFR 130.10). That proposal also would amend the nutrient content claims regulations in § 101.62 (21 CFR part 101.62) to provide for ''skim'' as a synonym for ''nonfat,'' thereby allowing the use of the names ''skim milk,'' ''acidified skim milk,'' ''cultured skim milk,'' and ''sweetened condensed skim milk.'' In addition, FDA has proposed (60 FR 53480, October 13, 1995) to revoke a number of regulations because they are obsolete or of no current interest to industry or consumers. Among those regulations are several standards of identity in part 161 (21 CFR part 161) that specify sizes for certain oyster products, the standards of identity in part 163 (21 CFR part 163) for coatings made from cocoa, sweet chocolate, or milk chocolate and vegetable fats other than cacao fat, and the standards of identity in part 137 (21 CFR part 137) for the corn grits products (i.e., corn grits, enriched corn grits, quick grits, and yellow grits).

The agency's review of the remaining food standards in parts 130 through 169 (21 CFR parts 130 through 169) and the common or usual name regulations in part 102 (21 CFR part 102) forms the basis of this advanced notice of proposed rulemaking.

B. History: Pre-1938

In providing for standards of identity, quality, and fill of container in section 401 of the Federal Food, Drug, and Cosmetic Act of 1938 (the act) (21 U.S.C. 341), Congress sought to correct a deficiency in the 1906 Food and Drugs Act (the 1906 act). The 1906 act established definitions for adulteration and misbranding and subjected foods to seizure if they were found to be in violation of these definitions. Section 7 of the 1906 act was intended to prevent adulteration in the form of dilution or substitution of a valuable ingredient, concealment of inferiority, or use of harmful ingredients in foods. It deemed that a food was adulterated if, among other things, the food's strength or quality had been lowered, or if it had been cheapened. However, the 1906 act contained no provision requiring foods to bear a statement of ingredients on the label and, thus, offered no means of comparing foods to determine whether dilution or substitution had occurred.

The misbranding provisions of the 1906 act actually contributed to the proliferation of cheap or debased foods that could be sold legally by reason of its so called ''distinctive name proviso.'' This provision permitted the marketing of foods that would have been adulterated and misbranded if sold under the name of the food they purported to be by allowing their sale under meaningless ''distinctive'' names such as ''Bred-Spred.'' Bred-Spred products were made in imitation of fruit preserves produced by adding acid and pectin to about 15 percent fruit. This quantity of fruit was far less than that used by the homemaker or by reputable manufacturers to make fruit preserves at that time.

The lack of a provision to establish mandatory standards under the 1906 act handicapped the Government in its attempts to maintain the integrity of the food supply by making it difficult for the Government to proceed against a debased food product, particularly a fabricated food. (See *U.S.* v. *10 Cases ''Bred-Spred,''* 49 F.2d 87 (8th Cir. 1931).)

Under the 1906 act, the Government established advisory definitions and standards for use in food inspections. However, these definitions and standards had no effect on the enforcement of the law. To establish a violation of law, the Government had to introduce testimony showing that an undeclared variation was not one expected by consumers in an article bearing the name of the food. It was also necessary for the Government to show that the variation was not the prevailing good commercial practice. Without standards or guidelines, judgments under the 1906 act varied widely. Manufacturers could not be assured that their products would not be found to be violative, nor were consumers' interests effectively protected. Manufacturers were not protected against disreputable competitors who could affect competitive pressures and, more importantly, reduce consumer confidence in the food supply.

Eventually, the Government and the industry came to the conclusion that a new statute was needed to ensure the integrity of food by keeping economically adulterated foods off the market. This recognition resulted in inclusion of three key provisions (sections 401, 403, and 701 of the act (21 U.S.C. 341, 343, and 371) for standardization of foods.

C. History: Post-1938

1. The 1938 Act

a. *Authority to establish standards.* The authority to establish standards is set forth in section 401 of the act. This section provides that:

> Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: *Provided,* That no definition and standard of identity and no standard of quality shall be established for fresh or dried fruits, fresh or dried vegetables, or butter, except that definitions and standards of identity may be established for avocados, cantaloupes, citrus fruits, and melons. * * *

Early standards of identity established under the act were primarily ''recipe standards,'' defining in considerable detail the specific ingredients (both mandatory and optional ingredients) to be used and, in many instances, the procedure to be followed in manufacturing the food, much like home recipes. In addition, they provided assurance that only ''harmless'' ingredients would be used in the food and designated which optional ingredients must be declared on the label.

Standards were intended to prevent economic deception. They were intended to protect consumers from receiving debased or watered down food products in which water or other fillers had been substituted for more valuable constituents. For example, the early standards for flour products established a maximum level of not more than 15 percent moisture in these foods. They also included a referenced method of analysis for moisture content to allow the manufacturer to use the same procedure as the Government inspector in testing the food for compliance with the standard.

In defining the composition of foods, the definitions and standards of identity provided an added measure of assurance that the food supply would be safe. The standards designated the specific ingredients that should be used by name or limited them as ''harmless ingredients'' where class names were used. For example, only harmless and assimilable forms of iron or calcium salts could be added to enrich farina, and, in the case of vitamin D addition, only harmless carriers that do not impair the enriched farina could be used (§ 137.305). Because the statute did not have in place, at that time, a mechanism for preclearance of food additives or other functional optional ingredients that were used in foods, inclusion of such a limitation on ingredients provided further assurance that the foods would be wholesome and not adulterated.

b. *Misbranding provisions of the act.* To ensure compliance with the definitions and standards established under section 401 of the act, Congress included two paragraphs under the misbranding provisions that effect food standards.

Section 403(g) of the act, states that a food shall be deemed to be misbranded:

> If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless: (1) It conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food.

In addition, section 403(i) of the act, as originally enacted, provided that a nonstandardized food (i.e., ''If it is not subject to the provisions of paragraph (g) of this section) was misbranded * * * unless its label bears (1) the common or usual name of the food, if any there be, and (2) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; * * *.''

Thus, the act, as originally enacted, required that foods purporting to be, or represented as, the standardized food comply with the compositional provisions of the applicable standard and bear the name designated in the definition and standard for the food. However, the act only provided for label declaration of the optional ingredients used in standardized foods and not the mandatory ingredients. Nonstandardized foods, on the other hand, had to list all ingredients used in the food, except that ''spices,'' ''flavorings,'' and ''colorings'' could be declared collectively using those terms.

c. *The standards setting process.* As enacted in 1938, section 701 of the act (21 U.S.C. 371) provided in paragraph (e)(1) and (e)(2) that ''any action for the issuance, amendment, or repeal'' of any standard of identity must be accomplished under formal rule making procedures where interested persons are given an opportunity to participate in a trial-type hearing.

d. *Preemption.* As enacted in 1938, the act contained no provision providing that Federal food standards preempt State laws. While the standards provided a minimum below which the States could not go, it did not prevent the States from adopting more stringent standards. (See *Grocery Manufacturers of America* v. *Gevace,* 581 F. Supp. 658 (S.D.N.Y. 1984), aff'd in part and rev'd in part, 75S F.2d 993 (2d Cir.), *cert. denied* 474 U.S. 820 (1985).)

2. Agency Implementation of the Standards Provisions

a. *Standards of identity.* FDA has implemented section 401 of the act by adopting over 280 standards of identity. These standards establish the common or usual name for a food and define the nature of the food, generally in terms of the types of ingredients that it must contain (i.e., mandatory ingredients), and that it may contain (i.e., optional ingredients). Standards may specify minimum levels of the valuable constituents and maximum levels for fillers and water. They may also designate the manufacturing process when that process has a bearing on the identity of the finished food. Finally, standards provide for label declaration of ingredients used in the food and may require other specific labeling, such as the declaration of the form of the food, packing medium, and flavorings or other characterizing ingredients as part of the name of the food or elsewhere on the principal display panel of the label.

Individual food standards vary widely in their content. These variations have developed because of the different aspects of food technology that are responsible for providing the defining characteristics of a food. Some foods are defined and distinguished by their ingredients. The standards for these foods set specific limits on the levels of ingredients that must be used in them. For example, the standard of identity for fruit preserves and jams (§ 150.160) states that these foods must contain a minimum of 45 parts or 47 parts of fruit (depending on the type of fruit used) to each 55 parts of sugar or other sweetener, and that they may contain other ingredients such as pectin, acidifying agents, buffering agents, preservatives, and antifoaming agents. In this way, the standard ensures that when consumers purchase ''jam,'' they receive a product that contains a level of fruit that meets their expectations.

Other foods standards focus on compositional characteristics of the food, rather than on the specific ingredients. The standards of identity for fruit juice products in part 146, for example, define these juices in terms of minimum juice soluble solids contents rather than on the ingredients used to make the food. Thus, the standard of identity for orange juice from concentrate (§ 146.145) requires that the food contain not less than 11.8 percent orange juice soluble solids, exclusive of any added sweetener. In this way, the standard helps to ensure that all products marketed as ''orange juice'' approximate, in the most important respects, the juice that comes directly from the fruit, and that consumers will receive a consistent orange juice product.

The standards of identity for milk products in part 131 list the minimum milkfat and minimum milk solids not fat levels that must be contained in these foods. These specific compositional requirements protect against addition of water or other substances that could dilute the value of the nutrients in the food. In the case of certain dehydrated products, such as lowfat dry milk, the standard of identity (§ 131.123) specifies a maximum moisture level to protect against microbiological growth and to enhance the overall keeping quality of the product. To ensure that these compositional requirements are met, the standards reference specific methods of analysis.

Other foods owe their distinctive characteristics to the manner in which they are produced. Thus, the standards for these foods reflect this fact. Standards of identity for some cheeses in part 133, for example, specify the manufacturing process, in addition to establishing minimum milkfat and maximum moisture requirements, to distinguish one cheese from another. These standards may also prescribe a curing process or specific species of mold to be used on or in the cheese to ensure that the finished cheese has the characteristic organoleptic properties commonly associated with that cheese.

Some foods are defined by the physical characteristics of the food itself. For example, the particle size is an important factor in distinguishing cracked wheat from crushed wheat. Thus, the standards of identity for cracked wheat in § 137.190 and crushed wheat in § 137.195 include methods of analysis for the determination of the particle size of these foods. The test methods are used by manufacturers and regulators to ensure that foods labeled with these standardized names will possess the same physical properties from purchase to purchase. They also ensure that bakers will not have to do additional particle sizing of the ingredients before they are used for a specific baking operation. Similarly, standards of identity for flour (§ 137.105), instantized flour (§ 137.170), and whole wheat flour (§ 137.200) rely in part on the particle size determination as a distinguishing feature of these foods. Although the primary purpose of the particle size designation is to aid in establishing the identity of the food, it also serves as a quality factor and ensures that consumers will receive the same physical characteristics in all of these cereal grain products, regardless of where they are purchased or by whom they are produced.

The distinctive property of other foods is provided by their nutrient levels. For example, the standards of identity for certain juices provide for the addition of vitamin C, some for milk products provide for the addition of vitamins A and D, while standards of identity for certain bakery products, enriched bread, rolls and buns, and cereal products, such as enriched macaroni and noodle products, enriched flours, and enriched corn meals provide for addition of thiamin, riboflavin, niacin, iron, and calcium. The enriched cereal grain products also provide for the optional addition of vitamin D. Such standards provide for consistency in fortification levels when nutrients are added to these foods and also serve as guidance to industry on what the agency believes are reasonable target levels for these nutrients in foods.

b. *Standards of quality and fill of container.* Standards of quality set minimum specifications for such factors as tenderness, color, and freedom from defects in canned fruits and vegetables. Quality standards, established primarily for canned foods, place limits on defects, such as limits on the amounts of peel in canned peeled tomatoes, or on the number of pit fragments that may be in canned peaches, on the levels of seriously blemished (shriveled, hard, discolored, etc.) peas in canned peas, and on the number of pits in pitted canned cherries. Such characteristics would not be readily apparent to the purchaser of these foods because of the nature of the foods and the manner in which they are presented to the consumer (inside of a can). In the case of certain juice products, they may also establish criteria for percent juice soluble solids and maximum acidity to ensure that the juice product will have an acceptable flavor profile.

Standards of fill of container set out requirements as to how much food must be in a container. These requirements are particularly important when foods are packed in liquids and sealed in opaque containers. The types of fill requirements differ for various products, depending on the characteristics of the food. Some fill-of-container standards specify minimum weights of solid food that must be present after the drainable liquid has been poured off (referred to as ''minimum drained weight''). For example, the fill of container for canned corn in § 155.130(c) is not less than 61 percent of the water capacity of the container. Other standards provide a simple stipulation that the container, with or without added liquid, must be filled with solid ingredients to a maximum that will still permit the lid to be attached and the food processed by heat to prevent spoilage, without crushing or breaking the solid ingredients. This type of standard was established for several canned fruits, i.e., apricots, cherries, peaches, and pears (see §§ 145.115(c), 145.125(c), 145.170(c), and 145.175(c), respectively), because the size, shape or textural properties of the foods will affect the fill of the raw food and the drained weight of the finished product. For example, the firmness, size, and shape of the peach or pear pieces (e.g., halves, slices, chunks) before heat processing in the container makes them difficult to pack to uniform fill-in weights. The fill of container for such foods is further complicated by the tendency of the pieces to soften on cooking and ''pack down,'' giving the appearance of a slack-filled container.

The minimum fill-of-container requirements in standards provide guidance to the manufacturer, as well as

to the food inspector, as to what constitutes a well-filled container. For some products, such as crushed pineapple, applesauce, pineapple juice, and packed nuts, where the consistency of the product is more uniform, or where there is no added packing medium that could serve to dilute the product contents, the required minimum fill of container is the total food contents, expressed as a percentage of the capacity of the container.

In the case of canned tuna (§ 161.190), which may be packed in oil or water, FDA has established minimum fill of container requirements, expressed in terms of the pressed cake weight, in ounces, depending on the size of the container used to pack the tuna. The minimum pressed cake weight requirement assures consumers that they will obtain a minimum amount of tuna flesh in each can. The measure of tuna obtained in the laboratory by the pressed cake weight procedure described in the standard approximates the measure that the homemaker would observe when the lid of the tuna can is removed and is used to press the tuna and drain the liquid. In the case of canned Pacific salmon (§ 161.170), in which no packing medium is added, the minimum fill of container is expressed in terms of a minimum net weight of salmon for each container size. The minimum net weight requirements established in the standard are slightly less than the water capacity of the container, thereby taking into account the irregular shapes of the salmon pieces, but at the same time, providing assurance that the containers will not be underfilled.

FDA regulations require that consumers be informed when foods do not comply with the applicable standard of quality or fill of container. Under § 130.14 (21 CFR 130.14), foods that fail to comply with the quality standards must bear bold label statements, such as ''BELOW STANDARD IN QUALITY,'' followed by a statement such as ''GOOD FOOD—NOT HIGH GRADE,'' or in the case of products that are substandard in fill, the statement ''BELOW STANDARD IN FILL,'' wherever the name of the food or any pictorial representation of the food appears so conspicuously as to be easily seen under customary conditions of purchase. The individual quality standards provide for an alternate label statement of the quality factor which makes the food substandard, such as ''EXCESSIVE COB'' on canned corn or ''EXCESSIVELY MEALY'' in canned peas instead of the general label statement, ''GOOD FOOD— NOT HIGH GRADE.''

Both the standards of quality and of fill of container provide detailed methodology for determining compliance. Because most of the methods included in the standards pertain only to the specific food identified by that standard, the agency has been of the opinion that this is the most efficient way to provide for such methods, e.g., the pressed cake weight method of analysis that pertains only to canned tuna. In some cases where the same method is used for multiple products, for example, the drained weight method of analysis for certain vegetables, FDA has simply referenced the method without repeating it in each of the standards (see § 155.3(a)). However, in the case of canned fruit cocktail, the drained weight method of analysis is incorporated in the standard of fill of container (§ 145.135(c)).

c. *Temporary marketing permits.* Under the agency's food standards program, FDA established a regulation providing for the issuance of temporary marketing permits (TMP's) in § 130.17. TMP's allow manufacturers to make products that deviate from applicable standards in specified ways and to test consumer acceptance of those foods in the marketplace. TMP's allow the manufacturer to market the product in interstate commerce to obtain data on the commercial viability of a change in a standard of identity before petitioning the agency to amend the applicable standard to provide for the deviation. Products marketed under temporary permits must be labeled in a manner whereby the consumer can distinguish between the food being tested and the food complying with the applicable standard.

FDA usually grants permits for a period not to exceed 15 months. However, with good reason, the agency may provide for a longer initial test market. Notice of the issuance of a permit, including a description of the deviations from the standardized food and the marketing conditions, is published in the Federal Register.

Under § 130.17, the TMP applicant may request an extension of the firm's permit, when such extension is necessary to obtain sufficient data to evaluate the test product. Requests for extensions must be accompanied by a description of the experiments conducted thus far under the permit, tentative conclusions reached, and reasons why further experimental shipments are considered to be necessary. Such requests must also be accompanied by a petition to amend the applicable standard to provide for the deviation.

If FDA concludes, based on the information supplied, that extension of the time for test marketing the product is in the interest of consumers, the agency publishes a notice in the Federal Register stating this fact and inviting other interested firms to participate in the test market under the same conditions as set forth for the original applicant, except that the designated distribution area for the test product would not apply. These extensions usually continue until FDA publishes a final regulation either modifying the standard of identity in the manner sought or terminating the proposed rulemaking, whichever is the case.

This procedure has worked well in providing manufacturers the flexibility to test the commercial viability of new, reformulated versions of traditional standardized foods. It has also served consumers well, allowing new and nutritionally advantageous products to be marketed before rulemaking. The data generated under TMP's also assist the agency in its rulemaking decisions. For example, before the passage of the 1990 amendments, the agency responded to more than 100 applications for TMP's for modified dairy products, such as nonfat sour cream, nonfat cottage cheese, and light eggnog. The success of these test products assured the agency that these nutritionally modified foods were viable products, which could be made to resemble and substitute for the traditional standardized food and in a manner so as not to be nutritionally inferior to the traditional standardized food. Recently, FDA has issued TMP's for white chocolate, a food that deviates from the cacao product standards in part 163 because it contains none on the nonfat cacao solids usually present in chocolate products.

3. Developments Affecting the Food Standard Regulations

a. *Safe and suitable policy.* Passage of the Food Additives Amendment of 1958 and the Color Additive Amendments of 1960 instituted premarket approval of new food and color additives. These amendments allowed FDA to develop its ''safe and suitable'' policy, codified in § 130.3(d), concerning functional ingredients used in foods. This policy provides that ingredients used in food must be listed food or color additives, or generally recognized as safe (GRAS) substances, and used at levels no higher than necessary to accomplish their intended functional effect in the food.

FDA first used this policy in 1961 in the standard of identity for frozen raw breaded shrimp (§ 161.175). At that time, it represented a significant change in the manner in which permitted

ingredients were designated in food standards. The standard simply provided for ''safe and suitable batter and breading ingredients,'' without listing the names of the specific permitted ingredients. This departure from the traditional food standards concept provided manufacturers with considerably more flexibility in the selection of ingredients to be used in the food. Along with this provision, the agency also required that each such safe and suitable optional ingredient used in the food be declared on the label.

Since the establishment of this policy, the agency has revised most of its standards to provide for the use of safe and suitable ingredients, by category, that perform the needed technical effect in the food, e.g., safe and suitable emulsifiers. However, a few of the standards have not been so updated to increase flexibility in the manufacture of those foods. These standards include the standards of identity for certain cheese products (e.g., §§ 133.169, 133.173, 133.179, 133.187, and 133.188), which specify antimycotics by name (e.g., sorbic acid, potassium sorbate, sodium sorbate, calcium propionate, and sodium propionate) and the levels at which they may be used in the food, and the standards of identity for artificially sweetened fruit products (e.g., §§ 145.116, 145.126, 145.131, 145.136, 145.171, 145.176, and 145.181), which designate the specific artificial sweeteners (saccharin and sodium saccharin) that may be used.

b. *The 1990 amendments*—i. *Ingredient labeling.* In the 1990 amendments Congress amended the ingredient labeling provisions in section 403(i) of the act by removing the language that limited full ingredient labeling to nonstandardized foods. The 1990 amendments also amended section 403(i) to require that certified color additives be declared by their common or usual names, rather than by the collective term ''colorings.'' The framers of the act in 1938 apparently believed that consumers would know what mandatory ingredients would be used in staple food products covered by standards of identity and, thus, only provided that the optional ingredients used in such food would need to be declared on the label. However, with advance in food product formulation and processing, the ingredients used in standardized foods in the 1990's are more varied, and many are less familiar to consumers than the ingredients that were being used in 1938. This fact, along with consumers' desire to know the nature of all ingredients used in foods, led to the amendment of section 403(i). In response, the agency amended the food standards, as necessary, in parts 131 through 169 to require label declaration of each ingredient used in these foods (58 FR 2850 at 2876 through 2887; and 58 FR 2888 at 2890 through 2896, January 6, 1993).

ii. *The standard setting process.* The 1990 amendments removed most section 401 proceedings from the list of rulemakings in which formal rulemaking is required under section 701(e) of the act. As a result, proceedings to establish, amend, or repeal food standards are subject to the requirements of informal notice and comment rulemaking. The only exception to this change is for actions to amend or repeal standards of identity for dairy products.

iii. *Preemption.* The 1990 amendments added section 403A(a)(1) to the act (21 U.S.C. 343–1(a)(1)). Under this provision, a State may not establish or continue in effect a standard of identity for a food that is the subject of a standard of identity under section 401 of the act if the standard is not identical to the Federal standard. One of Congress' goals in passing this provision was to provide industry with some relief from State requirements that interfere with its ability to market products in all 50 States in an efficient and cost effective manner (statement of Rep. Madigan, 136 Congressional Record H12954 (October 26, 1990)). Thus, as a result of the 1990 amendments, FDA's food standards are preemptive of State standards.

iv. *Other changes.* In addition to these provisions that bear directly on food standards, Congress made a number of fundamental changes in how virtually all foods are labeled that bear directly on the issue of the continuing need for some or all food standards. The 1990 amendments require that virtually all foods bear nutrition labeling. This information, plus the full ingredient list that is now required, ensures that consumers will have vastly more information about the make-up of a particular food product than was available in 1938. This information should make it immediately apparent if a marketer is attempting to sell a debased or watered down food. Because the standards were originally intended to prevent this type of economic deception, the nutrition labeling requirement raises a question as to whether food standards are still necessary.

The 1990 amendments also provide authority for FDA to adopt regulations defining nutrient content claims, such as ''reduced fat,'' ''low fat,'' and ''fat free'' in § 101.62 (January 6, 1993, 58 FR 2302 at 2418). Having established uniform definitions for these terms, the agency was able to establish a general definition and standard of identity in § 130.10, which permits the modification of a traditional standardized food to achieve a nutrition goal, such as a reduction in fat or calories. Such modified foods, complying with the requirements of § 130.10, may be named by the use of a nutrient content claim defined by FDA in part 101, such as ''reduced fat,'' and a standardized term, such as ''cheddar cheese'' (i.e., reduced fat cheddar cheese).

This general definition and standard of identity requires that the modified food: (1) Not be nutritionally inferior to the traditional standardized food that it resembles and for which it substitutes, (2) possess performance characteristics that are similar to the reference food, (3) contain a significant amount of any mandatory ingredient that is required to be in the traditional standardized food, and (4) not contain an ingredient that is prohibited in the traditional standardized food. However, under § 130.10, safe and suitable ingredients not specifically provided for in the standard for the traditional food may be added to ensure that the modified food will not be inferior in performance characteristics (e.g., physical properties, flavor characteristics, and shelf life) when compared to those of the traditional food. This one standard (§ 130.10) has provided enormous flexibility in the manufacture of foods that deviate from the traditional standards and in providing many healthful and informatively labeled food products to consumers. It has also eliminated the need for use of complex alternative names for foods, as well as the need for the industry to request establishment of new standards or TMP's to deviate from existing standards to make new foods to meet consumers' needs and desires.

In the past, many dairy products were defined by the level of milkfat in the food. Milkfat was considered to be one of the valuable constituents in the food, and if the minimum established level for milkfat was not met in the finished food, the product was deemed to be misbranded under section 403(g) of the act and adulterated under section 402(b) of the act. However, with the increased concern about fat and cholesterol in the diet, many consumers view milkfat in some dairy products as a negative factor or a constituent to be avoided rather than one that is sought after or highly valued. Under the general standard in § 130.10, manufacturers are able to meet consumers demands for reduced fat dairy products. Many new foods, e.g,

nonfat sour cream, reduced fat cheeses, and light or reduced fat ice cream products, to name a few, have been made available to consumers throughout the country in the past few years.

To assist manufacturers in producing informatively labeled reduced fat ice cream products, FDA published a final rule in the Federal Register of September 14, 1994 (59 FR 47072) that removed the standard of identity for ice milk and goat's milk ice milk. Products formerly labeled as ice milk may be labeled as ''reduced fat'' or ''lowfat ice cream,'' depending on the total fat content of the food. Manufacturers may make other versions of ice cream, such as ''nonfat ice cream'' or ''light ice cream.'' In that final rule, FDA also extended the optional sweeteners provision in the ice cream standard to include use of alternative sweeteners in reduced calorie ice cream products. For the next 3 years, until September 14, 1998, FDA is requiring that the name of the alternative sweeteners used in an ice cream be declared as part of the name of the food.

When Congress issued the 1990 amendments, it recognized that some standards of identity contained nutrient content claims as a part of their names and specifically exempted them from regulations implementing the requirements of the amendments. To ensure consistency in the use of such claims on food labels, the agency announced that it intended to amend as soon as possible those standards of identity that require that the use of the claim in the name of the standardized food be consistent with use of the claim on nonstandardized food labels. Elsewhere in this issue of the Federal Register, to effect that intent, FDA is proposing to rescind virtually every standard for a dairy product whose name includes a ''low fat'' or ''no fat'' claim.

D. Common or Usual Name Regulations

In the Federal Register of March 14, 1973 (38 FR 6964), FDA issued regulations in part 102 governing the establishment of ''common or usual names for nonstandardized foods.'' The agency stated in the preamble to the final rule that standards of identity are appropriate and useful where there is a need to prescribe the entire compositional requirement for a food, in addition to the name of the food. Often, however, the agency pointed out, there is a need simply to establish a uniform and informative name for food without the compositional aspects of a food standard.

In issuing this regulation, FDA did not intend to establish common or usual names for all foods. Many foods already have established names, for example, apples, carrots, or potatoes and the diced, sliced, dehydrated, or frozen versions of these foods. There is no need for regulations to define the nature of these foods. If these foods are labeled inappropriately or in a misleading manner, it is a simple violation of the misbranding provisions of the act. However, when these foods are fabricated with other ingredients or modified in ways that are unfamiliar to consumers, and when the same formulated products are being marketed with different names by different firms, the nature of the foods may become less obvious, and there may be need for regulation to ensure that consumers are not misled or deceived.

In the early 1970's, FDA received a petition requesting that it establish a regulation stating that onion rings were made from fresh onion bulbs, sliced and separated into rings, coated with batter or breading, and fried in a suitable fat or oil bath. The purpose of this regulation was to distinguish onion rings, so prepared, from an onion ring product that is made from fresh or dehydrated chopped onion, shaped by an extruder into ring shapes, breaded, and fried. This petition led to the establishment of the common or usual name regulation for ''onion rings made from diced onion'' in § 102.39. This regulation distinguishes onion rings made from comminuted onions from those made with intact slices. It also requires that, if the onion ingredient has been dehydrated, the name include this fact, i.e., ''onion rings made from dried diced onions.'' FDA received similar petitions for potato chips made from comminuted potatoes or dehydrated potato products leading to the establishment of another common or usual name regulation in § 102.41, ''potato chips made from dried potatoes.''

The 1969 White House Conference on Food, Nutrition, and Health had recommended that the agency establish by regulation uniform common or usual names for foods that accurately reflect the reasonable expectations of consumers. The Conference recommendation focused on concern that the amount of the characterizing ingredient, if any, be represented on the label in percentage form or some other uniform method. In the preamble to the final rule, FDA acknowledged that disclosure of the amount of a characterizing ingredient is often necessary for the consumer to choose between two competing products when the amount of the ingredient is important to the value of the food.

Part 102 consists of general principles for common or usual names for classes or subclasses of foods and several regulations that set requirements for naming specific nonstandardized foods. The general principles in § 102.5 require that the common or usual name of a food accurately describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients. The name must include the percentage of a characterizing ingredient or component or a statement of its presence or absence when the portion of that substance has material bearing on the value of the food, or when the appearance of the food might otherwise mislead the consumer as to the amount of the substance present.

FDA has issued common or usual name regulations for nonstandardized foods only when necessary to fully inform consumers, or where different names were being used for the same product by different manufacturers. The first common or usual name regulation that required percentage declaration of the valuable characterizing ingredient was for seafood cocktails consisting of two or more seafood constituents or for cocktails with one seafood constituent. FDA had received consumer complaints concerning both the amount of seafood present in such cocktails and the use of labeling that suggested a greater proportion of seafood than was present. The common or usual name sought to correct this situation. Because the proportion of the seafood in such cocktails has material bearing on price and consumer acceptance, this regulation allowed consumers to make better purchasing decisions.

At the time they were established, one of the benefits of the common or usual name provisions in part 102 was that names of new products could be established by regulation using informal notice and comment rulemaking procedures, rather than the lengthy formal rulemaking procedures required for food standards. With passage of the 1990 amendments, however, as explained above, new standards of identity also may be established by notice and comment rulemaking proceedings. In view of this change in the act, the agency requests comments on the need to retain the dual mechanisms of standards and common or usual name regulations for establishing the definition of a food. Comments who support retention of both should describe the circumstances in which common or usual names should be chosen over standards of

identity. If standards of identity are deemed more appropriate, the agency requests comments on whether the common or usual name regulations for specific foods in part 102 should be retained in that part, transferred to the appropriate food standards parts, or repealed.

II. Reinventing Government

Congress directed FDA to establish and implement food standards because there was a real need to protect consumers from economic fraud and to promote honesty and fair dealing in the interest of consumers. Food standards have been beneficial through their long history of providing assurance to consumers of product uniformity, with the resulting expectation and belief by consumers that all products bearing a particular name will possess the same characteristics irrespective of where they are purchased, or by whom they are manufactured or distributed. Food standards have also been an efficient mechanism for addressing public health problems through mandatory fortification requirements. In addition, standards have provided manufacturers with guidance in the production, naming, and labeling of products and with assurance that competitors will have to meet the same guidelines for the same foods.

However, the agency recognizes that food standards may serve as an impediment to the food industry to the degree to which they fail to reflect advances in food science and technology. New ingredients and plant varieties that allow manufacturers to enhance a food's organoleptic or functional properties, alter its nutritional profile, or extend its shelf life, are being developed and used in nonstandardized food products. Incorporation of these advances into standardized foods may be difficult or impossible without laborious amendment of the relevant standard. FDA believes that manufacturers of standardized foods should have the ability to make use of advances in food technology, provided the basic nature of the food remains essentially the same.

Also, consumer expectations may have changed dramatically in the past two decades. Busy, active consumers put a premium on convenience when purchasing foods, and this emphasis may have also altered their expectations relative to basic, staple food products. Additionally, with the growing body of scientific evidence linking diet and health, consumers are demanding modified versions of traditional products that have lower amounts of constituents associated with negative health implications, such as fat, saturated fat, cholesterol, and sodium.

Some critics have suggested that the agency revoke all food standards and allow market forces to control the composition of the products that are currently regulated by standards. On the other hand, industry and consumer spokespersons have expressed support for standards, believing them necessary to ensure that all manufacturers operate in a spirit of fairness and to ensure consistency in the products consumers are purchasing. They also state that standards promote consistency in labeling and to serve as a basis for nutrient content claims. For example, standards for traditional dairy products with established minimum fat levels can be used as the bases for ''reduced fat'' claims on labels of modified versions of these foods.

FDA believes that the two actions described previously, namely: (1) Amending standards to provide for the use of ''safe and suitable'' ingredients rather than explicit designation of all ingredients and (2) establishment of the general standard in § 130.10 for foods named by the use of a nutrient content claim and a standardized term, have lifted some of the restrictiveness of standards. However, the agency is considering further steps for providing flexibility in how foods are formulated and named, including, if appropriate, eliminating food standards, while continuing to promote honesty and fair dealing in the interest of consumers, and while continuing to ensure that food is not adulterated or misbranded. In light of the President's memorandum, FDA is looking critically at food standards.

The agency notes that the Food Safety and Inspection Service (FSIS) of the U.S. Department of Agriculture has established a number of food standards, under the authority of the acts that it administers. Many of these standards define the nature of meat and poultry products in a manner similar to FDA standards described previously. In a separate document, FSIS is announcing that it too is critically reviewing its standards in accordance with President Clinton's directive. Comments to this document are urged to consider, and provide comments separately to, FSIS's document.

III. International Standards

The United States is a charter member (dating back to 1963) and strong supporter of the Codex Alimentarius Commission (Codex) and its food standards program. The aim of the Codex, which is sponsored jointly by the United Nations' Food and Agriculture Organization (FAO) and World Health Organization (WHO), is to promote the health and economic interests of consumers, while encouraging fair international trade in food. One of the general provisions of FDA's food standards program is the review of Codex food standards, following the procedure described in § 130.6(a): ''All food standards adopted by the Codex Alimentarius Commission will be reviewed by the Food and Drug Administration and will be accepted without change, accepted with change, or not accepted.''

It has been FDA's policy to publish new Codex food standards in an advance notice of proposed rulemaking in the Federal Register for review and informal comment. If the comments support adoption of the Codex standard or amendment of an existing standard to incorporate changes based on the Codex standard, FDA publishes a proposal in the Federal Register to adopt the Codex standard's provisions insofar as practicable. A proposal of this type could also be begun on the agency's own initiative. These procedures are described in § 130.6. To date, the agency has considered 83 Codex standards for adoption. (As a part of its initiative on international harmonization, FDA is considering a separate rulemaking to amend and update procedures in § 130.6 to make them more consistent with current Codex policies.)

FDA notes that U.S. delegates participating in the development of the international standards at Codex Committee meetings have often relied upon criteria established in the U.S. food standards in deciding on compositional requirements to be included in Codex standards. The agency believes that this procedure is a reasonable course of action because the U.S. standards, for the most part, reflect current commercial practice in this country. In the absence of U.S. food standards, would the position of the U.S. delegates in the Codex Committee meetings be weakened? How important is it to exporters and importers that the compositional provisions of the U.S. food standards be reflected in international specifications such as those established by the Codex Alimentarius?

IV. Economic Issues

Executive Order 12866 directs FDA to maximize the net benefits (benefits minus costs) of its regulations. The agency generally considers the following seven factors in determining the net benefits of a food standard:

1. Net benefits are likely to be higher for standards involving the product

characteristics about which consumers are most concerned. FDA has no formal method of determining the level of consumer concern about various characteristics, however and, thus, seeks information on this issue. In particular, consumer concerns may change over time. FDA requests comments on how it should factor changing consumer concerns into the economic assessments that it does for any rulemaking that may result from this advance notice of proposed rulemaking.

2. Net benefits are likely to be higher for standards that consumers are best able to understand and interpret. Thus, it becomes significant if there are any cases in which standards of identity produce confusion rather than provide information. FDA requests comments as to whether any such standards exist. For example, might consumers believe that products similar to standardized products but which fail to meet the standard are necessarily inferior to products that meet the standard? Such confusion may deter consumers from purchasing nonconforming products, even though those products may have all the characteristics some consumers usually associate with that type of product or all the characteristics desired by consumers. This confusion could lead to a reduction in the development of new products, a reduction in competition between similar products, and a reduction in product variety. FDA requests comments and information on whether consumers may be confused when comparing standardized foods to other foods and on the importance of product variety in particular markets.

3. Net benefits are likely to be higher for standards dealing with characteristics that are least amenable to direct informational labeling, including both labeling required by FDA and voluntary labeling by manufacturers. Characteristics that are not amenable to direct informational labeling are those for which direct labeling would be particularly complex or lengthy, such as the relative proportion of various ingredients, particular functional or organoleptic characteristics, or particular methods of manufacture. Other characteristics, such as the presence of particular ingredients, nutritional facts, and the contents of containers, are now labeled for most products. FDA requests comments on which characteristics are most and least amenable to direct labeling.

4. Net benefits are likely to be higher for standards involving product characteristics that cannot be detected after purchase. Although information on characteristics that can be detected after, but not before, purchase can prevent post-purchase dissatisfaction, the value of this information is likely to be less. If a consumer purchases a brand name product and is not satisfied with that product, that consumer will purchase a different brand name in the future. Thus, food manufacturers have an economic incentive to produce products with the characteristics consumers desire, and that they can ensure are present. The agency believes that information about characteristics that cannot be detected after purchase is more valuable because consumers cannot acquire this information on their own. FDA requests comments on how much value the consumer places on being able to detect product characteristics before purchase so as to avoid post-purchase dissatisfaction.

5. Net benefits of federally established standards are likely to be higher for those standards least amenable to implementation by private organizations. If consumers are willing to pay for assurances that products have certain characteristics, it may be possible for private organizations to certify the presence of those characteristics in some cases.

6. Net benefits are likely to be higher for standards that are short, simple, and flexible. The lengthier and more complex a given standard, the more difficult it is likely to be for FDA to issue, and it may be more difficult to enforce. Shorter and less complex standards are also less costly for manufacturers to interpret and comply with. The more flexible a standard, the less likely FDA will have to revise or amend that standard in the future, and the less costly it will likely be for manufacturers to comply with that standard. FDA requests comments on the proper degree of flexibility for particular standards.

7. The net benefits of particular Federal standards may be larger or smaller than those of State standards preempted by those Federal standards. Conflicting State standards generate compliance costs because manufacturers selling products under conflicting standards must either provide alternative product formulations or labeling for those products. However, Federal standards are not necessarily superior to State standards because Federal and State standards may have different costs or benefits with respect to any of the factors listed previously, that is, State standards may provide more or less information than Federal standards, may restrict competition to a greater or lesser degree than Federal standards, and so on. Consumers in different States, however, may have conflicting ideas over the proper definition of various products, and some State standards may provide some consumers with better information on the characteristics that most concerned them. The benefits and costs of harmonizing Federal or State standards with international standards can be analyzed in the same manner as the benefits and costs of harmonizing State standards through the use of Federal standards.

V. Request for Information

Given this background on past standards activities and the agency's commitment to review all of its standards, FDA is soliciting comments on the following issues, as well as any other ideas that would assist the agency in fulfilling its mission to protect the interest of consumers. FDA particularly requests comments that reflect the following concerns of broad segments of industry, food manufacturers, and distributors, including importers and exporters, individuals and consumer groups, academia, State and local governments, and the international community:

A. Overall Operation of Food Standards

1. Utility of the System

a. Some persons have argued that there should be a partial or total dissolution of food standards. Do you agree? If so, why? What, if anything, should take their place? Are some standards obsolete? Are there different types of standards, some of which are more meaningful than others? Could the objective of food standards, ''to promote honesty and fair dealing in the interest of consumers,'' be accomplished by other, more effective means? If so, how would it be accomplished within the limits of current and anticipated FDA resources?

b. Are there any data that indicate whether consumers find the current system of standards meaningful, or whether significant alteration of standards would significantly affect consumers' ideas about the integrity of food products?

c. Does industry need compositional standards for orderly marketing of foods? Are food standards needed to control the composition of fabricated foods such as cheeses, ice cream, and enriched cereal and bakery products?

2. Naming Conventions

a. Food standards of identity are a means of defining the composition of a food that is marketed under a designated common or usual name. What criteria should be used for determining when a food standard is

appropriate? How should FDA interpret the phrase in section 401 of the act ''to promote honesty and fair dealing in the interest of consumers''? Should evidence of the existence of consumer confusion or dissatisfaction be required as a precondition before FDA undertakes the standards setting process?

b. In which markets does the potential misinterpretation of standards of identity generate a significant tradeoff between consumers' desire for product consistency and product variety? Given that standards define the trade-off between product consistency and product variety, for which products or characteristics is variety least important to consumers, and, hence, which products or characteristics are most appropriate to be standardized?

c. In section II.A. of this document, FDA discussed the different kinds of defining characteristics that serve as the basis for a standard of identity. Are food standards distinguishable by these characteristics? Can they be divided into categories, and should these categories be evaluated separately? For example, should standards for foods defined by physical characteristics, such as cracked wheat, be retained? Should they be revised by retaining the criterion for the defining characteristic, e.g., particle size, and removing the specific instructions for measuring the defining characteristic? Can the criterion be used effectively if the method to be used for measuring it is not specified? How can FDA best determinethe characteristics of food with which consumers are most concerned?

d. In addition to promoting honesty and fair dealing, standards also promote the health and safety of the general public. As noted above, in section I.C.2.a. of this document, a number of the standards of identity contain provisions for restoration of nutrients which may be lost during processing of the food or addition of nutrients to correct a nutritional deficiency, such as the addition of certain B vitamins and iron in cereal grain products. The agency requests comments on whether food standards are the best means of providing for the addition of such nutrients, and, if not, on what those other means are.

3. Products Sold to Manufacturers

Some standards of identity govern products that are sold primarily to other manufacturers, such as the standards for lactose in § 168.122 and dried glucose sirup in § 168.121. These standards define the purity of these ingredients. The agency requests comments on the need to retain these standards. Are standards that govern products that are sold primarily to manufacturers for use as ingredients in formulating other foods necessary to promote honesty and fair dealing in the interest of consumers? Would purity specifications for products, such as lactose, be more properly provided in food additive regulations, GRAS affirmation regulations, or other nonregulation sources such as the Food Chemicals Codex?

4. Test Marketing of Products

Should the agency continue to issue temporary marketing permits? Is there another way that the food industry could label, for test marketing purposes, products that deviate from the applicable standard of identity that would ensure that consumers will not be misled about the nature of the food and alert the consumer that the food is not the traditional standardized food? For example, could a product be labeled with a bold statement that ''this food deviates from the standard of identity established by the Food and Drug Administration because _____,'' and not be considered to be misleading to consumers? Would such a statement be meaningful to consumers? Can such a system be reconciled with section 403(g) of the act?

5. Methods of Analysis

FDA often provides detailed methods of analysis in its standards of identity, quality, and fill of container. Given that Federal food standards are preemptive, FDA believes that providing such detail for specific products in the standards appears to be an efficient way to convey to state and local enforcement agencies, as well as the food industry, information on the procedures the agency will use in its enforcement actions. In some of the food standards, where the same analytical method is used across many different foods, the agency may reference the method in a text such as the International AOAC's Official Methods of Analysis or a method that appears elsewhere in the Code of Federal Regulations. However, in the interest of having less complex standards, the agency requests comments on the need to continue to incorporate specific methods of analysis in food standards. Would incorporation of these methods in a separate manual or section of the Code of Federal Regulations be preferable to the current procedures? Are there other procedures that would provide for easier updating of the methods than amendment of the standards of identity? FDA points out that its current policy is to require that the methods it uses for enforcement of the provisions of the standards go through the rulemaking procedures applicable to all other provisions of the standards. Any change in how methods of analysis are dealt with must take into consideration the legal status of the resultant specification.

6. Elimination of Federal Preemption; Impact on State Jurisdiction

FDA specifically requests comments on the preemption aspects of standards of identity. If Federal standards of identity were discontinued, the States would be able to establish their own compositional requirements, a situation that would be contrary to the congressional move toward national uniformity in food standards and labeling. Is this desirable? How significant are costs associated with conflicting state regulations to firms marketing products interstate commerce?

In light of the preemption provisions of section 403A of the act, the agency requests comments as to whether it is in the interest of the general public that the agency retain a Federal food standards program. If so, should the operation of that program deviate from the existing system of standards of identity and common or usual names regulations? If it is not deemed to be in the interest of the public, what changes should be made in the act and in the regulations to effect the necessary changes in food regulation? Comments should be supported by data where available on the issues relating to the economics of production and marketing of commodities currently covered by food standards or common or usual name regulations, including the costs and benefits to consumers, industry, and international trade.

7. Impact on International Trade

a. How significant are the costs associated with State or Federal standards of identity that do not conform to international food standards?

b. In recommending an alternative to the current system of regulating the manufacture and sale of food using standards of identity and common or usual name regulations, comments should take into account the impact of the alternative on FDA's ability to participate in the development and harmonization of international standards. For example, how effective would U.S. delegates be in debating the merits of specific provisions in a Codex standard if the United States had no comparable standards?

8. FDA–FSIS Harmonization

FDA recognizes the need for consistency between FDA and FSIS in the development and implementation of food standards that set forth minimum compositional requirements. The agency believes that manufacturers will be better able to comply with the requirements of both agencies if similar approaches are used. Thus, to the extent possible, one of the agency's goals is to harmonize its regulations with those of FSIS. The agency requests comments on how this goal might be accomplished. Is consistency in the two agencies' policies sufficient harmonization to make regulations easier to use, or should the standards established by both agencies be listed together and in similar formats? For example, would codification of the FSIS and FDA standards of identity in the same Title of the Code of Federal Regulations be beneficial to users of these regulations? Commenters responding to this issue should consider the different authorities granted to FDA under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 *et seq.*) and to FSIS under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) in promulgation and enforcement of the standards, particularly the premarket clearance and inspection authority that is available to FSIS and not to FDA.

FDA regulations cover a wider range of food products than those of FSIS. In addition, FDA standards appear in a number of different formats, some of which also encompass quality and fill of container requirements. Should these differences continue, or should the two agencies strive to have a consistent format for their food standards?

9. Agency Budget Constraints

Because of budget constraints, FDA must prioritize its resources. In such a situation, matters affecting food safety and public health take precedence over those concerning issues of economic deception, such as the development and revision of food standards. If comments support a continuance of the existing food standards program, FDA requests comments on where resources for the program would be obtained. Should it be changed to a fee supported program in which petitioners for new standards or amendments to existing standards, including applicants for temporary marketing permits, would pay a filing fee that would cover the agency's cost of petition or application review and evaluation and the subsequent Federal Register document preparation?

10. Imitation Foods

A related matter that would arise should FDA decide to retain food standards in some form or another is the question of whether FDA should modify its treatment of imitation foods. Under § 101.3(e), a food shall be deemed to be an imitation, and thus subject to the requirements of section 403(c) of the act, if it is a substitute for and resembles another food but is nutritionally inferior to that food. If a food is an imitation, then the label of the food shall bear the word ''imitation'' and, immediately thereafter, the name of the food imitated. FDA requests comments on whether, if it retains food standards, it should modify its treatment of imitation foods in any way.

B. Alternatives

1. Regulate All Foods as Nonstandardized Foods

Revoke the existing food standards. Under this alternative, all foods would be labeled as nonstandardized foods in accordance with the regulations in parts 101 and 102. This alternative would provide maximum flexibility to manufacturers and would provide for a wider variety of foods to consumers. At the same time, it would mean that consumers would no longer be able to rely on the definitions of familiar foods established by foodstandards. FDA requests comment on the value of this alternative.

2. Declaration of Percentage of All Major Ingredients

Some persons have suggested label declaration in the ingredients list of the percentage of all ingredients used in a food as an alternative to minimum compositional requirements in food standards. Historically, FDA has not required such quantitative labeling of ingredients.

FDA now seeks comment on whether such quantitative ingredient labeling is a desirable and feasible alternative to food standards. If it is, how extensive should this labeling be? Should the percentages of all ingredients be listed? Should the declarations be limited to only the major ingredients in the food or to those ingredients that are present at a level greater than a certain designated limit, for example, 2 percent or more? What impact would this have on industry's ability to be flexible in its formulations if the labels must specify accurately the percentage of each ingredient or of each major ingredient? Would percentage ingredient labeling be adequate to allow consumers to distinguish between products with similar appearance? How important is percentage declaration of ingredients now that nutrition labeling of foods is mandatory? In considering the alternatives to the current system of standards of identity and common or usual name regulations, the agency requests that commenters consider the costs to industry, enforcement agencies, and consumers, as well as the benefits, of the alternatives.

3. Percentage Labeling of Characterizing Ingredients in the Food Name

Could a simpler system of nomenclature be established such as one based on a percentage declaration of the valuable characterizing ingredient in the food, for example, ''strawberry jelly, 30% strawberries,'' or ''peanut butter, 80% peanuts?''. (FDA standards for these foods require that strawberry jelly contain not less than 45 parts strawberries and 55 parts sweetener and that peanut butter contain not less than 90 percent peanut ingredient.) This approach would allow manufacturers to include greater or lesser amounts of the characterizing ingredients with the consumer being the ultimate decisionmaker regarding the product's acceptability. Would such a system be similar to common or usual name regulations in Part 102? Should a level be established below which a product could not be called by the traditional name? For example, should a product labeled as containing 5 percent strawberries be allowed to be called ''strawberry jelly,'' if the percentage of strawberries is declared as part of the name? Should this approach be limited to only certain types of foods? If so, what types of FDA regulated food products would be amenable to this type of labeling?

In multicomponent, fabricated food products, what determines the components whose percentage would be declared? Should the percentage of more than one component be declared? For example, in an egg noodle product, should the percentage of the flour and the egg be declared as part of the name of the food? Should the amount of milk used in the formulation or manufacture of a cheese be declared on the label even though not all of the components of the milk remain in the cheese? Would a declaration of the percentage of certain constituents of the finished food, e.g., the fat and protein contents of the cheese, be more informative than the percentage of the ingredients used to make the food?

4. Compositional Standard for the Parent Product

If percentage characterizing ingredient declaration were adopted for traditional

foods, such as fruit jellies, jams, and preserves, would it be necessary to identify a ''parent'' product, for example, a standardized jam or jelly that complies with minimum compositional requirements established by regulation, to avoid misleading use of the percentage declaration on the food label? For example, if products with less than 45 parts fruit were allowed to be called ''jam'' or ''preserves,'' provided the percentage of fruit were required to be declared, would a standard of identity for jam and preserves specifying the types of ingredients the foods contain and requiring a minimum fruit content, minimum sweetener content, or minimum soluble solids in the finished product be necessary? If so, would it be desirable that the standard of identity also require declaration of the percentage of fruit in the parent product for comparison purposes?

5. Establishment of Generic Food Standards

FDA has established several generic food standards, such as the class standards of identity in part 133 for certain types of cheeses for which the agency has not established individual varietal standards (e.g., § 133.150 *Hard cheeses*, and § 133.193 *Spiced, flavored standardized cheeses*) and the generic standard for nutritionally modified versions of traditional standardized foods in § 130.10 *Requirements for foods named by the use of a nutrient content claim and a standardized term*. Could the generic food standard concept be extended to other classes of food standards, e.g., canned fruits and canned fruit juices? Could these standards be written as ''performance'' standards rather than as recipes? If so, provide illustrative examples.

6. Private Certification of Food Products

Which characteristics of food products are most amenable to certification by private organizations rather than by local, State, or Federal government? Which factors render private certification impractical or inappropriate?

7. Labeling Qualifications That Product Differs From Government Standard

a. Should products that do not conform to FDA quality standards be labeled ''BELOW STANDARD IN QUALITY—GOOD FOOD, NOT HIGH GRADE?'' Is there better labeling that would provide more useful distinctions? Would alternative labeling be more readily interpreted in the case of substandard fill labeling?

b. FDA notes that most of the previous questions are directed primarily at standards of identity or common or usual name regulations. However, the agency requests that commenters also consider the need for standards of fill of container and standards of quality. How important are these regulations to consumers and the food industry? As in the case of standards of identity, FDA requests comments on whether these standards should be retained, revised, or revoked. Some of the quality factors of the standards were based on acceptance of the Codex Alimentarius international food standards and others on good commercial practice in this country. Thus, comments should consider as part of their analysis the impact of such standards relative to exported and imported food, as well as food produced and sold domestically.

8. Moratorium on Food Standards

FDA requests comment on whether, if it institutes a broad rulemaking on foods standards, a moratorium on foods standards actions, e.g., issuance of temporary marketing permits and the development of regulations to amend, repeal, or establish new standards, would be appropriate.

9. Are There Any Other Ideas?

a. Is there a better way to protect consumer expectations about food products without the market entry delays and demands on agency resources that frequently occur under the current system? If the existing system of standards is deemed to be outdated and no longer serving a useful purpose in the marketplace, is there a middle ground? Is there a different system for standards that would be useful? What, if anything, should be done about section 401 of the act? If this provision is not repealed, the agency will continue to receive petitions to issue standards of identity, quality, and fill of container.

b. The agency is particularly interested in the cost/benefit aspects of food standards. Do the benefits of standards of identity, quality, and fill of container to consumers and to the regulated industry outweigh the costs of such regulations? If the existing programs need to be restructured, how should this be accomplished, and how would such a change affect the costs and benefits to consumers?

c. What factors affect the benefits and costs of food standards, other than the factors listed previously? Are there considerations relating to the cost/benefit factors listed above that have not been acknowledged? How can FDA best estimate the benefits and costs of particular standards? Which standards are particularly beneficial or costly, and why?

Interested persons may, on or before April 29, 1996, submit to the Dockets Management Branch (address above) written comments regarding this advanced notice of proposed rulemaking. 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.

Dated: December 22, 1995.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 95–31492 Filed 12–26–95; 3:37 pm]

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federal register

Friday
December 29, 1995

Part VI

Department of Transportation

Federal Aviation Administration

14 CFR Part 91

Proposed Airspace and Flight Operations Requirements for the 1996 Summer Olympic Games, Atlanta, GA; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No. 28420 Notice No. 95–19]

Proposed Airspace and Flight Operations Requirements for the 1996 Summer Olympic Games, Atlanta, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes a Special Federal Aviation Regulation (SFAR), applicable for the period July 5 through August 11, 1996, to establish temporary flight restricted (TFR) areas overlying the various competition venues for the XXVI Olympic Games. This action also proposes to require slot reservations for arrivals and departures at specified airports in the vicinity of the Olympic Games. The FAA believes this action is necessary for the security of the venues, safe operation and management of aircraft operating to, within, and from these areas, and to prevent any unsafe congestion of sightseeing and other aircraft over the various game sites.

DATES: Comments must be received on or before January 22, 1996. Due to time constraints, the FAA is requiring a 21-day comment period.

ADDRESSES: Send comments on the rule in triplicate to the Federal Aviation Administration, Office of the Chief Counsel, Attn.: Rules Docket (AGC–204, Docket No.), 800 Independence Avenue, SW., Washington, DC 20591, United States of America (USA). Comments may also be sent electronically to the following Internet address: nprmcmts@mail.hq.faa.gov. Comments may be examined in Room 915G, weekdays, between 8:30 a.m. and 5:00 p.m. except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Janet Apple, Air Traffic Rules Branch, ATP–230, Airspace Rules and Aeronautical Information Division, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591; telephone (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in this regulatory action by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions. Communications should identify the regulatory docket number and be submitted in triplicate to the above specified address. All communications received on or before the closing date for comments will be considered by the Administrator. Commenters who wish the FAA to acknowledge receipt of their comments must submit with those comments a self addressed, stamped postcard on which the following statement is written: ''Comments to Docket Number.'' The postcard will be date/time stamped and returned to the commenter. The provisions in this rule may be changed in the light of comments received. All comments submitted will be available both before and after the closing date for the comments, in the Rules Docket for examination by interested persons. A report summarizing substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA–430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 426–8058. Communications must identify the notice number of this NPRM. Persons interested in being placed on the mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2 which describes the application procedure.

Comment Period Justification

The FAA is requesting a comment period of 21 days to allow for the incorporation of comments and the expeditious charting of the TFR areas. The early charting of the TFR areas would reduce the potential confusion of pilots since the SFAR restriction will significantly change the normal operating procedures of the affected areas. Furthermore, early charting of the TRF areas would result in security of the Olympic venues, safe operation and management of aircraft, and the prevention of any unsafe congestion of sightseeing and other aircraft over the various game sites and Olympic Villages.

Background/Need for Rulemaking

The 1996 Olympic Games will be held from July 19 through August 4, 1996, primarily in the Atlanta, Georgia, area and will mark the 100th anniversary of the modern Olympic Games. The event is the largest single, peace-time event in the history of the world. Over 350,000 visitors a day are expected to attend the games. In terms of air traffic demand, the pregame, game, and postgame activities from July 19 through August 4 are expected to generate substantial increases in aircraft operations in the Atlanta area as well as other sites in the United States. Those sites are:

The Olympic Village—Atlanta, GA
The Olympic Ring—Atlanta, GA
Wolf Creek Skeet Range—Atlanta, GA
Atlanta Beach—Jonesboro, GA
International Horsepark—Covington, GA
Stone Mountain Park—Stone Mountain, GA
Lake Sidney Lanier—Gainesville, GA
Sanford Stadium—Athens, GA
Golden Park—Columbus, GA
Lee College—Cleveland, TN
U.S. Highway 64—Tennessee
Ocoee River—Tennessee
Legion Field—Birmingham, Al
The Olympic Village—Savannah, GA
Sail Harbor and Wilmington River Transit Zone—Savannah, GA
Sailing Venue—Savannah, GA
The Citrus Bowl—Orlando, FL
The Orange Bowl—Miami, FL
RFK Stadium—Washington, DC
The Olympic Village—Davie, FL
The Olympic Village—Columbus, GA

The Special Federal Aviation Regulation (SFAR)

This notice proposes an SFAR to provide for the security of persons and property in the air and on the ground, and for the safe and efficient movement of air traffic during the Olympic period. To accomplish this goal, the SFAR is designed for flexibility and adaptability.

Traffic Management Arrival/Departure Slot Reservation System

During the busy Olympic period, the FAA must ensure continued safe and efficient use of airspace and air traffic control capacity. To achieve this objective while minimizing disruption to the air traveling public, the FAA proposes and arrival/departure slot reservation system to manage air traffic into and out of key airports in the Atlanta area. The proposed slot reservation system would be applicable to visual flight rules (VFR) arrivals at four specified airports, VFR departures at four specified airports, and to non-scheduled instrument flight rules (IFR) operations at 11 specified airports. As with most special events, airborne holding would not be authorized in lieu of a ground delay. Thus, aircraft without reservations may anticipate lengthy delays at departure airports.

VFR arrival slot reservations are required for: Cobb County-McCollum Field Airport (RYY), Marietta, GA; DeKalb-Peachtree Airport (PDK), Atlanta, GA; Fulton County-Brown

Field Airport (FTY), Atlanta, GA; and Gwinnett County-Briscoe Field Airport (LZU), Lawrenceville, GA.

VFR departure slot reservations are required for: Cobb County Airport-McCollum Field (RYY), Marietta, Ga; DeKalb-Peachtree Airport (PDK), Atlanta, GA; Fulton County-Brown Field Airport (FTY), Atlanta, GA; and Gwinnett County-Briscoe Field Airport (LZU), Lawrenceville, GA.

Non-Scheduled IFR slot reservations are required for:

Non-scheduled IFR slot reservations are required for: Clayton County-Tara Field Airport (4A7), Hampton, GA; Cobb County-McCollum Field Airport (RYY), Marietta, GA; Covington Municipal Airport (9A1), Covington, GA; DeKalb-Peachtree Airport (PDK), Atlanta, GA; Ben Epps Field Airport (AHN), Athens, GA; Peachtree City-Falcon Field Airport (FFC), Peachtree City, GA; Fulton County Airport-Brown Field Airport (FTY), Atlanta, GA; Lee Gilmer Memorial Airport (GVL), Gainesville, GA; Gwinnett County-Briscoe Field Airport (LZU), Lawrenceville, GA; The William B. Hartsfield Atlanta International Airport (ATL), Atlanta, GA; and Richard B. Russell Airport (RMG), Rome, GA.

Beginning July 14, 1996, 7:00 a.m. (EDT), pilots can reserve VFR arrival and departure of IFR arrival and departure slots at these airports by calling 1–800–96FAA96 (963–2296) 24 hours a day. Reservation slots may be reserved no sooner than 72 hours before your estimated time of arrival or departure. Be prepared to provide the following information: Arrival reservations: destination airport, estimated time of arrival, call sign, direction of arrival to the Atlanta area and type aircraft; Departure Reservations: departure airport, estimated time of departure, call sign, destination airport, first fix after departure and type aircraft.

Temporary Flight Restrictions

The FAA proposes to establish TFR areas over the Olympic Villages and competition sites. The establishment of TFR areas over the competition venues would result in the restriction of aircraft operations in these areas, however, access to these areas may be accommodated with an appropriate authorization from the designated using agency. ATC would retain the ability to manage aircraft through the TFR areas in accordance with normal traffic flows.

Operating restrictions within the airspace overlying competition venues are proposed for the period from three hours before to three hours after each event. The additional time that the restrictions are proposed to be imposed, before and after each match, would accommodate the observation and planning of ground traffic movement as well as facilitate the orderly movement of aircraft in and through the airspace above each event. Flight operations would be restricted within the airspace from the surface to approximately 2500 feet above the ground (AGL) to provide a safe environment.

These TFR areas generally would be circular areas of 1 to 4 NM in radius from the surface to approximately 2,500 AGL. Aircraft operations through, into, or out of these TFR areas would not be allowed during the effective dates and times unless specifically authorized by the designated using agency or ATC.

The locations, dimensions, and effective times of the TFR areas would be published for use by all pilots on air navigation charts and in the Federal Register with specific details disseminated by NOTAM. Requests for access to the airspace areas can be obtained by contacting the using agency for the particular venue as designated via NOTAM.

Certain Olympic venues fall within Class B surface area; specifically, RFK Stadium in Washington, DC and the Orange Bowl in Miami, Fl. These venues will be charted along with those outside of Class B airspace to ensure consistency.

Exceptions

This SFAR would contain provisions to provide flexible and efficient management and control of air traffic, such as the authority to give priority to or exclude from requirements of the special regulation, flight operations dealing with or containing essential military, medical emergency, rescue, law enforcement, public health and welfare, Presidential, Olympic family, and heads of state.

Obtainign U.S. Air Navigation Charts

The following provides information on how to obtain the special air navigation charts for the Olympic Games as well as other air navigation charts for use in the U.S.

The National Ocean Service (NOS) publishes and distributes aeronautical charts of the U.S. National airspace system (NAS). Charts are readily available through a network of sales agents located at and near principal civil airports. Because of the large variety, all NOS products may not be available locally; users can procure these products directly from NOS. Chart prices, subscription rates, and catalogs of related publications are available on request and are obtainable by writing to: National Oceanic and Atmospheric Administration, National Ocean Service, Distribution Branch, N/CG33, Riverdale, Maryland 20737, USA, Phone (301) 436–6990—General Information (301) 436–6993, Subscription Only: (301) 436–8194—One Time Sales Only.

NOS products will be shipped via United Parcel Service, First Class Mail, or priority package within the U.S. For foreign surface shipment to addresses in other countries, please add 5 percent to the total cost of order. Please write to NOS for a transportation cost quotation if faster foreign delivery is required. All mail order purchases must be accompanied by check or money order made payable to ''NOS, Department of Commerce, N/CG33''. Remittance must be made in U.S. funds; i.e., by check payable on a U.S. bank, or by international money order. Returned checks will result in cancellation of orders.

Chart sales offices are maintained at the following locations:

National Ocean Service, Chart Sales & Control Data Office, 701 C Street, Anchorage, Alaska 99513, USA

National Ocean Service, Chart Sales Office, 6501 Lafayette Avenue, Riverdale, Maryland 20737, USA

Pacific Marine Center, National Ocean Service, 1801 Fairview Avenue East, Seattle, Washington 98102, USA

Atlantic Marine Center, National Ocean Service, 439 West York Street, Norfolk, Virginia 23510, USA

Chart prices are subject to recomputation, based on cost of production, in accordance with Federal law. Price changes, when required, will be published 60 days in advance of the effective date.

The first of 13 charts that would show some of the Olympic TFR's would be published beginning with a February 1, 1996 effective date.

Notice to Airmen (NOTAM) Information

ATC and air traffic flow management systems will monitor and assess the air traffic demand so that restrictions are kept to an essential minimum. To assure maximum flexibility, the SFAR proposes the issuance of NOTAMs to announce all restrictions and other actions including the lifting of any restrictions taken by the FAA in response to changing airport and air traffic conditions.

Time-critical aeronautical information that is of a temporary nature or is not sufficiently known in advance to permit publication on aeronautical charts or in other operational publications, receives immediate dissemination via the National NOTAM system. All domestic

operators planning flight to the Olympics need to pay particular attention to NOTAM D and Flight Data Center (FDC) NOTAM information. NOTAM D information could affect a pilot's decision to make a flight. NOTAM D pertains to information on airports, runways, navigational aids, radar services, and other information essential to flight. An FDC NOTAM will contain information which is regulatory in nature, such as amendments to aeronautical charts and restrictions to flight. FDC NOTAM and NOTAM D information would also be provided to international operators in the form of International NOTAMs. NOTAMs are distributed through the National Communications Center in Kansas City, Missouri, USA, for transmission to all air traffic facilities having telecommunications access.

Pilots and operators should consult the biweekly Notices to Airmen Domestic/International publication. This publication contains the NOTAM FDC and D NOTAMs. Special information, including graphics, would be published in the biweekly publication several weeks in advance of the Olympics. For more detailed information concerning the NOTAM system, refer to the Aeronautical Information Manual, ''Preflight'' Section.

Other U.S. Laws and Regulations

Aircraft operators should clearly understand that the proposed SFAR is in addition to other laws and regulations of the U.S. The SFAR would not waive or supersede any U.S. law or obligation. When operating within the jurisdictional limits of the U.S., operators of foreign aircraft must conform with all applicable requirements of U.S. Federal, State, and local governments. In particular, aircraft operators planning flights into the U.S. must be aware of and conform to the rules and regulations established by the:

1. U.S. Civil Aeronautics Board regarding flights entering the U.S.;

2. U.S. Customs Service, Immigration and other authorities regarding customs, immigrations, health, firearms, and imports/exports;

3. U.S. FAA regarding flight in or into U.S. airspace. This includes compliance with Federal Aviation Regulations regarding operations into or within the U.S. through air defense identification zones, and compliance with general flight rules; and

4. Airport management authorities regarding use of airports and airport facilities.

Environmental Effects

This proposed action would establish TFR areas for safety and security purposes and would curtail or limit certain aircraft operations within designated areas at defined dates and times, rather than require aircraft to be operated along specified routings or in accordance with specific procedures. Additionally, this proposed action would be temporary in nature and effective only for the dates and times necessary to provide for the safety and protection of participants and spectators on the ground, as well as law enforcement and security personnel operating in the air at Olympic game venues. ATC would retain the ability to direct aircraft through the restricted areas in accordance with normal traffic flows. The FAA believes, therefore, that the proposed establishment of temporary flight restriction areas would have minimal impact on ATC routings or procedures.

Further, this action would result in a reduction in aircraft activity in the vicinity of the Olympic games by restricting aircraft operations. Therefore, there would be fewer aircraft operations in the vicinity of the Olympic games than would have occurred if the restricted areas were not in place and noise levels associated with that greater aircraft activity would also be reduced. Additionally, aircraft avoiding the restricted areas would not be routed over any particular area. This action would, therefore, not result in any long-term action which would routinely route aircraft over noise-sensitive areas. For the reasons stated above, the FAA concludes that this proposed rule would not significantly affect the quality of the human environment.

International Civil Aviation Organization and Joint Aviation Regulations

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation organization Standards and Recommended Practices (SARP) to the maximum extent practicable.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96–511), there are no requirements for information collection associated with this proposed regulation.

Regulatory Evaluation

This regulatory evaluation examines the costs and benefits of a proposed SFAR applicable for the period July 19 through August 4, 1996. The SFAR proposes to establish a TFR overlying the various competition venues for the 1996 Olympic games. This notice also proposes to require slot reservations for arrivals and departures at specified airports in the vicinity of the Olympics. Since the impacts of the proposed change are relatively minor this economic summary constitutes the analysis and no regulatory evaluation will be placed in the docket.

Costs and Benefits

There are two major areas where economic impacts are likely: Slot Reservation System and Temporary Flight Restrictions.

A. Slot Reservation System

During the Olympic period, the FAA must assure the continued safe and efficient use of airspace over the affected areas. To achieve this objective while minimizing disruption to the air traveling public, the FAA proposes an arrival and departure slot reservation system to manage air traffic into and out of airports serving the Olympic Games.

As a result of the slot reservation system some flights may be canceled and others rerouted. The cost of the cancellations would be the value of the flights to airlines and passengers less aircraft operating cost to conduct the flights. Other flights may be diverted to other airports in the Olympic Games area. Diversions would result in additional cost of trips to and from places of intended lodging and possible extra aircraft operation costs. The major economic impact in the case of a diversion would be inconvenience to operators who may have wanted to land at a given airport. Because such occurrences are of limited duration, the FAA believes that costs associated with any diversions from one airport to another in the affected area will probably by small. The additional FAA administrative workload generated by the proposed rule would be absorbed by current personnel and equipment resources. The proposed slot provision would not require any additional air traffic controllers nor additional radar control equipment.

The benefits of the slot reservation system would be better control of the airspace over Atlanta and other areas affected by the Olympics. Arrivals are expected to increase 25 percent during the 3 weeks of the Olympic season. There would be an increased risk of accidents due to this unprecedented congestion in the Atlanta area if greater controls are not implemented. There is also the potential benefit of reduced delay times for operators attempting to land in the Atlanta area. The proposed

slot provision would assure that the FAA will have sufficient capacity to handle the many possible extra flights carrying spectators, athletes, media personnel, and dignitaries during the Olympic period without unnecessary delay.

B. Temporary Flight Restriction Areas

Due to the substantial increase in aircraft operations that are expected in the Atlanta area as well as other sites, the FAA proposes to establish TFR areas over the Olympic village and competition sites. The establishment of TFR's over competition venues would result in the restriction of aircraft operations from the surface to 2500 feet.

The major economic impact of circumnavigation in this case would be inconvenience to operators who may have wanted to operate in the area of the TFR. Because such occurrences are of limited duration and the restricted areas are limited in size, the FAA believes that any circumnavigation costs will be negligible. An aircraft operator could avoid the restricted airspace by flying over it without significantly deviating from their current routes or by circumnavigating the restricted airspace.

The potential benefits of the proposed TFR airspace would be primarily enhanced safety to the public. Enhanced safety would take the form of the reduced possibility of fatalities and property damage as a result of a lowered risk of accidents due to increased positive control of TFR airspace. While benefits cannot be quantified, the FAA believes the benefits are commensurate with the small costs attributed to the temporary inconvenience of the flight restrictions for operators near the TFR.

Regulatory Flexibility Act Determination

The Regulatory Flexibility Act of 1980 (RFA) ensures that government regulations do not needlessly and disproportionately burden small businesses. The RFA requires the FAA to review each rule that may have a significant economic impact on a substantial number of small entities.

The FAA's criteria for a ''substantial number'' is a number that is not less than 11 and that is more than one third of the small entities subject to the rule. The small entities that could be potentially affected by the implementation of the proposed rule are operators of aircraft for hire owning nine or fewer aircraft. Because of the negligible impact of this regulatory action, the FAA initially determines that this proposed amendment would not have a significant impact on a substantial number of small entities.

Federalism Implications

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

International Trade Impact Assessment

The proposal would not constitute a barrier to international trade, including the export of U.S. goods and services to foreign countries and the import of foreign goods and services to the United States. This proposal would not impose temporary costs on aircraft operators. There should be no effect on U.S. or foreign aircraft manufacturers. Therefore, the FAA has determined that the proposed rule would neither have an effect on the sale of foreign aviation products nor services in United States, nor would it have an effect on the sale of U.S. products or services in foreign countries.

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Assessment, the FAA has determined that this proposed regulation is not a ''significant regulatory action'' under Executive Order 12866. The FAA has determined that the proposed rule would impose temporary costs on the public. The magnitude of these costs, while undetermined, are negligible. The benefits would be increased aviation safety resulting from a lower risk of accidents due to increased congestion during the Olympics. In addition, the FAA certifies that this proposed regulation would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This proposed regulation is not considered significant under DOT Order 2100.5, Policies and Procedures for Simplification, Analysis, and Review of Regulations. A Regulatory Flexibility Determination and International Impact Assessment are set out above. Because the economic impact of this proposal is likely to be minimal, no formal regulatory evaluation has been prepared.

List of Subjects in 14 CFR Part 91

Aircraft flight, Airspace, Aviation safety, Air Traffic Control.

The Proposed Special Federal Aviation Regulation (SFAR)

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 91 as follows:

PART 91—[AMENDED]

1. The authority citation for part 91 continues to read as follows:

Authority: 49 USC 106(g), 1155, 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46502, 46504, 46506, 46507, 47122, 47508, 47528–47531; articles 12 and 29 of the Convention on International Civil Aviation 861 stat. 1180.

2. By adding Special Federal Aviation Regulation No. 74 to read as follows:

SFAR No. 74 Airspace and Flight Operations Requirements for the 1996 Summer Olympic Games, Atlanta, Georgia

A. General

1. Each person shall be familiar with all NOTAMs issued pursuant to this SFAR and all other available information concerning that operation before conducting any operation into or out of an airport or area specified in this SFAR or in NOTAMs pursuant to this SFAR. In addition, each person operating an international flight that will enter the U.S. shall be familiar with any international NOTAMs issued pursuant to this SFAR. NOTAMs are available for inspection at operating FAA air traffic facilities and regional air traffic division offices.

2. Notwithstanding any provision of the Federal Aviation Regulations to the contrary, no person may operate an aircraft contrary to any restriction procedure specified in this SFAR or by the Administrator, through a NOTAM issued pursuant to this SFAR.

3. As conditions warrant, the Administrator is authorized to—

(a) Restrict, prohibit, or permit IFR/VFR operations at any airport, terminal, or enroute airspace area designated in this SFAR or in a NOTAM issued pursuant to this SFAR;

(b) Give priority to or exclude the following flights from provisions of this SFAR and NOTAMs issued pursuant to this SFAR:

(1) Essential military.

(2) Medical and rescue.

(3) Essential public health and welfare.

(4) Presidential and Vice Presidential.

(5) Flights carrying visiting heads of state.

(6) Flights in the service of the Olympic Committee and media flights whose planned activities have been coordinated and accredited by the Atlanta Committee for the Olympic Games.

(7) Law enforcement and security.

(8) Flights authorized by the Director, Air Traffic Service; and/or

(c) Implement flow control management procedures.

4. For security purposes, the Administrator may issue NOTAMs during the effective period of this SFAR to cancel or modify provisions of this SFAR and NOTAMs issued pursuant to this SFAR if such action is consistent with the safe and efficient use of airspace and the safety and security of persons and property on the ground as affected by air traffic.

5. No person may operate an aircraft to or from an airport listed in this SFAR or NOTAM issued pursuant to this SFAR unless that person complies with the requirements of this SFAR and NOTAMs issued pursuant to this SFAR that are applicable to his/her operations.

B. Slot Reservation System

1. General Description.

Slot reservations for arrivals and departures at specified airports in the vicinity of the Olympic Games are required for the period July 17 through August 6, 1996. The FAA believes this action is necessary for the security of the venues, safe operation and management of aircraft operating to, within, and from these areas, and to prevent any unsafe congestion of sightseeing and other aircraft over the various venues.

2. For purposes of the SFAR:

(a) Airports and airspace areas associated with Olympic activity which require restriction or prohibition of aviation activity will be designated in NOTAMs issued pursuant to this SFAR.

(b) Airports listed below and in NOTAMs issued pursuant to this SFAR are identified as:

VFR Arrival Slot Reservation Airports
Cobb County-McCollum Field Airport (RYY), Marietta, GA
Dekalb-Peachtree Airport (PDK), Atlanta, GA
Fulton County-Brown Airport Field Airport (FTY),
Atlanta, GA
Gwinnett County-Briscoe Field Airport (LZU),
Lawrenceville, GA

VFR Departure Slot Reservation Airports
Cobb County-McCollum Field Airport (RYY), Marietta, GA
DeKalb-Peachtree Airport (PDK), Atlanta, GA
Fulton County-Brown Airport Field Airport (FTY),
Atlanta, GA
Gwinnett County-Briscoe Field Airport (LZU),
Lawrenceville, GA

Non-scheduled IFR Slot Reservation Airports
Clayton County-Tara Field Airport (4A7), Hampton, GA
Cobb County-McCollum Field Airport (RYY), Marietta, GA
Covington Municipal Airport (9A1), Covington, GA
DeKalb-Peachtree Airport (PDK), Atlanta, GA
Ben Epps Field Airport (AHN), Athens, GA
Peachtree City-Falcon Field Airport (FFC), Peachtree City, GA
Fulton County Airport-Brown Field Airport (FTY),
Atlanta, GA
Lee Gilmer Memorial Airport (GVL), Gainesville, GA
Gwinnett County-Briscoe Field Airport (LZU),
Lawrenceville, GA
The William B. Hartsfield Atlanta International
Airport (ATL), Atlanta, GA
Richard B. Russell Airport (RMG), Rome, GA

3. Pilots can reserve VFR arrival or IFR arrival and departure slots at the airports listed in paragraph B.2. of this SFAR by calling 1–800–96FAA96 (963–2296) 24 hours a day beginning July 14, 1996, 7:00 a.m. (EDT). Reservation slots may be reserved no sooner than 72 hours before your estimated time of arrival or departure. Be prepared to provide the following information: Arrival Reservations: destination airport, estimated time of arrival, call sign, direction of arrival to the Atlanta area and type aircraft; Departure Reservations: departure airport, estimated time of departure, call sign, destination airport, first fix after departure and type aircraft.

C. Temporary Flight Restriction Areas

The FAA proposes to establish TFR areas over the Olympic Village and competition sites. The establishment of TFR areas over the competition venues would result in the restriction of aircraft operations in these areas, however, access to these areas may be accommodated with an appropriate authorization from the designated using agency. ATC would retain the ability to manage aircraft through the TFR areas in accordance with normal traffic flows.

Operating restrictions within the airspace overlying competition venues are proposed for the period from 3 hours before to 3 hours after each event. The additional time that the restrictions are proposed to be imposed, before and after each event, would accommodate the observation and planning of ground traffic movement as well as the facilitation of the orderly movement of aircraft in and through the airspace above each event. Flight operations would be restricted within the airspace from the surface to approximately 2500 feet AGL to provide a safe environment.

At the following locations, flight is restricted during the times of designation:

1. The Olympic Village; Atlanta, Georgia.

That airspace within a 1 NM radius of latitude (lat.) 33°46′35″ N, longitude (long.) 84°23′52″ W (ATL 012R/8.5 NM distance measuring equipment (DME) fix).

Designated altitudes: Surface to but not including 3,500 feet mean sea level (MSL).

Times of Designation: July 6, 1996 to August 11, 1996, 24 hours per day.

Using agency: Georgia State Patrol.

Contact: SFC W.S. Smith (770) 919–9929.

2. The Olympic Ring; Atlanta, Georgia.

That airspace within a 3 NM radius of lat. 33°45′27″ N, long. 84°24′05″ W (ATL 013R/7.4 NM DME fix).

Designated altitudes. Surface to but not including 3,500 feet MSL.

Times of Designation. July 19, 1996, from 7:00 p.m. local time to July 20, 1996 at 2:00 a.m.; July 20, 1996 until August 5, 1996, 5:00 a.m. until 2:00 a.m.

Using agency: Georgia State Patrol.

Contact: SFC W.S. Smith (770) 919–9929.

3. Wolf Creek Skeet Range; Atlanta, Georgia.

That airspace within a 1 NM radius of lat. 33°40′12″ N long. 84°33′54″ W, (ATL 286R/6 NM DME fix).

Designated altitudes: Surface to but not including 2,500 feet MSL.

Times of Designation:

July 20, 1996, from 8:00 a.m. until 8:00 p.m.
July 21, 1996, from 8:00 a.m. until 8:00 p.m.
July 22, 1996, from 8:00 a.m. until 4:30 p.m.
July 23, 1996, from 8:00 a.m. until 7:00 p.m.
July 24, 1996, from 8:00 a.m. until 5:30 p.m.
July 25, 1996, from 8:00 a.m. until 8:30 p.m.
July 26, 1996, from 8:00 a.m. until 7:00 p.m.
July 27, 1996, from 12:00 p.m. until 7:00 p.m.

Using agency: Georgia State Patrol.

Contact: SFC W.S. Smith (770) 919–9929.

4. Stone Mountain Park, Stone Mountain, Georgia.

That airspace within a 3 NM radius of lat. 33°48′24″ N, long. 84°08′06″ W (PDK 117R/9 NM DME fix).

Designated altitudes. Surface to and including 2,500 feet AGL.

Times of Designation:

July 22, 1996, from 9:00 a.m. until 9:00 p.m.
July 23, 1996, from 9:00 a.m. until 9:00 p.m.
July 24, 1996, from 9:00 a.m. until 9:00 p.m.
July 25, 1996, from 9:00 a.m. until 9:00 p.m.
July 26, 1996, from 9:00 a.m. until 9:00 p.m.
July 27, 1996, from 8:00 a.m. until 9:00 p.m.
July 28, 1996, from 8:00 a.m. until 9:00 p.m.
July 29, 1996, from 8:00 a.m. until 11:00 p.m.
July 30, 1996, from 8:00 a.m. until 11:00 p.m.
July 31, 1996, from 9:00 a.m. until 7:00 p.m.
August 1, 1996, from 9:00 a.m. until 8:00 p.m.
August 2, 1996, from 9:00 a.m. until 9:00 p.m.
August 3, 1996, from 9:00 a.m. until 12:00 a.m.

Using agency: Georgia State Patrol.

Contact: SFC W.S. Smith (770) 919–9929.

5. Atlanta Beach; Jonesboro, Georgia.

That airspace within a 1 NM radius of lat. 30°31′23″ N, long. 84°18′39″ W (ATL 137R/9 NM DME fix).

Designated altitudes. Surface to but not including 3,500 feet MSL.

Times of Designation:

July 23, 1996, from 6:00 a.m. until 9:00 p.m.
July 24, 1996, from 6:00 a.m. until 9:00 p.m.
July 25, 1996, from 6:00 a.m. until 9:00 p.m.
July 26, 1996, from 6:00 a.m. until 9:00 p.m.
July 27, 1996, from 6:00 a.m. until 9:00 p.m.
July 28, 1996, from 8:00 a.m. until 9:00 p.m.

Using agency Georgia State Patrol.

Contact: SFC W.S. Smith (770) 919–9929.

6. International Horsepark; Convington, Georgia.

That airspace within a 3 NM radius of lat. 33°40′28″ N, long. 83°56′58″ W (ATL 084R/24 NM. DME fix) excluding that airspace along and south of Interstate 20.

Designated altitudes. Surface to and including 2,500 feet AGL.

Times of Designation:

July 21, 1996, from 9:00 a.m. until 6:00 p.m.
July 22, 1996, from 9:00 a.m. until 6:00 p.m.
July 23, 1996, from 9:00 a.m. until 5:00 p.m.
July 24, 1996, from 8:30 a.m. until 11:00 p.m.
July 25, 1996, from 9:00 a.m. until 4:00 p.m.

July 26, 1996, from 9:00 a.m. until 1:00 p.m.
July 27, 1996, from 8:00 a.m. until 6:00 p.m.
July 28, 1996, from 9:00 a.m. until 6:00 p.m.
July 29, 1996, from 9:00 a.m. until 6:00 p.m.
July 30, 1996, from 8:00 a.m. until 9:30 p.m.
July 31, 1996, from 9:00 a.m. until 5:00 p.m.
August 1, 1996, from 8:00 a.m. until 7:30 p.m.
August 4, 1996, from 9:00 a.m. until 4:00 p.m.

Using agency: Georgia State Patrol.

Contact: SFC W.S. Smith (770) 919–9929.

7. Lake Sidney Lanier; Gainesville, Georgia.

That airspace within a 2 NM radius of lat. 34°21′00″ N, long. 83°47′11″ W (PDK 042R/38 NM DME fix).

Designated altitudes. Surface to and including 2,500 feet AGL.

Times of Designation.

July 21, 1996, from 8:00 a.m. until 2:00 p.m.
July 22, 1996, from 8:00 a.m. until 1:30 p.m.
July 23, 1996, from 8:00 a.m. until 1:00 p.m.
July 24, 1996, from 8:00 a.m. until 11:30 a.m.
July 25, 1996, from 8:00 a.m. until 12:30 p.m.
July 26, 1996, from 8:00 a.m. until 12:30 p.m.
July 27, 1996, from 7:30 a.m. until 1:30 p.m.
July 28, 1996, from 7:30 a.m. until 1:30 p.m.

Using agency: Georgia State Patrol.

Contact: SFC W.S. Smith (770) 919–9929.

8. Sanford Stadium; Athens, Georgia.

That airspace within a 1 NM radius of lat. 33°56′59″ N, long. 83°22′24″ W (AHN 258R/2 NM DME fix).

Designated altitudes: Surface to and including 2,500 feet AGL.

Times of Designation:

July 31, 1996, from 2:00 p.m. until 7:00 p.m.
August 1, 1996, from 9:00 a.m. until 7:00 p.m.
August 2, 1996, from 9:00 a.m. until 6:00 p.m.
August 3, 1996, from 12:00 p.m. until 6:00 p.m.

Using agency: Georgia State patrol.

Contact: SFC W.S. Smith (770) 919–9929.

9. Golden Park; Columbus, Georgia.

That airspace within a 1 NM radius of lat. 32°27′09″ N, long. 84°59′30″ W (CSG 172R/10 NM DME fix).

Designated altitudes: Surface to and including 2,500 feet AGL.

Times of Designation:

July 21, 1996, through July 27, 1996, 8:00 a.m. until 11:30 p.m.
July 29, 1996, from 5:30 p.m. until 11:30 p.m.
July 30, 1996, from 3:30 p.m. until 11:00 p.m.

Using agency: Columbus Police Department.

Contact: Lt. Butch Beach (706) 596–7237.

10. Olympic Village; Columbus, GA.

That airspace within a 1 NM radius of lat. 32°21′44″ N, long. 84°58′15″ W (CSG 171R/16 NM DME fix).

Designated altitudes. Surface to and including 2,000 feet AGL.

Times of Designation:

July 5, 1996, through August 8, 1996, when Ft. Benning Class D airspace is not effective.

Using agency: Ft. Benning Provost Marshall.

Contact: Capt. Nason (706) 545–5915.

11. Lee College; Cleveland, Tennessee.

That airspace within a 0.5 NM radius of lat. 35°09′58″ N, long. 84°52′13″ W (CHA 049R/18 NM DME fix).

Designated altitudes. Surface to and including 2,500 feet AGL.

Times of Designation:

July 6, 1996, from 6:00 a.m. until July 30, 1996, at 12:00 a.m.

Using agency: Ocoee River Venue Law Enforcement Committee (ORVLEC).

Contact: William J. Ferris III (423) 265–3601.

12. U.S. Highway 64; Tennessee.

0.5 NM on either side of U.S. Highway 64 from Cleveland, Lee College, TN., latitude 35°09′58″ N, longitude 84°51′13″ W, thence following U.S. Highway 64 to latitude 35°04′02″ N, longitude 84°27′37″ W.

Designated altitudes. Surface to and including 2,500 feet AGL.

Times of Designation:

July 26, 1996, through July 28, 1996, from dawn until dusk

Using agency: ORVLEC.

Contact: William J. Ferris III (423) 265–3601.

13. Ocoee River; Tennessee.

That airspace within a 2 NM radius of lat. 35°04′02″ N, long. 84°27′37″ W (CHA 080R/34 NM DME fix).

Designated altitudes. Surface to and including 2,500 feet AGL.

Times of Designation:

July 26, 1996, through July 28, 1996, from dawn until dusk

Using agency: ORVLEC.

Contact: William J. Ferris III (423) 265–3601.

14. Legion Field; Birmingham, Alabama.

That airspace within a 1 NM radius of lat. 33°30′42″ N, long. 86°50′34″ W (VUZ 160R/10 NM DME fix).

Designated altitudes. Surface to 2,000 feet AGL.

Times of Designation:

July 20, 1996, from 3:30 p.m. until 11:00 p.m.
July 24, 1996, from 10:30 a.m. until 8:30 p.m.
July 22, 1996, from 3:30 p.m. until 11:00 p.m.
July 23, 1996, from 1:30 p.m. until 11:30 p.m.
July 24, 1996, from 3:30 p.m. until 11:00 p.m.
July 25, 1996, from 2:30 p.m. until 12:30 a.m.
July 26, 1996
July 27, 1996, from 3:30 p.m. until 11:00 p.m.
July 28, 1996, from 12:00 p.m. until 7:30 p.m.

Using agency: Federal Bureau of Investigation

Contact: Jim Brant (205) 252–7705.

15. The Olympic Village; Savannah, Georgia.

That airspace within a 1 NM radius of lat. 32°04′45″ N, long. 81°04′50″ W (SAV 158R/6 NM DME fix).

Designated altitudes. Surface to and including 2,000 feet AGL.

Times of Designation: July 6, 1996, until August 7, 1996, 24 hours a day.

Using agency: Chatham County Police Department.

Contact: Capt. Doug Burkhalter (912) 652–6500.

16. Sail Harbor and Wilmington River Transit Zone; Savannah, Georgia.

That airspace within a 1 NM radius of lat. 32°00′20″ N, long. 81°00′00″W (SAV 147R/11 NM DME fix). Airspace within a 1 NM radius of the Sheraton Hotel, and airspace over the Wilmington River from this point south to Wassaw Sound.

Designated altitudes. Surface to and including 2,000 feet AGL.

Times of Designation: July 12, 1996, until August 4, 1996, during daylight hours.

Using agency: Chatham County Police Department.

Contact: Capt. Doug Burkhalter (912) 652–6500.

17. Sailing Venue; Savannah, Georgia.

That airspace within a 4 NM radius of lat. 31°55′00″ N, long, 80°53′00″ W (SAV 141R/19 NM DME fix).

Designated altitudes. Surface to and including 2,000 feet AGL.

Times of Designation: July 22, 1996, until August 1, 1996, during daylight hours.

Using agency: Chatham County Police Department.

Contact: Capt. Doug Burkhalter (912) 652–6500.

18. The Citrus Bowl; Orlando, Florida.

That airspace within a 1 NM radius of lat. 28°32′20″ N, long. 81°24′10″W (ORL 260R/4 NM DME fix).

Designated altitudes. Surface to but not including 1,600 feet MSL.

Times of Designation:

July 20, 1996, from 2:00 p.m. until 8:00 p.m.
July 21, 1996, from 2:00 p.m. until 10:30 p.m.
July 22, 1996, from 5:00 p.m. until 11:00 p.m.
July 23, 1996, from 5:00 p.m. until 1:30 p.m.
July 24, 1996, from 5:00 p.m. until 11:00 p.m.
July 25, 1996, from 5:00 p.m. until 1:30 p.m.

Using agency: Orange County Sheriff Office.

Contact: Cmdr. Richard Silverman (407) 836–3820.

19. Olympic Village; Davie, FL.

That airspace within a 1 NM radius of lat. 26°04′29″ N, long. 80°14′31″W (FLL 266R/05 NM DME fix).

Designated altitudes. Surface to and including 2,000 feet MSL.

Times of Designation:

July 6, 1996, until July 31, 1996, 24 hours a day

Using Agency. Davie Police Department

Contact: Lt. Steve Seefchak (305) 797–1224.

20. The Orange Bowl; Miami, Florida.

That airspace within a 1 NM radius of lat. 25°46′40″ N, long. 80°13′12″ W (DPH 100R/7 NM DME fix).

Designated altitudes. Surface to and including 2,500 feet MSL.

Times of Designation:

July 20, 1996, from 12:00 p.m. until 11:00 p.m.

July 21, 1996, from 1:00 p.m. until 11:00 p.m.

July 22, 1996, from 4:00 p.m. until 12:00 a.m.

July 23, 1996, from 3:00 p.m. until 1:00 a.m.

July 24, 1996, from 4:00 p.m. until 12:00 a.m.

July 25, 1996, from 3:00 p.m. until 2:00 a.m.

July 27, 1996, from 3:00 p.m. until 11:00 p.m.

July 28, 1996, from 3:00 p.m. until 11:00 p.m.

Using agency. Miami Police Department.

Contact: Capt. Paul Shepard (305) 579–6181.

21. RFK Stadium; Washington, DC.

That airspace with a 1 NM radius of lat. 38°53′23″ N, long. 76°58′19″ W (DCA 067R/3.5 NM DME fix).

Designated altitudes. Surface to and including 2,500 feet AGL.

Times of Designation:

July 20, 1996, from 11:30 a.m. until 5:30 p.m.

July 21, 1996, from 11:30 a.m. until 8:00 p.m.

July 22, 1996, from 5:00 p.m. until 11:00 p.m.

July 23, 1996, from 5:00 p.m. until 1:30 a.m.

July 24, 1996, from 5:00 p.m. until 11:00 p.m.

July 25, 1996, from 5:00 p.m. until 1:30 a.m.

Using agency: Special Operations Division of the Washington, DC, Metropolitan Police.

Contact: Don Pope (202) 727–4582 or Aviation Division (301) 248–7585.

D. Expiration Date

This SFAR expires on August 12, 1996.

Issued in Washington, DC on December 22, 1995.

Harold W. Becker,

Acting Program Director for Air Traffic Rules and Procedures.

[FR Doc. 95–31490 Filed 12–26–95; 3:50 pm]

BILLING CODE 4910–13-M

federal register

Friday
December 29, 1995

Part VII

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 25 and 52

Federal Acquisition Regulation; Uruguay Round; Final Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 25 and 52

[FAC 90–36; FAR Case 95–304]

RIN 9000–AG80

Federal Acquisition Regulation; Uruguay Round

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on an interim rule to amend the Federal Acquisition Regulation (FAR) to implement the renegotiated General Agreement on Tariffs and Trade (GATT) Government Procurement Agreement (1996 Code) (Uruguay Round) which becomes effective January 1, 1996. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: *Effective:* January 1, 1996. *Applicability:* This regulation applies to solicitations issued on or after January 1, 1996. *Comments Due:* Comments on the interim rule should be submitted to the FAR Secretariat at the address shown below on or before February 27, 1996 to be considered in the formulation of a final rule.

ADDRESSES: FAR Secretariat, Room 4037, GS Building, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Mr. Peter O'Such at (202) 501–1759 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501–4755. Please cite FAC 90–36, FAR case 95–304.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule amends the FAR to implement the renegotiated General Agreement on Tariffs and Trade (GATT) Government Procurement Agreement (1996 Code) (Uruguay Round) which becomes effective January 1, 1996. This agreement is implemented in statute by the Uruguay Round Agreement Act, Public Law 103–465, which amends the Trade Agreements Act of 1979 (19 U.S.C. 2501–2582).

B. Regulatory Flexibility Act

This interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any new requirements on contractors, large or small. The interim rule primarily changes the list of designated foreign countries and extends applicability of the Trade Agreements Act to all agencies for supply and construction contracts over certain dollar thresholds. However, those contracts which are now subject to the Trade Agreements Act were already subject to the Memorandum of Understanding Between the United States of America and the European Community on Government Procurement. This change should have minimal impact on U.S. firms. The interim rule will not diminish existing preferences for small businesses, because purchases under small and small disadvantaged business preference programs are exempted from the Trade Agreements Act. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected subpart will be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite FAC 90–36, FAR case 95–304, in correspondence.

C. Paperwork Reduction Act

This interim rule does not impose any new reporting or recordkeeping requirements which require Office of Management and Budget (OMB) approval under 44 U.S.C. 3501, *et seq.* Contractors, which previously were required to respond to the now deleted provision at 52.225–16, Buy American Act—Supplies under European Community Agreement Certificate, will now be required to respond to the comparable provision at 52.225–8, Buy American Act—Trade Agreements—Balance of Payments Program Certificate (OMB Control No. 9000–0046).

D. Determination to Issue an Interim Rule

A determination has been made under authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary in order to implement the renegotiated General Agreement on Tariffs and Trade (GATT) Government Procurement Agreement (1996 Code) (Uruguay Round) which becomes effective January 1, 1996. This agreement is implemented in statute by the Uruguay Round Agreement Act, Public Law 103–465, which amends the Trade Agreements Act of 1979 (19 U.S.C. 2501–2582). However, pursuant to Public Law 98–577 and FAR 1.501, public comments received in response to this interim rule will be considered in formulating the final rule.

List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: December 22, 1995.

Edward C. Loeb,

Acting Director, Office of Federal Acquisition Policy.

Federal Acquisition Circular

Number 90–36

Federal Acquisition Circular (FAC) 90–36 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90–36 is effective January 1, 1996. This regulation applies to solicitations issued on or after January 1, 1996.

Dated: December 21, 1995.

Eleanor R. Spector,

Director, Defense Procurement.

Dated: December 22, 1995.

Ida M. Ustad,

Associate Administrator, Office of Acquisition Policy, GSA.

Dated: December 20, 1995.

Deidre Lee,

Associate Administrator for Procurement, NASA.

Therefore, 48 CFR Parts 25 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 25 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 25—FOREIGN ACQUISITION

25.101 [Amended]

2. At 25.101 in the definition of ''Instrumentality'' the phrase ''European Economic Community'' is revised to read ''European Union''.

3. Section 25.104 is amended by revising paragraph (a) to read as follows:

25.104 Acquiring civil aircraft and related articles.

(a) The U.S. Trade Representative, on February 19, 1980 (45 FR 12349, February 25, 1980), waived applying the Buy American Act to the acquisition of civil aircraft and related articles of countries or instrumentalities that are parties to the Agreement on Civil Aircraft. The representative acted under the authority of section 303 of the Trade Agreements Act of 1979 (19 U.S.C. 2513). Countries and Instrumentalities that are parties to the agreement (as of January 1, 1996) are Canada, the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom), Japan, Norway, Romania, and Switzerland. The Office of the U.S. Trade Representative, Washington, DC 20506, can provide information on changes to the list of parties to the agreement made since January 1, 1996.

* * * * *

4. Section 25.109 is amended by revising paragraph (d), removing paragraphs (e) and (f), redesignating paragraph (g) as (e) and revising the introductory text and newly designated paragraph (e)(2); and amending newly designated paragraph (e)(1) by removing the word ''or''. The revised text reads as follows:

25.109 Solicitation provisions and contract clauses.

* * * * *

(d) Except as provided in paragraph (e) of this section, the contracting officer shall insert the clause at 52.225–3, Buy American Act—Supplies, in solicitations and contracts for the acquisition of supplies, or for services involving the furnishing of supplies, for use within the United States.

(e) Do not use the clause prescribed in paragraph (d) of this section when—

* * * * *

(2) The acquisition is made under a trade agreement (see subpart 25.4); or

* * * * *

25.202 [Amended]

5. At 25.202(c) the reference to ''25.402(a) (3) and (4)'' is revised to read ''25.402(a) (1) and (3).

6. At 25.205 paragraph (b) is revised to read as follows:

25.205 Solicitation provision and contract clause.

* * * * *

(b)(1) For construction solicitations and contracts with an estimated acquisition value of $7,311,000 or more, insert the basic clause at 52.225–15, Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement.

(2) For construction solicitations and contracts with an estimated value from $6,500,000 to $7,311,000, insert the clause with its Alternate I.

7. Section 25.400 is revised to read as follows:

25.400 Scope of subpart.

(a) This subpart provides policies and procedures for acquisitions subject to the Agreement on Government Procurement, as approved by Congress in the Trade Agreements Act of 1979 (19 U.S.C. 2501–2582), and as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), and other trade agreements including—

(1) Acquisitions from countries designated under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*);

(2) Acquisitions involving offers of Israeli end products under the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note);

(3) Acquisitions involving offers of Canadian or Mexican end products under the North American Free Trade Agreement (NAFTA), as approved by Congress in the NAFTA Implementation Act (Pub. L. 103–182, 107 Stat. 2057); and

(4) The Agreement on Civil Aircraft (19 U.S.C. 2513).

(b) For application of the trade agreements which are unique to individual agencies (Department of Defense, National Aeronautics and Space Administration, Department of Energy (Power Marketing Administration), Department of the Interior (Bureau of Reclamation) and Department of Transportation (Federal Aviation Administration), see agency regulations.

8. Section 25.401 is amended by revising the definitions for ''Canadian end product,'' ''Caribbean Basin country end product'' introductory text and paragraphs (a) and (b), ''Designated country,'' ''Designated country end product,'' and ''Mexican end product,''; definitions for ''European Community (EC) construction material,'' ''EC country,'' and ''EC end product,'' are removed; and a definition for ''Designated country construction material,'' is added to read as follows:

25.401 Definitions.

* * * * *

Canadian end product, as used in this subpart, means an article that (a) is wholly the growth, product, or manufacture of Canada, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself.

* * * * *

Caribbean Basin country end product, as used in this subpart, means an article that (a) is wholly the growth, product, or manufacture of the Caribbean Basin country, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself. The term excludes products that are excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703(b), which presently are—

* * * * *

Designated country, as used in this subpart, means a country or instrumentality designated under the Trade Agreements Act of 1979 and listed below:

Aruba	Japan
Austria	Lesotho
Bangladesh	Liechtenstein
Belgium	Luxembourg
Benin	Malawi
Bhutan	Maldives
Botswana	Mali
Burkina Faso	Nepal
Burundi	Netherlands
Canada	Niger
Cape Verde	Norway
Central African Republic	Portugal
Chad	Republic of Korea
Comoros	Rwanda

Denmark
Finland
France
Gambia
Germany
Greece
Guinea
Haiti
Ireland
Israel
Italy
Somalia
Spain
Sudan
Sweden
Switzerland
Tanzania U.R.
Uganda
United Kingdom
Western Samoa
Yemen

Designated country construction material, as used in this subpart, means construction material that (a) is wholly the growth, product, or manufacture of a designated country, or (b) in the case of a construction material which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in a designated country into a new and different construction material distinct from the materials from which it was transformed.

Designated country end product, as used in this subpart, means an article that (a) is wholly the growth, product, or manufacture of the designated country, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself.

* * * * *

Mexican end product, as used in this subpart, means an article that (a) is wholly the growth, product, or manufacture of Mexico, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in Mexico into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself.

9. At 25.402 paragraphs (a) (1) through (3) and (c) are revised, (a)(4) is removed, and (a) (5) and (6) are redesignated as (a) (4) and (5). The revised text reads as follows:

25.402 Policy.

(a)(1) Executive Order 12260 requires the U.S. Trade Representative to set the dollar threshold for application of the Trade Agreements Act. The current threshold is $190,000 for supply and services contracts and $7,311,000 for construction contracts. The thresholds will be published in the Federal Register and will be distributed through agency procedures on an expedited basis. When the value of the proposed acquisition of an eligible product is estimated to be at or over the dollar threshold, agencies shall evaluate offers for an eligible product without regard to the restrictions of the Buy American Act (see subpart 25.1) or the Balance of Payments Program (see subpart 25.3). When the value of the proposed construction contract is estimated to be at or over the dollar threshold, agencies shall evaluate offers of designated country construction materials without regard to the restrictions of the Buy American Act (see subpart 25.2) or the Balance of Payments Program (see subpart 25.3). When the value of the proposed acquisition is estimated to be below the Trade Agreements Act threshold, the restrictions of the Buy American Act or the Balance of Payments Program shall be applied to foreign offers, except as noted in paragraphs (a)(2) and (a)(3) of this section (see 25.105).

(2) As required by Article 15 of the U.S.-Israel Free Trade Area Agreement, agencies other than the Department of Defense, Department of Energy, Department of Transportation, the Bureau of Reclamation of the Department of the Interior, the Federal Housing Finance Board, and the Office of Thrift Supervision shall evaluate offers of Israeli end products at or above $50,000 in amount without regard to the restrictions of the Buy American Act (see subpart 25.1) or the Balance of Payments Program (see subpart 25.3).

(3) As required by the North American Free Trade Agreement (NAFTA) Implementation Act (Pub. L. 103–182, 107 Stat. 2057), agencies shall evaluate offers of the following NAFTA country end products without regard to the restrictions of the Buy American Act (see subpart 25.1) or the Balance of Payments Program (see subpart 25.3):

(i) NAFTA country construction materials under construction contracts with an estimated acquisition value of $6,500,000 or more.

(ii) Canadian end products under supply contracts with an estimated value above $25,000 and Mexican end products under supply contracts with an estimated value of $50,000 or more.

* * * * *

(c)(1) There shall be no acquisition of foreign end products subject to the Trade Agreements Act unless the foreign end products are eligible products, except as provided in paragraphs (c)(2) and (c)(3) of this section.

(2) The prohibition in paragraph (c)(1) of this section does not apply if offers of domestic end products or of eligible products are either not received or are insufficient to fulfill the requirements.

(3) A waiver may be granted under section 302(b)(2) of the Trade Agreements Act (19 U.S.C. 2512(b)(2)).

* * * * *

10. Section 25.403 is revised to read as follows:

25.403 Exceptions.

This subpart does not apply to—

(a) Acquisitions below the dollar thresholds in 25.402(a) (1) through (3), respectively;

(b) Purchases under small or small disadvantaged business preference programs;

(c)(1) Purchases of arms, ammunition or war materials, or purchases indispensable for national security or for national defense purposes, by the Department of Defense, as provided in departmental regulations;

(2) Purchases indispensable for national security or for national defense purposes, subject to policies established by the U.S. Trade Representative.

(d) Research and development contracts;

(e) Purchases of items for resale;

(f) Purchases under subpart 8.6, Acquisition from Federal Prison Industries, Inc., and subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled; or

(g) Purchases of products that are excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703 (b); which presently are—

(1) Textiles and apparel articles that are subject to textile agreements;

(2) Footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel not designated as eligible articles for this purpose of the Generalized System of Preferences under Title V of the Trade Act of 1974;

(3) Tuna, prepared or preserved in any manner in airtight containers;

(4) Petroleum, or any product derived from petroleum; and

(5) Watches and watch parts (including cases, bracelets and straps),

of whatever type including, but not limited to, mechanical, quartz digital or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Tariff Schedule of the United States (TSUS) column two rates of duty apply.

25.406 and 25.407 [Removed]

11. Sections 25.406 and 25.407 are removed and reserved.

12. Section 25.408 is amended by revising the section heading and paragraphs (a)(2) and (4) to read as follows:

25.408 Solicitation provisions and contract clauses.

(a) * * *

(2) The clause at 52.225–9, Buy American Act—Trade Agreements—Balance of Payments Program, in solicitations and contracts for supplies where the contracting officer has determined that the acquisition is subject to the Trade Agreements Act;

* * * * *

(4) The clause at 52.225–21, Buy American Act—North American Free Trade Agreement (NAFTA) Implementation Act—Balance of Payments Program, in solicitations and contracts for supplies where the contracting officer has determined that the acquisition is not subject to the Trade Agreements Act but is subject to NAFTA.

* * * * *

13. 25.1000 is amended by adding a new sentence at the end to read as follows:

25.1000 Scope of subpart.

* * * For thresholds which are unique to individual agencies (*e.g.*, Power Marketing Administration of the Department of Energy), see agency regulations.

14. 25.1001 is revised to read as follows:

25.1001 Definitions.

As used in this subpart—

Sanctioned European Union (EU) construction means construction to be performed in a sanctioned member state of the EU and the contract is awarded by a contracting activity located in the United States or its territories.

Sanctioned EU end product means an article that (a) is wholly the growth product or manufacture of a sanctioned member state of the EU or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that from which it was so transformed in a sanctioned member state of the EU. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of these incidental services does not exceed that of the product itself.

Sanctioned EU services means services to be performed in a sanctioned member state of the EU when the contract is awarded by a contracting activity located in the United States or its territories.

Sanctioned member state of the EU means Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, and the United Kingdom.

15. 25.1002 is amended by revising paragraphs (a)(1), (2), and (3) introductory text, removing (a)(3)(i), and redesignating (a)(3)(ii) as (a)(3)(i) and revising it, and redesignating (a)(3)(iii) as (a)(3)(ii); paragraph (c)(1) introductory text is amended by replacing ''EC'' with ''EU.'' The revised text reads as follows:

25.1002 Trade sanctions.

(a) * * *

(1) Sanctioned EU end products with an estimated acquisition value less than $190,000.

(2) Sanctioned EU construction with an estimated acquisition value less than $7,311,000.

(3) Sanctioned EU services as follows:

(i) Service contracts with an estimated acquisition value less than $190,000.

* * * * *

16. 25.1003 is revised to read as follows:

25.1003 Contract clauses.

Except as provided in 25.1002(b) and (c)—

(a) Insert the clause at 52.225–18, European Union Sanctions for End Products, in solicitations and contracts for supplies with an estimated acquisition value less than $190,000.

(b) Insert the clause at 52.225–19, European Union Sanction for Services, in solicitations and contracts for—

(1) Services with an estimated acquisition value less than $190,000; and

(2) All services listed in FAR 25.1002(a)(3)(ii).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212–5 [Amended]

17. 52.212–5 is amended by revising the date of the clause to read ''(JAN 1996)''; removing and reserving paragraph (b)(12); and in (b)(13) and (b)(14) by removing the phrase ''Community Sanctions'' and inserting ''Union Sanctions'' in its place.

18. 52.225–2 is amended by revising the introductory text, the clause date, and paragraph (b) to read as follows:

52.225–2 Waiver of Buy American Act for Civil Aircraft and Related Articles.

As prescribed in 25.109(c), insert the following provision:

Waiver of Buy American Act for Civil Aircraft and Related Articles (Jan 1996)

* * * * *

(b) The U.S. Trade Representative has waived applying the Buy American Act to the acquisition of civil aircraft and related articles (as defined in paragraph (a) of this clause) of countries or instrumentalities that are parties to the Agreement on Trade in Civil Aircraft. As of January 1, 1996, those countries and instrumentalities include Canada, the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom), Japan, Norway, Romania, and Switzerland.

* * * * *

19. 52.225–9 is amended as follows:

a. by revising the clause date;

b. in the definition of ''Caribbean Basin country end product,'' which follows paragraph (a), the second sentence is revised, the third sentence is removed, and the fourth sentence is amended to hyphenate the word ''duty-free'';

c. in the definition of ''Designated country end product,'' the second sentence is revised, and the third sentence is removed;

d. the definition ''Eligible product'' is added in alphabetical order;

e. in the definition of ''NAFTA country end product,'' the second sentence is revised, and the third sentence is removed; and

f. in paragraph (b) the fifth sentence is revised.

The revised text reads as follows:

52.225–9 Buy American Act—Trade Agreements—Balance of Payments Program.

* * * * *

Buy American Act—Trade Agreements—Balance of Payments Program (Jan 1996)

(a) * * *

* * * * *

Caribbean Basin country end product, * * * The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its

supply; provided, that the value of those incidental services does not exceed that of the product itself. * * *

* * * * *

Designated country end product, * * * The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself.

* * * * *

Eligible product, as used in this clause, means a designated, North American Free Trade Agreement (NAFTA), or Caribbean Basin country end product.

* * * * *

NAFTA country end product, * * * The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself.

(b) * * * Contractors may not supply a foreign end product for the line items subject to the Trade Agreements Act unless—

(1) The foreign end product is an eligible product (see FAR 25.401);

(2) The Contracting Officer determines that offers of domestic end products or of eligible products are either not received or are insufficient to fulfill the Government's requirements; or

(3) A waiver is granted under section 302 of the Trade Agreements Act of 1979 (see FAR 25.402(c)).

* * * * *

20. Section 52.225–15 is amended:

a. by revising the section and clause headings;

b. revising ''25.205(b)'' in the introductory text to read ''25.205(b)(1)'';

c. revising the clause date;

d. adding the definition ''Designated country construction material'' in alphabetical order;

e. removing the definitions ''European Community construction material'' and ''EC country'';

f. revising paragraph (b);

g. Amending paragraph (c) by replacing ''EC'' with ''designated country'' and revising ''materialmen'' to read ''material men''; and

h. adding Alternate I.

The revised and added text reads as follows:

52.225–15 Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement.

* * * * *

Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade (Jan. 1996)

(a) * * *

Designated country construction material means a construction material that (a) is wholly the growth, product, or manufacture of a designated country (as defined at FAR 25.401), or (b) in the case of a construction material which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in a designated country into a new and different construction material distinct from the materials from which it was transformed.

* * * * *

(b) The Buy American Act (41 U.S.C. 10) provides that the Government give preference to domestic material. In addition, the Trade Agreements Act and the North American Free Trade Agreement (NAFTA) provide that designated country and NAFTA construction materials are exempted from application of the Buy American Act.

Alternate I (Jan 1996). As prescribed in 25.205(b)(2), substitute the following paragraphs (b) and (c) in place of paragraphs (b) and (c) of the basic clause:

(b) The Buy American Act (41 U.S.C. 10) provides that the Government give preference to domestic material. In addition, the North American Free Trade Agreement (NAFTA) provides that NAFTA construction materials are exempted from application of the Buy American Act.

(c) The Contractor agrees that only domestic construction materials or NAFTA country construction materials will be used by the Contractor, subcontractors, material men and suppliers in the performance of this contract, except for other foreign construction materials, if any, listed in this contract.

52.225–16 and 52.225–17 [Removed]

21. 52.225–16 and 52.225–17 are removed and reserved.

22. 52.225–18 is amended:

a. by revising the section and clause headings;

b. by revising the clause date;

c. in paragraph (a), in the definition ''Sanctioned European Community (EC) end product'' by revising ''European Community'' to read ''European Union'', revising ''EC'' to read ''EU'' (3 times), revising the second sentence, and removing the third sentence;

d. in the definition ''Sanctioned member state of the EC'' ''EC'' is revised to read ''EU'';

e. in paragraph (b) by revising ''EC'' to read ''EU''. The revised text reads as follows:

52.225–18 European Union Sanction for End Products.

* * * * *

European Union Sanction for End Products (Jan 1996)

* * * * *

(a) * * *

* * * * *

Sanctioned European Union (EU) end product * * * The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of these incidental services does not exceed that of the product itself.

* * * * *

23. Section 52.225–19 is amended by revising the section and clause headings, revising the clause date, in paragraph (a) by removing ''Community (EC)'' and inserting in its place ''Union (EU)'', and revising the term ''EC'' to read ''EU'' in paragraph (b). The revised headings and date appear below.

52.225–19 European Union Sanction for Services.

* * * * *

European Union Sanction for Services (Jan 1996)

* * * * *

24. 52.225–21 is amended by revising the clause date; in paragraph (a), in the definition ''NAFTA country end product,'' by revising the second sentence and removing the third sentence; and by removing paragraph (d) and redesignating paragraph ''(e)'' as ''(d)''. The revised text reads as follows:

52.225–21 Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program.

* * * * *

Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program (Jan 1996)

(a) Definitions. * * *

* * * * *

NAFTA country end product * * * The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself.

* * * * *

[FR Doc. 95–31466 Filed 12–28–95; 8:45 am]

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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

TRANSPORTATION DEPARTMENT

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

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

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